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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)
Second Supplementary Submission

1.0 Submissions and Public Hearings

- 1.1 ATHOC welcomes the opportunity to add to the Submission and Supplementary Submission it has previously made to the Parliamentary Joint Committee ("PJC") on Corporations and Financial Services dealing with the inquiry into regulation of the timeshare industry.
- 1.2 ATHOC notes that Public Hearings were held on the 13th, 15th and 28th April 2005 and that Hansard proofs are publicly available for each of these Public Hearings.
- 1.3 ATHOC understands that the PJC is currently preparing its report which is intended to be tabled in parliament on the 23rd June 2005. ATHOC is grateful for the PJC taking this Second Supplementary Submission into account in the preparation of its report.
- 1.4 Given the lateness of this Second Supplementary Submission, ATHOC has deliberately kept its contents brief. It has focused on four major issues which have been identified and addressed throughout the submissions and hearings process. These four issues are as follows:
 - **Proposed Regulation and Regulator**
 - **ATHOC Role**
 - **Selling Practices**
 - **Resale.**

2.0 Proposed Regulation and Regulator

Unique Consumer Durable

- 2.1 On page 5 of the Hansard proof of the public hearings in Canberra on the 28th April 2005, the Chairman of the PJC stated that timesharing is “not really a financial product” but “more a long-term consumer durable.”. The Chairman then stated that “what a person is really purchasing is a right to enjoy a property, or access to various properties, for recreation purposes over an extended period of time.” and is therefore neither an investment product nor a financial product but rather “a long-term consumer durable”. This statement is remarkably similar to the definition of “timesharing scheme” in Section 9 of the Corporations Act, the essential elements of which are that participants use, occupy or possess property to which a timesharing scheme relates and which operates for not less than three years.
- 2.2 Not only is timesharing a long-term consumer durable product, it is also unique amongst consumer products and therefore requires legislative recognition which addresses its unique nature. Though a motor vehicle and washing machine are consumer products and an admission ticket to a football match and an airline ticket are consumer services, they are different consumer products and different consumer services but are more similar than they are different in terms of their essential component parts. There is widespread public recognition as to the nature and purpose of each of these consumer products and services. Accordingly, there is no particular need for licensing or disclosure.
- 2.3 Timesharing is an invented product whose characteristics have changed over time and will continue to change to address the changing holiday and recreational needs of the public. It is a “minestrone” of rights, duties and obligations, the ingredients of which are determined by the public palate. This is entirely the reason why comparison with other consumer products or services never results in a satisfactory outcome in terms of understanding or explanation. The product is unique in concept and application and therefore unique in terms of marketing and sales. There is unlikely ever to be a “Timesharing Shop” as the product is far too complex and multi-dimensional for it to be acquired “off the shelf”.

ASIC v ACCC

- 2.4 The regulation of timesharing as a managed investment scheme under the Corporations Act has its history in decisions made in the Supreme Court of Victoria in the late 1970s (A Home Away Case). It has been so regulated for almost 30 years in Australia, during which time neither the industry nor consumers have requested a change away from that jurisdiction, merely a change in the manner in which timesharing is regulated so as to address its unique characteristics. In general terms, this regulation has been both stable and consistent in addressing the following fundamental requirements:
- licensing;
 - training;
 - constituent documents;

- disclosure.

These are the naked pivotal requirements which are clothed by regulations which address the uniqueness of timesharing schemes.

