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Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
Department of Senate  
Parliament House  
Canberra ACT 2600

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## **Australian Timeshare & Holiday Ownership Council (ATHOC)** **SUPPLEMENTARY SUBMISSION**

### **1.0 Current Submissions**

- 1.1 ATHOC welcomes the opportunity to add to the Submission it has previously made to the Parliamentary Joint Committee ("PJC") on Corporations and Financial Services dealing with the inquiry into regulation of the time share industry.
- 1.2 At the date of this Supplementary Submission, ATHOC notes that 19 separate submissions have been made to the PJC.

### **2.0 ASIC Submission**

- 2.1 The submission by the Australian Securities & Investments Commission ("ASIC") is Submission 9 to the PJC.

Though the ASIC Submission largely comprises information regarding the current regulation of time sharing schemes in Australia, in section 5.2 of the ASIC Submission, ASIC states that "the greatest risk of consumer detriment in relation to time share, relates to the way in which time share interests are sold."

ATHOC respectfully disagrees with this view and notes below the 8 step process involved in a typical sales process. For the benefit of the Senate and the general public we wish to take this opportunity to outline a typical structured timeshare sale approach used by the industry. This approach is not mutually exclusive and there are some variations each timeshare vendor utilises in order to affect a successful sales. We make these comments because the sales process is one of the most misunderstood features of the timeshare industry. The sales process is a stepped procedure, designed to inform the consumer of all aspects relating to the product they are considering purchasing. The following details the typical 8 step typical sales process:

## **1. Consumer Meeting**

Consumers prospecting is undertaken in a variety of ways including using public available data, purchase of prospect lists from data providers, sales and marketing promotions at resorts, offsite personal contact such as shopping centres and malls, competitions and the like. Consumers who met predetermined affordability criteria and based on historical purchase of holiday products are usually invited to attend a sales presentation.

## **2. Survey**

Consumers are then surveyed to determine whether or not the timeshare product matches their holiday needs. Questions relate to typical holiday spending patterns, preferred holiday destinations, their expectations and needs (know your client rule!).

## **3. Product Explanation**

It is critical for the consumers to make an informed decision regarding the product. In a similar manner to purchasing an overseas holiday package, tour etc the consumer is given relevant information on the product. Timeshare sales staff provided detailed explanations in either a one-on-one discussion or group presentation. Contemporaneously, consumers are provided with product disclosure statements and other statutory disclosure documentation required to meet the Australian financial services licensing conditions and the corporation's law requirements.

## **4. Pricing**

Like all consumer products, timeshare is designed to suit specific customer holiday / lifestyle needs. Price is determined on the basis of the product type taking into account timing of holidays, locations desired, resort facilities, size of accommodation etc.

## **5. Invitation to join**

Once the product has been fully explained and pricing and package determined, consumers are invited to join the timeshare scheme. At any stage during the sales process consumers are able to leave if they do not believe the product will suit their lifestyle/holiday requirements. Customers are also offered time alone to discuss and consider the product by themselves, without the sales staff being present. If requested, they can adjourn to a separate room to do that

## **6. Purchase Incentives**

As with all consumer products targeted at discretionary income – incentives are provided to purchase a timeshare product. Incentives traditionally take the form of additional benefits, bonus holidays discounts on other travel products but usually no discounts on the price are offered.

## **7. Cooling Off**

All timeshare consumers are afforded a cooling off period to consider their purchase. The cooling off period varies between ATHOC members and non-members. Cooling off documentation is approved by ASIC and the timeshare vendor has to keep records of the consumer's receipt of the cooling off notice.

## **8. Signing and Clarification**

The document signing process is usually carried out by a specially trained staff member whose role it is to ensure the consumer understands fully all of the information provided during the sales process. Traditionally, a checklist is used by this specialist staff member to ensure all facets of the product including features benefits usage entitlements rights and obligations are clearly understood by the consumer. Most times an acknowledgement of this understanding is also requested at the signing stage. This process ensures the consumer has full understanding of the product being purchased and ongoing commitment and obligations. It is a check process to ensure the sales person has disclosed all aspects of the product and to ensure compliance with the regulatory requirements.

