COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Regulation of the timeshare industry

THURSDAY, 28 APRIL 2005

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

JOINT STATUTORY COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Thursday, 28 April 2005

Members: Senator Chapman *(Chair)*, Ms Burke *(Deputy Chair)*, Senators Brandis, Lundy, Murray and Wong and Mr Bartlett, Mr Bowen, Miss Jackie Kelly and Mr McArthur

Members in attendance: Senator Chapman and Ms Burke

Terms of reference for the inquiry:

To inquire into and report on:

The regulation of the time share industry in Australia, with specific reference to:

the effectiveness of the current regulatory arrangements for the time-share 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 time share products.

advantages and disadvantages of possible models for reform of the regulatory arrangements applying to the time share 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.

WITNESSES

Committee met at 6.33 p.m.

O'SHEA, Mr Paul, Lecturer, School of Law, University of Queensland; and Consumer Representative, Complaints Resolution Committee, Australian Timeshare and Holiday Ownership Council

CHAIRMAN—I call the committee to order. This evening the committee will hear evidence regarding its inquiry into the regulation of the timeshare accommodation industry and relevant and related matters. The committee expresses its gratitude to the contributors to this inquiry, including those who will be appearing before us as witnesses this evening. Before we start taking evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. Parliamentary privilege refers to special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution.

Any act by any person that operates to the disadvantage of a witness on account of evidence given by him or her before the parliament or any of its committees is treated as a breach of privilege. I also wish to state that, unless the committee should decide otherwise, this is a public hearing and as such all members of the public are welcome to attend. However, if at any stage a witness wishes to give evidence in camera then we would consider such a request. The committee has already held two hearings on this matter, on the Gold Coast in Queensland and in Sydney; and this, we expect, will be the final hearing on this reference. I now welcome Mr Paul O'Shea from the University of Queensland. I now invite you to make an opening statement, at the conclusion of which we will proceed to questions.

Evidence was taken via teleconference—

Mr O'Shea—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. The traditional, conventional timeshare product—the fixed term, single resort product; that is, you bought a fixed number of weeks at a particular resort—was inflexible and often very inappropriate to the consumer's needs. During the nineties, when I was a case worker who did a lot of litigation in this area, it was not uncommon for the client to have not been able to use the time share for a number of years but of course still be up for the levies, maintenance fees and, if they bought the time share on credit, repayments and interest.

This brings me to the point that time shares were often sold with linked credit, and this is linked to famous disasters such as the Terranora Lakes resort on the Tweed Coast near the New South Wales-Queensland border, which were sold with finance from the State Bank of New South Wales, and the resorts in Victoria that were supported by sales by Equus Financial Services. Linked credit now has its own regulation via consumer credit, but the market failures and inappropriate conduct that was often associated with linked credit sales also occurred with time share. It gained particular regulations under the corporations law as a prescribed interest and then later under the Managed Investments Act, but it was largely unregulated except by the general law and did not attract attention from regulators until well into the nineties.

There were substantial access to justice issues, because most time share purchasers were not people who could usually afford high-quality, or any, legal advice and representation. Generally, if a person can afford those, they are probably going to buy a holiday unit or a summer house; they are not going to buy a time share. Thus, there were massive inequalities of bargaining, litigious and information power between the parties to the timeshare contract transaction. That is not a recipe for a happy or functioning market.

It must be conceded that there have been substantial improvements, some of them due to the work of regulators and better regulation. Clearly, the Managed Investments Act was a step forward, and now we have the Financial Services Reform Act amendments to the Corporations Act. These have substantial disclosure requirements, which are directed towards the remediation of the information inequality. It is arguable that they are not really appropriately regulated as pure investments, given their link to real estate. However, in the absence of an adequate, uniform, centrally regulated investment property regulation regime, the financial services regime is clearly the best option. Why would it need to be national and uniform? Simply because the vast number of time shares—certainly more than half—are sold interstate.

Another improvement in the sector is the decline—they are no longer sold—of the fixed product; that is, the fixed term, fixed week at the same single resort product, and the development of the floating points system. This also does counter the industry argument that they are not really financial services, because the points system is far more akin to what, in legal terms, is called a chose in action, or more akin to a share, and therefore is more appropriately regulated as an investment product than a real estate product, which the old-style time share was more like.

Regardless of its greater suitability or not for financial services regulation, there is no doubt that the points system is more flexible and therefore becomes a more useful product for consumers, and this tends to be leading to a better result. Another factor that influenced improvements in the market practices of the industry was substantial adverse media attention. To its credit, the industry, through its industry body, the Australian Timeshare and Holiday Ownership Council, ATHOC, has tried to clean itself up. Its code of conduct is a meritorious document in many ways. A good example is that the Corporations Act and the Managed Investments Act only require a cooling-off period of five days. Those industry members who are members of ATHOC and therefore subscribe to the ATHOC code of conduct must give consumers a 10-day cooling-off period. It is that kind of trying to raise industry standards that must be encouraged when looking at the industry.

Again, the big stick has helped. Actions by regulators—for instance, the ACCC action against Trendwest—have been useful. One of the features of that action is that there was a representation that the time share was an investment which could accrue in value. This was sometimes explicit, which made it easy to prosecute, but also implied in the presentations—I do not know if any of you have been to any—which would talk about the growth in value of properties in the area where the time share was. Investment marketeer spruikers say, ‘Look at the capital growth in Gold Coast properties.’ By buying a time share, you are somehow buying into that. But the facts are that the industry’s own internal publications—the leaflets produced by organisations such as Resort Condominiums International, RCI, which used to largely control the market for resale of time shares—show that they almost always devalue by 20 per cent and never regain value.

Another improvement in the industry—and again, ATHOC is to be commended for this—is that it did adopt a dispute resolution model through its complaints resolution committee, which has a consumer representative and a chair, who is described in its constitution as having to be someone from outside the timeshare industry.

I have some criticisms of the ATHOC complaints resolution committee as an appropriate long-term dispute resolution body. Indeed, of course, ASIC clearly has such criticisms too. But those criticisms are to do with things like access—and, by access, we mean visibility—structure and perceptions of independence. 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 consumers have been favourably comparable with other better constituted schemes in the financial services sector.

I do not know if you have with your papers a report I gave to the Consumers Federation last year. In that report I referred to the case statistics for the ATHOC CRC in 2002-03, which was the last full year that the CRC had jurisdiction to handle licensed, regulated complaints. By that I mean complaints that relate to the sale of the time share, which, of course, are the ones that most people are interested in. During that period there were 18 complaints that went so far as to be included in the CRC process. One was abandoned even after that first step by the consumer. Six were settled in favour of complete rescission of the contract and return of all moneys paid by the consumer. This is a substantial remedy, as the value of time shares vary. I have seen them as dear as $19,000. They generally average somewhere around the $10,000 to $12,000 mark. The old days of the $3,000 to $6,000 time shares are long gone. One of the cases was settled in favour of the consumer in that they received an increased benefit from the position originally taken by the industry member and they accepted that.

The balance were not settled and were left then to the CRC to make a binding determination. Two of these were determined in favour of rescission and return of all moneys, four were determined in favour of the industry member and four were determined in favour of the consumer but with sanctions less than complete rescission, ranging from apologies to extra benefits attached to the time share, cash payments or partial refunds. Overall, the win-loss ratio for consumers from the ATHOC complaints resolution committee during that year was approximately 44 per cent for complete rescission, 22 per cent completely for the industry member and 27 per cent for remedies less than rescission. These statistics compare favourably, if a consumer win-loss ratio is part of what we are looking for, with schemes such as the Banking and Financial Services Ombudsman, the insurance ombudsman and the Finance Industry Complaints Service.