- 2.5 Each of these fundamental elements is addressed in the Corporations Act. In ATHOC's submission, what is required is for the Corporations Act to be modified to provide timesharing specific regulation, whether by way of an introduction of a further part or by way of regulation or a combination of both. It does not necessarily follow that merely because a timesharing interest is not an investment that it should be removed from the Corporations Act. It also does not necessarily follow that merely because its characteristics are different to other financial products or services, it should be regulated under the Corporations Act. It can simply be regulated as a timesharing service or product and attract the four major elements mentioned in 2.1, as modified by a separate part or separate regulations. Over a period of years, ASIC has built up a considerable body of expertise regarding the regulation and operation of timesharing schemes. This expertise is not readily exportable to the ACCC as there are legislative and policy constraints, together with a different methodology and philosophy.
- 2.6 A number of years ago, each of franchising and retirement villages were also "prescribed interests" under the then corporations legislation. They are both now exempt from the legislation with franchising being regulated under the Trade Practices Act and retirement villages being regulated on a State by State basis.
- 2.7 In ATHOC's submission, it is entirely inappropriate for timesharing to be regulated on a State by State basis as the concept of a timesharing resort located in only one place has been progressively replaced by a multi-destination concept where members of a scheme are drawn from all parts of Australia with holidays in different parts of Australia and indeed outside Australia. **What is required however is for state legislation to be consistent with federal legislation in the regulation of timesharing given that timesharing operators conduct business across all States and Territories of Australia. Consistency of treatment will ultimately benefit the consumer in having consistency of regulation and application, regardless of the domicile of a consumer.**
- 2.8 Franchising is regulated under the Trade Practices Act by way of regulation which includes an entirely prescriptive Code of Conduct which in turn includes an entirely prescriptive Disclosure Document. For timesharing to be regulated under the Trade Practices Act by the ACCC an entirely new part would need to be introduced into that legislation which provides for at least licensing, product training, constituent documents, disclosure and a compliance regime. It appears a pointless exercise to create the infrastructure which already exists under the Corporations Act relating to these fundamental elements, particular when the thrust of the Trade Practices Act is to avoid misleading and deceptive conduct. For consistency of application, it would certainly assist if the matters which are currently addressed to the State Offices of Fair Trading were instead addressed to the ACCC or to ASIC under Parts 2 and 3 of the ASIC act. In that manner, there would be consistency of regulation and application for marketing and sales directed activities and complaints.

Summary

- 2.9 In summary, ATHOC prefers that timesharing continue to be regulated by ASIC under the Corporations Act and the ASIC Act with the legislation and/or regulations being modified to address the unique nature of the product and with remaining applicable State-based legislation to be made harmonious and consistent.

3.0 ATHOC Role

Industry Body

- 3.1 ATHOC was established approximately 10 years ago as the timesharing industry representative body in Australia. Its establishment was recommended and overseen by a number of different regulators and consumer bodies. Shortly after its establishment, ATHOC arranged for a meeting of these regulators in Melbourne. There was representation from ASIC, the ACCC, tourism and consumer bodies and agencies, each of whom strongly recommended that ATHOC establish its own Code of Practice to establish best practice and complaints handling procedures and to become the liaison between the industry and regulators and consumer agencies. ATHOC has done this and has enjoyed a credible, long-term and effective relationship with regulators and consumer agencies alike. The Policy Statements of ASIC, the revenue ruling of the Australian Taxation Office (dealing with GST) and other policy have been developed in consultation with ATHOC, as was the ATHOC Code of Practice developed in consultation with regulators and consumer agencies.

Industry Supervisory Body (“ISB”)

- 3.2 In response to the exemption given by ASIC for primarily sold-out timesharing schemes, ATHOC made its ISB application to ASIC in 1999 and has effectively been a co-regulator with ASIC since. The indicative criteria developed by ASIC for an ISB were included by ATHOC in its Constitution, redrafted Code of Practice and in the ATHOC Agreement, the latter of which was approved by ASIC. ATHOC has undertaken and continues to undertake supervisory and surveillance functions on its own members and reports to ASIC regarding these ISB activities. ASIC appears to have changed its policy position regarding approval of any body as an Industry Supervisory Body but may continue to recognise ATHOC on a de facto basis until it develops an alternate policy. Membership of ATHOC is drawn from all elements of the timesharing industry in Australia, including consumer elements in that at least four directors of a ten member board of ATHOC represent sold-out clubs.