- 2.2 Since 1997, all members of ATHOC have been subject to a Code of Practice, a copy of which is annexed to this Supplementary Submission as Appendix C and a copy of which is available on ATHOC web site [www.athoc.com.au/codes](http://www.athoc.com.au/codes). A revised draft proposed Code of Practice has also been submitted to ASIC for approval and is annexed as Appendix D. Before the existing Code of Practice is substituted with the draft proposed Code of Practice, the outcome of the existing ISB Application by ATHOC to ASIC needs to be known, as does the outcome of the current proceedings in the Administrative Appeals Tribunal dealing with the refusal by ASIC to approve the PS 139 Application of ATHOC, namely approval of an external complaints resolution scheme which is specific for the time sharing industry in Australia.
- 2.3 Paragraph 3 of the existing Code of Practice deals extensively with advertising, promotion, sales and marketing. Paragraph 3.7 deals specifically with the offer of incentives to the public by time-share promoters. Prior to the Code of Practice being adopted, there was lengthy and detailed consultation between ATHOC and various regulatory and consumer affairs agencies and bodies in Australia. The provisions in paragraph 3.0 of the Code of Practice were intended to address the then concerns of the regulatory and consumer affairs agencies and bodies. ATHOC has wide-ranging and effective sanction powers (see Clause 11 of the Code of Practice) to deal with breaches of the Code by its members.
- 2.4 The existing Code of Practice should be read in conjunction with the ATHOC Agreement which has previously been approved by ASIC and which is annexed to this Supplementary Submission as Appendix E.
- 2.5 In addition to ATHOC members being subject to the Code of Practice, they are also subject to the Constitution of ATHOC, a copy of which is annexed as Appendix F. The Constitution has been modified on several occasions over the last few years to include requirements as a result both of the ISB Application to ASIC and also the PS139 Application to ASIC.

### 3.0 Law Institute of Victoria (“LIV”) Submission

- 3.1 The Law Institute of Victoria has made a submission to the PJC dated the 16<sup>th</sup> February 2005 and identified as Submission 3.
- 3.2 In Section 2 of its submission, the LIV states its belief that “the current regulatory regime for the time-share industry is not satisfactory in that it does not provide sufficient consumer protection for prospective purchasers, nor does it sufficiently address the behaviour of developers and sales people of time-sharing resorts.”.
- 3.3 In Section 2 of its submission, the LIV suggests that dedicated legislation is required to deal with all aspects of the time share industry including fully sold out clubs and resorts, to relieve the latter of the current compliance and regulatory burden and to ensure developers are subject to specific controls.
- 3.4 The main difference between the ATHOC Submission and the LIV Submission is that ATHOC believes that ASIC should remain as the appropriate regulator however, the Corporations Act 2001 (Cth) should be modified so that there are purpose-drafted provisions for the regulation of time-sharing in Australia independently of and without reference to investment-based products. To that extent, this process would result in a “new dedicated piece of legislation” within the Corporations Act.
- 3.5 ATHOC believes that some statements made in the LIV Submission are factually incorrect. These statements are referred to as follows:
- **Land holding (Section 2 of LIV Submission)** – in Victoria some 20 years ago, the Transfer of Land Act was modified to recognise fractional interests in a title as tenancies in common. This amendment was made to address the issue of title holding in title-based time-share resorts. As unit-trust based schemes largely replaced title-based schemes, the trustee of an approved scheme held the title or titles for members in the scheme. With the introduction of the managed investment provisions, the responsible entity of the time-sharing scheme holds the title or titles on trust for members;
  - **Current regulatory arrangements (Section 3.1 of LIV Submission)** – for time-sharing schemes which are subject to the managed investment provisions of the Corporations Act, “sales people and developers” are no less regulated than their counterparts for other financial services or products. In fact they are more regulated as they are subject to the Code of Practice. Sold-out resorts and clubs (including developers), as a condition of exemption from the managed investment provisions (pursuant to exemptions granted by ASIC) are subject to onerous surveillance and reporting requirements in the Code of Practice, as modified by the ATHOC Agreement. It was initially the intention of ASIC that these exempt clubs be subject to an Industry Supervisory Body which, as part of an ISB Application needed to include within its Code of Practice and Constitution a number of Indicative Criteria prescribed by ASIC. This is the reason why the ATHOC Agreement was drafted and subsequently approved by ASIC, as an interim measure to ensure that whilst a new Code of Practice was being drafted, exempt members were subject to ISB requirements contained within the ATHOC

