THE TIMESHARE TRAP

CHOICE super-complaint to ASIC about the timeshare industry

MAY 2021

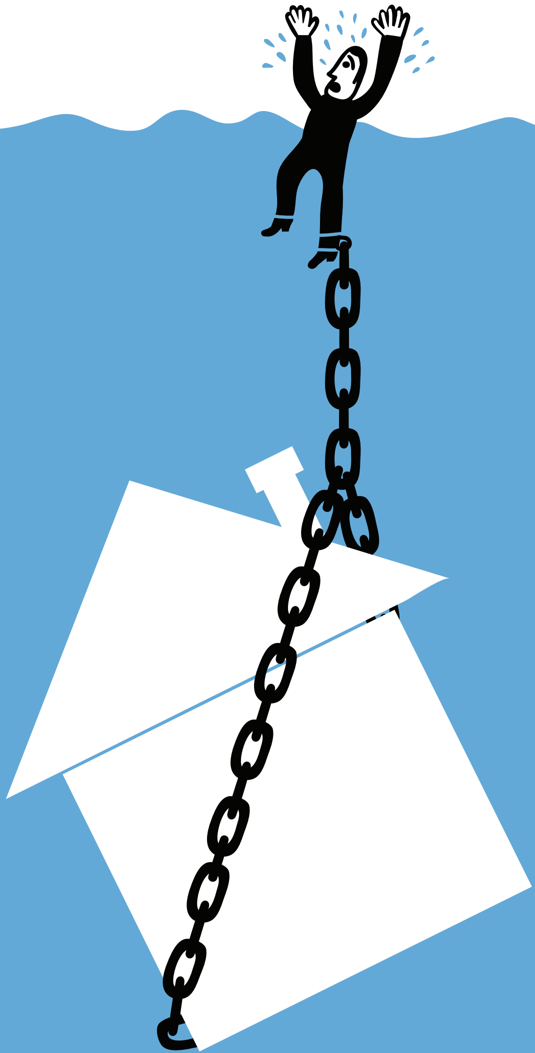
CHOICE

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

To find out more about CHOICE's campaign work visit **www.choice.com.au/campaigns**

CHOICE



INTRODUCTION

Timeshare is a predatory industry that traps too many people in expensive, long-term contracts that offer poor value. Between December 2020 and January 2021, CHOICE surveyed over 350 timeshare members on their experiences with industry.[1] The survey results paint a damning picture of the sector.

The survey found:

- almost 30% of survey respondents report they'd like to exit their timeshare schemes but can't, and another 12.5% say they're thinking about exiting;
- 18% of survey respondents report being subject to high-pressure sales tactics or being misled by salespeople about their timeshare membership;
- 8% of respondents said they were not provided any documents stating they cannot exit their membership;
- timeshare providers are forcing people to pay exorbitant fees to exit title-based timeshare schemes. One survey respondent reported they would be allowed to leave a legacy scheme only if they paid $29,000 in fees to switch to a new fixed-points timeshare product; and
- 70% of people say they expect schemes and ongoing costs or debts to pass on to their childen, who will be burdened with the annual fees. A further 15% said they were unsure if it was the case. The legal status of this claim is disputed.

Since 2016 CHOICE has written four complaints to ASIC about potentially illegal conduct within the timeshare industry. This super complaint outlines further issues with the timeshare sector. It is time for ASIC to seriously deal with widespread consumer harm by enforcing existing laws.

At every stage of the timeshare journey, consumers have reported unfair or oppressive practices that CHOICE believes is either in breach of the law or falls well below community standards and expectations.

- **High-pressure sales tactics.** People are coerced into attending timeshare presentations with financial rewards, such as the offer of a free holiday or consumer product. ASIC's own research found that not a single surveyed individual who attended a presentation expected to buy a timeshare scheme.[2] Salespeople regularly use coercive tactics, including same-day 'exclusives', placing time pressure on people to make a decision, and obscuring certain terms and conditions to pressure people into purchasing a timeshare product.

- **Poor financial advice.** Timeshare salespeople are selling complex financial products and are rightly regulated as financial advisers. They have an obligation under Section 961B of the *Corporations Act 2001* ('the Corporations Act') to act in the best interests of customers. Despite this, salespeople sell people into complex timeshare contracts that can last over 60 years and can cost over $450,000.[3] CHOICE is concerned that the advice provided to people attending timeshare presentations is of poor quality and very seldom is in their best interests.

