

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 (xxxi) 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.

SENATOR GRANT CHAPMAN

CHAIRMAN

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.

