



Parliamentary Joint Committee on Corporations and Financial Services

Timeshare: The Price of Leisure

September 2005

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DUTIES OF THE COMMITTEE

Section 243 of the *Australian Securities and Investments Commission Act 2001* sets out the duties of the committee as follows:

The Parliamentary Committee's duties are:

- (a) to inquire into, and report to both Houses on:
 - (i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or
 - (ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and
- (b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and
- (c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

TERMS OF REFERENCE

On 8 December 2004, the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquire into the regulation of the timeshare industry in Australia, with specific reference to:

- the effectiveness of the current regulatory arrangements for the timeshare industry under the *Corporations Act 2001*, including:
 - whether the current regulatory arrangements are confusing to consumers and inhibit the development of industry;
 - whether the current regulatory arrangements place an undue compliance cost on industry;
 - whether the current regulatory arrangements are effective in protecting consumers of timeshare products.
- advantages and disadvantages of possible models for reform of the regulatory arrangements applying to the timeshare industry, including:
 - self-regulation of the industry on a national basis;
 - alternatives to coverage under the *Corporations Act 2001*, either by separate Commonwealth legislation or state and territory legislation.

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List of acronyms

AAT	Administrative Appeals Tribunal
ACA	Australian Consumers Association
ACCC	Australian Competition and Consumer Commission
AFS	Australian Financial Services (licence)
ALRC	Australian Law Reform Commission
APVC	Accor Premier Vacation Club
ASIC	Australian Securities and Investments Commission
ATHOC	Australian Timeshare and Holiday Ownership Council
CAB	Citizens Advice Bureau
CASAC	Companies and Securities Advisory Committee
CCLS	Consumer Credit Legal Service
CLA	Commercial Law Association of Australia
CRC	Complaints Resolution Committee
EU	European Union
FICS	Financial Industry Complaints Service
FSG	Financial Services Guide
FSR	Financial Services Reform
FSR Act	<i>Financial Services Reform Act 2001</i>
GST	Goods and Services Tax
ISB	Industry Supervisory Body
LIV	The Law Institute of Victoria
MIA	<i>Managed Investments Act 1998</i>
NTA	Net Tangible Assets
PDS	Product Disclosure Statement

PS	ASIC Policy Statement
RCI Pacific	Resorts Condominiums International Pacific
RE	Responsible Entity
SEC	Securities Exchange Commission
SOA	Statement of Advice
TFTWID	Queensland Department of Tourism, Fair Trading and Wine Industry Development
TPA	<i>Trade Practices Act 1974</i>
TTF	Tourism and Transport Forum Australia
UK	United Kingdom
US	United States
WTO	World Tourism Organisation

Recommendations

Recommendation 1, para. 4.30

The Committee recommends that timeshare should continue to be regulated under the *Corporations Act 2001*.

Recommendation 2, para. 4.38

The Committee recommends that:

- timeshare should be removed as a definitional element of managed investment funds under s.7 of the *Corporations Act 2001*; and
- a separate chapter should be inserted into the *Corporations Act 2001* to deal specifically with timeshare.

Recommendation 3, para. 5.16

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

Recommendation 4, para. 5.27

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

Recommendation 5, para. 5.28

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

Recommendation 6, para. 5.29

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

Recommendation 7, para. 5.34

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* state that any approach to a potential timeshare customer,

whether by a timeshare company, a marketing company, or any other agency, must make it clear that:

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

Recommendation 8, para. 5.38

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

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

Recommendation 9, para. 5.44

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

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

Recommendation 10, para. 5.52

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

Recommendation 11, para. 5.58

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

Recommendation 12, para. 5.63

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

Recommendation 13, para. 5.67

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

- a document of one page approved by ASIC for this purpose; and
- advice of the entitlement and the length of the cooling off period in the contract's Schumer box.

Recommendation 14, para. 5.71

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

Recommendation 15, para. 5.85

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

Recommendation 16, para. 5.93

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

Recommendation 17, para. 6.14

The Committee recommends that fully sold timeshare schemes should be able to sell interests in their own timeshare scheme without holding an Australian financial services license.

Recommendation 18, para. 6.19

The Committee recommends that the Treasurer consult with appropriate state and territory ministers with a view to implementing the scheme outlined in paragraph 6.17 of this report.

Recommendation 19, para. 6.24

The Committee recommends that any new regulatory scheme should make clear that the board of a fully sold title-based scheme can dismiss the resort manager if the board is unsatisfied with the performance of the manager.

Chapter 1

Background to the inquiry

1.1 In Australia, timeshare schemes have been subject to regulation for twenty years. The regulatory environment relating to financial services has recently been reviewed and a new uniform compliance framework for the financial services industry implemented.

1.2 Until the introduction of the *Managed Investments Act* in 1998 timeshare schemes had been regulated as 'prescribed interests' under the Corporations Law. The legislation redefined 'prescribed interests' as 'managed investments', inserting a new set of compliance requirements into the Corporations Act. The implementation of the *Financial Services Reform Act 2001* brought a further wave of regulatory change for timeshare schemes, which became subject to licensing requirements as financial products.

1.3 Since the introduction of the new regime, representatives of the Australian timeshare industry have approached the Parliamentary Joint Committee on Corporations and Financial Services with concerns about the regulation of timeshare schemes. They have argued that regulation as an investment has made timeshare 'a square peg in a round hole', placing excessive constraints on the industry while, at the same time, confusing consumers about the true nature of the product.

1.4 The Committee meanwhile maintained a watching brief on Australian Securities and Investments Commission enforcement activities in relation to timeshare. Compared with the transition period to financial reform, there appears to have been a decline in these. Over the same period, the volume of timeshare sales has markedly increased. Taking these two things into account, the Committee determined that scheme operators and consumers may benefit from a timely review of the regulatory arrangements governing timeshare.

Conduct of the inquiry

1.5 On 8 December 2004 the Committee resolved to conduct an inquiry into the regulation of the timeshare industry to determine:

- the effectiveness of the current regulatory arrangements for the timeshare industry under the *Corporations Act 2001*, including:
 - whether the current regulatory arrangements are confusing to consumers and inhibit the development of industry;
 - whether the current regulatory arrangements place an undue compliance cost on industry;

- whether the current regulatory arrangements are effective in protecting consumers of timeshare products.
- advantages and disadvantages of possible models for reform of the regulatory arrangements applying to the timeshare industry, including:
 - self-regulation of the industry on a national basis;
 - alternatives to coverage under the *Corporations Act 2001*, either by separate Commonwealth legislation or state and territory legislation.

1.6 Details of the inquiry were placed on the Committee's website. It was also advertised in two national newspapers, the *Australian* and the *Australian Financial Review*, on 15 December 2004. Written submissions were invited from interested parties to be lodged by 18 February 2005. The Committee contacted a wide range of industry participants, peak bodies, experts and state and federal government agencies inviting them to participate in the inquiry.

1.7 Altogether 23 submissions were received. These are listed in **appendix 1**.

1.8 The Committee held three public hearings and visited two timeshare resorts. Details of these appear in **appendix 2**. Hansard records of the hearings are available at: www.apf.gov.au/hansard

Inquiry report

1.9 The report of the inquiry is presented in six chapters.

1.10 The first chapter, this one, sets out the details of the inquiry process and provides an outline of the Committee's report.

1.11 The second chapter describes the features of the regulatory regime governing timeshare schemes in Australia. It provides a legal and general definition of timeshare, and a profile of the timeshare industry, both international and local.

1.12 The third chapter tests the contention that timeshare is not properly regulated as a managed investment. It adopts a broad approach, looking first at the historical situation of the product within the managed investment regime, then at some reported advantages and disadvantages of the current regulation of timeshare. Finally, Australia's regulation of timeshare as a securities product is assessed in the international context, and conclusions are drawn about the merits of Commonwealth regulation of timeshare schemes.

1.13 The fourth chapter assesses evidence on the nature of timeshare to establish which alternative statutory approach might more effectively regulate the product. The relevant provisions in the *Trade Practices Act 1974* and the *Corporations Act 2001* are compared to establish the best fit by legal definition. The chapter arrives at the view that the *Corporations Act* provides the best framework for consumer protection but that a dedicated timeshare chapter could ensure that framework is appropriate for timeshare.

1.14 The fifth chapter sets out suggestions to address exceptional features of the timeshare product requiring dedicated regulation. A focus in the chapter is the relationship between market signals, marketing costs and the pricing of timeshare. The chapter takes the view that the dynamic between these may be conducive to inappropriate selling practices commonly associated with the industry, and may drive oligopolistic tendencies and uncompetitive market practices. Recommendations are made to deal directly with these problems. The chapter evaluates industry claims about excessive compliance requirements for licensing, disclosure, training and cooling-off periods in this context.

1.15 The final chapter, chapter six, addresses problems peculiar to fully sold schemes. These schemes are exempt from the full effect of the Corporations Act, but only if their managers do not participate in secondary sales of timeshare, which they must do to keep their resorts viable. As the smallest group within a comparatively small industry, the financial services requirements proved the most onerous for fully sold schemes. This chapter of the report aims to ameliorate their situation by recommending proposals to address title reclamation, resale and resort management issues.

Chapter 2

Regulation of timeshare schemes

Introduction

2.1 The introduction of a new management structure and uniform compliance regime for managed investment schemes was intended to reduce institution risk and enhance consumer protection. The regime was put in place to improve the international competitiveness of the Australian financial services industry.

2.2 Timeshare operators assert that the regulatory framework imposed under the Corporations Act has erected unnecessary and expensive administrative hurdles for industry. Further, it is argued that the regime has the effect of decreasing the international competitiveness of the timeshare industry without improving consumer protection.

2.3 This chapter provides a context for consideration of the issues raised by the timeshare operators and other evidence to the inquiry. It begins with a definition and brief overview of the timeshare industry before setting out the main features of the regulatory arrangements which currently govern timeshare schemes.

Industry definition and profile

2.4 The legal definition of timeshare is provided under the *Corporations Act 2001* (Corporations Act), which specifies that a timeshare scheme is a scheme, undertaking or enterprise, whether in Australia or elsewhere:

(a) participants in which are, or may become, entitled to use, occupy or possess, for two or more periods during the period for which the scheme, undertaking or enterprise is to operate, property to which the scheme, undertaking or enterprise relates; and

(b) that is to operate for a period of not less than three years.¹

This captures the variety of timeshare schemes operating in Australia, including those featuring holiday exchange arrangements.

2.5 The timeshare industry is a hybrid of the property development, tourism, and hospitality industries, and as such involves four principal groups of service providers:

- developers who build resort complexes;
- marketers and promoters who sell units to consumers;

¹ Section 9. The definition is carried over from the same section of the old Corporations Law.

- exchange companies which facilitate the bartering of units between locations; and
- networks of participating resorts.²

2.6 Timeshare schemes traditionally operated as title-based schemes in which a purchaser became a tenant in common with a right to share in the ownership of real property. The timeshare contract secured the owner a holiday at the same timeshare property for a specified period, at a designated time once a year.

2.7 Timeshare operators now offer more flexible 'holiday club' or vacation exchange schemes. These allow for time in resort or hotel accommodation to be exchanged between members using mechanisms such as the 'points' system. Owners purchasing under title-based schemes can convert their investment into points to purchase any number of days accommodation, plus extra services, at any time of the year at another participating resort. New clients buy a certain number of points to achieve the level of service they require, and can upgrade by purchasing additional points.³

2.8 To invest in timeshare the purchaser must sign a timeshare contract. This is a complicated document involving management and trust arrangements and setting out the obligations of a number of parties. The price of an average contract is between \$12,000 and \$25,000.⁴ Timeshare contracts apply for a pre-determined period of up to 80 years duration.⁵

2.9 The resale market for timeshare in Australia is undeveloped compared with Europe and some states of the United States. If the owner wishes to exit the contract they may receive between 50 or 60 percent of the paid price for points products, title-based products in older resorts may realise only 10 per cent of the original price.

2.10 Most new-offer timeshare schemes are structured as share-based schemes or unit trusts. At the end of the contract, the scheme must determine whether the timeshare operation will be wound up and the funds distributed between the owners or whether the contracts will be reinstated. As with other trust-based systems, all property is held and managed by the operator until the scheme expiry date.⁶

2 'Timeshare in Australia', *FocusOn*, Jones De LaSalle Hotels at www.joneslanglasallehotels.com (accessed 10 December 2004).

3 'Timeshare in Australia', *FocusOn*, Jones De LaSalle Hotels website (accessed 10 December 2004).

4 Entry price for one week annually. The total contract price is conditioned by a number factors such as season booked and size of accommodation. *ATHOC Submission 10*, p.7; 10B, p. [2].

5 *ATHOC, Submission 10*, p. 7.

6 Mr John Reghenzani, Corporate Counsel, Accor Premier Vacation Club (APVC) and Mr John Robinson, Trendwest Resorts South Pacific (Trendwest), *Transcript of evidence*, 13 April 2005, p. 42.