- **Terrible value.** People are sold into schemes that are often incredibly poor value. In 2018 CHOICE found that some timeshare contracts are over 938% more expensive than booking directly online.[4] We could not recommend a single timeshare product.[5]

- **Timeshare operators trap people into contracts and make exiting extremely difficult.** Exiting is an extreme challenge. Many timeshare providers say people are locked into the scheme and can not practically exit. Other providers make people pay exorbitant exit fees to switch to a different scheme. If an individual is actually able to sell, they are forced to sell at a heavily discounted rate.

The timeshare industry consistently hurts consumers, trapping people into expensive contracts that have little or no value. This complaint features the personal stories of survey respondents. Respondents report feeling fear, shame, embarrassment, a sense of defeat and guilt with their timeshare products.

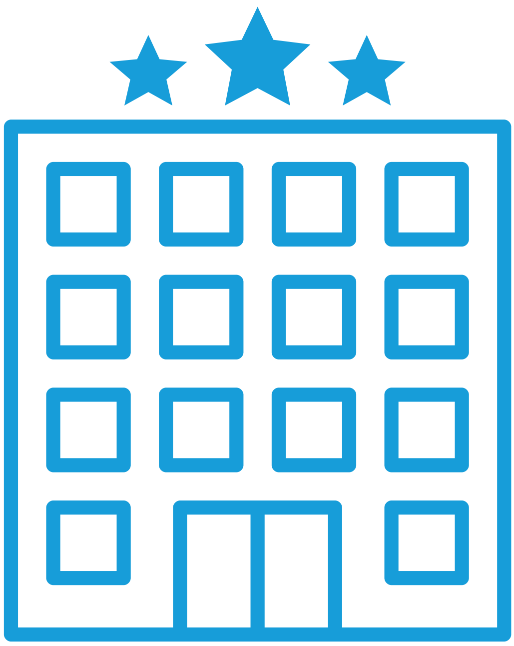
The timeshare business model is founded on taking advantage of consumers. This public complaint alleges that practices within the industry potentially breach the following laws:

- hawking of interests in managed investment schemes (s992AA of the Corporations Act);
- misleading or deceptive conduct (s1041H of the Corporations Act and s12DA of the *Australian Securities and Investments Act 2001* ['the ASIC Act']);
- making false or misleading representations or inducing persons to deal (s1041E–1041F of the Corporations Act and s12DB of the ASIC Act);
- acting in the best interests of the client (s961B of the Corporations Act);
- providing advice if it would be reasonable to conclude the advice is appropriate to the client (s961G of the Corporations Act);
- prioritising the client's interest if there is a conflict of interest between the client and the provider (s961J of Corporations Act);
- general conduct obligations that require financial services licensees to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly' (s912(A)(1)(a) of the Corporations Act 2001); and
- unconscionable conduct provisions (s991A of the Corporations Act and s12CA–12CC of the ASIC Act).

These issues are not isolated case studies. CHOICE has observed so many potential breaches of law that we question whether the timeshare industry should be allowed to operate with existing business practices.

Policy leadership is needed to fix this broken industry. **At a minimum, ASIC must take action and prosecute timeshare providers who break the law.** However, a wholesale review of the industry is needed. **CHOICE is calling on a Federal Government inquiry into the timeshare industry to address issues with legacy schemes and with ongoing sales.**

The President of the Law Council of Australia, Dr Jacoba Brasch QC supports the call to review the timeshare industry. She says "timeshare contracts are complex, long, and commonly misunderstood and are regulated as a managed investment scheme under Chapter 5C of the *Corporations Act 2001* (Cth). We support calls for the timeshare industry to undergo a rigorous review."[6]



RECOMMENDATIONS

1. ASIC should prosecute timeshare operators who engage in the hawking of timeshare memberships. This includes when there is not a "positive, clear and informed request" to purchase a timeshare scheme.

2. ASIC should work with the timeshare industry to initiate a remediation program for people who have been sold into a timeshare product where there has been a breach of law, including:
   a. unsolicited selling;
   b. misleading and deceptive conduct; or
   c. financial advice that was not in the best interests of the customer.

