

Submission: Consultation Paper 325: Product design and distribution obligations

Australian Timeshare and Holiday Ownership Council

The Australian Timeshare and Holiday Ownership Council (**ATHOC, we, our, or us**) is the industry body for the timeshare industry. ATHOC is a not-for-profit industry body established in 1994 to represent all interests involved in the Australian timeshare industry, and to work toward national industry best practice.

ATHOC operates nationally with an elected board representing a range of membership categories covering resorts, timeshare owners, developers and promoters, marketers, exchange companies and organisations providing professional advice to the timeshare industry.

ATHOC aims to foster a high standard of ethics and adherence to industry best practice amongst its members and to maintain good standing with all stakeholders (by requiring its members to abide by a code of ethics and a code of practice), to continually promote the benefits of the industry and to protect the goodwill of both members and consumers, and to assist members to achieve growth and profitability.

ATHOC's members include several AFS licensees, in particular responsible entities of timeshare schemes and sellers of timeshare and this submission is made on behalf of those members. These licensees issue PDSs for the purchase of interests in their schemes and provide general and personal advice to retail clients in connection with their schemes and will be subject to the product design and distribution obligations.

Consumers who acquire timeshare products from a responsible entity may obtain a loan to assist fund such purchase. The lender will hold an Australian credit licence and while such entities are not members of ATHOC they are related to, or work in conjunction with, a responsible entity of a timeshare scheme. Credit licensees will also be subject to the product design and distribution obligations.

ATHOC has consulted with a number of its AFS licensee members and makes the following submissions on behalf of those members. ATHOC's submission is not confidential.

Submission of Consultation Paper 325 and draft Regulatory Guide on Product design and distribution obligations

- 1 ATHOC acknowledges that the financial product design and distribution obligations created by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* are principles-based. Accordingly, ATHOC supports ASIC's high-level and principles-based approach in preparing the draft Regulatory Guide (**RG**) on Product design and distribution obligations (**DDO**). ATHOC considers such approach is consistent with the intent of the legislation and recognises the breadth and scalability of these obligations having regard the broad scope of products,

issuers and distributors covered by the DDO. ATHOC also agrees with ASIC's approach of not providing definitive guidance on the content and form of a target market determination and the formulation of a target market and allowing issuers to determine this having regard to the principles underlying the DDO.

- 2 As a result, ATHOC's submission relates to broad key comments on the draft RG rather than specific responses to ASIC's specific consultation questions.
- 3 ATHOC also supports ASIC's acknowledgment at paragraph 24 of the Consultation Paper that approach taken by issuers and distributors to comply with the DDO on commencement may differ from the approach taken several years from now and ASIC's representation that it will have a constructive relationship with industry during the implementation phase.

Application of distribution obligations to provision of personal advice

- 4 ATHOC notes that personal advice and associated conduct are excluded from most of the distribution obligations. Specifically, the obligations on distributors:

- (a) not to engage in retail product distribution conduct unless a target market determination has been made (section 994D);
- (b) not to distribute where the target market distribution may not be appropriate (section 994C); and
- (c) to take reasonable steps so that distribution is consistent with the target market determination (section 994E),

do not apply where the distribution conduct consists of personal advice or associated conduct (namely, dealing in a product to implement personal advice).

- 5 In contrast, the obligation to notify an issuer of significant dealings that are not consistent with a product's target market determination applies even where the distribution conduct involves personal advice or associated conduct (section 994F).
- 6 From the perspective of ATHOC's responsible entity members, their timeshare products are currently distributed by the responsible entity's advisers who provide personal financial product advice. Therefore, the distribution obligations outlined at paragraph 4 above will not apply to the distribution of these products. ATHOC notes this will also be the position for the distribution of products by financial advisers who provide personal advice.
- 7 Given the majority of the distribution obligations will not apply to the distribution of timeshare products by timeshare advisers, and to distribution of other financial products by financial advisers who provide personal advice, ATHOC considers that this fact could be more clearly and prominently discussed in the RG, and recommends that ASIC revise the RG accordingly.

- 8 Specifically, ATHOC recommends that ASIC should consider the following:
- (a) revising table 2 of the RG to disclose that the distribution obligations in section 994D and 994E do not apply to distribution conduct consisting of personal advice or associated conduct. A similar amendment should also be made to table 1 of the RG in relation to an issuer's obligation to notify ASIC of significant dealings, as such obligation does not apply to dealings where personal advice was provided); and
 - (b) amending paragraphs 156 and 157 of the RG to recognise that these obligations do not apply where the distribution involves the provision of personal advice ord dealing undertaken in the implementation of personal advice.
- 9 ATHOC acknowledges that ASIC mentions at paragraph 180 of the RG that the obligation on a distributor to take reasonable steps so the distribution of the product will result in consistency with the target market determination does not apply where personal advice is provide. However, ATHOC submits the RG would provide clearer and more effective guidance to distributors of their DDO obligations if such information was mentioned in the same location of the RG where this distribution obligation was discussed, rather than subsequently under a different subheading.
- 10 ATHOC notes the approach it suggests at paragraph 8 will be consistent with the approach taken by ASIC in the RG in discussing the obligation of distributors to notify issuers of 'significant dealings' in a product that are not consistent with the target market determination. This distribution obligation applies to distributors where personal advice is provided and ASIC has clearly highlighted this requirement at the same place in the RG where the notification obligation is discussed (refer paragraph 192 of the RG). Similarly, in discussing the record-keeping obligations of distributors at paragraph 199 of the RG, ASIC has included a note to explain that this obligation applies to distributors where personal advice is provided.
- 11 Similarly, for product issuers, where a DDO obligation does not apply as a result of distribution occurring via personal advice ATHOC recommends that ASIC clearly mention this in the RG in close proximity to where the obligation is discussed. For example, at paragraph 126 of the RG ASIC discusses an issuer's obligation under section 994C to stop issuing a product and to direct its distributors to stop distributing the product where a event or circumstance (such as a review trigger) has occurred that would reasonably suggest a target market determination is no longer appropriate. However, this obligation does not arise where the distribution conduct is personal advice or dealing in the product arising from personal advice, and ATHOC recommends that paragraph 126 of the RG be amended (or a new paragraph 127 added) to clearly disclose this fact.

Application of DDO obligations where issuer and distributor as the same entity

- 12 ASIC recognises, at paragraph 154 of the RG, that an issuer who distributes its own products directly to consumers will also be the distributor. This is relevant for the timeshare industry as ATHOC's responsible entity members, and the finance companies associated with those responsible entities, are generally both the issuer and distributor of their respective products. Therefore, they must comply with the DDO applying to both issuers and distributors.

- 13 In ATHOC's view, the RG has been primarily drafted from the perspective that the issuer and distributor will be separate entities. ATHOC's considers that it would be beneficial if ASIC would provide practical guidance in the RG on how it considers various obligations will apply to an entity who is both the issuer and distributor of the product. For example, it would be useful for ASIC to explain its expectations on how an issuer who is also a distributor can satisfy its 'selection of distributors' and 'supervision and monitoring' obligations are summarized in table 3 of the RG.