Evolution of the product

2.11 The Swiss company Hapimag originated the idea of timeshare in the 1960s. It sold ski resort units on the basis of one set month or one week's annual usage, for a fixed number of years or in perpetuity.⁷ After the oil crisis in the 1970s, tourism slumped and American resort owners began offering seasonally adjusted prices on a timeshare basis to encourage high year-round occupancy rates. In 1974 the development of global 'ownership pools' allowed for members to exchange their holiday entitlements for another member's entitlement in other resort locations.⁸

2.12 In the 1980s the global timeshare market began to attract large international hotel management and hospitality groups which offered higher standards of accommodation and focussed delivery on the more flexible vacation arrangements.⁹ This foreshadowed the revival of the global timeshare industry in the 1990s, as the table below shows.¹⁰

Table 1: Growth of global timeshare industry 1980 to 1998

	1980	1985	1990	1994	1998
Owners	155 000	805 000	2 048 804	3 144 000	5 498 000
Resorts	506	1 774	2 357	4 145	5 487
Intervals sold per year	100 000	245 000	405 000	560 000	778 000

2.13 The World Tourism Organisation now rates timeshare as the fastest growing segment of the world tourism and leisure industry.¹¹ Statistics indicate that the volume of global timeshare sales has grown by an average of 15 per cent over the last ten years, with sales in 2003 estimated at A\$15 billion.¹²

Timeshare in Australia

2.14 The 1980s saw a proliferation of timeshare schemes, particularly on Queensland's Gold Coast, but the questionable marketing practices of property entrepreneurs soon led to an industry downturn. In 1990 the collapse of the unlisted

7 Susan Marks, *Paradise Lost: CAB Clients Experience of Timeshare and Timeshare-like Products*, The CAB Service UK's European Consumer and European Extra-Judicial Network, November 2003, p. 5.

8 'Timeshare and Holiday Ownership at A Glance', ATHOC www.athoc.com.au/m30/m30.htm (accessed 20 December 2004).

9 'Timeshare History', Marriott Vacation Club International at www.vacationclub.com/en-us/vc/about/history.asp (accessed 10 December 2004).

10 Table: ATHOC website (accessed 20 December 2004).

11 ATHOC website (accessed 2 December 2004).

12 Statistics from Interval International quoted in *FocusOn*, Jones De LaSalle Hotels.

property trust market further reduced investor confidence.¹³ By 1995, there were fewer than five resorts actively selling timeshare in Australia.¹⁴

2.15 In 1994 the Australian Timeshare and Holiday Ownership Council (ATHOC), the timeshare industry's peak body, was formed to improve the image of the industry. It developed an industry code of practice and provided training and dispute resolution services. Corporations law reform in the late 1990s raised industry standards and provided more protection for consumers.

2.16 ATHOC and industry submitters maintain that the now buoyant timeshare industry results from the entry of large internationals into the Australian market. For example, international exchange arrangements offered by large operators like RCI Pacific are said to support high year round occupation rates in resorts, which contribute to stable employment and regional economic growth. According to the 2002 timeshare survey *Resort Timesharing in Australia and New Zealand* (the Ragatz report), timeshare owners in Australia spend about \$116 million annually at resort communities, while timeshare resorts spend about \$39.7 million on maintenance, staff and purchase of goods and services a year.¹⁵

2.17 The ATHOC submission reports that the Australian timeshare industry recorded over \$300 million in timeshare sales in 2004, with over 130,000 households owning rights to about 160,000 timeshare weeks. There are at present approximately 110 timeshare resorts in Australia.¹⁶ A list of major participants in the timeshare industry in Australia is at **appendix 3**.

2.18 Yet despite this positive picture, the Committee has been petitioned by major timeshare operators over a number of years about the negative pressures placed on the industry by its regulation under the Corporations Act.

2.19 In 2003 the Committee surveyed industry opinion to obtain a better understanding of these issues. Respondents maintained that the regulatory framework imposed on timeshare is not appropriate, principally because timeshare is a tourist product not a financial product. They considered that the present approach imposes unnecessary restrictions and high compliance costs on the industry, while also affecting consumer perceptions of timeshare. As a result, the Committee was told, the Australian timeshare industry remains underdeveloped. In particular:

13 The collapse of Estate Mortgage trusts prompted a review of the regulation of the collective investments system covering timeshare schemes. See discussion of the Companies and Securities Advisory Committee (CASAC) and the Australian Law Reform Commission (ALRC) report *Collective Investments: Other People's Money* (1993) in Chapter 3 below.

14 Interval International in *FocusOn*, Jones De LaSalle Hotels.

15 'Key Findings' *Resort Timesharing in Australia and New Zealand*, Ragatz Associates, RCI, April 2002, p. [2]; submitted by ATHOC.

16 *Submission 10*, p. 9.

- timeshare does not have the domestic market presence it has overseas; and
- timeshare operators cannot meet the high level of international demand for resort accommodation in Australia.¹⁷

2.20 The main features of the regulatory regime applying to the establishment and operation of timeshare schemes in Australia are set out below.

Corporations Act reforms and the timeshare industry

2.21 Section 9 of the *Corporations Act 2001* specifically defines a 'time-sharing scheme' as a type of 'managed investment scheme', where:

- (i) people contribute money or money's worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).

2.22 Traditional financial assets schemes predominate among managed investments schemes but the legislation also covers a number of property, primary production, mortgage and master fund schemes. Timeshare schemes, along with film, derivative and strata schemes, are relatively low in number. In 2003 less than four percent of managed investment schemes were timeshares schemes.¹⁸

2.23 As managed investments, timeshare schemes are regulated principally by Chapter 5C of the Corporations Act, although other provisions of the Act apply where relevant. Chapter 5C was inserted into the Corporations Act by the *Managed Investments Act 1998* (MIA) with effect from 1 July 1998.

2.24 The MIA completely revised the regulation of managed investment schemes. Under the previous prescribed interest system, schemes were operated under a dual trustee/fund manager structure. Under the MIA, there is no independent trustee. Instead, sole responsibility for custodianship of funds and scheme operation lies with

17 Correspondence to the Committee, May 2003.

18 *Australian Corporations and Securities Legislation 2003*, CCH Australia Limited, vol. 1, 2003, p. 8. Timeshare schemes are a subset of the 'other' category.

the fund manager, the single responsible entity which must set up the compliance structure, register with ASIC and meet new licensing requirements.

2.25 These requirements are contained in the regulatory framework introduced by the *Financial Services Reform Act 2001* (FSR Act), which applies to managed investment schemes regulated under Chapter 5C.

2.26 The definition of a financial product, found in Part 7.1 Division 3 of the Act, includes managed investment schemes, and any form of interest in these schemes.¹⁹ Subsection 763A (1) provides the general definition that a financial product is a facility through which, or by the acquisition of which, a person makes a financial investment, manages financial risk or a makes non-cash payments, although exemptions also apply.²⁰

2.27 Under former regulation as 'prescribed interests' any scheme offering timeshare rights on the basis of shares in a title to real property had to provide a registered prospectus to potential investors. The prospectus was expected to disclose the nature of the scheme and set out the protections offered to investors. However, there were no statutory requirements or administrative guidelines for the content of the prospectus, nor was there a registration and licensing regime.

2.28 Under the amendments introduced by the FSR Act any promoter involved in the advertising, marketing, selling or promoting of interests in a managed investment scheme is operating a financial service business²¹ and must hold an Australian Financial Services (AFS) licence for the type of product sold by the business.²² The obligations of the financial services licence are clearly enumerated²³ and have the effect of significantly increasing disclosure and transparency requirements for providers of managed investments products, which includes timeshare schemes.

2.29 The following sets out the key requirements for timeshare managed investment schemes under the *Corporations Act 2001*.

Registration with the Australian Securities and Investments Commission (ASIC)

2.30 To register with ASIC a timeshare scheme must:

19 *Corporations Act 2001*, s 764A.

20 Excluding certain financial products that might otherwise be considered managed investments products, see s762A(3).

21 s 911D.

22 s 911A(1).

23 s 912A.

-
- have a responsible entity which is a public company that holds the appropriate AFS licence ‘to operate the scheme and perform the functions conferred on it by the scheme’s constitution and [the Corporations Act]’;²⁴
 - ensure that the RE holds scheme property on trust for scheme members;
 - have a constitution setting out matters such as:
 - the costs of investing in the scheme;
 - the responsible entity’s powers and rights, if any, to be paid fees out of scheme property;
 - a complaints resolution mechanism;
 - winding-up arrangements; and
 - procedures for making and dealing with withdrawal requests.²⁵
 - have a compliance plan setting out ‘adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with [the Corporations Act] and the scheme’s constitution’;²⁶
 - appoint a registered company auditor to audit the compliance plan and advise ASIC of any suspected breaches which the auditor believes has not been or will not be adequately dealt with by the responsible entity;²⁷
 - lodge the auditor’s compliance report with ASIC together with lodgements of the responsible entity’s financial reports and directors’ reports;²⁸ and
 - have an in-house compliance committee to monitor the activities of the responsible entity.²⁹

Australian Financial Services licence obligations

2.31 To obtain and hold an AFS licence the operator of a managed investment scheme must ensure compliance with the following general obligations, such that:

- the financial services covered by the licence are provided efficiently, honestly and fairly;
- adequate financial technological and human resources are available to deliver these services;

24 s 601FA and s 601FB(1).

25 See ss 601GA(1) to (4).

26 s 601HA(1).

27 s 601HG.

28 s 601HG.

29 s 601JA to 601JJ.

- representatives of the business are adequately trained, competent to provide the financial services pertaining to the licence, and are adequately supervised for compliance with the law;
- an internal dispute resolution system is in place which complies with the standards and requirements determined by ASIC and covers complaints made against the licensee by retail clients; and
- the scheme is a member of one or more external dispute resolution schemes that are approved by ASIC's regulations and cover complaints about the licensee made by retail clients (other than those that can be dealt with by the Superannuation Complaints Tribunal).³⁰

2.32 In addition, a financial services licensee must report to ASIC breaches which might affect the licensee's capacity to deliver the financial service.³¹ Financial service licensees must also provide the required disclosure document, statement or prospectus, for the type of financial service they provide.³²

Disclosure requirements for licensees

2.33 Section 710 of the Corporations Act sets out the general content requirements for a prospectus which must contain 'all the information that investors and their advisers would reasonably require to make an informed assessment'. Managed investment schemes must disclose:

- the rights and liabilities attached to the offer, including any detail the purchaser might 'reasonably be expected to know', such as the nature of the scheme and any risks, or fees, commissions or charges attaching to the offer; and
- assets and liabilities, financial position, performance and prospects of the scheme, including details about the scheme operator, and financial licensee.

2.34 Section 714 also states that any product issuer must lodge and declare lodgement of a copy of the profile statement with ASIC, and give any other information required by regulations under ASIC.³³

2.35 ASIC's Policy Statement 175 *Licensing: Financial Product Advisers—Conduct and Disclosure* (PS 175) describes how the disclosure and conduct obligations set out in Part 7.7 of the Corporations Act apply to the provision of financial service product advice to retail clients. The required information must be set out in a Product Disclosure Statement, a Financial Services Guide, and/or a

30 s 912A.

31 s 912D.

32 s 705.

33 s714 (1)E.

Statement of Advice. The adviser must also ascertain the financial situation of the client, to meet the 'know your client' rule.

2.36 ASIC's role in applying additional statutory requirements and providing relief from the effect of the Corporation Act for timeshare operators in particular is discussed below.

ASIC's regulation of timeshare schemes

2.37 ASIC's responsibilities in overseeing the managed investments regulatory framework are quite extensive. ASIC assesses and approves scheme registration and licence applications. It is the body which the compliance plan auditor and compliance committee are required to advise in certain circumstances where there are actual or suspected breaches of the law. The responsible entity's annual financial reports must be lodged with ASIC, as must copies of disclosure documents appropriate to the type of service being offered and type of scheme.

2.38 ASIC has the power to undertake surveillance checks of schemes and is equipped with a range of enforcement options. It also has powers under section 601QA to modify or exempt a person from the application of Chapter 5C. ASIC has used these powers to exempt certain timeshare schemes from the requirements of the Act or otherwise to modify their application.

2.39 To clarify its expectations of the industry, ASIC issued its first policy statement on timeshare schemes, PS 66, in 1993. The statement set out the types of schemes subject to regulation and provided exemptions from certain aspects of their regulation as 'prescribed interests'. PS 160: *Time-Sharing Schemes* was an update issued in 2000 after the introduction of the *Managed Investments Act 1998*. It sets out both concessions and additional requirements ASIC has determined for the industry.

