



ASIC

Australian Securities & Investments Commission

REPORT 522

Response to submissions on CP 272 Remaking ASIC class orders on time-sharing schemes

April 2017

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 272 *Remaking ASIC class orders on time-sharing schemes* (CP 272) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 160](#) *Time-sharing schemes* (RG 160).

Note: RG 160 will be updated after we have completed our proposed changes to the current policy settings. See Section C of this report for further details.

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A Overview/Consultation process

- 1 In [Consultation Paper 272](#) *Remaking ASIC class orders on time-sharing schemes* (CP 272), we sought feedback on our proposals to remake our class orders on time-sharing schemes. Under the *Legislation Act 2003*, these class orders would have expired ('sunset') if not remade.
- 2 We sought feedback from the time-sharing industry, consumers and consumer advocates (including on whether additional consumer protections are needed), and other industry parties on our proposals to:
 - (a) remake, as a single instrument, our class orders on time-sharing schemes:
 - (i) Class Order [CO 00/2460] *Time-sharing schemes—property valuations*;
 - (ii) Class Order [CO 02/315] *Time-sharing schemes—use of loose-leaf price list*; and
 - (iii) Class Order [CO 03/104] *Relief facilitating the acquisition and sale of forfeited interests in registered time-sharing schemes*;
 - (b) repeal Class Order [CO 02/237] *Time-sharing schemes—operation of rental pool* and incorporate transitional relief for existing operators relying on [CO 02/237] into the proposed single new instrument;
 - (c) change our approach to (or amend):
 - (i) Pro Forma 208 *Time-sharing schemes—cooling-off statement* (PF 208), including incorporating the cooling-off statement for registered time-sharing schemes into the proposed single new instrument; and
 - (ii) Pro Forma 209 *Australian financial services licence conditions* (PF 209), including incorporating all the conditions for Australian financial services (AFS) licensees that operate time-sharing schemes into the proposed single new instrument;
 - (d) modify the enhanced fee disclosure requirements in Sch 10 to the Corporations Regulations 2001 (Corporations Regulations) and incorporate the requirements into the proposed single new instrument;
 - (e) amend the definition of 'special custody assets' in Class Order [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services*;
 - (f) withdraw the following pro formas for new applications and amend the existing relief granted:
 - (i) Pro Forma 205 *Time-sharing schemes formerly exempt under state laws* (PF 205);

- (ii) Pro Forma 206 *Time-sharing schemes—Chapter 5C relief* (PF 206); and
- (iii) Pro Forma 207 *Title-based time-sharing schemes* (PF 207); and
- (g) update our guidance in Regulatory Guide 160 *Time-sharing schemes* (RG 160).

- 3 The proposals related to the relief and obligations in relation to the managed investment scheme, AFS licensing and product disclosure provisions of the *Corporations Act 2001* (Corporations Act).
- 4 This report highlights the key issues that arose out of the submissions received on CP 272. This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 272. We have limited this report to the key issues.
- 5 We received eight non-confidential responses to CP 272, which included an industry body, consumer groups and external dispute resolution schemes. We are grateful to respondents for taking the time to send us their comments.
- 6 For a list of the non-confidential respondents to CP 272, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 272.

Responses to consultation

- 7 There was general support for continuation of the relief under [CO 00/2460], [CO 02/315] and [CO 03/104], and for the repeal of [CO 02/237] (with transitional relief for existing operators relying on [CO 02/237]).
- 8 We received divergent feedback from respondents on a number of our other proposals outlined in paragraph 2 above, such as the introduction of a new oral advice requirement and a new fee disclosure regime. An area of significant contention was the current cooling-off regime and whether changes are required to the timeframe of the cooling-off periods or whether it should be an ‘opt-in’ model—that is, an applicant is deemed to have exercised their cooling-off rights if they do not provide an additional written confirmation within a prescribed period.

Implementation of policy changes in two phases

- 9 In light of the divergent feedback received and the sunseting deadline of 1 April 2017 for most of the time-sharing class orders, we have decided to implement the following phased approach to our review of the current policy settings for time-sharing schemes:

- (a) *Phase 1*—In this phase, we have remade—in [ASIC Corporations \(Time-sharing Schemes\) Instrument 2017/272](#)—the sunseting class orders [CO 00/2460], [CO 02/315] and [CO 03/104] in substantially the same form and provided transitional relief to existing operators relying on [CO 02/237]: see Section B of this report. This is to provide certainty to operators of time-sharing schemes and consumers while we undertake further consultation in Phase 2 to ensure proposals to change the current policy settings are given proper consideration.
- (b) *Phase 2*—We intend to implement our more substantive changes to the current policy settings, including any substantial changes to the relief, after we have undertaken further consultation on the feedback we received in response to CP 272. Section C of this report discusses the feedback we received on the other proposed policy changes in CP 272. As the next step, we will be contacting parties who provided responses to CP 272 to discuss their feedback.

