

Submission: Establishment of the Australian Financial Complaints Authority Consultation Paper

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 are members of either the Financial Ombudsman Service (**FOS**) or the Credit and Investments Ombudsman (**CIO**).

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, and their representatives, are also members of FOS or CIO.

ATHOC has consulted with a number of its AFS licensee members and makes the following submissions on those items which its members identified as being of greatest importance or concern for them.

Questions for discussion		Response
1	Are there any other principles that should be included in the guiding principles for AFCA's establishment?	ATHOC does not consider there are any other principles which should be included in the guiding principles for AFCA's establishment.
Issue 1: Monetary limits		
2	As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for: (a) income stream risk disputes; (b) general insurance broking disputes; and (c) third party motor vehicle insurance?	ATHOC has no comment on this query as it is not applicable to ATHOC's members.
3	If these specific limits are to be retained, should there be an increase in the limits?	ATHOC has no comment on this query as it is not applicable to ATHOC's members.
4	Are there any anticipated effects on firms that will be disproportionate to any increase in specific increase monetary limits?	<p>ATHOC's AFS licensee members are responsible entities of registered timeshare managed investment schemes and provide personal advice on timeshare scheme interests.</p> <p>ATHOC notes the government's recommendations for AFCA to commence operations with, as relevant for ATHOC's members, a dispute limit of \$1 million and a compensation cap of \$500,000.</p> <p>While this paper is not seeking submissions on the limits, ATHOC considers that the dispute limit of \$1 million, which is nearly triple the current CIO limit and double the current FOS limit, is too high. The Corporations Act draws a distinction between retail clients and wholesale clients and imposes various obligations on licensees dealing with retail clients intended to protect the interests of those clients such as requiring managed investment schemes which issue interests to retail clients to be registered, requiring retail clients to be provided with a product disclosure statement prior to acquiring interests in a scheme, requiring retail clients to be given a statement of advice when being provided personal advice, and requiring retail clients to be given a financial services guide before being provided with financial services.</p> <p>Similarly, licensees who provide financial services to retail clients are required to have an internal dispute resolution system and be a member of an ASIC-</p>

Questions for discussion	Response
	<p>approved external dispute resolution scheme, whereas such obligation does not apply to licensees who are only authorised to provide financial services to wholesale clients.</p> <p>Consistently with the distinction between retail and wholesale clients, and Regulatory Guide 134, which sets out ASIC’s policy on registered scheme constitutions, ASIC recognises that a responsible entity can devise its own complaint handling procedure for wholesale clients and ATHOC submits that, consequently, scheme constitutions often provide that wholesale clients are unable to access the external dispute resolution scheme of which the responsible entity is a member. This is also consistent with the terms of reference of FOS and CIO’s rules.</p> <p>The concept of wholesale client is defined in section 761G Corporations Act and ATHOC notes that a person who contributes \$500,000 or more in the acquisition of interests in a registered managed investment scheme is deemed to be a wholesale client (and there are other categories of wholesale client, including based on the person’s net asset or gross income position).</p> <p>Accordingly, for consistency with the Corporations Act distinction between retail and wholesale clients, the provisions of scheme constitutions regarding the availability of dispute resolution procedures to wholesale clients and the existing terms of reference or rules of CIO and FOS, ATHOC considers that the dispute limit for AFCA should be \$500,000 as consumers who invested or contributed \$500,000 or more in a managed investment scheme or are provided advice or other financial services in relation to financial products with a value of \$500,000 or more will be wholesale clients and, as recognised by the Corporations Act, should not require the protection of the external dispute resolution procedure.</p> <p>ATHOC also highlights that an increase to the dispute limit to \$500,000 represents a significant increase to the current cap of \$309,000.</p> <p>While ATHOC recognises that the value of the dispute may not necessarily reflect the value of the financial product acquired or financial service received, ATHOC considers that typically the value of the dispute will be less than or equal to the value of the product or service provided. Accordingly, ATHOC considers it is appropriate to adopt a dispute limit of \$500,000.</p>