2.40 Relief from the requirement to register as a managed investment scheme is provided under various pro forma instruments according to the particular type of timeshare. The three main categories of timeshare schemes eligible for relief are:

- schemes that were previously not required to comply with the prescribed interest regime under state laws (PS 160, Pro forma 205);
- substantially sold out title-based schemes (PS 160, Pro forma 207); and
- schemes where the responsible entity relinquishes control to member owned clubs (PS 160, Pro forma 206).³⁴

34 ASIC, *Submission 9*, p. 9.

Exemptions under state laws and for fully sold title-based schemes

2.41 PS 160 offers exemptions for schemes that were previously not required to comply with the prescribed interest regime under state laws (Pro forma 205). The relief is offered on the condition that such schemes:

- make no primary offers after 31 May 2000; or
- belong to an approved external complaint system or become a member of an approved industry supervisory body before 1 October 2000 (extended to 31 March 2006).³⁵

2.42 PS 160 provides that, on application to ASIC, sold out title-based schemes are also eligible for exemption from the managed investment provisions if:

- planned buildings specified in the prospectus had been built or substantially completed, or would not be built without affecting the interests of members;
- a minimum of 90 percent by value or number of all the interests in the scheme were held on 1 June 2000 by persons who were not associated with the scheme operator, manager, promoter or developer;
- any further issue of sale of interests in the scheme be conducted by a licensed securities dealer, and that the offer must comply with conditions for licence as if the scheme were a registered scheme; or
- other conditions relating to issue of membership certificates, member voting rights, membership of an external complaints system or an approved industry body and the application of cooling-off rights to purchasers of scheme interests are satisfied.

2.43 ASIC's submission records that, as at September 2004, there were four operators relying on relief under formerly exempt state laws and 26 operators relying on relief as title-based schemes.³⁶

Exemptions for owner operated clubs

2.44 Some timeshare schemes are run as 'clubs' by a board representing timeshare co-owners. Clubs that have taken over management of scheme property from the responsible entity are entitled to relief from Chapter 5C in certain instances.³⁷ These are that:

35 Australian Securities and Investments Commission (ASIC), *Submission 9*, p. 10, and see ASIC Class Order 04/1204, *Time-Sharing Schemes—Extension of Time until 30 June 2005 to belong to an ASIC Approved Industry Supervisory Body*, 30 September 2004; and Instrument 05/403, *Time-Sharing Schemes—Extension of Time until 31 March 2006 to belong to an ASIC Approved Industry Supervisory Body*, 22 April 2005.

36 ASIC, *Submission 9*, p. 4.

37 PS 160: 12.

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- there are certain controls on the club's expenditure;
 - the club has a veto over all decisions that materially affect members' best interests;
 - the club is a public company;
 - the property is held on trust for members or members hold title (and the relevant title documentation) to the scheme property, and members hold membership certificates in the club;
 - scheme buildings are completed or substantially completed and at least 90 percent of the interests have been issued to persons other than the scheme promoter, developer, manager, responsible entity or an associate of theirs;
 - the club holds a trust account audited twice yearly by a registered company auditor;
 - any agreement between the club and another party to supply management services must provide members with voting rights to dismiss the person providing the service and without any additional payment;
 - the club is a member of an approved industry supervisory body;
 - all sales of scheme interests are subject to a minimum of five business days cooling-off period; and
 - the responsible entity does not operate a rental pool.

2.45 Notably, if the club offers any new or secondary (resale) interests the operator must take out a financial services licence for dealing and advising, and comply with its conditions, as though the scheme were a registered managed investment scheme.³⁸

2.46 ASIC reports that, at September 2004, there were only two timeshare schemes relying on this relief.³⁹

Exemption as prescribed interest schemes

2.47 The *Managed Investment Act 1998* was introduced with transition provisions which allowed the prescribed interests regulatory framework to continue to apply to certain scheme operators for two years.⁴⁰ PS 135: *Managed Investments: Transitional Issues* sets out ASIC's policy on transitional arrangements for managed investment schemes of various types, providing relief from registration and other requirements. Under PS 135 ASIC may extend transition provisions for timeshare operators.⁴¹

38 PS160:12 (f) and see discussion of transitional arrangements below.

39 ASIC, *Submission 9*, p. 10.

40 ASIC, *Submission 9*, p. 5.

41 PS 135: 13.

2.48 In March 2003, ASIC announced a further extension of relief from registration requirements for non-transitioning exempt schemes until 30 June 2010. Extensions will only be awarded, however, if it is clear to ASIC that scheme property will be properly managed. ASIC has advised that still further extensions may be allowable.⁴²

2.49 ASIC reported that, at February 2005, there were 18 timeshare schemes still operating as prescribed interest schemes.⁴³

Exemptions from net tangible asset requirements

2.50 Among other concessions⁴⁴ provided to timeshare schemes, ASIC provides an exemption from the minimum net tangible assets (NTA) requirements applying to financial services licence holders.

2.51 As mentioned, a responsible entity must hold such a licence to provide the relevant services. Under the Corporations Act, licensees must have 'adequate financial resources' to provide the licensed services and carry out supervisory arrangements. Part C of ASIC's Policy Statement 166 *Licensing: Financial Requirements* relating to managed investment schemes and custody services states that a licensed responsible entity holding scheme property and assets itself must have a minimum of \$5 million NTA.⁴⁵

2.52 PS 160:5 provides that a responsible entity of a timeshare scheme is not required to have NTA of \$5 million if it holds scheme assets consisting of:

- scheme levies held in a trust account that is audited twice annually by a registered company auditor who reports to the responsible entity;⁴⁶ and
- title to land to which a timeshare scheme relates.

Class orders

2.53 Class orders are offered extensively by ASIC to provide relief to timeshare scheme operators on a case by case or issue basis. In its submission to the Turnbull review of the Managed Investment Act in 2001, ASIC reported that of the 137 Class Orders issued during the two year transitional period for the legislation, a

42 ASIC Media and Information Release IR 03-05, *ASIC Grants Further Extension of Interim Relief for Non-Transitioning Managed Investment Schemes*, 5 March 2003.

43 ASIC, *Submission 9*, p. 5.

44 Other exemptions in PS 160 were relief from valuation requirements, the exemption of rental pools, subject to certain conditions, and of non-accommodation based timesharing schemes.

45 Where the responsible entity has appointed a suitably qualified custodian to hold scheme property, it must have a minimum of 0.5 per cent of the value of the scheme assets and other scheme property. The minimum NTA is \$50,000 and the maximum \$5 million.

46 These levies must not be more than the responsible entity reasonably considers necessary for maintaining, refurbishing or improving scheme property or meeting expenses required by law.

disproportionate number of 81 related to non-mainstream products, including timeshare schemes.⁴⁷

Introduction of the cooling-off period

2.54 ASIC may also modify the law to apply additional restrictions on licensees dealing in timeshare schemes. PS 160:11 provides that, to obtain a licence, timeshare operators must ensure that each sale has a cooling-off period of:

- five business days, if the applicant is a member of ATHOC; and
- ten business days in other cases.

2.55 Sale documentation must prominently advise of this and purchasers must be given a separate dated statement to this effect. A record of the statements is to be kept by the responsible entity of the scheme. If a prospective member decides not to proceed, all consideration, including administration and any other fees, must be refunded.

Approved dispute resolution and an industry supervisory body membership

2.56 Access to class orders and the exemptions allowed under PS 160, as outlined in this section, are contingent on the applicant belonging to an ASIC approved external complaints system or holding membership with the approved industry supervisory body (ISB).

2.57 Many timeshare operators are members of the Financial Industry Complaints Service (FICS) which is an approved external complaints body. ATHOC operates a complaints resolution committee (CRC) but ASIC withdrew interim approval for it to deal with regulated matters in March 2004.⁴⁸ ATHOC has appealed against this decision and the matter is now before the Administrative Appeals Tribunal (AAT). The ATHOC CRC now deals only with unlicensed, unregulated complaints about maintenance and management of resorts.⁴⁹

2.58 ATHOC has also made application to ASIC to become the ISB but to date has been unsuccessful.⁵⁰ Given the lack of an approved ISB, ASIC has permitted interim modification of the requirements so that schemes may hold membership of ATHOC instead. In September 2004, ASIC issued Class Order 04/1204 which gave

47 Malcolm Turnbull, *Review of the Managed Investment Act 1998*, 2001, p. 19.

48 Mr Paul O' Shea, Lecturer at the Beirne School of Law, University of Queensland, *Transcript of evidence*, 28 April 2005, p. 4.

49 Mr O'Shea, *Transcript of evidence* 28 April 2005, pp. 4-5, and See ATHOC *Submission 10*, p. 34.

50 ATHOC, *Submission 10*, p. 34.

an extension of time until June 2005 for timesharing schemes to belong to ATHOC. A further extension, to March 2006, was offered in April 2005.⁵¹

2.59 ASIC has advised that it is considering revising the PS 160 requirement for membership of an ISB, and potentially reviewing PS 160 more comprehensively, given that no ISB has yet been appointed.⁵²

Conclusions

2.60 The new obligations imposed on timeshare schemes by the introduction of the *Managed Investments Act 1998* and the *Financial Services Reform Act 2001* are very significant. Timeshare schemes are among a small sliver of untypical managed investments schemes which attract a disproportionate number of applications for relief from Chapter 5C.

2.61 Given the nature of the timeshare industry, with its diverse range of products and service providers, the obligations imposed under Corporation Act reform have seemed onerous to timeshare operators compared with some other managed investment providers.

2.62 The industry effectively operates as two tiers: timeshare marketers and developers attract the full legislative effect of financial reform. As operators of a managed investment scheme they must register the scheme, obtain an appropriate financial service licence and meet disclosure, training and other requirements. For fully sold clubs the position is more ambiguous. While exempt from meeting scheme management and compliance structures, they are prohibited from assisting with resale or advising owners about their timeshares. If they do, extensive and costly compliance requirements must be met.

2.63 For industry players such inconsistencies cause operational problems and increase costs, raising questions about the credentials of the present regime effectively and comprehensively to regulate the timeshare industry. For consumers, lack of clarity about the legal status of timeshare may diminish awareness of rights and protections; may make them vulnerable to loopholes in a timeshare contract.

2.64 The next chapter of the report will look more closely at some of the strengths and weaknesses of the current approach.

51 INS 05/403, *Time-Sharing Schemes—Extension of Time until 31 March 2006 to belong to an ASIC Approved Industry Supervisory Body*, 22 April 2005.

52 ASIC, *Submission 9*, p. 9.

Chapter 3

Timeshare as a managed investment

Introduction

3.1 A main contention in industry evidence to the inquiry is that timeshare is not a true investment product, and so should not be regulated as a financial product under Chapter 7 of the Corporations Act. This chapter evaluates that contention by making a broad assessment of the strengths and weaknesses of the current approach.

3.2 The chapter first tests assumptions that the inclusion of timeshare within the managed investments regime is an accident of history. The Committee referred to the review of the prescribed interests system undertaken in 1991 and a subsequent review which reflected upon the regulation of timeshare schemes.

3.3 Evidence before the Committee identified a number of advantages and also disadvantages for the timeshare industry and for consumers under the present regulation. These features, set out next in the chapter, introduce key themes which direct inquiry and recommendation in the body of the report.

3.4 The chapter then situates Australia's approach internationally by surveying timeshare regulation in the European Union, the United Kingdom and the United States. This reveals that Australia's focus on consumer protection is commensurate with other regulatory approaches and that this is true whether the product is dealt with as securities, real estate or under fair trade protection frameworks.

3.5 Corporations Act regulation is also shown to have a particular advantage, in providing a nationally consistent framework for regulation of the product which covers the now dominant holiday clubs and vacation timeshare schemes.

Background to the current approach

3.6 As noted in the previous chapter, timeshare has been regulated as a managed investment since the introduction of the Managed Investments Act (MIA) in 1998.

3.7 Its inclusion under the Act was decided on the basis of the findings of a comprehensive review of the regulatory framework for prescribed interests, conducted by the Companies and Securities Advisory Committee (CASAC)¹ and the Australian Law Reform Commission (ALRC) in 1991. The review was to determine:

- if the current regime provided a proper level of regulation of the various kinds of collective investment schemes; and

1 Now Corporations and Markets Advisory Committee (CAMAC)

- whether different systems of regulation should be provided for different kinds of such schemes.²

3.8 In 1993 the review report *Collective Investments: Other People's Money* was released. It concluded that there should be an overhaul of the existing regulation of collective investment schemes.

