

Remaking ASIC class orders on time-sharing schemes

Financial Ombudsman Service Australia Submission

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Executive summary

The Financial Ombudsman Service (FOS) Australia¹ is an ASIC-approved independent external dispute resolution (EDR) scheme that covers disputes across the financial sector.²

In addition to our role in dispute resolution, we have responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC. We also provide code monitoring and compliance services for four industry codes of practice.

Operators of time-sharing schemes (Scheme Operators), and other businesses involved in the timeshare industry, are members of FOS at present and have been members since FOS was established. We consider disputes about loans to finance purchases of interests in time-sharing schemes as well as disputes about the interests themselves.

We welcome the opportunity to respond to ASIC's Consultation Paper 272 *Remaking ASIC class orders on time-sharing schemes* (CP 272).

This submission is based on the following principles, which we consider to be overarching objectives in relation to time-sharing schemes:

- promoting trust and confidence in the financial sector
- ensuring that the consumer is at the centre of all decision making and service provision in relation to time-sharing schemes
- seeking to improve transparency and clarity about all of the obligations and responsibilities of Scheme Operators and their authorised representatives and
- achieving fairness in service provision, conduct and treatment at every stage of timeshare transactions, from sales and marketing to complaints handling.

Key points in this submission³ include:

1 Dispute statistics

We provide statistics of timeshare disputes accepted by FOS in recent years.

¹ Information about FOS is set out in full on our website at www.fos.org.au. The Appendix summarises key points.

² FOS is approved by ASIC under its Regulatory Guide (RG) 139.

³ This submission does not necessarily represent the views of the Board of FOS. It draws on the experience of FOS and its predecessor schemes.

2 Claims made in disputes

To describe the timeshare disputes that FOS considers, we note typical claims made by consumers in those disputes.

3 Cooling off arrangements

We consider that measures to assist with simpler disclosure of cooling off rights, and transparency about how and when those rights operate, are important. We suggest measures to address issues we have identified through disputes, by strengthening cooling off arrangements, including:

- requirements to make key information about cooling off arrangements more prominent and effective
- enhancement of written disclosure of cooling off rights by statements made when oral advice is provided
- steps relating to the ATHOC⁴ Code of Practice
- changes to the proposed template cooling off statement and
- implementation of several proposals in CP 272.

4 Associates of Scheme Operators

We support the proposals in regard to the conduct of associates outlined in paragraphs 54 and 55 of CP 272.

We suggest ASIC considers whether specific disclosure requirements are needed to ensure consumers understand the relationships in timeshare transactions that involve multiple parties.

5 Access to internal and external dispute resolution

We suggest ASIC provides additional guidance in RG 160 on the obligations imposed through RG 165 – particularly on the steps licensees should take to inform consumers about their access to EDR.

⁴ Australian Timeshare and Holiday Ownership Council.

6 Conduct issues

6.1 Statements of advice

We suggest ASIC considers providing additional guidance in RG 160 to improve compliance with a number of requirements under the Corporations Act⁵ relating to statements of advice.

6.2 Authorised representatives with limited authorisations

We suggest RG 160 explains that, in certain circumstances, authorised representatives of Scheme Operators with limited authorisations may not be able to satisfy the duty to act in the best interests of clients. We identify:

- matters that could be addressed in further guidance on the best interests duty, tailored for authorised representatives of Scheme Operators with limited authorisations and
- existing ASIC guidance that could be used as a model for the further guidance.

If FOS can provide further input or assistance, please contact us.

⁵ *Corporations Act 2001.*

1 Dispute statistics

FOS accepted a total of 20,298 disputes across our whole jurisdiction in 2015-16. In that year, we accepted 46 timeshare disputes. Numbers of timeshare disputes accepted in the last three financial years are set out below.⁶

Financial year	Timeshare disputes accepted by FOS
2015-16	46
2014-15	29
2013-14	14

Some disputes handled by FOS relate to time-sharing schemes, but are classified as lending disputes, because the consumer complained about a loan taken to finance the purchase of an interest in a time-sharing scheme rather than the interest itself. The timeshare dispute statistics above show numbers of disputes about interests in time-sharing schemes accepted by FOS – not including disputes about lending for purchases of these interests.

2 Claims made in disputes

To describe the timeshare disputes that FOS considers, we note that typical claims made by consumers include:

- inadequate disclosure of, or failure to fully explain, cooling off rights, including the consequences of not exercising those rights within applicable timeframes
- inadequate assessment of, or failure to properly assess, the consumer's ability to repay any loan associated with a purchase
- pressure selling, usually following a sales presentation
- misrepresentations made during sales presentations and in private consultations to make sales
- insufficient time to read membership, purchase and finance contracts before execution
- failure to ensure the consumer understood the nature and implications of their transactions

⁶ See our recent [annual reviews](#) for further statistics and information to explain how we calculate our statistics.

- failure to fully explain the terms and conditions of cancellation of membership or sale of holiday credits
- the consumer could not afford to purchase their interest, or to meet repayments where lending was involved
- the consumer relied on the appropriateness of financial advice provided by an authorised representative (including statements of advice) and
- the consumer failed to fully understand rights and consequences associated with terminating an agreement.