However, there are obviously still some issues. There are substantial problems still with disclosure. This is very disappointing, because one of the achievements of the Financial Services Reform Act was the improvement in product disclosure, or the creation of the product disclosure statements. There are still examples, and we are still seeing them coming through, of misleading and deceptive conduct where consumers are misled even when the timeshare sales entity had ostensibly complied with the requirements of the act. I do not know if you have been distributed with an article I wrote in the *Journal of Banking and Finance Law and Practice* which relates to consumer credit disclosure, in which I conducted some experiments with a fairly large number of participants. The results are very disturbing for UCCCMC and for MCCA, which is the body entrusted with the supervision of that disclosure regime.

Similar critiques can be made of the financial services regime—that is, too much disclosure can be often not nearly enough. And, despite the best efforts of draftspeople, both regulators and companies, formats and language still confuse consumers rather than assist them.

The other disappointing issue is the cooling-off period. Sometimes its notification is not as clear as it should be. One of the undertakings that Trendwest was forced to give the ACCC as a result of that litigation was that they display the notice about the cooling-off period more prominently. 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.

Again, another problem with all documentary disclosure is that human beings have always been and are increasingly becoming visual and verbal people who communicate and receive communications more effectively by nondocumentary means. The seminar style presentations, usually done by a person with a lot of personality and flair, with the private interviews afterwards, lend themselves to representations being made and impressions being formed and misunderstandings being reached by consumers, which completely defeats the purpose of the disclosures. This leads me to my next point about the training of sales staff. Not a lot of effort is put into it, despite the requirements of the FSR, because it is largely a very transient employment situation for the direct sales staff.

I finally come now to the touchy point, because I am sure the committee is aware that this is a matter before the AAT at the moment, that the ATHOC CRC as it is currently structured is not sufficient. It is not sufficiently independent. This is why, in March of last year, its temporary approval under policy statement 139 from ASIC to be an appropriate external dispute resolution body was withdrawn and consequently the ATHOC CRC now can only deal with unlicensed, unregulated complaints. These are those that relate to the maintenance and management of a timeshare resort. Some of these are quite interesting still and clearly very important to the consumers. But the amount of money at stake in them is nowhere near as great as it is in the licensed complaints.

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.

I am given to understand that ATHOC has amended its proposal, to try and incorporate these issues, and that ASIC is still refusing PS139 approval and that that decision is the subject of an appeal to the AAT. The structure, procedures and terms of reference of the proposed scheme are actually very good and they compare well with other schemes in the sector. What ATHOC really needs to do is satisfy ASIC that it is willing to put up enough money to make the scheme truly viable and capable of standing alone. Until that is done, I concede that ASIC will be within it is rights to refuse approval. On the other hand, if ATHOC can satisfy those concerns, as I say, the terms of reference and the constitution of the scheme are pretty good. I was consulted substantially on those. As you can guess, I put in as much input as I could to make them as consumer friendly as possible. Is there anything more you would like to ask me?

CHAIRMAN—Firstly, I would like to explore with you in a bit more detail the nature of this product.

Mr O'Shea—In modern form or old form?

CHAIRMAN—Both, I guess, because people still own both.

Mr O'Shea—Yes, that is true. When I said that the old fixed-term product—fixed-week product—was leaving the marketplace, that, of course, referred only to the new ones. There are still a lot of them out there.

CHAIRMAN—You seem to define it as a financial product.

Mr O'Shea—Now? Clearly it is; yes.

CHAIRMAN—It seems to me that it is not really a financial product; it is more a long-term consumer durable. If it were a financial or investment product you would expect it to increase in value, over time, but clearly this does not happen, and does not appear likely to happen, with time share. What a person is really purchasing is a right to enjoy a property, or access to various properties, for recreation purposes over an extended period of time. Isn't that more in the nature of a long-term consumer durable rather than an investment product or financial product?

Mr O'Shea—It is certainly not an investment product. But a financial product, even by the definitions provided in the FSR Act—which, of course, I admit is a piece of legislation that is directed principally at investments—need not necessarily increase in value. I am sure that we have all had the experience of purchasing shares that did not increase in value.

CHAIRMAN—But the intention of people purchasing shares is generally that they will increase in value or at least provide an income.

Mr O'Shea—Provide some return.

CHAIRMAN—Yes.

Mr O'Shea—I suppose that is the case for those old life insurance style savings plan products—even though they have nearly all gone now. They were fairly low return and were mostly sold as a hedge against inflation rather than as high return investment products. But they still had some return, whereas there is no doubt that a time share simply depreciates. On the other hand, 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. 'Consumer durable' is not a bad term. I put it to you, Senator, that the only problem with that is that in the absence of a national, uniform, adequate regulatory regime for such a product I still think that the FSR is the best option as it currently stands.

CHAIRMAN—Part of the reason for our inquiry is in fact to determine whether there should be an alternative regime established. Given you accept that in descriptive terms 'consumer durable' is possibly appropriate, would it be more appropriate to set up a new regulatory regime perhaps under the Trade Practices Act and the ACCC rather than continue its present regulation as a financial product under ASIC?

Mr O'Shea—Would you be looking at a new part to the TPA or would you be looking at a code of conduct?

CHAIRMAN—Either/or. If we chose to go down that path when we reached our conclusions, these would be the two options to be considered. Obviously your advice on either of those possibilities would be welcome in terms of our decision-making process.

Mr O'Shea—Despite my criticisms of disclosure, I am not saying that we should throw out the baby with the bathwater. I think disclosure has done a lot. Detailed disclosure regimes are not normally the subject of codes of conduct—cooling-off periods, yes; redress mechanisms, yes; but not a prescribed format for what has to be in the document and what people have to see. They are almost always dealt with by way of legislation because of the level of prescription required. So that is a problem that we have. But if the committee was willing to take the step of recommending a new part to the Trade Practices Act, the ACCC is a very effective regulator—no more effective than ASIC—and putting it within the Trade Practices Act would not be a problem at all. I would not think that a code of conduct though would be sufficient for what we are looking for here. It worked for franchising, but remember that in franchising we are talking about small business. Although small business clearly needs more protection than it is getting under the Trade Practices Act, it is still more empowered in these transactions than the people who buy time shares as consumers.

CHAIRMAN—In your earlier remarks you referred to the issue of the cooling-off period. You said that the standard legislative requirement is five days but that ATHOC had introduced a cooling-off period of 10 days.

Mr O'Shea—Yes, but that is only for ATHOC members

CHAIRMAN—Yes, I understand that. In their evidence to us, ATHOC were actually complaining about the requirements to prominently display the cooling-off provisions in the documents and the fact that they had to be in three separate locations and also in the contract. Their complaints about the cooling-off requirements seem to be at odds with what you seem to be suggesting—that is, that ATHOC have enhanced cooling-off periods.