3.9 The proposed framework was largely adopted and introduced by the MIA. As part of this process, the old definition of 'time-sharing schemes' was directly incorporated in the new definition of collective investments; the definition was not changed by the MIA nor by any subsequent legislation.³

3.10 Later, in 2001, the Turnbull review of the MIA confirmed that timeshare schemes should remain within the purview of the Act. Amendments were recommended to ensure that loopholes would not allow timeshare schemes to escape regulation; for example, the definition of scheme property had expressly to include property that was timeshare-scheme related.⁴

3.11 In evidence to this inquiry ASIC stated that timeshare, as a deliberate act of Parliament, had been treated as a form of financial product for more than twenty years. The definition of a financial product under the prescribed interest system had a broad reach, as was intended by the legislation. This has been continued under the managed investments regime.⁵

3.12 Mr Malcom Rodgers, ASIC Executive Director, Regulation, explained that for consumer protection reasons the definition of financial products applies 'to a range of financial products which are considerably broader than investment products—a product where a consumer is asked to make a decision about the use of discretionary funds'. He stated that this immediately necessitates a requirement for up-front disclosure 'so that it is clear what rights and risks come with that decision'. ASIC, however, made no commitment to the future treatment of timeshare as part of the current regime, referring consideration of the matter to the Parliament.⁶

Some advantages

3.13 Evidence before the Committee canvassed the relative advantages and disadvantages of the current regulatory approach. Some of the advantages arising from treatment of timeshare as an investment product were: a Goods and Services Tax

2 CASAC/ALRC report, *Collective Investments: Other People's Money*, 1993, pp. xv-xvi.

3 See section 9 of the Corporations Act.

4 Malcolm Turnbull, *Review of the Managed Investment Act 1998*, para. 5.3.3, p. 98.

5 Mr Malcom Rodgers, *Transcript of evidence*, 28 April 2005 p. 12.

6 Mr Malcom Rodgers, *Transcript of evidence*, 28 April 2005 p. 12.

(GST) exemption; a national regulatory regime; and an enhanced consumer protection framework.

Good and Services Tax exemption

3.14 Timeshare schemes received concessions from the GST when amendments were made to the regulations for that purpose.⁷ The industry was exempted on the grounds that timeshare schemes do not make real estate transactions, which would have attracted GST, but instead are selling investment or financial products.⁸

A consistent national regulatory regime

3.15 As financial products, timeshare schemes are captured by consistent federal regulation, with compliance overseen by ASIC. The national law makes for a more predictable operating environment for industry participants, most of whom operate across state borders and many of which are overseas based.

3.16 Inquiry evidence universally supported the need for a nationally consistent regime for regulation of timeshare. At hearings, RCI Pacific stated:

...one thing that the forum, ATHOC [Australian Timeshare and Holiday Ownership Council] and all the industry participants are quite clear on after searching the world for legislation is that we are absolutely positive that we cannot allow this to be drilled down to state based legislation.⁹

3.17 Accor Premier Vacation Club (APVC) agreed that nationally consistent legislation was essential if Australian timeshare operators are to be globally competitive, but argued that some adjustment to current regulation is needed if this objective is to be realised:

APVC is strongly supportive of the continued regulation and supervision of the timeshare industry by the Commonwealth government. We operate on a national scale and indeed aspire to operate on an international scale. We believe that stringent, consistent and nationwide regulation can only assist the timeshare industry in its quest to move from the category of a bought good into the mainstream world of commerce and be viewed as a sought good...However, like anyone else operating under legislative and prescriptive administrative regulation, we seek clarity of the existing law and modifications to the law so as to make it relevant to today's commercial marketplace, less burdensome where the law fails to achieve its purpose, and directive so as to clarify for the regulators the will of parliament in relation to regulations and policies.¹⁰

7 A New Tax System Goods and Services Tax (Amendment Regulations 2000 No. 2)

8 See discussion, Senator Harris, *Senate Hansard*, 11 October 2001, p. 18343.

9 Mr John Schwartz, Manager Special Projects, RCI Pacific, *Transcript of evidence*, 13 April 2005, p. 42.

10 Mr Martin Kandel, Executive Officer, APVC, *Transcript of evidence*, 13 April 2005, pp. 35–36.

Enhanced consumer protection

3.18 The Committee heard that the introduction of financial services reform (FSR) had been beneficial to both consumers and industry participants: it had driven down the incidence of complaints against timeshare operators while raising standards and consolidating a more positive reputation for the industry.¹¹

3.19 The Consumer Credit Legal Service (CCLS) and the Australian Consumers Association (ACA) reported a decline in complaints against timeshare operators under FSR. They considered that most matters dealt with by CCLS client advisers and ACA caseworkers had originated prior to the introduction, or during transition, to the new regime.¹² The CCLS stated that, in most situations, the matters dealt with related to timeshare marketing practices and to credit-related problems arising from timeshare vendors' use of linked finance arrangements.¹³

3.20 In support of the claimed improvement in industry standards, timeshare operators RCI Pacific and APVC affiliate Becton Group Holdings reported consumer benefits from operator compliance with the managed investments regime. They stated that the formation of statutory trusts and scheme operation by the Responsible Entity safeguards the integrity of the scheme while giving long-term security to scheme members.¹⁴

3.21 The FSR provisions add another layer of protection. The Australian Financial Services licence must be acquired on registration of the scheme. It sets out standards for provision of the financial service, requiring that consumers are dealt with by trained advisers and have full access to information about the product they are purchasing.¹⁵ As Mr Brian Gillard of the Commercial Law Association of Australia (CLA) stated, the regime creates a 'cost for misbehaviour'—the potential loss of the licence to trade, making the business unviable.¹⁶

3.22 The FSR requirement for operator membership of an approved dispute resolution scheme was also considered to be an important element in the consumer protection framework. Mr Paul O'Shea, Lecturer at the Beirne School of Law, University of Queensland, commented on the outcomes achieved by ATHOC's

11 ATHOC *Submission 10*, p. 18; Tourism and Transport Forum (TTF) *Submission 16*, p. [2].

12 Consumer Credit Legal Service, *Submission 5*, p. 2; Ms Catherine Wolthuizen, Senior Policy Officer, ACA, *Transcript of evidence*, 15 April 2005, pp. 1–2.

13 CCLS, *Submission 5*, p. 1.

14 RCI Pacific, *Submission 12*, p. 3; Becton Group Holdings, *Submission 13*, p. 1.

15 Associate Professor Mike Dempsey, Head of Finance Discipline, Department of Accounting, Economics and Finance, Griffith University, *Transcript of evidence*, 13 April 2005, p. 2; Mr Paul O'Shea, Lecturer at the Beirne School of Law, University of Queensland, *Transcript of evidence*, 28 April 2005, p. 2.

16 Mr Brian Gillard, Member, Legislation Reform Taskforce, CLA, *Transcript of evidence*, 15 April 2005, p. 2.

Consumer Complaints Resolution Committee, both on regulated and un-regulated matters, while the CCLS submission cited access to dispute resolution as a vital mechanism for consumer protection and a key achievement of financial services reform.¹⁷

And some disadvantages

3.23 However, evidence also raised questions about the effectiveness of the disclosure-based regime to protect consumers. Timeshare marketers and developers considered disclosure relatively ineffective as a consumer protection mechanism. They also stated that licence costs associated with compliance are excessive. Fully sold schemes reported that the regime made resort operation difficult, erecting significant impediments to the resale of timeshares.

Ineffectiveness of disclosure regime

3.24 There was some general consideration of the effectiveness of the disclosure regime to protect consumers. Mr O'Shea presented the Committee with an analysis of the effectiveness of disclosure requirements under the Consumer Credit Code. His research indicated that consumers rarely read documentation in full and were often confused about which items of information were important. This suggested a simplified and more transparent approach to disclosure is required.¹⁸

3.25 Industry operators, in particular large operators, considered the disclosure requirements attached to financial products have resulted in a duplication of information.¹⁹ ATHOC suggested that disclosure of commissions and other payments are not relevant for timeshare. It also asked for a simplified approach to cooling-off disclosure.²⁰

3.26 Fully sold schemes had the opposite problem. As exempt schemes, they are prohibited from giving timeshare owners, or other resort occupants, advice about availability of timeshare in their resorts or other product information.²¹ Mr Clive Constance, Manager of Paradise Timeshare Club (trading as Port Pacific Resort) explained that this disadvantages the consumer who must rely on third party promoters to gain prices and other information about timeshare resales.²²

17 Mr Paul O' Shea, *Transcript of evidence*, 28 April 2005, pp. 2–3; Consumer Credit Legal Service, *Submission 5*, p. 3.

18 P.O' Shea and Dr C. Finn, 'Consumer Credit Code Disclosure: Does It Work?', *Journal of Banking and Finance Law Practice* 5, vol. 16, March 2005.

19 See for example, Trendwest Resorts South Pacific, *Submission 8*, p. 6.

20 ATHOC, *Submission 10*, p. 29.

21 Paradise Timeshare Club, trading as Port Pacific Resort, *Submission 4*, p. 3.

22 Mr Clive Constance, *Transcript of evidence*, 15 April 2005, p. 49.

3.27 Consumer groups expressed concerns that the volume of documentation was being used to conceal rather than reveal important information.²³ Mr O'Shea advised that 'too much disclosure can often be not nearly enough', this being indicated by reports that consumers continue to be misled by timeshare operators which are ostensibly complying with the disclosure requirements.²⁴

3.28 Another concern was that timeshare purchasers, making a relatively small financial outlay, are both less likely to seek legal advice and less able to interpret the detail set out in a timeshare contract.²⁵ Linked finance arrangements made these consumers even more vulnerable. Ms Catherine Wolthuizen, Senior Policy Officer with the ACA reported:

Caseworkers—and particularly the clients of casework agencies...financial counsellors and the like—report that they tend to see people who are drawn in by the idea that they can use linked finance to give them access to an interest in a property, whereas they could not otherwise participate in rising property values. Often these are people who really do not understand the nature of the legal obligations they are entering into, the nature of the interest that they are acquiring or the obligations that accompany the financing arrangement they have agreed to. These are the people least able to protect themselves in the absence of any effective regulatory framework.²⁶

The costs of compliance

3.29 While it was acknowledged that more rigorous regulation has contributed to the improved reputation enjoyed by the timeshare industry, operators asserted that some aspects of the compliance framework are not appropriate for timeshare. These features are said to impose costs and inefficiencies which reduce industry competitiveness and diversity.

3.30 ATHOC argued that the regulation of timeshare as a financial product has brought with it obligations which are too onerous. It drew attention to what it maintains is a fundamental contradiction in the treatment of the timeshare as an investment. ATHOC asked for legislation better tailored to the timeshare product as a leisure or holiday service. Its submission stated:

With the increasing complexity and compliance burden of the regulatory arrangements over time there has been a growing concern within the industry that [timeshare's] 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

23 For example, Consumer Credit Legal Service, *Submission 5*, p. 2.

24 Mr Paul O'Shea, *Transcript of evidence*, 28 April 2005, p. 3.

25 See Consumer Credit Legal Service, *Submission 5*, p. 2.

26 Ms Catherine Wothuizen, ACA, *Transcript of evidence*, 15 April 2005, pp. 1–2.

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.²⁷

3.31 International exchange operator RCI Pacific along with marketer/developers Trendwest Resorts South Pacific (Trendwest), APVC and Becton supported this view. Their market interest is in the sale of new timeshare offers, principally in the form of points-based ownership. These operators support the corporate structure set up under the MIA as suitable for their operations but argue that the compliance requirements—including licensing, training and disclosure—are excessive, costly and inappropriate to the product.

3.32 In its submission Trendwest estimated that, in 2004, it had spent \$1 million on compliance including staff wages, compliance committee fees, audit fees, printing costs for product disclosure statements and financial services guides, training costs, advice surveillance mechanisms and regular training and monitoring. A further \$10,000 went on training annually, and a total of \$700,000 on licensing fees and associated administration costs in 2000–03.²⁸

3.33 These costs were considered by Trendwest to reduce market diversity in the timeshare industry, concentrating the industry among large corporations.²⁹ Mr George Dutton, Financial Officer of APVC, thought that the costs attached to licensing also limited the entry of reselling businesses, like those operating in the United States. He stated:

One major difference...between the USA and here is the licensing process whereby a reseller can get into the industry in the first place...one of the main reasons, I suspect, that there is no significant resale market in this country is that financial services licences and all of the attendant costs and complexities are simply way beyond the means of the average small business person or independent trader who might be the sort of person who would enter into such a business in this country. That is certainly a major factor in terms of non-liquidity.³⁰

3.34 Tourism and Transport Forum Australia (TTF) took the view that the expense of compliance was overall detrimental to industry efficiency, competitiveness and growth:

The significant compliance costs that are incurred by the industry are ultimately passed on to consumers. When combined with the complexity of the purchase process from a consumer perspective, a real threat to consumer demand emerges. The international competitiveness of the Australian

27 ATHOC, *Submission 10*, p. 3.

28 Trendwest, *Submission 8*, pp. 5; 4.

29 Trendwest, *Submission 8*, p. 5.

30 Mr George Dutton, *Transcript of evidence*, 13 April 2005, p. 49.

timeshare industry is endangered, and investment in the industry is potentially deterred.³¹

Re-sale problems: fully sold schemes

3.35 Fully sold timeshare schemes are exempt from the Corporations Act. However, scheme operators state that regulation of timeshare schemes under securities legislation places significant regulatory impediments on their capacity to conduct resale of timeshares. Witnesses told the Committee that many fully sold resorts have a percentage of owners who, due to age or other life changes, wish to exit their timeshare contracts. Under current regulations, timeshare resort managers are unable to help these owners. Specifically:

- the Corporations Act provides that any relinquished timeshares must be extinguished back into the timeshare scheme. As a result, resort managers cannot offer to buy back the owner's shares.³²
- if resort managers advise owners or assist them with the resale, or purchasing of unwanted timeshares, the Corporations Act financial investment advice, disclosure and training requirements must be met.³³
- ownership of timeshare in many older style resorts is based on a 99 year title. If owners cease to pay management fees and 'disappear' with the titles, resort owners may only recover these titles through expensive litigation.³⁴
- when it comes to the wind up of the scheme it will be unclear whether the title owner or the share 'renter' is entitled to the funds held in the trust.³⁵

3.36 Representatives from Paradise Timeshare Club, Kyneton Bushland Resort and Eastcoast Timeshare Group argued that these factors considerably impede the capacity of fully sold resorts to remain viable, while also disadvantaging the timeshare owner who may need to sell. The Law Institute of Victoria summed up the situation for fully sold operators in its submission:

The LIV queries why such resorts and clubs should need to comply with these requirements if they are simply organising the use of the facility between their members and not selling time. It appears that the legislation was intended to address the problems that arise for consumers who fall for

31 TTF, *Submission 16*, p. [3].

32 Paradise Timeshare Club, trading as Port Pacific Resort, *Submission 4*, p. 3.

33 Mr John Nissen, Resort Manager, Kyneton Bushland Resort Limited, *Transcript of evidence*, 15 April 2005, p. 44.

34 Kyneton Bushland Resort Limited, *Submission 14*.

35 Mr Dennis Grimes, Administration manager, Eastcoast Timeshare Group, *Transcript of evidence*, 28 April 2005, p. 24.

the traps of salespeople who are selling ‘new’ time but does not address the specific needs of resales of time or those needs of fully sold out resorts.³⁶

Conclusion

3.37 The Committee concluded that while the timeshare industry has benefited from operating within the Corporations framework, industry participants are experiencing some operational difficulties because of the treatment of timeshare as an investment product. These include excessive costs, consumer confusion about the product, and resort management issues which affect both time share operators and owners. These problems suggest some adjustment to the current regulation of the industry may be warranted.