B Remaking ASIC class orders

Key points

This section outlines the feedback we received on our proposal to remake, as a single new instrument, [CO 00/2460], [CO 02/315] and [CO 03/104], which were due to sunset between 1 April 2017 and 1 October 2017.

It also sets out feedback we received on our proposals to incorporate into the new instrument:

- transitional relief for existing operators relying on [CO 02/237]; and
- a new requirement that the time-sharing scheme must not be promoted as a means of generating a financial return (other than by way of a rental pool).

[CO 00/2460], [CO 02/315], [CO 03/104] and [CO 02/237]

- 10 In CP 272, we proposed remaking, as a single new instrument, [CO 00/2460], [CO 02/315] and [CO 03/104] and providing transitional relief for existing operators relying on [CO 02/237].
- 11 Four of the eight submissions provided feedback on the class orders. There was general support for our proposal to remake the relief in [CO 00/2460], [CO 02/315] and [CO 03/104]. Some respondents raised, as part of feedback on the class orders, the need for further disclosure on the quality, upkeep and availability of accommodation.
- 12 There was also support for repealing [CO 02/237] on the basis it was no longer widely used and to provide transitional relief to continue the relief under [CO 02/237] for existing operators. Two respondents supported reducing the frequency of the audit of the trust account from twice a year to once a year for existing operators of a rental pool.
- 13 We also proposed imposing a new condition on the relief that the time-sharing scheme must not be promoted as a means of generating a financial return (other than by way of a rental pool). Respondents generally supported this new requirement.

ASIC's response

We have implemented Phase 1 (see paragraph 9) of our review of the policy settings for time-sharing schemes by:

- remaking [CO 00/2460], [CO 02/315] and [CO 03/104] as ASIC Corporations (Time-sharing Schemes) Instrument 2017/272;

- providing transitional relief, in ASIC Corporations (Time-sharing Schemes) Instrument 2017/272, for existing operators;
- including a new condition that a time-sharing scheme must not be promoted as a means of generating a financial return (other than by way of a rental pool); and
- repealing [CO 00/2460], [CO 02/315], [CO 03/104] and [CO 02/237] in [ASIC Corporations \(Repeal\) Instrument 2017/273](#).

The implementation of Phase 1 will maintain the status quo while we undertake Phase 2—that is, further consultation on other proposed changes outlined in CP 272. We will also consider any more substantive changes that are required to the relief as part of our work in Phase 2.

The relief operates to amend strict compliance with certain obligations under the Corporations Act, given the type of managed investment scheme. The relief also includes conditions to assist investors (e.g. cooling-off requirements, audit requirements and disclosure obligations), which are not imposed under the Corporations Act.

C Other proposals

Key points

This section outlines the submissions on our other proposals in CP 272 relating to:

- the template cooling-off statement;
- amendments to the AFS licence conditions for licensees that operate registered time-sharing schemes;
- modifications to the enhanced fee disclosure requirements in Sch 10 to the Corporations Regulations;
- amendments to the definition of 'special custody assets' in [CO 13/760];
- the withdrawal of PF 205, PF 206 and PF 207 and amendments to existing relief granted;
- the transitional period for compliance with any new requirements; and
- updating ASIC guidance.

The template cooling-off statement

- 14 In CP 272, we proposed:
- (a) incorporating the template cooling-off statement under PF 208 into the new instrument for entities that are dealing in interests or operating a registered time-sharing scheme, with revisions to simplify the drafting (see proposal B5 in CP 272); and
 - (b) updating PF 208 so that it only applies to exempt time-sharing schemes, with similar drafting changes (see proposal D1 in CP 272).
- 15 The majority of respondents supported the continued use of a template cooling-off statement because of benefits such as consistency, although one respondent suggested that ASIC allow some flexibility to tailor for applicable circumstances. Another respondent expressed the view that there is no material benefit in including a template cooling-off statement and that cooling-off periods do not constitute an effective form of consumer protection.
- 16 Respondents made a number of suggestions to the form and content of the proposed template, such as:
- (a) stating the exact dates when the cooling-off period begins and ends;
 - (b) highlighting key information such as the timeframe to exercise cooling-off rights in large prominent lettering; and
 - (c) limiting the template to one page for ease of reference.