Mr O'Shea—It may indicate a slightly schizophrenic mental attitude but the actual facts are that an ATHOC member has to give 10 days of cooling off. The actual legislative requirement is only five. They hate cooling off in some senses. Remember that with ATHOC you are talking about industry leaders, who are not necessarily all industry players. I am sure you are aware of the phenomenon that the people whom regulators and government talk to in industries are often not the people whom they want to fix or regulate. The people who are willing to participate in industry development are often the people whose practices are the best. But I would strongly argue against any reduction in the prominence of display of cooling-off rights. That would further undermine their effectiveness.

There are players in industry who just do not want people to exercise the rights because they see them as a vast cost to themselves. They have a product that they have to pay someone to sell. The person sells it. They record their sale. They move on thinking they have got a sale and then 10 days later, or within 10 days, someone exercises their rights and they have to go back to scratch. So the cooling-off period is resented by a lot of people in the sales end of the industry. But I have severe problems with any attempt to undermine disclosure about cooling off. That is again one of the good parts about disclosure. If you read my research you will find that some of the more technical but nevertheless very important features of consumer credit disclosure seem to slip right by consumers mostly. They just do not get them or understand them. But something as simple and as clear as a statement that you have got 10 days to get out of this contract with no obligation, using terminology that is commonly understood—like the phrase 'cooling off'—is often far more effective than some of the other sorts of disclosure.

If you have a look at my consumer credit research you will see that questions like 'What's the interest rate?' get a fairly high and satisfactory score amongst the experiment participants but questions like 'How much does the credit cost?' do not. They get terribly poor answers because those require a little bit more understanding, reasoning and working out. My criticisms of disclosure do not apply to a simple, clear statement of cooling-off rights. That is exactly the sort of thing consumers do understand.

CHAIRMAN—You have suggested the inclusion of a financial disclosure box or a Schumer box to streamline disclosure and help consumers better understand the timeshare product and its ongoing costs.

Mr O'Shea—That is what is coming in in consumer credit. 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.

CHAIRMAN—Is this similar to or identical with something that Virgin credit cards have been promoting of late, which they call the honesty box?

Mr O'Shea—I am not familiar with that product.

Ms BURKE—It is the Schumer box.

CHAIRMAN—Ms Burke intervenes that it is the Schumer box.

Mr O'Shea—Virgin is getting one step ahead of the game because their product may well be regulated shortly to require Schumer box disclosure.

CHAIRMAN—They have made representations to us, or to me as committee chairman, to have a look at this with a view to making it a regulatory requirement.

Mr O'Shea—Of time share?

CHAIRMAN—No. The Schumer box in relation to credit cards.

Mr O'Shea—My understanding is that the Ministerial Council on Consumer Affairs will be moving exactly in that direction this year.

CHAIRMAN—I was just trying to clarify what it meant.

Mr O'Shea—That is what I mean. I do not know the Virgin product, but I can imagine what you are talking about, Ms Burke. Of course, there would be a lot of discussion about what should be in these boxes on the front of a timeshare contract and that would require, I think, some empirical work to inform the regulatory process—in order to work out, for instance, from a focus group perspective, what it is consumers want to know and what the salient features are that they need to know most clearly. I think some examination of the complaints history, both in the old CRC and what is now going through FICS and ASIC, would be useful there. Then we would need to work with cognitive psychology people and people who are into document design about the best way to bring the box to the consumer's attention in the early days of the document. Clearly, one of the things that has to be in the 'honesty box' is cooling off.

CHAIRMAN—If we head down that path again, doesn't that lend itself to a view that regulation under the FSR is perhaps not appropriate? I do not think there is any suggestion that the Schumer box be applied across the board to financial products, is there?

Mr O'Shea—Through PDSs. No, there is no suggestion of that. I suppose the argument could be made that there are many products regulated by FSR that would not be amenable to the Schumer box style. In the case of some insurance products, it might not be a bad idea. Yes, you could use that argument—you could—but there is no legislative structural reason why the regulations under the FSR provisions of the Corporations Act cannot regulate for a particular product to satisfy the disclosure requirements in a particular way. It already does so. The disclosure requirements for insurance are slightly different from those for some other financial products under that act. Again, I can see where you are leading, Senator, but there is actually no legislative structural reason why the FSR regime cannot also regulate for the Schumer box style.

I think the Schumer box has a lot of merit, particularly for a product where a couple of simple, big points need to be made—like for time share.

Ms BURKE—In your introduction you said, and some of the evidence we have also had says, that the industry has picked up its game—

Mr O'Shea—It needed to.

Ms BURKE—but still the marketing of the product—we actually witnessed it; we were quite entertained—is still very—

Mr O'Shea—Hyper.

Ms BURKE—intense, very in your face: 'Sign now or you're not going to get the deal' or 'If you walk away, you're an idiot' and that sort of thing.

Mr O'Shea—A once in a lifetime opportunity!

Ms BURKE—Yes. In the complaints that you saw and dealt with, were a few of them about the sales techniques and the marketing?

Mr O'Shea—Absolutely. As I said in my report to the Consumers Federation, which I think you have there, all of the cases that were settled or determined—those that resulted in a complete recision—involved the high-pressure sales techniques and misleading perceptions and impressions formed either during the presentation or during the little side interviews afterwards.

Ms BURKE—We were trying to ascertain why they need to market this—

Mr O'Shea—Have you ever been to a session?

Ms BURKE—We went; it was interesting.

Mr O'Shea—They knew you were the committee, and they still did the full show?

Ms BURKE—It was still the full show.

Mr O'Shea—I went in an undercover way when I was first thinking about taking up this appointment, to check it all out.

CHAIRMAN—I did the same several years ago.

Mr O'Shea—I nearly came away with a time share. I am certainly keeping the steak knives!

Ms BURKE—We were there at the 'sales desk'—

Mr O'Shea—Where? At Mariner Shores or—

Ms BURKE—at Kirra, a Trendwest time share, and then we went to one of the Classics. We looked at both of them.

Mr O'Shea—All right.

Ms BURKE—They had been into their little thing where they were shown the video and you can go on the cruise and you can do this and you can do that, and then we saw the one-on-one intensity of the sales right in front of us. We can regulate this industry till—

Mr O'Shea—We are blue in the face.

Ms BURKE—we are blue in the face, but how do you actually stop those pressurised sales that then cause the consumer problems at the end of the day?

Mr O'Shea—Clearly, cooling off has got to stay. No matter what regulatory format you adopt, cooling off is a remedy that can go some of the way towards that. I have told you about ways in which I think cooling off can be undermined by a lack of responsiveness to questions asked during that time, but I think cooling off is one of the few remedies to get people out of the hothouse atmosphere and give them a chance to reconsider their position.

Ms BURKE—The industry was putting to us that they are over-regulated, that they need less regulation and that the training regime is too onerous, given that they are not selling the financial product but they have to do the whole amount of it. But I would contend that we actually need more specific training for time share.

Mr O'Shea—I think so. The only problem with FSR is the one-size-fits-all aspect. Maybe, as ASIC gets better at FSR—and, remember, it is very early days when you think about it—more specific policy statements could be issued about more specific types of training. But I would like to keep the barriers for entry and exit up fairly high for timeshare sales staff participants, because any industry where you have a transient sales staff is never good for consumers. For one thing, it reduces accountability. In many of the cases I had, it was said about the person who had made the representation, 'They no longer work here.' That was almost always the answer.

Ms BURKE—Yes. It is like the cab driver I am trying to sue at the moment who left the country the day after the complaint—but never mind. The other thing we keep coming up against is: what are you buying? Are you buying something to sell or not sell? The fact that there is not a resale market also seems to be one of the—

Mr O'Shea—There is a resale market—but it is always at a terrible loss.