3.38 The Committee also notes the industry's request that any alternative regulatory arrangement considered by the Committee should be uniform and national.

International regulatory approaches

3.39 In its review of the regulatory arrangements applying to timeshare, the Committee wished to establish whether the Australian approach was consistent or had any particular merit relative to the type of legislation applying to timeshare in jurisdictions overseas.

3.40 The first obvious feature of other regulatory treatments was that the treatment depends on whether timeshare is considered primarily as a real estate or as a securities product. Mr Shin Siow, Senior Counsel of Trendwest, provided a useful overview of the treatment of timeshare in a number of countries. He explained that land is the security in all timeshare purchases, but that the legislation interprets this in different ways:

When you buy into time share, you are buying an interest in land...I think this is perceived right through all the legislation around the world. If you have an interest in land, it [may] come under the securities regime. It is the same in Singapore and it would be the same in Hong Kong. In the United States they treat it as real estate. It is regulated as real estate in seven jurisdictions, but some states will regulate it as securities. In Malaysia, they see it as securities, but they overlay it with a bit of trade practice kind of control, so they say, 'If this is going to be a timeshare arrangement, these are the things that you need to do: you need to produce a disclosure document, you need to have a cooling-off period and you need to set aside some end-funds.' Those are the three things that they have prescribed in the legislation.³⁷

3.41 In its evaluation, the Committee found that the last three requirements—disclosure, cooling-off and capital adequacy—are the foundations of international

36 Law Institute of Victoria, *Submission 3*, p. 3.

37 Mr Shin Siow, *Transcript of evidence*, 13 April, p. 41.

compliance architecture for timeshare. This is true whether the framework for that treatment is carried by real estate, securities, trade practice or other consumer protection frameworks.

The European Union Timeshare Directive

3.42 The European Union Timeshare Directive 1994³⁸ demonstrates this trend. The directive is a harmonisation initiative for the regulation of timeshare. It provides a compliance template which imposes the following standards on any timeshare contract entered into in a member country or where property is in the European Economic Area (EEA):

- a right to a ten day cooling-off period. Buyers may cancel during the cooling-off period and are entitled to reimbursement of all costs incurred in the making the contract (such as fees for lawyer's witness signatures as required in some countries);
- sellers are strictly prohibited from seeking money during the cooling-off period;
- sellers must provide purchasers with a brochure on request. The brochure must contain specified information and this information must appear in the contract;
- sellers must provide a translation of the contract in an official language of the country where the timeshare is located; and
- any associated credit agreement is cancelled automatically when the buyer cancels the timeshare contract.³⁹

3.43 Complying countries decide how they will effect the requirements in each jurisdiction. Only two member states—Spain and Portugal—created a specific legal framework for timeshare contracts, granting timeshare the status of real property rights.⁴⁰

United Kingdom

3.44 The United Kingdom has dedicated timeshare legislation, the *Timeshare Act 1992* (amended by Timeshare Regulations 1997), which is enforced by UK Trading Standards. The legislation provides for a cooling-off period of 14 days, longer than the

38 *Directive 94/47 EC*, European Parliament and Council, 26 October 1994.

39 'Timeshare', EUROPA European Commission of Consumer Affairs, http://europa.eu.int/comm/consumers/cons_int/safe_shop/timsahe/index_en.htm (accessed 21 January 2005)

40 *Report on Application of Directive 94/47/EC of the European Parliament and Council of 26 October 1994*, SEC (1999) 1795 final, p. 9.

EU at 10 days, but otherwise imposes a set of compliance requirements commensurate with the EU Directive.⁴¹

3.45 In the UK, timeshare is specifically excluded from the ambit of financial services regulation. Further, timeshare cannot vest real property rights as it is not possible for more than four persons to register for a single property in the land register. Nor can it be considered as a long term lease, as leases of more than twenty one years cannot be registered.⁴²

3.46 In 2003 a report based on an evaluation conducted by the Citizens Advice Bureau (CAB) called on the UK government to review timeshare law. Among other things, the CAB noted that the definition of timeshare under the *Timeshare Act 1992* had not captured some of the more flexible vacation plan arrangements dominating the timeshare market, and that pressure selling and deceptive conduct remained features of the industry. The report also suggested that the EU Commission should revise its Timeshare Directive to take into account holiday clubs and similar schemes and to extend the minimum cooling-off period from 10 to 14 days.⁴³

3.47 Australia's approach, which captures all types of timeshare schemes, thus appears in some respects superior to the UK and European regulation of timeshare schemes.

United States: state and federal legislation

3.48 The Committee also heard that Australia's national regulatory system avoids the inconsistencies resulting from the state and federal statutory duplication which exists in the United States. Mr Martin Kandel, a former assistant Attorney-General of the state of Maryland and now Chief Executive Officer of APVC, reported:

My unfortunate experience in the United States is that, in addition to federal regulation, there is regulation literally on a state by state basis. It runs the gamut. New York State requires a securities licence. Other states require real estate licences. Some states—Florida being the one that I am most familiar with—have enacted specific timeshare legislation with built-in consumer protections. There are licensing requirements, bonding requirements and disclosure requirements.⁴⁴

3.49 Florida has been described as the 'timeshare capital of the world'. Not only does it have a thriving market for new inventory but it also has a developed resale

41 ASIC, *Submission 9*, Attachment A, p. 13.

42 *Report on Application of Directive 94/47/EC*, p. 9.

43 Susan Marks, 'Key Recommendations' *Paradise Lost: CAB Clients Experience of Timeshare and Timeshare like Products*, The Citizens Advice Bureau, November 2003, p. 3.

44 Mr Martin Kandel, *Transcript of evidence*, 13 April 2005, pp. 39–49

market.⁴⁵ The Committee examined the Florida legislation as another example of dedicated timeshare legislation.

3.50 Florida regulates timeshare under Chapter 721 of the Florida Statute XL Real and Personal Property 2004.⁴⁶ As in Australia, the legislation is comprehensive in its coverage of products⁴⁷ and applies to all timeshare plans with a duration of least three years. The legislation affects all schemes located in the state of Florida or offered for sale in that state.⁴⁸

3.51 The Florida statute specifically states that timeshare plans are not securities.⁴⁹ It is a prescriptive regime; it provides definitions of the different types of timeshare schemes and specifies requirements for their operation and upkeep. These cover lodgement of filing fees and disclosure made in the offering statements for each type of scheme.⁵⁰ Licensing requirements also apply to all timeshare operators. The statute requires that any seller of timeshare must be a licensed real estate broker or broker associate. Solicitors, subject to certain limitations, may also sell timeshare.⁵¹

3.52 As a comparison with the Australian approach, the Committee also examined the US federal regulation of timeshare as securities. Under the *Securities Act 1993* (US) and the *Securities Exchange Act 1934* (US), timeshare schemes may fall within the definition of securities if they have one of the following characteristics:

- (a) an emphasis on the economic benefits that can be obtained from the management of renting the accommodation;
- (b) an offer of a rental pool; or
- (c) an offer of an arrangement that materially restricts the purchaser's right to occupy or rent the accommodation, for example a requirement to hold the property available for rental, or a requirement to use an exclusive rental management agent.⁵²

3.53 The US Securities Exchange Commission (SEC) advises that in interpreting these requirements: 'substance should not be disregarded for form, and the

45 Mr George Dutton, *Transcript of evidence*, 13 April 2005, p. 49.

46 *The 2004 Florida Statutes*, The Florida Senate at www.flstat.gov/statutes/index.cfm (accessed 13 June 2005)

47 The legislation covers, but is not limited to, condominiums, cooperatives, undivided interest campgrounds, cruise ships, vessels, houseboats, recreational vehicles and other motor vehicles, and includes, vacation clubs, multi-site vacation plans, and multiyear vacation and lodging certificates. 721.02 (5).

48 721.02 (5).

49 721.23.

50 721.18.

51 721.20 (1).

52 ASIC, *Submission 9*, Attachment A, p. 13.

fundamental statutory policy of affording broad protection to investors should be heeded'.⁵³

3.54 This approach is commensurate with Australia's current interpretation of timeshare within the managed investments regime. At hearings Mr John Price, ASIC Director of Financial Services Reform Legal and Technical Operations, compared Australia's approach:

Some jurisdictions treat the regulation of timeshare a little differently to us. However, I think there is common ground in the sense that things that are actively managed or sold with an emphasis on the economic benefits that can flow from the purchase are generally subject to securities type regulation. It is important to point out as well that, with regard to some other jurisdictions, not only are timeshare schemes subject to federal legislation; they are also subject to myriad state legislation, and that is particularly the case in the United States.⁵⁴

He concluded:

...our treatment of the regulation of timeshare schemes is really influenced by what we perceive the consumer experience with time share to be. In our regulatory regime we use tools such as disclosure, cooling-off and, obviously, complaints resolution schemes.⁵⁵

Conclusions

3.55 The Committee concluded that Australia's compliance system is commensurate, and in some instances superior, to the regulatory arrangements applying to timeshare in some other countries. Overseas regimes, in their diversity, are characterised by a focus on enhanced consumer protection, resulting in the implementation of mandatory requirements for disclosure and cooling-off periods. This is consistent with ASIC's regulation of the timeshare industry as an investment product.

3.56 The Committee also observed that the national regulatory framework established under the Corporations Act offers streamlining and consistency in the treatment of the timeshare product.

3.57 There was consensus in the evidence that nationally consistent regulatory and consumer protection framework is the bottom line for providing certainty to industry

53 *SEC Release No. 33-5347*. ASIC notes that this is consistent with the decision in *SEC v WJ Howey*, 328 US 293, 329 US 819 (1946) where the United States Supreme Court emphasised the need to consider the purpose of securities laws rather than the substance of the form when deciding whether an interest is a security. ASIC, *Submission 9*, Attachment A, p. 13.

54 Mr John Price, *Transcript of evidence*, 28 April 2005, p. 12.

55 Mr Malcolm Rodgers, *Transcript of evidence*, 28 April 2005, p. 12.

and consumers. The Committee agrees with this view, and considers that a national regulatory system provides the most appropriate model for regulation of timeshare.

3.58 The Committee recognises, however, that the treatment of timeshare as an 'investment' product under the financial services regime poses problems for operators. Timeshare is prohibited from being sold as an investment, yet is regulated as an investment product. These same regulatory arrangements also appear actively to inhibit the development of a functioning market in resales.

3.59 The timeshare industry is therefore experiencing difficulties which may prevent its development into a well functioning market where the buying and selling of timeshare is conducted in a competitive environment.

3.60 In relation to the regulation of timeshare as securities, the Committee agrees with the view of the US SEC that an absolute fit of the product is not essential, but rather the significance of the legislation is in its capacity to adequately protect the consumer.

3.61 The Committee believes that ASIC currently applies this principle in good faith in its treatment of timeshare as a financial product. The overall effectiveness of the approach, given concerns about the costs of compliance and the adequacy of consumer protection relative to other possible treatments, will be assessed in the next chapter.