3 Cooling off arrangements

Consumers need time to make informed decisions and need to be protected from pressure sales of interests in time-sharing schemes. It is essential for consumers to have, prior to purchase, an opportunity to properly consider:

- any loan, finance or contract document
- any statement of advice provided and
- the consequences associated with the nature and implications of the transaction including its affordability, its suitability, any loan and repayments that may be necessary, the cancellation of membership or sale of holiday credits and how the agreement may be terminated.

We consider that measures to assist with simpler disclosure of cooling off rights, and transparency about how and when those rights operate, are important. Our experience indicates that disclosure of cooling off rights needs to be improved. Sometimes the cooling off rights for an interest in a time-sharing scheme have been confused with the cooling off rights for a loan to finance the purchase of that interest. Also, there is sometimes confusion – on the part of either party or both parties - about when the cooling off period begins and ends.

We suggest that revisions to cooling off requirements take into account, and seek to address, issues that have arisen in disputes. Matters we have observed include:

- Consumers need to make informed decisions about whether or not to exercise their cooling off rights. Consumers can encounter major problems if they fail to exercise their rights within their cooling off period. After that time, it can be very difficult to cancel or terminate purchase agreements.
- Consumers may enter into transactions quickly because of the sales practices used. Our experience indicates that agreements to purchase interests are usually signed immediately after a marketing presentation, before the consumers leave the venue.

Below, our views on specific measures are outlined, with references to relevant points in CP 272 noted.

- We suggest there should be more prominent highlighting of key information about cooling off arrangements, including warnings about what happens if consumers do not exercise their cooling off rights within applicable timeframes. See CP272 question B6Q12.
- We agree that written disclosure of cooling off rights should be enhanced by statements made when oral advice is provided. See CP 272 paragraph 59 and proposal B6(b)(iv).
- We accept that ASIC's proposed cooling off periods of 7 days for ATHOC members and 14 days for other Scheme Operators are generally sufficient. However we consider that the obligations on operators need to be strengthened to ensure cooling off rights are clearly and adequately brought to the consumer's attention. See CP 272 paragraph 62 and question B6Q12.
- We also suggest that, if the shorter timeframe is to continue to apply for ATHOC members, there should be greater transparency about how the ATHOC Code of Practice is actively monitored and enforced.
- It appears to us that the clauses of ATHOC's code relating to cooling off rights merely restate the law. We would encourage ATHOC to review clauses 3.38.3 and 4.4 of its code to ensure they continue to describe best industry practice in relation to cooling off.
- We agree that a pro forma cooling off statement to be used throughout the sector, such as the statement outlined on pages 31 and 32 of Attachment 1 to CP272, would improve consistency of performance across the industry and improve the transparency and prominence of information about cooling off rights for consumers. See CP 272 paragraph 46 and proposal B5(b).
- We also agree with the proposal to clarify that receipt of a cooling off statement must be acknowledged by signing part of the statement itself, rather than using a separate document. See CP 272 paragraphs 97 and 98 and proposal E1(e).
- The cooling off period for a purchase of an interest in a time-sharing scheme needs to be absolutely clear. A statement drafted in accordance with the template in Attachment 1 to CP 272 may not make the dates of a cooling off period clear to the consumer however. It would describe the period in quite complicated terms, and would not actually state the dates when the period begins and ends. We suggest that ASIC considers changing the template to address this. Perhaps the statement could explain plainly that the cooling off period commences on the date the consumer fills in on the 'Confirmation that you have kept a copy of the cooling-off statement' form and ends 7 or 14 days later. See CP 272 question B6Q12.

4 Associates of Scheme Operators

We support the proposals in regard to the conduct of associates outlined in paragraphs 54 and 55 of CP 272. Disputes about onselling overseas suggest that the proposed measures are required.

These disputes also suggest to us that specific disclosure requirements may be needed to ensure consumers understand the relationships in timeshare transactions that involve multiple parties. Transparency is particularly important, for example, where transactions involve a finance provider as well as a Scheme Operator, or include a party overseas acquiring and onselling interests.

5 Access to internal and external dispute resolution

Consumer access to effective dispute resolution is crucial in relation to time-sharing schemes given the methods used to sell interests in the schemes. To improve compliance with the obligations imposed through RG 165, we suggest ASIC provides additional guidance on those obligations in RG 160.⁷

ASIC will be aware that, from time to time, FOS finds that a financial services provider does not meet its requirements under RG 165 in respect of final responses in internal dispute resolution. A particular concern has been failure to inform consumers about their access to EDR.⁸ This non-compliance has amounted to a systemic issue in the timeshare industry and in other industries in the financial sector. In other words, non-compliance has been an issue affecting, but not confined to, time-sharing.

6 Conduct issues

We acknowledge that, as explained in paragraph 19 of CP 272, time-sharing schemes are designed to produce 'lifestyle benefits'. Given the unique nature of time-sharing schemes, we consider that the obligations relating to advice about interests in those schemes require special clarification. Tailored disclosure obligations are necessary, in addition to effective cooling off rights. Our experience indicates that situations involving lending present the highest risks to consumers.