Ms BURKE—But if there were a regulated, established resale market, would that—

Mr O'Shea—That is a matter that we do still see at the ATHOC CRC, because that is often influenced and controlled by the resort management situation—and also the renting market. You cannot use your resort, so the only way you can recoup your levies that year is to try to get it rented—sublet. And the resort managers control who is able to get their week sublet or not. So that is an interesting area of complaint. I think consumers need to be informed that this product is not an investment and does not gain in value, and you are only buying it as a lifestyle choice.

One of the Schumer box entries that I would be arguing for is a very clear statement to that effect. I would love that very clear statement in the Schumer box on the front of the document, because that is the truth. Yet, in a lot of the material, if not expressly—I think they try and avoid being too express about it any more after the Trendwest case—there is still this implication that somehow you are buying into a growing capital market in the area where your time shares are, and of course that is just illusory.

CHAIRMAN—I think that probably completes our questions, Mr O'Shea. Thank you very much for your quite lengthy introduction, which I found very valuable.

Mr O'Shea—I hope it was not too long.

CHAIRMAN—No, it was not; it was very informative in terms of what we are trying to resolve. Your responses to our questions, combined with your submission, have been very helpful in terms of our inquiry. Thank you very much for appearing before the committee.

Mr O'Shea—If you think I can be of further assistance to the committee or to the process in general, I will of course see what I can do.

CHAIRMAN—Thank you very much.

[7.20 p.m.]

PRICE, Mr John David, Director, Financial Services Reform Legal and Technical Operations, Australian Securities and Investments Commission

RODGERS, Mr Malcolm James, Executive Director, Regulation, Australian Securities and Investments Commission

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public, but if at any stage you wish to give your evidence in camera you may request that of the committee and we will consider such request. We have before us your submission, which we have numbered No. 9. Do you wish to make any alterations or additions to your submission?

Mr Rodgers—No.

CHAIRMAN—I now invite you to make an opening statement.

Mr Rodgers—We do not propose to make an opening statement, because you have our submission. We are happy to help with any issues that you might have an interest in hearing from ASIC on.

CHAIRMAN—I will start by trying to define what product we are dealing with here. You heard the exchange with the earlier witness, and certainly a lot of the evidence we have received tends, in my view, towards the view that it is not really an investment product. In my view, it is stretching the definition to even call it a financial product. It really is a lifestyle or what I would call a long-term—or hopefully long-term, if it is still there—consumer durable rather than a financial product as such. What is ASIC's response to that sort of definition issue?

Mr Rodgers—I will begin by saying that this product, as a deliberate act of a parliament more than 20 years ago, has been treated as a financial product of one kind under the old prescribed interest scheme. After some initial different views, there was a deliberate attempt made by parliaments to close off a structuring of this kind of product so that it was not caught by the securities legislation. The old prescribed interest definition and the managed investment definition always had a broad reach and, in some senses, were always intended to. ASIC is not expressing a view on the long-term future of time share. That is really a matter for the parliament. But let me just say a couple of things about your characterisation of it as a consumer durable.

If you look at the tools that attach, for consumer protection reasons, to things that are financial products—and they are really now a range of financial products that are considerably broader than investment products—a product where a consumer is asked to make a decision about the use of discretionary funds, where there looks like there is good consumer protection work done by an up-front disclosure regime so that it is clear what rights and risks come with that decision, does have some characteristics of traditional managed investment schemes, as well as that disclosure entry point.

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. To some extent, with the way that we have adapted it through our own policy and relief powers, the managed investments legislation does distinguish. Pretty universally we have said that the disclosure regime needs to apply. There are disclosures that consumers need to know about. The broadscale type disclosures through the Corporations Act look like they ought to do the work here, because there are so many varieties of these things.

We have adapted, if you like, the law in a significant way in certain areas. For example, after the sale process, the people who own the time share effectively take control of its future management as a club. The managed investments regime, which is directed beyond the disclosure regime to the governance of what happens to the asset when it is being managed by somebody else, does not look like it makes sense. So we have said that, if it becomes an asset that is held and controlled by its members and is no longer held by its original promoter or any third-party manager, we would disconnect the managed investments regime. There are certainly some schemes like that, but there are many where there is long-term consumer dependence on the skills, the ability and the honesty of the management, the third-party manager, going forward.

CHAIRMAN—We have heard evidence from members of a couple of the old, original schemes—one from New South Wales and another from Victoria—where the original managers had in effect fallen over and the owners themselves had basically taken over and appointed a board to manage the time share.

Mr Rodgers—Historically, a number of schemes have been promoted with exactly that purpose—the promoter's financial interest is in the promotion of the scheme, not in its long-term management. The legislative framework that we work with says that, where you are a purchaser of one of these things and dependent in the long term on the skills of a third party, that looks like work that the managed investments part of the legislation does and, therefore, the FSR and the Corporations Act regime as a whole.

CHAIRMAN—How does our regulatory approach compare with those of, say, the United Kingdom or America?

Mr Price—That is set out in our submission. Some jurisdictions treat the regulation of time share 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 case in the United States.

CHAIRMAN—Have you made an assessment of the advantages and disadvantages of our regulatory regime compared with the regulatory regimes of those two countries?

Mr Price—As a matter of policy, where you want to end up with the regulation of time share is a matter for this committee and the government to make a call on. I would point out that 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.

CHAIRMAN—Can you give your view as to the advantages and disadvantages were the committee to determine that this should be put under the Trade Practices Act and the ACCC rather than the current regulatory structure.

Mr Rodgers—You heard from the previous witness that one feature of regulation under the Trade Practices Act as it presently stands is that, while it is directed towards some of the conduct that has caused everyone some concern here—some selling practices and conduct that has been associated with at least some parts of the timeshare industry—it is not the job of that regime, in its present form, to create mandatory disclosure regimes; certainly not where there is the kind of long-term dependency, which I talked about, to create a structure for, if you like, the regulation and governance of the relationship between people who have interests in a scheme and the operator of that scheme. I may be blinkered by a Corporations Act perspective but, were one to construct a scheme that said that was part of what needed to be done, it is a little bit hard for me to imagine how you would end up with a scheme that does the regulatory work that arguably needs to be done, without it having many of the features of the Corporations Act regime. I stress that I am not arguing a particular policy line there.

On that basis, if you look at the work that is done through the Corporations Act regime, there is a disclosure regime, including a cooling-off period; and a mechanism for governing the long-term relationship between people where, whatever they have used their money to purchase, the asset in which they hold that interest is being managed by another person. They have an ability to control who the long-term management is. Their ability to intervene in that arrangement is supplied by the managed investments regime—they have rights as members, more than merely contractual rights. The choice seems to me to be, in simple terms, to use a structure like that or to allow control of the selling process and all of the rest to be done by contract. One might be entitled to ask in those circumstances what contracts are likely to emerge over time that are not influenced at least by the shape of the Corporations Act.

CHAIRMAN—Turning to the marketing side of the schemes: on the one hand we have had the complaint from ATHOC and the industry that the FSR regime is not appropriate because it requires their salespeople to be trained to a level and in areas that are not really relevant to time share. On the other side of the coin you have the issue of high-pressure selling, which regulation under FSR does not seem to be controlling, stopping or whatever. Again, is the mix in the regulatory structure appropriate there? How could it be improved? Do you accept ATHOC's argument that in effect their staff have to be overtrained, for want of a better word, for what they are doing?