Chapter 4

Regulatory options

Introduction

4.1 In the previous chapter the Committee considered the current approach to the regulation of timeshare and found that there is widespread support for continuing to have a national regulatory scheme with a focus on consumer protection. In this chapter the Committee considers what the general approach to a national timeshare scheme should be. Chapter 5 will consider some aspects of the proposed regulatory scheme in detail.

4.2 In general, four broad regulatory approaches emerged from the evidence:

- continued regulation of timeshare under the *Corporations Act 2001*, with the Australian Securities and Investments Commission (ASIC) as the lead regulator;
- regulation of timeshare under specific provisions of the *Trade Practices Act 1974* (most likely via a mandatory industry code of conduct), with the Australian Competition and Consumer Commission (ACCC) as the lead regulator;
- regulation of timeshare via nationally consistent real estate legislation, regulated in each state by the appropriate regulator; and
- self-regulation by the industry.

4.3 The Committee took the view that the best scheme would be one which retained, and possibly extended, current protection for consumers while minimising the compliance burden for the timeshare industry.

4.4 The latter two proposals, consistent state legislation and self-regulation, attracted little support, and are considered briefly below.

Consistent state legislation

4.5 One option to regulate timeshare would be for all states and territories to introduce consistent legislation which would then be administered by the states. This would allow for nationally consistent legislation albeit via a series of identical regulatory schemes.

4.6 Possibly because of the amount of timeshare activity in Queensland, the Queensland Government is the leader in the development of state-based timeshare regulation. The Queensland Department of Tourism, Fair Trading and Wine Industry Development (TFTWID) informed the Committee that it is in the process of considering a proposal for dedicated timeshare provisions incorporated into the Queensland *Body Corporate and Community Management Act 1997*. The objective of

these provisions would be to address differences between timeshare schemes and other collective investment schemes in the state.¹ The TFTWID submission reported the findings of a public consultation on body corporate issues commenced in July 2004. Submissions to the consultation indicated a lack of knowledge about the interrelationship of state and federal laws in the area, in particular the effect of the Corporations Act. The TFTWID submission concluded that the case for education to clarify the current arrangements for consumers was 'overwhelming'.²

4.7 There was no evidence before the Committee which suggested that consistent state-based legislation is the best way to regulate timeshare. The Committee would observe that such a scheme may seem to be cost-shifting by the Commonwealth, because the states would become responsible for the regulation of timeshare within their state borders. Additionally, it is reasonable to consider whether states and territories such as the Northern Territory and South Australia, with relatively little timeshare activity, would be inclined to adopt new regulatory structures for an industry which has not attracted great attention within their jurisdictions.

4.8 The Committee concluded that any regulatory scheme should be a Commonwealth scheme.

Self-regulation

4.9 In its terms of reference the Committee canvassed the possibility of self-regulation as one regulatory option. This option received virtually no support in evidence, and attracted criticism from both within and outside the industry. For instance, Ms Catherine Wolthuizen, Senior Policy Officer of the Australian Consumers Association (ACA), stated:

In our view, self-regulation of this industry would be ineffective in ensuring consumer protection. There is little evidence that the industry is capable of self-regulating to an adequate degree. Voluntary codes would simply mean that better operators would comply and the rogues would opt out, and consumers would generally be unaware of the difference. We also believe that as time share is often sold as an investment it should be regulated as such. The risks that exist are similar to those of other forms of investment and they require transparency, accountability and access to independent redress to overcome. In our view, without requirements to disclose commissions, refrain from inappropriate hawking activity and provide access to satisfactory dispute resolution, there is little evidence the industry would do it voluntarily.³

1 Queensland Department of Tourism, Fair Trading and Wine Industry Development, *Submission 2*.

2 Queensland Department of Tourism Fair Trading and Wine Industry Development, *Submission 2*, p. 4.

3 Ms Catherine Wolthuizen, *Transcript of evidence*, 15 April 2005, p. 2.

4.10 Mr Martin Kandel, Chief Executive Officer of Accor Premiere Vacation Club (APVC), stated:

Finally, we are not in favour of self-regulation or separate state and territory legislation, as we believe that time share should be regulated by the Commonwealth within the overall framework of the Corporations Act but without labelling it as a managed investment scheme or a financial product.⁴

4.11 Australian Timeshare and Holiday Ownership (ATHOC) which did not directly call for self-regulation, saw a greater role for industry as a co-regulator, particularly through its code of ethics and dispute resolution scheme:

...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.⁵

4.12 Obviously the Committee has no intention of interfering in a matter before the Administrative Appeals Tribunal (AAT). The Committee did, however, receive some evidence in relation to ATHOC's dispute resolution scheme from another witness, Mr Paul O' Shea of the University of Queensland, who stated:

ATHOC put up a comprehensive proposal which, in its documentary form—in its final form—was quite a good proposal in that the scheme it proposed, the Australian timeshare industry complaints scheme, did have an independent board of management and an independent complaints panel. But, on its face, it was not given sufficient funding to allow it to stand alone with respect to the use of resources. So these probably would have to have been shared with ATHOC, which would have been unsatisfactory. And there were doubts about its long-term viability with respect to things like advertising and the three-year regular reviews, which are a requirement of PS139 approval. So ASIC has refused it.⁶

4.13 It should be noted however that Mr O' Shea was also optimistic about the overall performance of the dispute resolution scheme:

On an operational basis, at least in the last two or three years of the scheme when I have been the consumer representative on the CRC, its outcomes for

4 Mr Martin Kandel, *Transcript of evidence*, 13 April 2005, p. 37.

5 ATHOC, *Submission 10*, p. 34.

6 Mr Paul O' Shea, Lecturer at the Beirne School of Law, University of Queensland, *Transcript of evidence*, 28 April 2005, pp. 4–5.

consumers have been favourably comparable with other better constituted schemes in the financial services sector.⁷

4.14 The Committee supports ATHOC in its attempts to increase continually the prevalence of professional conduct within the timeshare industry. The development and improvement of a dispute resolution system is an important component of that. However, the Committee makes no reflection on ASIC's decision regarding ATHOC's application to become an independent dispute resolution service provider, nor on any review of that decision by the AAT. On balance, the Committee prefers at this point to propose a government-based regulatory scheme.

Alternative statutory approaches

4.15 Having eliminated state-based regulation and self-regulation, two approaches remain: regulation under the *Trade Practices Act 1974*, and regulation under the *Corporations Act 2001*.

4.16 During its inquiries, the Committee arrived at the view that the nature of timeshare should be the factor deciding which of these Acts are appropriate. If timeshare is a consumer product in the nature of a consumer durable or a long term service contract, then regulation under the Trade Practices Act would appear to be more appropriate, as this is the source of Commonwealth protection for consumers of other like products and services. If, on the other hand, timeshare continues to be regarded as a financial instrument, then it should be regulated under the Corporations Act along with other financial instruments.

The legal nature of timeshare

4.17 One function of the Trade Practices Act (TPA) is to provide the Commonwealth framework for consumer protection. In particular:

- Part IVA of the TPA prohibits unconscionable conduct in trade and commerce by corporations (but does not apply to the supply of financial services);⁸
- Part IVB of the TPA allows for mandatory industry codes of conduct to be given the status of subordinate legislation; and
- Part V of the TPA contains a wide range of provisions essentially prohibiting misleading or deceptive conduct, and false or misleading representations (again, this Part does not apply to financial services).

4.18 Services, under section 4 of the TPA, are defined as follows:

7 Mr Paul O' Shea, *Transcript of evidence*, 28 April 2005, p. 3.

8 See s.51AAB.

services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade and commerce...⁹

4.19 Timeshare would certainly appear to fall within this definition. As noted above, however, most of the consumer protection provisions exclude financial products and services.

4.20 Currently, timeshare is specifically defined as a financial product and is excluded from the relevant provisions of the TPA by a somewhat complex series of cross-references:

- Section 4 of the TPA gives 'financial product' and 'financial service' the meanings given to them in Division 2 Part 2 of the *ASIC Act 2001*;
- Division 2 Part 2 (section 12BA) of the ASIC Act gives 'financial product' the meaning given to it in section 12BAA and 'financial service' the meaning given in section 12BAB;
- Subsection 12BAA(7)(b)(i) of the ASIC Act makes an interest in a managed investment scheme a 'financial product';
- The meaning of 'managed investment scheme' in turn is taken from s.9 of the *Corporations Act 2001* in which the definition of managed investment scheme includes paragraph (b) specifically describing 'a time-sharing scheme' as a managed investment scheme.

4.21 While this describes the current state of the law, the Committee need not necessarily be bound by this series of definitions. The more general definition of 'managed investment scheme' given in section 7 of the *Corporations Act 2001* is as follows:

managed investment scheme means:

- (a) a scheme that has the following features:
 - (i) people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
 - (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

9 *Trade Practices Act 1974* s.4.

- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)...

Timeshare also appears to fit well within this definition. Consequently, on an initial reading, timeshare could adequately fall within either the TPA definition of 'services' or the Corporations Act definition of a managed investment scheme.

Evidence on the legal nature of timeshare

4.22 The Committee tested this question of the proper nature of timeshare with a number of witnesses. ATHOC agreed with the view that timeshare is more like a consumer durable product or service than like a managed investment:

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.¹⁰

4.23 Mr Paul O' Shea pointed out some differences between the nature of what is 'purchased' by a timeshare member, and a more customary purchase of goods or services:

the legal nature of the interest is that it is now more akin to a share. It is a floating point product: it does not actually relate to any specific piece of real estate. So, whatever pretensions the old product had to being a kind of title—and I am sure that you have been amused by some of the elaborate certificates that used to be given to people when they bought them in the old days—the modern product has no such relationship to a particular piece of real estate. In fact, the actual resort theoretically could cease to exist yet there would still be the right to use, say, resorts that were in the same group in the hands of the time share owner.¹¹

4.24 Associate Professor Mike Dempsey of Griffith University came to the centre of this difficulty by pointing out just how blurred is the line between 'investment' in timeshare and 'consumption' of a vacation:

But if you have what you referred to as an ongoing consumable that lasts for 20 years, it starts to have those characteristics of an investment. If you suddenly decide that it is not what you want after all—we all change our

10 ATHOC, *Submission 10C*, p. 1.

11 Mr Paul O' Shea, *Transcript of evidence*, 28 April 2005, p. 6.

minds two, three or five years later—then as much as you may have thought of it as a consumable at the time, when you come to part company with it for a very disappointing price, for all intents and purposes, at that point in time it is now an investment that in your own thinking went badly wrong. The distinction between a consumable and investment in the case of time share is not quite as distinct as it may be normally. A holiday in Bali is a consumable; putting extra money into my superannuation fund is an investment. But what we call a consumable over many years can have characteristics of an investment when you part company with it, especially if you did so prematurely—meaning that you do not wish to keep it for life after all.¹²

Conclusions

4.25 Regrettably, this definitional question is not one which will admit of an easy and self-evidently correct answer. As Professor Dempsey has pointed out, timeshare can be seen either as a long term service contract, or as an investment which is unlikely to create a capital return, but which provides benefits (in the form of vacations) for so long as the investment is held.

4.26 The Committee noted, however, the important fit between timeshare and subparagraphs (ii) and (iii) of the definition of a managed investments scheme.

4.27 Subparagraph (ii) notes that managed investments are pooled or used in a common enterprise. One of the key characteristics of timeshare—perhaps the definitive feature of timeshare—is that it is a *pooled* system, where timeshare members join with one another to acquire, through a trust or a company, ownership over a resort or a series of resorts. In the case of the larger players, the pool may have many thousands of members, and may have a portfolio of property worth many millions of dollars. The very reason why timeshare members are able to holiday in countries around the world is because they have pooled their contribution with the contribution of many others. The definition of managed investment schemes captures the pooled nature of timeshare far better than does the TPA definition of a service.

4.28 Subparagraph (iii) notes that in managed investments, the investor gives up day-to-day control of the investment—this gives the investment its 'managed' character. This is also the case for timeshare, as ASIC pointed out:

It is not a consumer durable in a narrow sense, because, while the consumer has use access to the underlying asset, the asset in many cases continues to be managed by another person. Your ability to enjoy that asset going forward depends on the way it is managed by another person. That distinguishes it from many consumer durables.¹³

12 Assoc. Prof. Mike Dempsey, Head of Finance Discipline, Department of Accounting, Economics and Finance, Griffith University, *Transcript of evidence*, 13 April 2005, p. 6.

13 Mr Malcolm Rodgers, Executive Director, Regulation, *Transcript of evidence*, 28 April 2005, p. 13.

4.29 On the basis of these observations, the Committee concludes that the *Corporations Act 2001* will continue to be the best legislative 'vehicle' for the regulation of timeshare.

Recommendation 1

4.30 The Committee recommends that timeshare should continue to be regulated under the *Corporations Act 2001*.

Regulation under the Corporations Act

4.31 While the Committee has recommended that timeshare should continue to be regulated under the Corporations Act, the Committee is not simply supporting the status quo. In Chapter 3, the Committee canvassed some of the difficulties associated with the current regulation of timeshare under the Corporations Act. The current process has led to substantial costs of compliance for timeshare operators, and has not necessarily delivered successful protection for consumers as a result.