Agreement. It is incorrect to state that a “fully sold time share resort or club” must either obtain an exemption from ASIC from the managed investment requirements of the Corporations Act or “it cannot operate”. As far as ATHOC is aware, there is no fully sold out time share resort or club which has not obtained an exemption from the managed investment provisions of the Corporations Act. ATHOC has for some time recognised the differing needs between new and existing schemes which are being promoted and sold-out schemes. It was in fact ATHOC’s submission to ASIC prior to the introduction of the managed investment legislation that resulted in ASIC providing conditional exemptions to sold-out schemes so that these schemes would not need to transition to the managed investment provisions of the Corporations Act;

- **Consumers (Section 3.3 of LIV Submission)** – the statements made are simply incorrect. Consumer protection is a paramount consideration both for ASIC and ATHOC. Holders of Australian Financial Services Licences (every responsible entity is required to hold such a licence) are subject to a vast array of regulatory, compliance and reporting requirements. In addition, there is a mandatory cooling-off period. ATHOC rejects the characterisation of tactics of “sales people” as “unscrupulous” or high-pressure. These allegations are simply incorrect;
- **Type of regulation (Section 4.1 of LIV Submission)** – the ATHOC Submission details the reason for inclusion of time-sharing interests as initially interests, then prescribed interests and then managed investment interests (as defined within the Corporations Act). The Supreme Court of Victoria held in 1981 that a time-share interest was a “prescribed interest” and therefore regulated under the companies and securities legislation. ATHOC does however agree with the LIV that a time-sharing interest does not now have nor has ever had an “investment” character and accordingly should not be regulated as an investment. It is unclear as to which ASIC policy statement is referred to by the LIV at the foot of page 4 of its submission. As far as ATHOC is aware, ASIC has never indicated that exempt clubs need to “reorganise themselves in due course into a structure that is corporation based and therefore controllable by ASIC.”. ATHOC also joins issue with the statement made by the LIV that ATHOC has “no meaningful voting power as the bigger participants can outweigh the smaller groups.”. The categories of membership of ATHOC are set out in Clause 9.3 of its Constitution. The first 5 categories are “voting” categories and represent the disparate interests within the time-sharing industry in Australia. There is a category known as “Resort and Resort Management” which is dedicated to sold-out resorts and sold-out clubs. The Code of Practice and indeed, the Constitution recognises that fully sold clubs do not have the same interests as developers and accordingly, each category of membership is subject to regulation appropriate to that category;
- **Title-based resorts (Section 4.2 of LIV Submission)** – this problem has been recognised by ASIC in Policy Statement 160. As far as ATHOC is aware, the current position of ASIC is a no-action approach to the sale of shares in a title-based time-sharing scheme without the sale of the accompanying title. For sold-out schemes, ATHOC believes that ASIC will

grant conditional licensing relief so that a sold-out exempt club need not hold an Australian Financial Services Licence to deal in secondary interests;

- **Resales (Section 4.3 of LIV Submission)** – historically, the resale market became extremely congested 10-15 years ago as a result of considerable existing stock being available during and for some time after the recession. The time-sharing industry is no more “recession proof” than any other industry. It is totally impractical and calculated to ensure that no new time-share schemes are developed if developers are constrained from selling new stock whilst old stock is available. Logically, once an interest is sold in a new scheme, the owner is able to sell that interest at any time. Accordingly, if the developer is constrained from selling any further interests whilst “resale weeks” continue to be available, the developer would not be able to sell a single interest in a new scheme. This is akin to restricting a car manufacturer from selling any new motor vehicles whilst “resale” motor vehicles of the same type are available. As “used” stock is always available, no new stock would ever be sold.

3.6 ATHOC thanks the LIV for its submission and also for highlighting the inappropriate nature of investment-based legislation or provisions for the continued regulation of time-sharing schemes in Australia.

ATHOC welcomes any comment by the committee, should it require any clarification to the matters raised in the supplementary submission.

Yours faithfully  
ATHOC

Ramy Filo  
President