Mr Rodgers—It is always important to begin the discussion about training requirements and ASIC's policy statement 146 by making the point that it applies only to people who are giving financial advice on a personal basis to people. It is true that it is generally one size fits all. I have looked at some of the evidence that the committee has heard about tier 1 and tier 2. Tier 2 was never intended to be applied to other than a quite small number of products, such as basic

deposit products and consumer level general insurance products, which are well understood and used by most consumers and where it is easy to see that the relationship between someone giving advice and a consumer is really confined quite tightly to that particular conversation. In the language that the industry sometimes uses: these products are bought rather than sold.

That is clearly not true about the timeshare industry. The selling practices within the timeshare industry have developed over time, but it is a product that is very actively sold. It is not something that it appears that consumers look at on their own account and simply find one, as they would a bank deposit product or a general insurance product. To the extent that the selling process ends up with individuals giving personal recommendations to people to purchase the product, it is set in PS146 that when you are in an adviser relationship with someone you should see it as part of an overall obligation to give them advice that is in their own interests, which includes some consideration about whether, of all the things they might do with their discretionary money, that is the one they ought to do.

I heard the comments from the previous witness about the potential to adapt the FSR regime as we go on through it. Policy statement 146 was always an important plank because it delivered on one of the key features of the FSR regime, which is that when people are licensed to deal in financial services—accepting the general point about characterisation of time share—consumers should be able to rely on at least a warrant of minimum competence in that business. If there is a very specialised part of financial services where personal advice is being given I can see the argument, 'That's not what we do, therefore we don't need to be trained to do it,' but I am not sure that I find it completely persuasive that you should break up that general underpinning represented by policy statement 146. I think the potential for enormous fragmentation in the advice industry would be very significant and potentially to the detriment of consumers.

That is a high-level generic argument. I can see the case that says, 'If people are merely in the business of selling time share, why should they have to know what they would need to know if they were advising people about shares?' But I think the starting point characterisation is that they are in effect licensed to give financial advice to people. If that is what they are doing, even if in a narrow area, they need to be adequately trained to do that. I can understand that it might be inconvenient for a process that the industry characterises entirely as a selling process, but that is not what it is at law or under our policy.

CHAIRMAN—Given what seems to be the continuing pattern of relatively high-pressure selling, is that not contrary to the whole intent and even the letter of PS146 and the FSR process?

Mr Rodgers—FSR does not prohibit pressure selling of any financial product. It has inbuilt into it some mechanisms, especially cooling-off periods, that are appropriate ways of dealing with high-pressure selling methods. PS146 is really not directed towards the selling process. Nothing in the FSR regime in effect limits the way that you can sell things provided that you do not end up misleading or deceiving consumers.

CHAIRMAN—But aren't you supposed to be advising?

Mr Rodgers—The definition of advice in the FSR regime—and I will talk generally about advice before I talk about personal advice—is a very broad concept. It does intrude into what I think many industry players think of as the selling process. At the general advice level, that

means that, if you merely give information about the product, then you are really not caught and you do not need a licence to give people bare information about the product. If you go beyond that and suggest that this product actually matches a set of consumer needs, the FSR regime says that, because of the differences in the knowledge about the product that you bring to that, you have to see yourself as having an obligation to the client. That is where the personal advice cuts in. If you are making a recommendation to someone, you really do need to have regard for their interests and the skills, background and training to make sure that you are capable of doing that. Venturing an observation, which I would not want to be held absolutely to, the selling practices that are used, perhaps, in some parts of the timeshare industry and, indeed, in other parts of the financial services sector—there are still people who will very aggressively sells shares, for example—put the salesperson in a position where they are trying to create exactly the dependency on the information that is being received which is at the core of the rules about giving advice. When you put a person in that position, you are obliged to take account of their interests. How neatly that sits with, say, general high-pressure selling practices is the nub of the problem. But it is not clear that that means the regime should retreat from that.

Ms BURKE—The action you took against Trendwest got down to what they were actually selling, didn't it? Senator Chapman and I have a bit of a different view about this. It comes down to what the people perceive they are buying versus what they are actually buying. You went around to these places and they said, 'The owners of the building.' They think: 'I'm buying a holiday house that I get to use one week a year. I think that's growing in value because it is on the Gold Coast and everything is going up in value on the Gold Coast. So when I no longer need it, I'm going to make a profit.' Does it get down to what, at the point of sale, you are told you are being sold? In the Trendwest case, you took them because you said it was an investment product.

Mr Price—In a lot of cases, things like unconscionable conduct, misleading and deceptive conduct, false and misleading representations are all things that are governed by the ASIC Act. But those particular types of offences, if you like, are very fact specific. You really have to look at the particular circumstances and make an assessment about whether or not, in a particular case, there was a contravention of any one or more of those provisions.

Ms BURKE—But do we still need the regulation, as is in place now, to ensure that consumers are protected?

Mr Rodgers—Without getting dragged into the policy argument—

Ms BURKE—I just want you to comment on your experience of complaints.

Mr Rodgers—Drawing on our experience, I think it is fair to say that these are areas of particular vulnerabilities for consumers. There is good evidence that, while there have clearly been changes over time in the timeshare industry, a number of those vulnerabilities remain. The timeshare industry has grown so there is the potential emerging for expectations on the part of consumers about an asset that they think they are purchasing and its potential for increase in value to be on the table in the selling process.

Our old policy, under the old prescribed interests regime, did have a ruling saying that, if you were going to take the benefit of the relief that we were prepared to provide under that old regime, you were expressly precluded. You had to say that these things were not to be treated as

investments. In many respects, that is the differentiation in the US regime. There are a large variety of timeshare schemes and a large variety of mechanisms, from quite old-style ones where you do actually own a property right of real substance to others where you acquire something much more intangible—points that you can use and so on.

I do not personally know the extent to which the investment line, if you like, is used in the selling practice. There is always a risk that it may be, particularly where what you are acquiring is something akin to a real property right or something that looks like it has an inherent value and could possibly be sold at a future time. In some of the submissions the committee was asked to see these as a kind of wasting asset, where you put your money up and as long as you got your timeshare use out of it there should be no expectations on anybody's part at the end of it. I think the disclosure regime has to work quite hard to get to that result of consumers having a real understanding if they start with the notion that what they are purchasing is an asset that has a future value as well as a time value.

Ms BURKE—So would something like a Schumer Box be one way of doing it, as the last person was arguing—some sort of pretty upfront disclosure on the documents?

Mr Rodgers—To talk generally about that, there is potentially a tension between the general disclosure rules in the Corporations Act, which really start from the proposition that there are some things which you have to people. But you should not have a closed list; you should have an obligation to tell people everything they need to know to make a decision in their own interests on one side and effective consumer communication on the other. We have done quite a lot of work in this and I think that there are continual debates about executive summaries and about other forms of summarising key information. There are always risks in that that if you ask people to concentrate on the summary they will not engage with the detail. Sometimes they really should engage with the detail, but generally there is no rule that precludes people putting Schumer Boxes or other effective communication methods in their disclosure documents.

Mr Price—The law encourages it, in a sense. It requires that disclosure be worded and presented in a clear, concise and effective manner.