4.32 In particular, the paradox of regarding timeshare as a managed investment and yet forbidding timeshare operators from selling it as an investment, is exasperating both for the industry and the Committee. Mr Ramy Filo, ATHOC President, neatly outlined the paradox in terms of the 'investment' training the current regulations require for staff:

I have just finished doing a training session for a couple of people. At the end of it I said, 'You've got to learn all of this to pass but once you've passed I want you to forget everything you've learnt here—just understand what time share is about and make sure you never say that it is an investment.' It is an investment in lifestyle, but you should not use the word 'investment'.¹⁴

4.33 Evidence before the Committee from within the industry called for continued treatment under the Corporations Act, but called for separate provisions within the Corporations Act. Mr Kandel from APVC, for instance, stated:

[Timeshare] should have a separate chapter within the Corporations Act with relevant consumer protection provisions but dispense with the irrelevant financial product related requirements.¹⁵

4.34 ATHOC in its submission made a similar argument based on securing appropriate exemptions from the current Corporations Act provisions.¹⁶ The Committee notes that providing a separate chapter for timeshare would have the same effect as selectively providing exemptions from current arrangements, but would be far neater from a regulatory perspective. In evidence, Mr Filo from ATHOC stated:

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

15 Mr Martin Kandel, *Transcript of evidence*, 13 April 2005, p. 37.

16 ATHOC, *Submission 10*, p. 21.

The timeshare industry is regulated within legislation that fits our industry like a square peg in a round hole. Although the corporations legislation is the best overall framework for our industry, there are key aspects that need modification and/or review for their appropriateness. We have detailed these aspects in our submission. Our industry is the most regulated consumer product in Australia. Even as a financial product, time share is subject to more regulatory requirements than many other financial products.¹⁷

4.35 The Committee accepts these views. While timeshare is more like a managed investment than a service, there remain some important distinctions between managed investments and timeshare. An investor in a managed investment is attempting to gain a return on the capital invested. The expected return will almost certainly be financial in nature. A timeshare purchaser, on the other hand, will almost certainly not realise a financial return on their investment. Indeed, price signals from the timeshare resale market¹⁸ suggest that the initial timeshare entry price should be regarded as virtually a sunk cost, which cannot be recovered.

4.36 It is clear to the Committee that continuing to regulate timeshare as a managed investment is inappropriate. However, any separate chapter on timeshare in the Corporations Act must ensure that consumers receive the same levels of protection as are currently provided. The regulatory regime may be tailored differently, to suit the special nature of timeshare and to minimise compliance burdens, but it must be no less rigorous than the scheme which currently applies.

4.37 In the next chapter, the Committee will outline some of the issues which should be addressed in a Corporations Act chapter on timeshare.

Recommendation 2

4.38 The Committee recommends that:

- **timeshare should be removed as a definitional element of managed investment funds under s.7 of the *Corporations Act 2001*; and**
- **a separate chapter should be inserted into the *Corporations Act 2001* to deal specifically with timeshare.**

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

18 See discussion in the next chapter.

Chapter 5

Issues for regulation

Introduction

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

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

5.3 Issues to be discussed are:

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

The price of timeshare

Entry pricing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Financial obligations after entry

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

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

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

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

Potential for anticompetitive behaviour

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

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

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

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

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

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

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

Recommendation 3

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

Value associated with timeshare membership

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

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

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

Sales and marketing

Pressure selling

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 4

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

Recommendation 5

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

Recommendation 6

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

The use of bait

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

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

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

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

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

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

Congratulations!

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

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

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

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

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

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

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

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

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

15 All emphases in the original.

Recommendation 7

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

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

Pressure to sign immediately

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

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

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

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

Recommendation 8

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

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

Timeshare and real property

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

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

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

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

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

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

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

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

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

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

Recommendation 9

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

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

Selling 'upgrades'

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

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

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

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

21 See below for discussion of Schumer boxes.

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

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

Direct marketing and anti-hawking provisions

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

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

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

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

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

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

Recommendation 10

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

Training and licensing

Current training requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 11

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

Cooling-off periods

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

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

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

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

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

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

Recommendation 12

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

²⁷ ATHOC, *Submission 10*, p. 25.

²⁸ ATHOC, *Submission 10*, p. 26.

Disclosure of cooling-off periods

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

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

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

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

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

Recommendation 13

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

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

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

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

Service during the cooling-off period

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

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

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

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

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

Recommendation 14

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

Disclosure

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

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

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

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

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

5.75 Two main objections to the disclosure requirements were:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Schumer disclosure box

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

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

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

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

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

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

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

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

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

Recommendation 15

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

Exiting timeshare and reselling interests

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 16

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

Conclusions

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

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

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

Chapter 6

Fully sold schemes

Introduction

6.1 Contemporary timeshare schemes, such as those operated by Accor Premier Vacation Club (APVC) and Trendwest Resorts South Pacific (Trendwest), are points-based schemes which allow members (who are within the appropriate membership categories) to redeem their points anywhere around the world. These flexible arrangements, based on large timeshare companies with very large property portfolios, are a relatively modern development.

6.2 Timeshare in Australia, as elsewhere, began as an operation based on single resorts, who sold to their members the right to use a particular room during a particular week each year. In many cases, these schemes were also title-based, that is, members actually owned a small amount of the real property which comprised the resort (complete with certificates of title).

6.3 This historical perspective, where timeshare owners actually purchased a very small amount of real property, is perhaps the source of the continuing confusion for some customers about the nature of their timeshare purchase.

6.4 Many of those early timeshare resorts are, of course, still operating today. The Committee heard that 'there are still 60,000 to 70,000 Australian families who have old style title-based week-for-week exchange type activities.'¹ They are termed 'fully sold' resorts because each resort has a fixed number of possible interests (the number of rooms multiplied by 51 weeks per year with one week for maintenance) and in general all of the interests for these resorts have been sold.

6.5 In considering the regulation of timeshare, the impact of regulations on these fully sold schemes must be considered separately because in terms of structure, purpose and nature these title-based, fully sold resorts are distinct from the contemporary, points-based timeshare industry.

6.6 The Committee took the view that, for most of these small resorts, the current regulatory arrangements have the potential to impose unnecessary burdens on timeshare communities who simply wish to operate their resort and enjoy their holidays. This chapter considers issues that were raised in evidence which are specific to these fully sold schemes.

1 Mr John Nissen, Resort Manager, Kyneton Bushland Resort, *Transcript of evidence*, 15 April 2005, p. 34.

Regulatory exemptions

6.7 The Australian Securities and Investments Commission's application of the current regulatory arrangements recognises that fully sold timeshare resorts face different circumstances to newer timeshare schemes. A number of exemptions apply for older timeshare schemes. These were set out in some detail in Chapter 2 of this report.

6.8 In evidence before the Committee, some fully sold schemes argued that these exemptions still leave them facing unnecessary difficulties. One reason for this is the apparent complexity of the regulatory arrangements.² Another concern related to the regulatory advantages which fully sold schemes derive from membership of the Australian Timeshare and Holiday Ownership Council (ATHOC). Evidence suggested that at least some fully sold scheme managers resented the requirement that they be part of ATHOC in order to gain access to an appropriate dispute resolution service:

Our view on ATHOC is that it does very little for the independent sold-out resorts—it is dominated by the big players in the industry. I am sitting here representing close to 15,000 members. With Port Pacific Resort we represent about 30 per cent of the title based resort membership base. So we believe that we have a pretty significant position in the marketplace. We do not see that we get a whole heap of benefit from ATHOC at this point in time. Our resorts are members of VECCI, the Victorian Employers Chamber of Commerce and Industry, which costs about \$1,000 a year, and we are paying ATHOC some \$7,000 or \$8,000 a year for membership. The only thing that we get out of that is the regulatory exemptions that were required by ASIC several years back.³

6.9 Indeed, evidence before the Committee from fully sold resorts suggested that they are sharply critical of ATHOC and its ability to represent this portion of the industry:

We are one of the founding members of ATHOC as we believe the industry needed a focal group both to exchange ideas and work to ensure the industry worked to the best practice. While ATHOC has done some good for the industry it is very focused around marketing and big business. In fact, a look at its structure will show small resorts have only one category of resort manager they can apply to for membership and, even then, unless the smaller resorts unite to vote for the one member and the large management companies do not vote for each other, they are unable to have a voice. We have found ourselves to be unwilling or unable to enforce this code of ethics and unwilling to censure any of the larger players.⁴

2 Kyneton Bushland Resort, *Submission 14*, p. 2.

3 Mr John Nissen, Resort Manager, Kyneton Bushland Resort, *Transcript of evidence*, 15 April 2005, p. 33.

4 Mr Dennis Grimes, Administration Manager, Eastcoast Timeshare Group, *Transcript of evidence*, 28 April 2005, p. 24.

6.10 The Committee supports continuing exemptions for fully sold timeshare schemes and considers that ASIC should conduct a wide consultation and information process with fully sold schemes in order to clarify current misunderstandings and determine whether simpler means of exemption can be adopted. However, those exemptions should continue to be premised on membership of an appropriate external dispute resolution service—whether it be the Financial Industry Complaints Service (FICS) or run by ATHOC or some other service provider.

Resales

6.11 The sale of timeshare interests is not a principal activity of the fully sold schemes, for self evident reasons—they are fully sold. However, each year there is some turnover of interests in these resorts, as people leave the scheme or give their interests to family and friends (by a will or otherwise):

Our view on a secondary market is that we would be quite happy if we could sell our own shares at each of the resorts. We have developed our own secondary market, and that is the demand that comes from the guests who come and stay with us and also our shareholder base. The best advertising you can do is to get your membership base to introduce their friends. We do not sell; people buy. In the case of Sunraysia Resort, we would turn over 40 to 50 resales each year. When I talk about resales, these are forfeited shares that we pass on to new participants. At Kyneton Bushland Resort it is around 25 to 30. All these resorts are fully sold-out resorts.⁵

6.12 These resales are important. While an interest is not possessed, nobody is paying maintenance fees on that interest and the maintenance costs must be borne by the scheme members as a whole. In evidence, fully sold schemes argued that they should be able to sell interests in their own resorts as they become vacant, without needing an AFS licence.

6.13 The Committee can see merit in this argument. Requiring these resorts to have the same level of training and expertise as timeshare companies in the continual and active business of selling timeshare interests appears to be too onerous. Further, unless the AFS licence is held, resort owners are unable to give advice about available timeshares or other product information, which is clearly against the interests of both consumers and the resort.

Recommendation 17

6.14 The Committee recommends that fully sold timeshare schemes should be able to sell interests in their own timeshare scheme without holding an Australian Financial Services licence.

5 Mr John Nissen, *Transcript of evidence*, 15 April 2005, p. 32.

Delinquent members

6.15 The issue of so-called 'delinquent' members—that is, members who have simply stopped paying their annual maintenance fees and stopped utilising their timeshare weeks—is not unique to the fully sold schemes. All timeshare schemes reported these members as a concern. However fully sold schemes face a particular difficulty as, while the delinquent member may have breached their timeshare contract, they remain seised of their title in real property. So they 'disappear', and the title to the real property disappears with them. Evidence suggested this is perhaps the biggest challenge facing fully sold schemes:

The fully sold clubs that are title based all acknowledge that this is their biggest problem and that the title issue must be able to be sorted out in order for them to survive into the future. As a lawyer, I brief senior counsel seeking advice on a method to apply to a court to try and resolve the issue for the east coast trusts. The tentative advice is that it may be possible but the issue becomes a huge cost for those proceedings. Even if they are successful, I think the cost in excess of \$20,000 per club would need to be seen as a minimum.

What I would like to see this committee grapple with is providing a mechanism for the appropriate minister by order to declare certain trusts to come within the definition of a title based time share and, by virtue of that, the minister be able to deem all of the relevant titles to then vest in an appropriate trustee. This could even be done as a one-off piece of legislation to deem all of those titles vested in the minister with the power to pass those titles to a trustee once the minister is satisfied. This is a very big issue for title based trusts.⁶

6.16 It is unfortunate that the original timeshare contracts did not include a lien over the real property, which would allow for recovery of the title in the event of default on the timeshare agreement. Future timeshare agreements should include such a clause.