Questions for discussion		Response
		<p>ATHOC believes that increasing the dispute limit to \$1 million and the compensation cap to \$500,000 as proposed by the Governed, being an increase to current FOS and CIO limits, will significantly increase the price of professional indemnity insurance. This is because such limits will effectively enable the external dispute resolution procedure to be available to wholesale clients, will increase the number of claims made (due to an increase in the dispute limit) and increase the value of awards (as a result of an increase in the compensation limit).</p> <p>To reduce the anticipated financial impact on licensees from increased insurance premiums and EDRS costs (due to the likely higher number of complains) which will result from the proposed limits, ATHOC recommends that the dispute limit be reduced to \$500,000. This will reduce both the accessibility of AFCA to wholesale clients and therefore number of complaints made and ensure increases in professional indemnity insurance premiums and costs of the dispute resolution processes to licensees are manageable, reasonable and not disproportionate to current premium amounts.</p>
Issue 2: Enhanced decision making		
5	<p>What measures may assist in ensuring AFCA's decision making processes promote consistency, while:</p> <p>(a) deciding each case on its merits based on the facts and circumstances of the complaint; and</p> <p>(b) maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?</p>	<p>ATHOC endorses the measures proposed by the government to assist in ensuring AFCA's decision-making process promotes consistency (being to adopt a consistent approach to decision-making, adhere to a principle of comparability of outcomes, publish decisions in an anonymised form and take into account previous EDRS decisions as appropriate) and the internal governance procedures identified in the consultation paper.</p> <p>Other measures which ATHOC considers AFCA could adopt to ensure its decision-making provides consistency are service levels detailing the time periods within which AFCA will progress disputes to ensure disputes are handled in a timely manner (to the extent within the control of AFCA, noting it relies upon both the member and the complainant in the timely progression of complaints). ATHOC considers the timely consideration and determination of complaints will also promote consistency.</p>

Questions for discussion		Response
		For example, these measures could specify periods within which AFCA will consider and respond to material provided by complainants, time periods by which parties to the dispute must provide submissions or respond to queries, and, upon all material being provided, make a determination (while providing flexibility for disputes which are particularly complex or involved).
6	Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?	ATHOC considers that a further principle which should guide AFCA's decision-making process is that decisions should be not be contrary to law (which is a requirement applying to the determination of superannuation complaints as set out in the Bill). Requiring decisions to be in accordance with law will promote consistency and ensure decisions are fair, efficient, timely and independent.
7	To what extent should these principles be reflected in the Terms of Reference, while allowing for operational flexibility?	ATHOC submits that the principles can be reflected in AFCA's term of reference without impeding operational flexibility as the principles are broad statements intended to govern AFCA's decision-making process. More detailed guidance of how these principles are implemented in practice can be included in operational guides or procedure manuals.
8	How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?	ATHOC considers that the balance between the advantages of using panels in certain circumstances against efficiency and service implications can be achieved by defining the circumstances in which disputes can be referred to the panel. For example, referral to the panel could be a decision approved by sub-committee of, or a committee appointed by, the AFCA board upon request by the AFCA member or case manager.
Issue 3: Use of Panels		
9	Are there other factors that should be taken into account when considering whether a panel should be used?	Presumably, AFCA will look to pass some or all of the cost of the panel to the applicable AFCA member/licensee. Accordingly, ATHOC suggests that the following factors should be taken into account:

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		<p>(a) the cost of the panel should be borne by AFCA (and therefore all members indirectly) rather than the particular member in appropriate circumstances, particularly where the dispute is likely to result in a new decision that raises novel issues and may set an industry standard, relates to an application of particular law, or may be beneficial to participants of certain industry as a whole. This would be equivalent to the current ability in FOS's terms of reference for FOS to treat disputes as a test case; and</p> <p>(b) if the cost of a panel is to be borne, in whole or in part, by the applicable AFCA member, then the matter should only proceed to the panel with the consent of that member so the financial burden of proceeding to a panel is not forced upon the member without their consent.</p>
10	How best can AFCA provide clear guidance about to users about when a panel should be used?	ATHOC considers that guidance should be provided in a policy or similar document which can be revised in a timely manner as process and procedures of the panel develop.
Issue 4: Independent Reviews		
11	Apart from the review of the impact of the higher compensation cap, are there other aspects of AFCA's operations that should be subject to independent review within the first three years of its commencement?	<p>ATHOC suggests that the following aspects of AFCA's operations should also be subject to an independent review within the first three years of commencement:</p> <p>(a) the extent to which AFCA has achieved its service levels (i.e. time periods for responding to complaints and submissions, time periods for making decisions, etc.);</p> <p>(b) the use and performance of expert panels; and</p> <p>(c) the interaction between independent assessor and AFCA (for example, a consideration of the number of matters referred to an assessor, common issues referred, recommendation made and whether the assessor's recommendations were implemented by AFCA.).</p>