Mr Rodgers—I suppose the only other general point about that, from a general policy point of view, is that it transfers the risk. If you think that the real consumer disclosure is going to be done by that, it does transfer the risk of the disclosure from the person who is selling the product to the disclosure regime and the regulator.

Ms BURKE—What sort of level of complaint have you had about the industry? Do you know?

Mr Price—We can get that.

Ms BURKE—I would be interested.

Mr Rodgers—There is a pattern of complaints. It is not a large number. We will supply the numbers but, if you look at the number of complaints and if you see these things as part of the managed investments industry, timeshare complaints are slightly overrepresented in terms of the

number of schemes compared to all other managed investment schemes—not statistically significantly, I think, but they are continuous. We get them all the time.

Ms BURKE—Are they about the same issues?

Mr Rodgers—They tend to focus on the front end of the process, as the committee has already heard. They tend to focus on the selling practice and the realisation by people that what they have bought is something that, on reflection, they are not happy about the way in which they made the decision or the way in which they were encouraged to make the decision. That is the regular pattern. Occasionally, you will get complaints downstream from the selling process about management and about how management has been conducted, about it not turning out, a few years down the track, the way that people wanted it to. But the vast majority of complaints are about the selling process and the disclosures.

Mr Price—Our submission also notes that there is some commonality of those sorts of issues with some overseas regulators as well. We have given you a few references there.

CHAIRMAN—Does that mean that over time people actually become satisfied with the product they bought? They realise that it may not have resale value or investment value, but the actual product turns out okay for them?

Mr Rodgers—If the relative absence of complaints means satisfaction, it probably does mean that. It might mean other things.

Ms BURKE—It seems nowadays if you are going to get something, you will also be offered the finance to do it. The linking of finance with a product—the fact that you are not only selling a product, but you are then selling the finance to go with it—needs something. We have certainly had evidence put before us about people with that experience. We had the consumer representative body come along and say: 'We've had lots of complaints, people realising that not only have they bought something they don't want, they've now got a debt they can't service.' Those issues are coming through, the need for consumer protection in those areas. Are you hearing complaints about that?

Mr Rodgers—I am not aware of that.

Mr Price—I am not sure that the details I have seen go down to that level of specifics.

Ms BURKE—Then you would not know if we have seen a decline in that sort of stuff post FSR?

Mr Price—Again, I would prefer to take that on notice.

Mr Rodgers—We will have a look at that and we will see if we can get back to you with something. That is not difficult to do.

Ms BURKE—ASIC states it is considering updating PS160, which regulates time share. Given that no industry supervisory body has been approved, can ASIC indicate how comprehensive the updating of PS160 will be, and will there be industry consultation?

Mr Rodgers—There will certainly be industry consultation. At the moment, my thinking on this is that we are not minded fundamentally to revisit the approach in policy statement 160. When we adopted policy statement 160, we did try to accommodate the possibility of some role by industry bodies in the supervision of time shares as the industry's supervisory body. As our submission notes, we have not approved an industry supervisory body. It is not clear that it is so integral a part of that policy that we should persist with it. What we had in mind was an industry body that dealt with some of the post selling issues and that had some mechanism for actual regulation, or at least industry based regulation, under our supervision within the industry and where complaints and so on might appropriately be dealt with. We have not yet had a proposition from industry either on the complaints side or on the industry supervisory body side that we think we can approve under current policy.

Ms BURKE—They are currently appealing the decision to knock that back?

Mr Rodgers—A decision that we made in relation to the proposed external dispute resolution scheme is the subject of an appeal to the AAT.

Ms BURKE—I will not go there, under the usual rules. Would part of the review of PS160 go to looking at the notion of creating a resale venue or suggesting that the industry establish one and regulate it? It does seem that that is at the other end of the complaints area: you have this thing and you cannot sell it.

CHAIRMAN—An independent exchange.

Mr Rodgers—There are some things that I do not think you can do by regulation, although you can recognise them.

Ms BURKE—Commonsense is one of them, but never mind!

Mr Rodgers—In other words, if there was a mechanism and a demand for that to occur then we would certainly factor that into policy thinking. But at the moment it is not clear to me that there is anything we could do from the regulatory side of the table. Therefore, our focus is on the disclosure and the expectations that people have about that.

Ms BURKE—So that they understand that there is no resale value.

Mr Rodgers—And they are not misled in the selling process about the prospect of being able to either sell at a profit or recover their original outlay.

Ms BURKE—Where do you envisage complaints going? I do not want to pre-empt the outcome of a dispute; that is something for the AAT. But if you do not grant that, where were you envisaging that complaints would go?

Mr Price—FICS already hear timeshare complaints. Many timeshare schemes use FICS rather than ATHOC. They are entitled to rely on the relief that we give from the law.

Mr Rodgers—That is part of a broader proposition. A number of timeshare operators are fully compliant with the financial services regime, hold a licence and are members of FICS. That does

tend to be at the economic top end of the market, where all the economies of scale are available. But FICS is available. FICS has members whose sole business is time share.

Ms BURKE—I suppose that the smaller sold-out schemes would say that it is beyond their capability to be involved in these sorts of things.

Mr Price—I believe that some in fact are members of FICS.

Ms BURKE—I am not sure if it is in your bailiwick, but the sold-out schemes also complain about the notion of trying to get back title. They have given out one fifty-second of a title that people have defaulted on, they cannot get the title back and they will have a drama if they ever wind up the scheme and sell. I suppose they are looking for a way to sell without having a title.

Mr Price—I think that is a matter for state property law.

Mr Rodgers—Unfortunately.

CHAIRMAN—In their supplementary submission ATHOC have said:

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

That is inconsistent with what the operators said. Can you comment on that?

Mr Price—We give some relief from licensing provisions but it is only for particular schemes. One of our policy statements which deals with licensing generally, policy statement 167, states:

... we will give relief from the requirement to be licensed to any person whose only financial services business is dealing in or advising about those interests ...

That applies to certain timeshare schemes which were formerly exempt under state laws. So it certainly does not apply across the board.

CHAIRMAN—Some of the owner-operated sold-out resorts reported predatory activities by developer marketing operations that tried to buy up resort shares and take control of boards, which resulted in increases in costs to the remaining owners. Are you able to comment on that issue?

Mr Rodgers—How that process works would partly depend on the type of timeshare scheme, the time at which it came into existence and therefore, if you like, the regulatory rules that apply to it. Take a relatively new timeshare scheme which is in effect not taking the benefit of any substantial relief under the Corporations Act at the moment. That is an activity that can occur and the act encourages, if you like, a competition between responsible entities. It enables one party wanting the responsible entity role or the management role to basically bid to take that over. That works in relation to managed investment schemes now pretty much like the takeovers rules work for shares in corporations. The underlying policy there is to make sure there is genuine competition in the provision of those management services. I am not actually aware that

that particular issue has come to us in the form of a complaint. There will be many scenarios here. 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.

Mr Price—The other thing that is relevant to that question is what law applies. Some timeshare schemes are governed by laws grandparented into a former regulatory regime, whereas schemes that are set up today are governed under the Managed Investments Act. So it really depends on the specific factual circumstances of it.

CHAIRMAN—In these situations it would seem that it is actually the responsible entity that is buying up the shares, so it is not really a competitive process. They are buying up shares in sold-out fixed-interest resorts and exchanging those for those owners with points in the bigger scheme. They then use their market power within that bought-out resort to take over the management rather than bidding for the management.