- 17 Two respondents suggested that consumers have the option to provide the notice to exercise their rights by email. One of these respondents suggested further forms of providing notice, including by telephone or in person.

Amendments to the AFS licence conditions

- 18 In CP 272, we proposed modifying the Corporations Act to introduce a notional s912AE into the proposed single new instrument—to set out the obligations on AFS licensees that operate registered time-sharing schemes: see proposal B6 in CP 272.

Amendments to existing AFS licence conditions

- 19 We proposed several amendments to existing AFS licence conditions. These included those relating to:
- (a) the refund of financing costs when cooling-off rights are exercised; and
 - (b) additional requirements where oral financial product advice is provided to a retail client in relation to the acquisition of a time-sharing interest.

Refund of money if cooling-off rights are exercised

- 20 There were differing views on the proposed requirement to refund financing costs to applicants on the exercise of cooling-off rights if the responsible entity facilitates financing for the applicant to acquire an interest.
- 21 One respondent did not agree with this proposal because a responsible entity may not have the ability to require the financier to refund money paid. Two respondents agreed with the proposal and considered that the responsible entity and financier should bear all costs if the consumer exercises their cooling-off rights.
- 22 Respondents agreed with our view in CP 272 to maintain the current position not to facilitate any deduction of marketing expenses from the money to be returned to applicants who exercise their cooling-off rights under condition 47(b) of PF 209.

Additional requirements on advice

- 23 We received two submissions in response to the proposal to introduce a new oral advice requirement—that is, if financial product advice is provided to a retail client orally in relation to the acquisition of an interest, the responsible entity must not issue or sell to a person unless the oral advice includes an explanation of the cooling-off rights available and the fees and costs payable to acquire an interest.

- 24 One respondent stated that a typical complaint is inadequate disclosure of cooling-off rights and this proposal would enhance written disclosure of cooling-off rights. Another respondent did not support this proposal and noted the difficulties that would be encountered to prove that a verbal explanation was given and privacy concerns for consumers. It was also submitted that there would be considerable cost incurred.

Additional feedback on AFS licence conditions

- 25 In CP 272, we sought additional feedback on AFS licence conditions, including on sales practices and whether the cooling-off requirements are working effectively.

Sales practices and cooling-off

- 26 We received feedback from one respondent that no further changes were required in relation to hawking and sales practices. However, four respondents stated that the current requirements for sales practices do not go far enough in protecting consumers.

- 27 Some of the respondents provided case studies raising concerns, such as:
- (a) a lack of transparency about contract length and difficulty in exiting a contract outside of the cooling-off period;
 - (b) inadequate consideration by sales representatives as to whether the acquisition of a time-sharing interest or entering into financing is appropriate for the particular consumer; and
 - (c) pressure-selling tactics and potentially unsolicited sales conduct.

- 28 Some respondents also suggested requirements be imposed on operators such as the ability for consumers to more easily terminate a time-sharing contract and any related financing arrangement and limits to the term of time-sharing contracts.

- 29 One respondent suggested that consumers be required to seek independent legal advice before making a decision to purchase an interest in a time-sharing scheme. The respondent also suggested that operators give a separate warning statement to consumers at the point of sale with information such as a large prominent statement that the product is a 'time-sharing product', involves a long-term ongoing and significant financial commitment, and may not be a suitable product.

- 30 We received divergent feedback on whether the existing cooling-off regime is working and if changes are necessary, such as a longer cooling-off period, an opt-in approach, delaying the commencement of the cooling-off period until the applicant returns to their usual residence or 'stopping the clock' when further information is requested.

- 31 One respondent expressed the view that the existing cooling-off regime strikes an appropriate balance between protecting the interests of consumers from potential pressure-selling tactics and the commercial interests of AFS licensees in selling interests in time-sharing schemes.
- 32 Five respondents considered that improvements are needed to the existing regime. One respondent stated that while the cooling-off periods are generally sufficient, the obligations on operators need to be strengthened to ensure cooling-off rights are clearly and adequately brought to the consumer's attention.
- 33 Four respondents supported replacing the existing cooling-off regime with an opt-in model. Some considered it would assist to address:
- (a) barriers to exercising cooling-off rights (e.g. practical difficulties in returning the notice within the timeframe and limited literacy skills and understanding of cooling-off rights); and
 - (b) time-sharing contracts that were signed in a high-pressure sales environment.
- 34 There were a number of suggestions as to how the opt-in model should work, such as the use of a prescribed opt-in statement and imposing a designated period of two days to reconsider the purchase and then a five-day period during which the consumer can opt-in.
- 35 On the other hand, one respondent considered that an opt-in regime would be an unnecessary and unreasonable reaction to protect the interests of a very small proportion of time-sharing consumers who fail to take action to exercise their cooling-off rights and is outweighed by the considerable cost and detriment an opt-in regime would cause to the time-sharing industry and the broader economy.
- 36 It was suggested by one respondent who supported an opt-in model that, if this model is not adopted, the cooling-off requirements should be extended to 21 days starting when the consumer has returned to their usual address, if they signed the agreement while on holidays. Another suggested as an alternative that the cooling-off period should be long enough to take into account that the consumer may be on holidays and have important questions to be answered.