Questions for discussion		Response
Issue 5: Independent Assessor		
12	How and where should the charter of the independent assessor be defined? Who should be able to make a complaint to the independent assessor?	The charter for the independent assessor should be subject to consultation with both AFCA and AFCA members. Complaints to an independent assessor should be limited to AFCA members given they are the members of AFCA and pay for services provided by, and the operation of, AFCA.
13	What safeguards should be put in place to ensure the assessor remains 'independent' (for example, should there be restrictions on early termination of the independent assessor)?	Safeguards which may assist to ensure independence include: <ul style="list-style-type: none"> (a) the assessor's appointment being for a fixed term (and not subject to early termination by AFCA); (b) the assessor must not have been an employee or director of AFCA within the previous three years; and (c) the assessor should not be employed by, or appointed to the board of, AFCA within three years after cessation as independent assessor.
14	Should the independent assessor have guaranteed direct access to the AFCA Board?	Yes.
15	What other reporting arrangements should be in place (for example, if there is serious misconduct or a systemic issue)?	ATHOC submit the independent assessor should publish an annual report which summarises, on an anonymised basis, the number of matters referred to it, the nature of those referrals, the outcome of the assessor's investigation, the recommendations made by the assessor, and the extent to which AFCA implemented the assessor's recommendation.
16	Should the independent assessor publish their findings in each case on an anonymised basis?	Yes.
17	What should happen if AFCA disagrees with the independent assessor's decision?	ATHOC considers that the independent assessor's decision should be binding on AFCA and AFCA required to implement the independent assessor's recommendation, though with the ability for AFCA to discuss the independent assessor's recommendation with the assessor prior to its finalisation.
18	When should a review of the functions and operation of the independent assessor be undertaken?	ATHOC considers that review of the independent assessor's functions and operation should be undertaken three yearly, which is consistent with the timing of the independent review of the AFCA.

Issue 6: Exclusions from AFCA's jurisdiction		
19	Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?	No.
20	Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?	Yes. If the practices proposed by ATHOC at question 21 are adopted, ATHOC recommends that AFCA should have greater preparedness (compared to that currently demonstrated by FOS and CIO) to exercise the power to refuse to accept complaints which are lacking substance, vexatious or relate to the same factual circumstances as a complaint previously made by the complainant to AFCA.
21	What, if any, further practices should be adopted to ensure the correct balance between accessibility to the scheme and ensuring that complaints not appropriate for consideration by an EDR scheme are excluded?	ATHOC considers that a decision to accept or refuse to accept a complaint could be a matter referable to the independent panel (specifically, where such a decision has broader implication for an industry), referable to the independent assessor (noting the independent assessor will not make a decision on the particular dispute but can assess whether the interpretation of AFCA's jurisdiction was correct) and referable to the relevant case manager's supervisor for review.
Issue 7: Other issues to be addressed in the Terms of Reference		
22	What requirements relating to accessibility should be included in AFCA's terms of reference?	ATHOC considers that the terms of reference should recognise that AFCA must be accessible and such concept of accessibility reflect the requirements of RG139. ATHOC also submits that the terms of reference should recognise that the AFCA scheme is accessible to retail clients only and not wholesale clients.
23	Having regard to the current FOS terms of reference and CIO rules, what principles and topics are of sufficient ongoing significance that they should be addressed in the AFCA terms of reference?	ATHOC considers that the AFCA terms of reference should cover the principles and topics currently covered in the FOS terms of reference and CIO rules.
24	Are there any matters not currently included in the FOS terms of reference/CIO rules that warrant inclusion in AFCA's terms of reference?	ATHOC has not identified any additional matters which should be included in the AFCA's term of reference.
25	What additional matters related to superannuation should be addressed in AFCA's terms of reference (as opposed to operational guidelines)?	ATHOC has no comment on this query as it is not applicable to ATHOC's members.