6.17 However, the Committee has considered a number of ways in which the Parliament may be able to relieve this problem, and has a method to suggest. The proposed solution outlined above, of simply deeming the title to be vested in a trustee, would be a particularly heavy-handed approach to this problem. It would essentially involve government unilaterally, and without compensation, depriving people of real property they currently possess (or, at the very least, taking their current legal interest in the title and turning it into an equitable interest as beneficiaries of a trust). The Committee has spent time considering a more just solution which brings the title back to the resorts without simply depriving people of their title. The proposed solution is complex, but this is necessary as the problem itself is complex. The Committee's proposal is as follows:

6 Mr David Lindsay, Member, Law Institute of Victoria, *Transcript of evidence*, 28 April 2005, p. 23.

1. The timeshare scheme managers must wait for a certain period of time before considering the interest to have lapsed. (The Committee considers that three years without receiving maintenance payments would be an appropriate period.)
2. During this period of time, the timeshare managers must make efforts to contact the timeshare member in order to determine whether they have indeed chosen to leave the scheme. If they locate the former member, the scheme managers should either (a) directly purchase the title from the former member, or (b) advise the former member that unless the arrears are received, they will initiate the process set out below.
3. If the member cannot be contacted, the timeshare managers should place a notice in an appropriate newspaper notifying of their intention to commence the process set out below.
4. The timeshare managers apply to a government agency established for this purpose, for reclamation of the title. The application must demonstrate that the member has lapsed in their payments, and that the process set out above has been undertaken.
5. When satisfied with the application, the government agency compulsorily resumes the land in question and becomes the legal title holder.⁷
6. The agency then advises the timeshare managers that it is in possession of the title.
7. The agency then sells the timeshare interest to the timeshare managers. The consideration received from the managers should be comprised of:
 - a nominal cash amount (say \$200); and
 - an undertaking to write off outstanding management fees associated with that title; and
 - payment of the fees associated with the conveyance of the title.
8. The agency then places the nominal cash amounts received in a fund, and maintains a register of the identities of the titleholders who have had their title compulsorily acquired. Those titleholders may then apply to the fund for a disbursement of the cash amount received from the timeshare manager. The titleholder therefore receives two financial benefits, which constitute 'just terms':

7 This raises a constitutional issue as to whether the agency could be a Commonwealth Agency. The Commonwealth can resume land on just terms under s.51 (xxxix) of the Constitution, but only for a purpose 'in respect of which the Parliament has power to make laws'. If this scheme does not fall within that power, each affected state would need its own agency.

- a small payment in cash; and
- removal of outstanding debt.

6.18 This process, if followed, would result in the return of the real property to the timeshare scheme, but would also offer the defaulting person the benefit of a nominal cash payment, and erasure of the debt arising from their breach of the timeshare contract. It is, perhaps, a novel use of government's power to compulsorily acquire land so it should be carefully scrutinised. However it should be clear from the above explanation that the Government itself would derive no benefit other than the resolution of the problem of delinquent titleholders.

Recommendation 18

6.19 The Committee recommends that the Treasurer consult with appropriate state and territory ministers with a view to implementing the scheme outlined in paragraph 6.17 of this report.

Management issues

6.20 Finally, a number of issues relating to the management of fully sold timeshare schemes were raised with the Committee. Some fully sold timeshare witnesses objected to what they see as an encroaching process of larger timeshare players acquiring interests in small timeshare resorts and dominating the board:

The Timeshare industry is witnessing increasing incidents where the control of Boards is passing to co-owners who represent developers, resellers and/or management companies. They do not represent the grass root 'Mum and Dad' co-owners who thought that they were investing in a carefree annual holiday for the rest of their lives, with minimal annual costs. In many instances, corporations are progressively acquiring shares and then manoeuvring to gain positions on Boards. It is questionable whether such strategies are in the interest of ordinary co-owners or simply part of a broader strategy to gain management control of a stable of Resorts. In many instances anecdotal evidence suggests that co-owners have been faced with higher levies after corporations have gained control of local Boards.⁸

6.21 While the Committee has some sympathy for the views of members who do not wish to see the composition of their boards change, the reality is that timeshare must operate in a market which is as free as possible. Witnesses from ASIC made the point in the following manner:

In that kind of scenario, some who hold interests may be quite disturbed by that process, as indeed minority shareholders in, say, a listed corporation are often disturbed by a takeover process. But the law not only permits but also encourages and creates a mechanism for that to occur.⁹

8 Port Pacific Resort, *Submission 4*, p. 1.

9 Mr Malcolm Rodgers, Executive Director, Regulation, *Transcript of evidence*, 28 April 2005, p. 21.

6.22 Another management issue raised was that of the ongoing maintenance of timeshare resorts. The Committee considers that where resort managers (particularly third party managers) are not considered to be running the timeshare resort effectively, the board should be able to dismiss the managers and either appoint new managers or manage the resort themselves. Mr John Nissen of Kyneton Bushland Resort indicated that he became involved in the resort's management during just these sorts of circumstances:

I got involved when the developer fell over in four timeshare resorts and we found ourselves, as a group of owners, in a position where Sunraysia Resort, Lake Edge Resort, Murray Valley Resort and Kyneton Bushland Resort—which all had previous names, by the way—were close to insolvent. The collection of maintenance levies was less than 60 per cent and they were going down the drain pretty quickly. They were not maintained and so forth. The first thing we did was to hop in there...I must say now that we are collecting, both at Sunraysia and at Kyneton. Kyneton is a few points behind Sunraysia, but I hold Sunraysia up as being the best structured and managed resort in Australia. We run at an occupancy of about 96 or 97 per cent. We collect 98 per cent of our maintenance fees, and we have a natural attrition of memberships of one to 1½ per cent per annum.¹⁰

6.23 The Committee tested the proposal to enshrine this power of dismissal in the regulations with other witnesses, who supported the proposal.¹¹

Recommendation 19

6.24 The Committee recommends that any new regulatory scheme should make clear that the board of a fully sold title-based scheme can dismiss the resort manager if the board is unsatisfied with the performance of the manager.

6.25 The Committee notes that ASIC Policy Statement 160 governing timeshare schemes currently requires that provisions for dismissal of management must be contained in any agreement between a club and a person providing management services. These requirements should be used as the basis for drafting the provisions proposed for inclusion in the new timeshare chapter.

10 Mr John Nissen, *Transcript of evidence*, 15 April 2005, pp. 31–32.

11 See evidence from Dr John Keogh, President, Commercial Law Association, *Transcript of evidence*, 15 April 2005, p. 19.

APPENDIX 1

SUBMISSIONS RECEIVED

1. Mr Peter Holt
- 1a Mr Peter Holt
- 1b Holiday Concepts
2. Department of Tourism, Fair Trading & Wine Development
3. Law Institute of Victoria
4. Port Pacific Resort
5. Consumer Credit Legal Service Inc
6. CONFIDENTIAL
7. The Commercial Law Association of Australia
8. Trendwest Resorts South Pacific Limited
9. Australian Securities and Investments Commission
10. Australian Timeshare & Holiday Ownership Council Ltd
- 10a Accor Première Vacation Club
- 10b Australian Timeshare & Holiday Ownership Council Ltd
11. American Resort Development Association
12. RCI Pacific Pty Limited
13. Becton Group Holdings
14. Kyneton Bushland Resort Ltd
15. LawConsumers Incorporated
16. TTF Australia Ltd
17. Australian Direct Marketing Association
18. Associate Professor Mike Dempsey
19. Mr Paul O'Shea

APPENDIX 2

PUBLIC HEARINGS AND SITE VISITS

PUBLIC HEARINGS

WEDNESDAY 13 APRIL 2005—GOLD COAST

Accor Première Vacation Club

Dutton, Mr George, Chief Financial Officer

Kandel, Mr Martin, Chief Executive Officer

Reghenzani, Mr John, Corporate Counsel

Australian Timeshare and Holiday Ownership Council (ATHOC)

Bengasino, Mr Joseph, Director and Legal Advisor

Filo, Mr Ramy, President

Dempsey, Associate Professor Mike

Head of Finance Discipline, Department of Accounting, Economics and Finance,
Griffith University

RCI Pacific

Knowles, Mr Gary, Vice President and Chief Executive Officer

Schwartz, Mr John, Manager Special Projects

Trendwest Resorts South Pacific

Robinson, Mr Barry, Chief Executive Officer

Siow, Mr Shin, Senior Counsel

Southern Gold Coast Chamber of Commerce

Robbie, Mrs Marie, Immediate Past President; Human Resources Manager,
Classic Holidays

FRIDAY 15 APRIL 2005 —SYDNEY**Australian Consumers Association (ACA)**

Wolthuizen, Ms Catherine, Senior Policy Officer, Financial Services

Australian Direct Marketing Association (ADMA)

Sangster, Ms Jodie, Director, Legal and Regulatory Affairs

Commercial Law Association of Australia Ltd

Durie, Mrs Anne, Member, Legislative Review Task Force

Gillard, Mr Brian, Member, Legislation Reform Task Force

Keogh, Dr John, President

Kyneton Bushland Resort Ltd

Nissen, Mr John Andreas, Resort Manager

Paradise Timeshare Club Ltd, trading as Port Pacific Resort

Constance, Mr Clive Edward, Manager

Walton, Mr Anthony (Tony), Chairman of Board of Directors

Tourism and Transport Forum Australia

Staveley, Mr John Peter, National Manager, Infrastructure and Investment

THURSDAY 28 APRIL 2005—CANBERRA**Australian Securities and Investments Commission**

Price, Mr John, Director, Financial Services Reform Legal and Technical Operations

Rodgers, Mr Malcolm Executive Director, Regulation, Australian Securities and Investments Commission

Law Institute of Victoria and Eastcoast Timeshare Group

Grimes, Mr Dennis, Administration Manager

Lindsay, Mr David, Member Law Institute of Victoria; and Chairman, Board of Directors, Eastcoast Timeshare Group

O' Shea, Mr Paul

Lecturer, Bierne School of Law, University of Queensland; Consumer Representative, Complaints Resolution Committee, ATHOC

SITE VISITS

THURSDAY 14 APRIL 2005

WorldMark at Kirra

Corner Coyne and Winston Streets, Kirra, Coolangatta, Qld

Escort: Mr David Cockburn
Director—Resorts, Club and Travel Operations
Trendwest Resorts Asia Pacific

Beach House Seaside

Corner of Marine Parade and Mclean Street, Coolangatta, Qld

Escorts: Mr Ramy Filo, Managing Director, Classic Holidays
Ms Carole Smith, General Manager, Classic Holidays
Ms Laura Younger, General Manager, ATHOC

APPENDIX 3

MAJOR TIMESHARE INDUSTRY PARTICIPANTS

Promoters/developers

Accor Premier Vacation Club (APVC)—In conjunction with Becton, Accor launched APVC in November 2000. It has timeshare facilities in eight properties in Australia, one in New Zealand and 38 additional resorts and hotels around the Asia Pacific region. It is affiliated with Interval International. Turnover in 2003 was estimated at \$40 million.

Major properties in Australia include:

- Novotel Pacific Bay Resort, Coffs Harbour
- Novotel Palm Cove Resort, Cairns
- Novotel Twin Waters Resort, Sunshine Coast
- Mercure Grand Apartments, Darling Harbour
- Mercure Grand Hotel, Bowral
- Heritage Park, Bowral
- Mercure Grand Hotel, Flinders Lane, Melbourne

Flexi Point Holidays Limited—Flexi-Point Holidays is affiliated with RCI and offers holidays at more than 3 000 resorts across the globe.

Holiday Concepts Management—Established in 1984, Holiday Concepts offers timeshare ownership in around 15 resorts within Australia.

Trendwest South Pacific Pty Limited—Commenced marketing their first property in the South Pacific (Fiji) in June 2000 and their first Australian property in January 2001. Owned by US-based Trendwest Resorts (in turn owned by Cendant Corporation) Trendwest South Pacific has over 13,000 owners. At 2002 Trendwest had access to 220 apartments in 8 resorts across Australia and Fiji. Trendwest timeshare owners can also use their credits for a range of other travel services including airfares, car hire, hotels, day tours and cruises.

Trendwest South Pacific generates revenue of \$90–100 million each year and has generated market recognition through sports sponsorship. Trendwest has apartments in the following Australian properties:

- Trinity Links Apartments, Cairns
- All Seasons Premier Pacific Bay Resort, Coffs Harbour
- Calypso Plaza Resort, Coolangatta
- WorldMark Golden Beach Resort, Caloundra
- WorldMark Kirra Beach, Gold Coast
- Northpoint Apartments, Port Macquarie
- Horizons Golf Resort, Port Stephens

Exchange companies

RCI (Resorts Condominiums International)—Owned by Cendant Corporation, RCI is reputed to be the world's leading timeshare exchange company, offering exchange holidays in approximately 3,700 resorts in nearly 100 countries. Ninety three of these resorts are in Australia.

Interchange Timeshare—Covering New Zealand and Australia, Interchange offers holiday exchanges with 57 resorts in Queensland, New South Wales, Victoria, Tasmania, South and Western Australia.

Dial an Exchange—Dial an Exchange is an independent exchange company with access to 50 timeshare resorts in Australia.

Interval International—Interval International has a global network of 2,000 resorts in 75 countries. Represented by Vacation Management Limited in the South Pacific, it offers a selection of exchange options with 32 hotels and resorts located in Australia.

Resorts

Many timeshare resorts, particularly those managed by hotel operators, are mixed use developments offering hotel rooms and timeshare units. These developments benefit from shared amenities including bars, restaurants and recreational facilities, staff, management as well as the flexibility to use timeshare units for casual guests. It is difficult to determine how many resorts are involved in timeshare in Australia however internet searches confirm over 90 participants.

