

Submission: Consultation Paper 346 – The hawking prohibition: Update to RG 38

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. As these entities may offer to issue or sell financial products, specifically interests in registered timeshare managed investment schemes, they will be required to comply with the revised hawking provisions in Division 8 of Part 7.8 of the Corporations Act from 5 October 2021, and to have regard to ASIC's guidance in the proposed update Regulatory Guide 38 (**RG 38**).

ATHOC has consulted with a number of its responsible entity and timeshare seller members and makes the following submissions on behalf of those members. ATHOC broadly agrees with the guidance proposed by ASIC in the draft updated RG 38 and, accordingly, rather than responding to each proposal and question set out in the consultation paper has identified, and outlined below, two issues for ASIC's consideration.

Tracking consumer consent

- 1 ATHOC recommends it would be useful for ASIC to provide guidance in RG 38 on the interplay between:
 - (a) the section 992A(5)(g) requirement that an offeror may only rely on the consent provided by a consumer for the six-week period after the consent is given; and
 - (b) the breaking of the causal nexus between the unsolicited contact and the offer, request or invitation.

- 2 For example, if, as a result of unsolicited contact, a consumer agrees to attend a presentation at the product issuer's office about a financial product (where an offer was made at such presentation) and the presentation was scheduled to occur 8 weeks after the contact, consistently with ASIC's guidance in RG 38.28, the consumer's positive action in attending such meeting would break the 'causal' nexus between the unsolicited contact and any offer of a financial product made at the presentation (and consequently, such presentation would not be 'unsolicited contact'). However, if a consumer failed to attend the presentation this would constitute the withdrawal of consent and if the product issuer subsequently contacted the consumer, such contact would be unsolicited and no offer of a financial product could be made on such call. Though, the consumer could again agree on that call to attend a presentation which would restart the process. ATHOC submits it would be useful for ASIC to include a scenario of this nature as an example in RG 38.
- 3 Conversely, if, following unsolicited contact, a product issuer arranged to call a consumer, or attend a consumer's residence, 8 weeks after unsolicited contact, no offer of a financial product could be made during such call or meeting as the call or meeting would be 'unsolicited contact' (as a result of occurring more than 6 weeks after the initial contact) in circumstances where the causal nexus between the initial contact and the subsequent contact/offer of financial product has not been broken. Therefore, the offer of a financial product during the subsequent call or meeting will be unsolicited contact because, due to the six week requirement, it is a result of the unsolicited initial contact and also unsolicited contact in its own right.

Return of a product

- 4 As noted at section E of proposed updated RG 38, where the hawking prohibition has been breached, section 992AA gives consumers a right to return any financial product issued or sold to them and to receive a refund.
- 5 In relation to managed investment schemes which are not liquid for the purposes of Part 5C.6 of the Corporations Act, such as timeshare schemes, members can only withdraw from such schemes in response to a withdrawal offer. Consequently, ATHOC recommends ASIC acknowledge in RG 38 that the 'return' of a managed investment product and payment of a refund to a consumer in accordance with section 992AA is not a 'withdrawal' from the scheme for the purposes of Part 5C.6 (as, otherwise, compliance with section 992AA would constitute a breach of Part 5C.6 which ATHOC believes was not the Government's intention when drafting section 992AA).
- 6 In the context of a timeshare scheme, a consumer could utilize their membership to stay at a resort and incur costs associated with using such accommodation which are payable by members (such as housekeeping expenses) and then exercise a right to return the product and receive a refund. Similarly, for other managed investment schemes, a consumer could acquire the product, receive a distribution from the scheme and then seek to return the product and receive a refund. In either scenario, the responsible entity should be able to deduct the benefit received by the consumer or a cost incurred by the consumer (excluding any costs by way of fees paid to the responsible entity or costs of processing the return and refund) from the refund owing to the consumer (that is, offset against the refund any amount owing by the consumer). ATHOC recommends ASIC include commentary in RG 38 to address this point.