Mr Rodgers—In the model we are talking about, if that was a managed investment scheme it is open to the investors, provided they have, if I can put it crudely, the numbers before that occurs, to ask themselves whether they would not prefer an alternative manager.

CHAIRMAN—I think the problem is that they are probably losing the numbers. I think that may be the issue. They finish up in a minority position.

Mr Rodgers—Yes; they need to be alert to that possibility a little earlier in the process. There are rules in the managed investment legislation that determine how the responsible entity can deal with people. It must treat people in the same class equally and it must treat the body of interest holders fairly. That is partly an argument about why you need governance rules here. A responsible entity in that position, if it were a responsible entity, has obligations to those who hold interests and it cannot prefer its own interests to the interests of unit holders as a body. It is not entitled to discriminate against individual unit holders. Unit holders in that circumstance do have remedies.

CHAIRMAN—We have also heard, again from the sold-out resorts, evidence that they pay high fees to be a member of ATHOC mainly to gain exempt status. As a relatively small player, they do not really get any other benefit from their membership of ATHOC, which is dominated by the big operators. But to get the exempt status they basically have to be a member. Can you indicate your plans for exempt resorts under PS160 in the absence of an approved industry body?

Mr Price—It is important to recognise at the outset that there are in fact three categories of exempt schemes currently under ASIC relief. There are schemes that are formally exempt under state law. There are member controlled clubs. There is a third category, as well, which is title based schemes. In two of those cases, which make up the vast majority of individual relief that ASIC gives, the reference to ATHOC in our relief instrument is relevant to the extent that ATHOC is able, on an interim basis, to provide some complaints resolution service. It would be open for those schemes, for example, to become a member of FICS, if they so wished, and they would still be able to rely on our relief. In two particular instances—I am only aware of two—

substantive relief is given from the managed investment provisions on the basis that ATHOC has some supervisory arrangements in terms of the timeshare schemes. Obviously there would need to be some thought given to what would happen to those schemes, if the industry supervisory concept were abandoned. That is absolutely correct.

CHAIRMAN—Thank you both for your appearance before the committee and your assistance with our inquiry.

[8.13 p.m.]

GRIMES, Mr Dennis, Administration Manager, Eastcoast Timeshare Group

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

Evidence was taken via teleconference—

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public, but if at any stage of your evidence you wish to give evidence in camera you may request that of the committee and we would consider such a request. I invite you to make an opening statement, at the conclusion of which we will proceed with some questions.

Mr Lindsay—I represent the Law Institute of Victoria. As it turns out, when the Law Institute sought interest there were only two solicitors who responded: me and one other who often acts for a developer. I guess today I am wearing the two hats. The Law Institute sought input, and I responded. Unfortunately, as far as our timeshare group is concerned, we had no notification from ATHOC or anyone else that this inquiry was taking place and we only found out about it through the Law Institute. My main submission is that ATHOC does not represent the interests of consumers, and if this is to be consumer protection legislation then it has to separate the interests of the development managers and exchange companies from those of the members who are merely consumers.

ATHOC, in my view, seems to be only interested in preserving the status quo, which will not achieve anything positive for consumers. 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. If some legislative assistance is not granted then each of those clubs is deemed to finding a large sum of money so that they can perhaps set off on this piece of litigation or even wind up.

You will note that one of the most serious issues between developers and managers in the clubs is the issues of resales. A club may wish to resell a forfeited week for perhaps $3,000, which is the usual market price, while the development manager may say that this should not be sold as it wants to sell the same week for perhaps $15,000. So the interests of both are quite

different and, in my view, are not reconcilable within the one organisation or the uniform legislation as it presently exists.

Please do not see this as an attack on developers and managers. It is certainly not intended that way. They are a vital part of maintaining new resorts and keeping expectations and standards high. Lastly, this is all about mum, dad and the kids having a holiday at a quality destination with the opportunity to swap the venue for others all over the world. It should not be administered by ASIC; it should have its own legislation and be administered as part of a portfolio of a minister involved in tourism or similar.

Mr Grimes—I have been invited along as a subject matter expert. I have been a timeshare owner since 1981 and own in the Eastcoast Timeshare Group. The east coast group is three title based resorts running as one entity at a reduced cost. It used to be run by a professional management company but, due to the fact that this was costing the members too much, the owners took over the running of the company in 1990. Since taking over the company we have cut costs significantly and brought all our resorts up to international standards.

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.

As a group we are concerned about the existing legislation as it is only by ASIC giving us an exemption to some of the provisions that we are able to comply with it. As we do not sell time share we wonder why we have been brought under its umbrella. We have more in common with the local tennis club than with the companies dealing with securities which we have been grouped with.

One thing we would like resolved, however, is the issue of title. Like other title based clubs we are unable to easily transfer title with the unit's certificate due to the costs involved and the inability to foreclose on title holders when they are in default of their fees. In the not too distant future we will be faced with major structural upgrades of our building. This lays question as to whether we redevelop or wind up. In either case we have the question of who is responsible and where the money goes: to the title holder or to the unit certificate holder. We see opportunity in this legislation for this issue to be resolved.

CHAIRMAN—You have reinforced what was contained in your submission regarding your view that sold-out resorts should be regulated differently from the more recent ones that involve point systems and timeshare developers. Could you outline for us the features of the regulatory framework that you think should apply to sold-out resorts.

Mr Grimes—Do you mean the pieces of the current framework?

CHAIRMAN—No. I understand from what you have told us that you think that the regulatory regime applying to sold-out resorts should not be what is there currently; there should be a different regime.

Mr Grimes—True.

CHAIRMAN—Could you just outline what features would be part of that different regime compared with the current FSR regulatory regime.

Mr Grimes—That is difficult. I guess you are asking us to cast legislation where we probably see what is needed is a lack of legislation or a lack of regulation. There may be a role for some regulation but I have not turned my mind to particular issues in there, because we do not have any real contact between one club and another. One club regulates itself internally and the only contact we might have with another club would be when members of one, swapped through an exchange company, use the facilities of another.

I guess from a consumer point a view there would probably need to be regulation as to resales—how they are done and who they are done by—and also regulation as to the winding up of timeshare clubs. We would like to see in there, as I have said before, an ability to divest ourselves of the terrible problem that we were established with when they were first done with titles. I guess setting out what I see as an ideal framework for managing fully sold-out resorts is a drafting issue which I honestly have not tried to do—and perhaps I should have. I do not know what way other people may see this legislation as needing to go.

My problem is that we are lumped in with people who may be able to afford the cost of compliance, whereas we certainly cannot. Most of the sold-out clubs certainly cannot. If we all had to become responsible entities in that type of arrangement, you would be looking at $10,000 or more per annum for the cost of compliance. I would love to be able to answer that, but I think it is something that would need a week or two of solid work.

CHAIRMAN—I gather it is your view that sold-out operators cannot operate unless they gain exemption from the Corporations Act but that that ASIC intends that all sold-out operators will eventually have to comply with corporations requirements.

Mr Lindsay—That was my original understanding. I may have been mistaken. I note it was a point made by ATHOC in their reply—

CHAIRMAN—I was going to raise what. They are challenging this view.

Mr Lindsay—I was referring to the original draft policy statement. I think the intention at that stage—I am sure I read it—was that in due course we would bring ourselves within a corporate structure that was able to be regulated. I might be wrong. I think that the policy statement that was later adopted did not have that in it. I apologise if I have misled anyone, but that was our understanding of it.