Modifications to the enhanced fee disclosure requirements

- 37 In CP 272, we proposed:
- (a) alternative fee disclosure requirements to the enhanced fee disclosure requirements in Sch 10 to the Corporations Regulations—to tailor them to the nature of a time-sharing scheme and the types of fees and costs involved; and

- (b) a standardised template for information on the purchase price, levies, and fees and costs—disclosed in a separate section of the Product Disclosure Statement (PDS) (which may include the loose-leaf price list) (see proposal B7 in CP 272).

38 We received mixed feedback from four respondents on the proposed fees and costs disclosures. While there was general support for a standardised format for fees and costs disclosure, one respondent did not agree with disclosing the purchase price in the same section as other fees and costs. The concern raised was that it may confuse or mislead consumers because the purchase price is a capital amount rather than a fee or cost.

39 Two respondents supported the proposal to consolidate all the fees and costs in one section of the PDS.

40 One respondent expressed concerns about the points-based system and how it presents difficulties in ascertaining the real value of a time-sharing scheme. The same respondent suggested that to help consumers assess the true value of a scheme and make proper comparisons with other accommodation offers for these types of schemes, the PDS should include the following information on the front page:

- (a) the current dollar value for one credit or point;
- (b) the minimum amount of credits or points that a member needs to purchase each year expressed in both points and the total amount required to be paid; and
- (c) the average amount of credits or points required for a one-week holiday for two people and the total amount a member would need to spend on points to obtain this benefit.

Summary of financing costs

41 Two respondents were against proposals requiring disclosure of the financing fee for reasons including that the financier and responsible entity are separate legal entities, financing fees are not relevant for all members, information will be provided by the credit provider at a later stage and the financing costs and terms vary depending on the borrower.

Example of annual costs over 10-year period

42 We also proposed as part of the new enhanced fee disclosure requirements that responsible entities provide an example of the annual costs a member could be paying on average for a typical accommodation (including with financing, if financing is facilitated) over a 10-year period for their interest.

43 Two respondents stated that there is no concept of a 'typical accommodation'. As an alternative, it was suggested by one respondent that

this term be replaced with an example of accommodation that can be used with points from the class of membership offered under that PDS that has the greatest number of members.

- 44 The same respondent also raised concerns that using a timeframe of 10 years could be potentially misleading and of little benefit to consumers, and suggested a one-year timeframe instead.
- 45 Another respondent suggested it may be more useful to consumers if there is prominent disclosure on the front page of the PDS of the following:
- (a) an example of annual costs a member would be paying on average for one week of accommodation;
 - (b) all other fees and costs members will face, including how interest or price rises will affect costs over time; and
 - (c) the total minimum cost for the first year of membership and for the minimum length of the membership to help draw attention to the long contract length.

Amending the definition of ‘special custody assets’ in [CO 13/760]

- 46 In CP 272, we proposed to amend [CO 13/760] to:
- (a) expand the definition of ‘special custody assets’ to cover specified assets of points-based time-sharing schemes; and
 - (b) reduce the frequency of the audit of the trust account as required in paragraph (g) of the definition of ‘special custody assets’ from twice a year to once a year (see proposal C1 in CP 272).
- 47 One respondent requested further expansion of the definition of ‘special custody assets’ beyond what was proposed and suggested any assets of time-sharing schemes should be special custody assets. It was suggested that if the further expansion is not undertaken then the levies category should be expanded to include other cash held by the time-sharing scheme and general insurance products that are maintained by the responsible entity to insure scheme property.

Audit of ‘points’

- 48 We also sought feedback on whether it is appropriate for the annual audit to include an audit of the ‘points’ of points-based time-sharing schemes. We received three submissions that supported an additional audit of points for points-based schemes. Two of the submissions stated that consideration should be given to the scope of the audit and further clarity would be necessary on what is required.