6.1 Statements of advice

In sales of interests in time-sharing schemes through authorised representatives, a statement of advice is sometimes provided to the consumer. In disputes arising where a statement of advice was provided, consumers usually assert that the representative did not gather sufficient information about the consumer's personal

⁷ The additional guidance suggested may be covered by the proposal in paragraph 94(e) of CP 272, but is not referred to specifically in that proposal.

⁸ The requirements are specified in RG 165 and our Terms of Reference, and are explained in our [Operational Guidelines](#) – in the guideline to paragraph 6.2 of the Terms of Reference.

circumstances and that the advice to purchase the interest was therefore not appropriate.

Our dispute resolution experience indicates that, if any information about the consumer's personal circumstances is gathered, it is usually gathered only by using one or two of the following documents:

- surveys
- internal worksheets and
- applications for finance.

On occasion the total amount of information gathered by the representative is not sufficient to satisfy requirements in the Corporations Act to properly assess the consumer's personal circumstances. Details recorded can be sparse and information gathered on the consumer's assets and liabilities can be inadequate. This information is particularly relevant when assessing not only whether the consumer can afford to purchase an interest, but also whether the purchase should be financed through a loan.

In addition, although not always specifically raised by consumers, it is often appropriate for FOS to consider whether the actual content of the statement of advice, once given to the consumer, contains all of the other required information for that type of disclosure document.

In our experience, unfortunately, not all statements of advice contain the relevant details or the necessary analysis.

Given the reliance placed on these documents by consumers to make informed decisions about whether to purchase interests in time-sharing schemes, we suggest ASIC considers providing guidance to the industry on how the conduct provisions apply in the situations discussed including:

- how the duty under section 961B of the Corporations Act to act in the best interest of clients operates and
- the circumstances in which, and when, a statement of advice may be required.

We consider that this would promote a consistent approach across the industry and help to ensure consumers have relevant information on which to base decisions about purchasing interests. It could also reduce confusion for consumers about whether they are being provided with a personal advice service.

6.2 Authorised representatives with limited authorisations

The authorised representatives of a Scheme Operator may have limited authorisations that prevent the representatives from considering the merits of alternatives to interests offered by the Scheme Operator. When the representatives

provide advice, they may not be able to consider interests offered by other Scheme Operators or holiday accommodation options not provided through time-sharing.

From our dispute resolution work, we have seen that **personal advice** is provided by authorised representatives of Scheme Operators with limited authorisations. In providing this category of advice, the representatives must act in the best interests of their clients.

In certain circumstances, authorised representatives with limited authorisations may not be able to satisfy the best interests duty. This is a complicated area that RG 160 should explain in our view.

We consider that guidance on this point would promote compliance and also help Scheme Operators to design their business models satisfactorily. The guidance could highlight that, for some operators, it would be more appropriate to only provide general advice or factual information – not personal advice. The guidance could also draw attention to:

- the need, where consumers only receive general advice or factual information, to make the limitations of that advice or information absolutely clear and
- the duties that advisers still have to their clients where the best interests duty does not apply.

RG 175⁹ addresses issues presented by section 961B where a licensee has an approved product list. We consider that similar guidance, tailored for authorised representatives of Scheme Operators with limited authorisations, would be very useful.

⁹ See, in particular, paragraphs 325 to 330 of RG 175. Section D of RG 244 also contains relevant material.

Appendix - About FOS

FOS is an ASIC-approved independent EDR scheme that covers disputes across the financial sector. Our service is free to consumers and is funded through a combination of levies and case fees paid by our members, which are financial services providers.

FOS was formed in 2008 from the merger of three predecessor schemes organised largely along industry sector lines. The original participants were:

- the Banking and Financial Services Ombudsman
- the Financial Industry Complaints Service, and
- the Insurance Ombudsman Service.

On 1 January 2009, two other schemes joined FOS, namely:

- the Credit Union Dispute Resolution Centre, and
- Insurance Brokers Disputes Ltd.

Our operations are governed by our Terms of Reference that form a contract with our members. The Terms of Reference are available on our website.

FOS and its predecessor schemes have over 20 years' experience in providing dispute resolution services in the financial services sector. FOS provides services to resolve disputes between member financial services providers and consumers, including certain small businesses, about financial services such as:

- banking
- credit
- loans
- general insurance
- life insurance
- financial planning
- investments
- stock broking
- managed funds, and
- pooled superannuation trusts.

As well as its functions in relation to dispute resolution, FOS has responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC.

FOS also provides code monitoring, administration and secretariat services to committees that monitor financial services providers' compliance with these industry codes of practice:

- the Code of Banking Practice
- the Customer Owned Banking Code of Practice
- the General Insurance Code of Practice and
- the Insurance Brokers Code of Practice.

FOS is governed by a board with an independent chair and:

- four 'industry directors' appointed based on their expertise in and knowledge of the financial services industry, independence and capacity and willingness to consult with the industry, and
- four 'consumer directors' appointed based on their expertise in consumer affairs, knowledge of issues pertaining to the industry, independence and capacity and willingness to consult with consumer organisations.