3. ASIC should investigate the extent of misleading and deceptive representations made by timeshare sales representatives at sales presentations. Enforcement action should be taken against timeshare operators who break the law.

4. ASIC should take action against timeshare operators for clear breaches of financial advice laws, including the failure of salespeople to:
   a. act in the best interests of the client (s961B);
   b. provide advice if it would be reasonable to conclude the advice is appropriate to the client (s961G);
   c. prioritise the client's interest if there is a conflict of interest between the client and the provider (s961J)

5. ASIC should commence surveillance work on representations made by timeshare operators that trap people in timeshare contracts. Enforcement action should be taken against providers who break the law.

6. The Federal Government should establish a Parliamentary inquiry into the timeshare industry. This inquiry should focus on:
   a. what legislative and regulatory changes are necessary to protect people from harmful timeshare schemes and improve industry practice
   b. whether the current regulatory regime is fit for the purpose of protecting people from harmful timeshare schemes;
   c. the scale and extent of breaches of the law; and
   d. fair policy options for people seeking to exit title-based timeshare schemes.

TIMESHARE INDUSTRY AT A GLANCE

180,000
members

$23,000
Average upfront cost of new membership

$800
Average annual cost of membership

235,818
Sales presentations in 2018/2019

Source: ASIC 2019[7]

What are timeshare schemes?

Timeshare schemes are complex financial products that are regulated as managed investment schemes under the Corporations Act. There are two main types of timeshare memberships:

#1 'Title-based' schemes

A title-based or legacy timeshare scheme is where a member enters into a contract that grants them access to use a specific property for a given period of time. Contracts can last up to 99 years. Title-based schemes were commonly sold to consumers in the 1980's and 1990's.

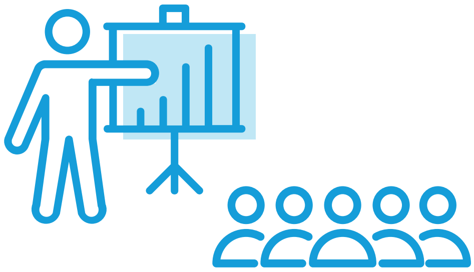
Title-based schemes are no longer sold in Australia. CHOICE has heard from consumers trapped in legacy schemes who are told by providers they are unable to exit. People in legacy schemes have reported to CHOICE they were not informed about the duration of the contract, nor that exiting the scheme was almost impossible.

#2 'Points-based' schemes

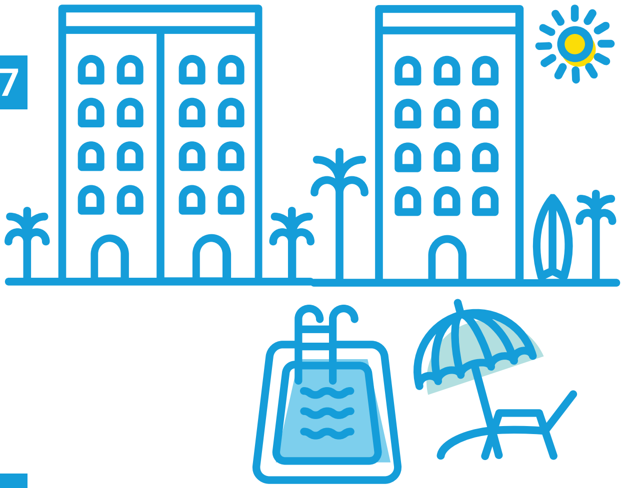
A point-based timeshare scheme is where members buy points and redeems them for holidays at specific resorts or holiday accommodations. For example, a consumer buys a 6000 points a year membership for a one-off cost of $30,000.[8] Every year, they would receive the 6000 points – but also have to pay annual fees and costs every year. This allows you to spend points at specific holiday destinations. These point-based schemes are often for a fixed period of time, with some contracts lasting over 60 years and costing over $450,000 over the life of the contract.