ASIC pro formas: PF 205, PF 206 and PF 207

49 In CP 272, we proposed to withdraw PF 205, PF 206 and PF 207 because there does not appear to be continuing demand for the relief based on the pro formas and the pro formas do not reflect current drafting practices: see proposal D1 in CP 272. We considered it was more appropriate to assess the new applications for similar relief (and the terms of any relief) on a case-by-case basis.

50 We also proposed to write to existing operators relying on case-by-case relief based on PF 206 and PF 207 and make amendments to the relief granted to:

- (a) reduce the frequency of the audit on the trust account from twice a year to once a year;
- (b) increase the voting and ownership restrictions from 10% to 20% on conditions; and
- (c) impose a restriction on a member who is the operator, manager, promoter, developer or an associate of them voting where the member has an interest in a resolution other than in their capacity as a member.

51 We only received one submission in response to this proposal. The respondent supported the consideration of new applications seeking relief based on PF 205, PF 206 and PF 207 on a case-by-case basis because there are likely to be limited, if any, new applications for the relief.

52 The respondent also supported the proposals to write to existing operators and to reduce the frequency of the audit.

53 However, the respondent disagreed with the proposed amendments to the voting and ownership restrictions. Instead, they requested that the voting and ownership threshold be removed and any acquisition of interests should be governed by a regime similar to the general takeover provisions.

54 The respondent also disagreed with the proposed restriction on voting by related parties because they considered it would unreasonably restrict related members from exercising their membership rights. They suggested as an alternative to restrict voting by related members on such resolutions to no more than 10% of voting power because this would strike an equitable balance between related members being able to exercise membership rights and protecting the interests of unrelated members.

Transitional period for compliance with any new requirements

- 55 In CP 272, we sought feedback on whether any transitional period was required to comply with the proposed amendments to the existing AFS licence conditions and enhanced fee disclosure requirements.
- 56 We received one submission that a 12-month transitional period is likely to be necessary. However, another submission suggested that any reform that increases the protections for consumers should begin operating immediately.

Updating ASIC guidance

- 57 [Regulatory Guide 160](#) *Time-sharing schemes* (RG 160) sets out our approach to regulating time-sharing schemes under the Corporations Act and discusses the relief we give for time-sharing schemes. In CP 272, we proposed to update RG 160 to reflect the changes to the relief proposed and also to provide additional guidance, including guidance on our expectations for compliance by operators and promoters of time-sharing schemes based on our regulatory experiences: see proposal E1 in CP 272.
- 58 Six of the eight respondents provided feedback on these proposals and supported the need for additional guidance. One respondent requested that we consult with industry before publishing any new guidance.
- 59 Other respondents suggested that the guidance should expressly cover:
- (a) what conduct constitutes an unsolicited sale, including case studies and examples of conduct;
 - (b) in respect of the provision of financial product advice—conduct that must comply with the obligation to act in the best interests of the client, providing advice that is appropriate to the client’s relevant personal circumstances and the giving of a Statement of Advice (including in relation to the provision of finance), particularly where financing is involved;
 - (c) the obligations under [Regulatory Guide 165](#) *Licensing: Internal and external dispute resolution* (RG 165) and the steps required to be undertaken by an AFS licensee to inform consumers about their access to external dispute resolution schemes; and
 - (d) how an interest in a time-sharing scheme is treated on the death of a member.

ASIC’s response

In light of the divergent feedback received, we will be undertaking further consultation (Phase 2) to ensure proposals to change the current policy settings are given proper consideration.

Phase 2 will involve further consultation on the feedback received, including:

- the proposed template cooling-off statement;
- whether changes should be made to the existing cooling-off regime;
- proposed amendments to the AFS licence conditions— including requirements relating to financial product advice that is provided orally and the refund of financing costs to applicants on the exercise of cooling-off rights;
- the proposed new enhanced fee disclosure requirements;
- amendments to the definition of ‘special custody assets’ in [CO 13/760];
- the scope of any new requirement for audits of the points of points-based time-sharing schemes;
- amendments requested to the individual relief based on PF 206 and PF 207;
- changes to ASIC Corporations (Time-sharing Schemes) Instrument 2017/272 released in Phase 1; and
- any other substantive changes to our policy settings for time-sharing schemes and the transitional periods required.

As part of Phase 2, we will also consult on updating our guidance in RG 160 to explain our relief and clarify our expectations for compliance by operators and promoters of time-sharing schemes.

Appendix: List of non-confidential respondents

- Australian Timeshare and Holiday Ownership Council
 - CHOICE
 - Consumer Action Law Centre and Financial Rights Legal Centre
 - Credit and Investments Ombudsman
 - Crowe Horwath
 - Financial Ombudsman Service Australia
 - Legal Aid NSW
 - Queensland Consumers Association
-