CHAIRMAN—We are not necessarily saying that you have misled us; we are just trying to find out which claim is correct, in a sense. In its supplementary submission ASIC said that it would grant conditional licensing relief to a sold-out club so that it would not need to hold an

AFS licence to deal in secondary interests. Again, this is contrary to what timeshare resort operators have reported to us. I am wondering what your understanding of that is?

Mr Grimes—The situation is that we have been instructed through ATHOC that our requirement is to follow the 146 licensing. We are required to have a licence if we are going to do resales. Most of us, rather than get our own licence, which is very expensive, have managed to get under the umbrella and do a training course at one of the marketing companies, just so that we can indicate to anybody we might resell to that we meet the same standards.

CHAIRMAN—Do you think that anything can be done in terms of regulation to encourage the development of a resale market? The absence of that seems to be a problem for both sold-out resort operators and timeshare owners. Just adding to that, the large developers and operators seem to be disinclined to foster such a secondary market.

Mr Grimes—You are certainly right in that assumption. The people in the primary sales are obviously not interested in doing resales, mainly because there is no benefit to them. In the instance where they are doing primary sales, they have a new resort which they can show off and they can do most of the sales work around it. In the case of a resale, the stock is scattered throughout Australia and there is no way known that you can show the new purchaser what they actually buying. It is very hard to strike a value for it unless you are going on just the break-up value if the resort were to be wound up. I guess you could market that methodology.

It is certainly a very hard thing to judge, and there would still be a large disparity between the value of a resale week and what is being marketed. For instance, if we wound up our resort now and did a distribution to all our members, based on the weeks they had, the distribution would be around the $3,500 per member per week owned. When you compare that to the existing primary market, for most of the people selling points or a week—points being the equivalent of a week—it works out around the $20,000 mark. So there is a big difference in the profit that a marketer can make.

Mr Lindsay—I just do not think there is anyone interested in a secondary market, because the value of the weeks is small. The average is about $3,000 and it would be very difficult for somebody to make a living from those because it is difficult to move guest time share. It is a fact that most of those weeks people want to give away because they do not want to become bogged down and stuck with the cost of the annual maintenance fees et cetera. I do not see how it can be done. I do not know how we can encourage a secondary sales market.

Ms BURKE—I take it that both of you are owners of time share.

Mr Grimes—That is correct.

Ms BURKE—When you bought into it all those years ago, what did you think you were buying? Were you buying an investment, a lifestyle choice or a holiday concept? What did you think you were actually buying?

Mr Grimes—I bought in 1981, which was right at the start of the timeshare market. In the marketing approach they were using at that time, they certainly did not sell it as an investment. Personally, I did not believe it would ever work as an investment, and bought it more as a

lifestyle choice because I wanted somewhere to go for holidays. Yes, it has been sold as an investment in the past, but it is certainly not that. That was more of a marketing technique than a fact.

Mr Lindsay—I bought in about 1991. For some years before that I had a job regularly helping people escape from contracts to buy time share, which also included contracts to borrow money to pay for that time share, so I had a pretty good idea of what time share was about on the negative side. People had a terrible job when they had gone away for the weekend and bought something—they were never given copies of documents and they were loaded down with things they could not afford. My wife and I had a holiday given to us. She liked the idea. I admit that I have been very happy with it since then, because it allows me to get away from my work every year. People who use time share really do appreciate it as a holiday activity, but certainly not as an investment.

Ms BURKE—With the move from the sold-out schemes and the week-by-week schemes to the points system, most people giving evidence have said that the greatest benefit of time share is the ability to swap and go to other places. Have you had any difficulties with the fact that the swapping market is really controlled by two big players? Has that been an issue for you or for members of the club?

Mr Grimes—We have found that in the market in the last three or four years it has become a little bit harder to swap. Certainly, the impact of the points system and our inability as a week owner to exchange into a points system property is an issue. A points system owner can still trade into our week property so it is a one-way street because our properties lose out. However, we do have an issue with one of the exchange companies at present. We have a complaint before ATHOC regarding the way it is treating our members, but I do not want to go into that—

Ms BURKE—That is fine. You mentioned in your opening statement the issue of regaining title—and we have certainly had that mentioned before. Do you see that as doing some sort of trust and having it brought back that way or do you envisage other ways of having regulation getting around this problem of finding hundreds of bits of title that are off in the ether somewhere?

Mr Lindsay—The only way I can see would be for somebody to legislate because they have to be dealt with somehow. All of these old resorts such as the one mentioned are getting to the end of their physical life where they must not just be refurbished but redeveloped. It needs an injection of funds that can only come perhaps from development, and in order to do that you have to deal with land. I am sure the current unit holders would be happy to enter into an arrangement of that type so that their facilities go into the future. But unless we can deal with the land it will never happen. Even then it can only be wound up when you have identified the people who have an interest in the land. Either way it really is a problem that has not been able to be addressed.

I have been looking at the law here in Victoria with a hope to making an application to the court. We have briefed counsel but we have been told to put it on hold. I have been contacted by a number of clubs who know that I have been planning this litigation. They are all waiting to see whether I have any success because they would all like to do the same thing. It is a real problem

for them but it does not seem to be a problem that is appreciated by anybody else. Without legislation there is really no way else you can help.

Ms BURKE—I suppose they are happy if you go and bear the cost of the exercise and then they can benefit from it afterwards.

Mr Lindsay—We are a small group in Eastcoast. When I came in in 1991 we were worse than broke. The place had really been raped by the previous administration. We have brought it back to a good strong position now through hard work. We are all voluntary—which is unusual, but we are—and that is why we have tried to push forward. But we feel very strongly that it is very difficult to pass legislation that applies to people who are selling, and I can understand why you have to have legislation there to control the activities of these people. But when we get down to our kind of resort—we see ourselves as a non-profit organisation run as a small cooperative—we certainly do have to battle for every penny, and to comply with onerous legislation is really difficult for us and for all other clubs like us.

Ms BURKE—Some of the sold-out resorts have said that larger entities in the points system are buying into your market and trying to take over and take control of boards and they have seen increased maintenance fees and other things for owners. Have you experienced that?

Mr Grimes—The answer to that is definitely yes. We have already withstood one hostile takeover. Our members voted overwhelmingly to reject the proposal that was put before them.

Mr Lindsay—The rejection has brought with it a number of threats of litigation. In fact, since then we have been punished in the marketplace by that entity.

CHAIRMAN—On the question that was prompted by your earlier comments, you indicated that in the current secondary market it would cost about $3½ thousand to buy an interest from an existing owner.

Mr Lindsay—That would be about right, yes.

CHAIRMAN—I think you also said that if you wound up your scheme, which I assume would include selling the property, again the distribution would be about $3½ thousand.

Mr Lindsay—That is purely coincidental, from our point of view, but that is roughly what we think it would raise. Most numbers are the same: I do not know.

CHAIRMAN—I was just wondering whether that meant that the current secondary market was reflecting the market value of the real estate.

Mr Lindsay—No, not at all. We would not really have any idea.

Mr Grimes—Most sales that I have processed for members in the last six months have been for values between $1,000 and $1,500 per week, not $3½ thousand. It all depends on supply and demand.

CHAIRMAN—I thank both of you for appearing before the committee and especially for appearing in the evening. Your evidence is certainly very worth while in assisting us with our inquiry.

Committee adjourned at 8.42 p.m.