26	What matters related to superannuation would benefit from the additional flexibility that comes from being addressed in operational guidelines?	ATHOC has no comment on this query as it is not applicable to ATHOC's members.
27	What additional arrangements could be put in place to facilitate the transition of complaints that were lodged with the SCT prior to 1 July 2018, but are not yet 'dealt with', to be considered by AFCA? At what point could a complaint be considered to be 'dealt with' by the SCT?	ATHOC has no comment on this query as it is not applicable to ATHOC's members.
28	What measures could be put in place to secure sufficient knowledge of how different parts of the industry operate, while avoiding the representative tag for directors?	ATHOC has no submission on this topic.
29	What measures should be put in place to ensure the AFCA Board appropriately balances the considerations of currency of director knowledge of particular industry sectors, conflict of interests, and breadth of competencies required?	ATHOC has no submission on this topic.
30	What needs to be addressed at a Board/constitution level and what can be addressed through additional governance arrangements established by AFCA such as industry sector advisory panel(s) for transition?	ATHOC has no submission on this topic.
31	Are there additional functions or responsibilities of the AFCA board that are not reflected in the constitutions of the existing schemes?	ATHOC has no submission on this topic.
32	What benchmarks should AFCA have in relation to matters addressed in the ASX corporate governance principles, including: <ul style="list-style-type: none"> (a) board renewal; (b) diversity; (c) procedures for assessing board performance; (d) management of conflicts of interest or of duty on the part of directors and executive staff; and (e) remuneration policy? 	ATHOC considers that the benchmark applying to directors of ASX listed companies should broadly be applicable to AFCA, with the expertise of the AFCA directors to reflect the industries covered by the AFCA.

33	Should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to the outcomes of a particular dispute or class of disputes?	ATHOC agrees that the constitution should provide that no individual director can direct the decision maker on the outcome of a particular dispute. However, ATHOC does not consider this restriction should apply to the board as a whole.
34	In addition to matters identified in paragraphs 1-3 above, what other material should a company seeking authorisation to operate the AFCA scheme provide to demonstrate that it has satisfied the requirements of adequate funding and sufficient funding flexibility?	ATHOC does not consider any other material is required. However, as AFCA's costs will be funded by members and may constitute a significant financial burden for members, ATHOC submits that AFCA should primarily spend its funds on functions directly related to the resolution of complaints. Additional activities which are not directly linked to resolving complaints (such as monitoring appliance with industry codes of conduct) should be funded by, for example, the applicable industry and not AFCA members. Further, the government has identified activities such as community outreach and education as being directly linked to complaints resolution. However, while such activities are important, as AFCA will be funded by its members, there should be a limit on the quantum of funds which can be expended on these activities to ensure that the substantial majority of AFCA's funds are expended on resolving disputes.
35	Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?	ATHOC agrees with the principles identified and does not consider any further principles are required.
36	Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?	ATHOC is not experienced with the resolution of superannuation disputes and therefore does not have a position on this question. However, ATHOC supports a position that the model should reflect the attributes of a user pays approach and if the resources expended by AFCA in resolving superannuation disputes are greater than those for non-superannuation disputes, the funding raised from superannuation versus non-superannuation members should reflect this.

37	If an interim funding arrangement were put in place, what features should it have and when would it be appropriate to transition to a long-run funding model?	Any interim funding model should take into account the government's proposal for current FOS and CIO members to remain as members for a period up to 12 months after AFCA commences and therefore will likely be paying fees to both AFCA and FOS/CIO. Accordingly, during this period, AFCA's activity should be limited solely to resolving disputes and the fees raised for members applied for this purpose.
38	What special considerations might need to be factored into an interim funding model to balance the need for adequate resources (certainty) with the principles (accuracy)?	Refer to response to question 37.
39	Who are the key stakeholders AFCA is accountable to? What is the key objective and measure of importance to each stakeholder?	The key stakeholders who AFCA is accountable to are its members as they are responsible for funding AFCA. AFCA is also accountable to the complainants, as users of the service provided by AFCA. The key objectives and measures of importance to AFCA members are reflected in the principles referred to in questions 5 and 6.
40	In addition to the accountability measures in the Bill, are there additional measures that should be embedded in AFCA's Constitution and/or terms of reference or reflected in ASIC guidance to ensure accountability to stakeholders?	ATHOC does not consider any additional measures required.
41	Are there other conditions that could be put in place to ensure the scheme is accountable to members in relation to fees?	The provision of an annual report by AFCA setting out the fees recovered from members and how those funds were expended will assist in ensuring accountability as will the ability to refer issues to an independent assessor and the undertaking of an independent review every three years.