CHOICE investigates timeshare industry

October 2016
We investigate pressure sales tactics and deceptive practices in the timeshare industry



2017

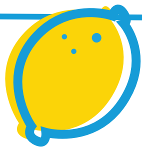


2018

February 2018
Our staff attend a timeshare seminar and witness pressure sales tactics first hand

February 2018
Our fact checkers crunch the numbers and conclude that booking your own holidays is substantially cheaper that using timeshare schemes

October 2018
We give Marriott Vacation Club a Shonky Award



2018
ASIC updates its timeshare regulations to give consumers some limited additional protections

2019

February 2019
We issue a formal complaint to ASIC, alleging that Ultiqa violated the best interests duty

June 2019
We issue formal complaints to ASIC, alleging that Classic Holidays engaged in deceptive conduct

September 2019
We investigate the case of a 69-year-old couple trapped in a 99-year Classic Holidays scheme until 2076

November 2019
ASIC launches investigation into the timeshare industry

2020

September 2020
We investigate case of a 66-year-old woman trapped in a 99-year Classic Holidays scheme until 2084

December 2020
Our verdict: New ASIC regulatory update fails to protect consumers

2021

CASE STUDY #1 - THE MATCHAM FAMILY

"I was thinking, I don't want to pay it, I don't want to pay, but I'll have to because I don't want to go to debt collection,"

In 2020, CHOICE was contacted by the Coral Matcham. Coral Matcham and her late husband purchased a timeshare interest at Tasmania's Shearwater Country Club and Resort in 1996. In 2015, Classic Holidays took over management of the scheme.

Coral Matcham is 66 years old, has no superannuation and is about to go on to the pension. She asked Classic Holidays if she can exit the timeshare scheme, as she hasn't stayed at the timeshare in many years and won't be staying there again.

According to the latest communication from Classic Holidays, Coral is stuck with her timeshare contract for another 64 years, with no way out except to sell it. Selling is an incredibly difficult process given the lack of buyers for these types of timeshare deals, which can last up to 99 years with no exit option.

Coral continues to pay annual fees of $912 because the timeshare manager that took over management of the scheme in 2015, Queensland-based Classic Holidays, threatened to send debt collectors after her if she was to stop paying the annual fees.

Classic Holidays has told the family the scheme becomes part of their estate and passes on to their children – whether they like or not. Even if the annual fee remained the same – which it wouldn't because of inflation – Coral, and then her daughter Cass, have been told they would be liable for $58,368 in fees over the remaining life of the scheme.

In July 2019, Coral Matcham and her daughter Cass asked Classic Holidays for a contract and product disclosure statement (PDS). Both Classic Holidays and Shearwater resort said they had no contract or Product Disclosure Statement. Coral Matcham, who's a career professional documents manager said they were never given a contract.


Coral Matcham and her late husband Wayne.

"I am 66 years old. I will eventually be going on to a pension. I don't have superannuation. I lost my husband a couple of years ago and he'd been very, very ill with cancer, so whatever superannuation we had in those years leading up to that, we still had the mortgage, we had debt, we had living costs, we had hospital costs, so our super went. So when I stop working, or if I don't get any more work, then I'm on an old-age pension, and there's no way on God's green earth I can afford this on a pension."

Classic Holidays has told the Matcham family unreliable information about how many years remain on Coral's scheme. They have been told there are 67, 64, or "around 60 years" left on the scheme.

Cass had requested that her mother qualify for hardship relief, as Coral was over the pension age and has been affected by COVID-19. However, Classic Holidays told CHOICE in 2020 that hardship requirements don't apply to "legacy titles" like Coral's. They said they had no hardship options available at all.

After Cass followed up on the hardship question, Classic Holidays said the only option was to move Coral to its Aspire Program. Coral would still be liable to pay a significant upfront fee and then annual fees for a set number of years. The total cost to Coral would still have been more than $10,000.

Cass complained first to the Australian Financial Complaints Authority (AFCA) and then to ASIC about her and her mum's predicament with Classic Holidays. AFCA said it can't help because Classic Holidays isn't a member of AFCA, and ASIC said it doesn't take individual complaints and directed them to AFCA.

As of April 2021, the Matchams did not take the Aspire option and are still trying to escape their Classic Holidays scheme. Their annual levy is about to fall due.