External Complaints

- 3.3 In 1999, ATHOC made an application to ASIC under Policy Statement 139 for approval of an external complaints scheme (Australian Timeshare Industry Complaints Service (“ATICS”). Until that time, the CRC of ATHOC handled and determined all timesharing complaints. The CRC comprises a consumer representative, an industry representative and an independent chair. ATICS is intended to replicate the CRC in having a panel comprising a consumer representative, industry representative and an independent chair. ATICS is intended to be totally independent of ATHOC in having its own three member board (consumer representative, industry representative and independent chair). It is

intended to have sufficient resources to effectively deal with all timesharing complaints in Australia. As a result of what ATHOC believes to be a change in ASIC policy which prefers large complaints handling schemes, ASIC has not approved the PS139 application of ATHOC and this decision is currently being reviewed by the Administrative Appeals Tribunal.

Cooling Off Requirements

- 3.4 Well before the introduction of the FSR Act, as a result of ATHOC having implemented its Code of Practice and introduced “best practice” requirements for its members, ASIC agreed to have a two tier cooling off regime, one for ATHOC members and one for non-members. Members have a five business day cooling off period whereas non-members have a ten business day cooling off period for sales of primary interests. In addition, the Code of Practice requires ATHOC members to provide a five business day cooling off period for secondary sales. There are a large number of other consumer protection initiatives in the Code of Practice which were introduced after consultation with the ACCC and consumer bodies and agencies.

Summary

- 3.5 ATHOC, over approximately ten years, has demonstrated its willingness to accept and implement suggestions of regulators and consumer bodies for more effective regulation and consumer protection. However, as membership of ATHOC is entirely voluntary, unless members obtain some advantage over non-members by means of membership, they are less likely to submit to the Code of Practice. Incentive-driven best practices are far more likely to survive than those driven by legislation or some form of coercion. There is no body in Australia which is more representative of the timesharing industry (inclusive of all its disparate elements) with the necessary resources, experience and expertise to be a co-regulator with ASIC regarding exempt schemes and to handle and resolve complaints deriving from marketing or sale of timesharing interests or the operation of a timesharing scheme. The infrastructure is already in place.

4.0 Selling Practices

Selling Practises – Timeshare is a Unique Product

Timeshare is a distinctive “lifestyle” product which does not fit easily into any other consumer product category. Timeshare is a holiday accommodation and leisure product that is regulated as a financial product and is backed by real estate.

The misconception raised during the hearings that timeshare is sold under a “high pressure” environment is outdated, highly subjective, and tends to be an echo of opinions formed long ago during the 1980’s, before the current regulatory environment came into existence and before many of the key operators commenced trading. We prefer to rely on the facts, which are as follows:

- 4.1 All purchasers of timeshare interests in Australia have the unfettered option to rescind any contract that has been entered into by exercising their cooling off rights. The cooling off rules, which have not been applied to any other class of managed

investment scheme other than timeshare schemes, were introduced many years ago to address concerns about perceived “high pressure” sales.

- 4.2 Consumers are able to purchase timeshare at any time – promoters simply offer extra benefits for those who choose to purchase while attending the presentation.
- 4.3 50% of Timeshare purchasers purchase after attending more than one presentation (ref page 39 Ragatz research in timesharing appendix to original submission).
- 4.4 90% of people attending a timeshare presentation do not purchase.
- 4.5 There is no significant level of consumer complaints (ref FIC’s 3 year historical data).

5.0 The Resale Market

The price of timeshare resales is driven by free market forces, i.e. mutual agreement between willing buyers and willing sellers. It is difficult to see how these prices might be regulated or enforced or who would benefit from such red tape.

Given the nature of the timeshare product, and the different types of timeshare interest offered in the marketplace, there is, in our view, a strong argument that the commercial (as opposed to private) resellers of timeshare interests should be subject to similar disclosure standards and consumer protection requirements to those imposed upon primary sellers. This would enable buyers to make informed choices to an extent that may be absent today.

As the timeshare industry matures and the market grows the pricing difference between primary and secondary sales tends to decrease. This has been the experience in the USA, the world’s largest timeshare market.

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

Yours faithfully
ATHOC



Ramy Filo
President