Source[9]

UNFAIR SALES PRACTICES

"Sales tactics were pushy and they literally tricked us into sitting through a presentation by suggesting we would be given free nights at a resort, no matter the final outcome. If payment was a problem for us, they had that covered, a payment plan ! Honestly, I felt very uncomfortable and felt I couldn't back out and not sign up. This is the biggest con, and we wished we were brave enough to have said no in the beginning." Barbara, QLD

The hawking of timeshare to consumers

The timeshare industry is predicated on unsolicited selling or 'hawking' of timeshare products to unsuspecting consumers. Survey respondents report they are tricked into attending timeshare presentations under the guise of receiving a free prize.

"Sales tactics were pushy and they literally tricked us into sitting through a presentation by suggesting we would be given free nights at a resort, no matter the final outcome."

"My husband signed us up for one of the free overnight stay things for Valentine's Day. The sales pitch was convincing, as were the salespeople. We didn't even have the deposit but they still made sure we could sign up. It should have been apparent to them we couldn't afford it. We have so many issues and complaints with it."

Community legal centres, legal aid commissions and financial counsellors report they assist vulnerable people who have been hawked into attending timeshare presentations.[10] In 2019, Legal Aid NSW reported:

"We continue to assist clients that experience harm as a result of unsolicited meetings used to sell timeshare schemes, often marketed as Holiday Clubs. Common scenarios include consumers being approached at shopping centres or other public spaces and being offered free tickets, holidays or cash (often as a result of "winning" a prize on a scratch and win card)."[11]

Unsolicited selling is an outdated and abusive practice with a significant risk of mis-selling people products they don't want, need or understand.

"They promised many benefits with aggressive sales tactics to lure the people to purchase credits and gave little or no time to think about their product. I think Wyndham has misled innocent people." *Jason**

ASIC's research into the consumer experience of timeshare found:

- the majority of ASIC's survey participants were approached by timeshare representatives;
- most participants had little prior awareness or interest in timeshare memberships;
- every participant was offered an incentive, including cash, a free holiday, consumer goods, to attend a sales presentation; and
- few participants realised they would be attending a presentation relating to the sale of a timeshare membership.[12]

The Corporations Act prohibits unsolicited selling or 'hawking' of interests in managed investment schemes.[13] ASIC's Regulatory Guide says the regulator generally considers:

"an approach, meeting or telephone call to be unsolicited unless it takes place in response to a positive, clear and informed request from a consumer that they wish to discuss an interest in a timesharing scheme. If the consumer made the request with an expectation that the meeting or telephone call would be about a different type of product or a different topic, the offeror cannot rely on the request."[14]

ASIC's Regulatory Guide provides an example of a consumer who is induced to attend a timeshare presentation under the pretence of earning free movie tickets. ASIC concludes this conduct is unsolicited because it "does not take place in response to an informed request from the consumer to discuss the purchase of an interest in a time-sharing scheme."[15]

The current industry practice of tricking people into attending a timeshare presentation while failing to disclose the purpose is the sale of timeshare membership is arguably in breach of anti-hawking provisions of the Corporations Act.

We are concerned that current anti-hawking provisions are being ignored by the timeshare industry and are not being enforced by ASIC. It's clear from ASIC's own consumer research that the majority of people who attend timeshare presentations are not doing so with a "*positive, clear and informed request*" to purchase a timeshare scheme. Rather, people are duped into attending the sales pitch under the pretence of receiving a free financial reward.

This harmful industry practice needs to be stamped out. First, ASIC should prosecute timeshare operators who engage in the hawking of timeshare memberships. Second, ASIC must facilitate a remediation program for people who have been sold into timeshare presentations through unsolicited selling. Finally, the Federal Government should also investigate whether the current anti-hawking provisions are fit for the purpose of protecting people from being coerced into timeshare schemes.

High-pressure sales tactics - consistent breaches of financial advice laws

18% of survey respondents report being subject to high-pressure sales tactics or being misled by salespeople about their timeshare membership.

CHOICE's survey respondents reported feeling pressured and coerced while attending the presentation:

"Thought it sounded like a good idea with all the hype of the sales people. Felt a little pressured and bought into Wyndham don't feel we understand the full advantage of the scheme. We feel we have been sucked/pressured in several times to purchase more credits."

"We were made promises about the sort of accommodation that would be available to us. We were spoken to for so many hours in the end (at that stage) with our young children present we caved in as did a few other couples there. We were never told about the accommodation not being made available at times of the year yet we had not signed up for a specific class or week of the year."

CHOICE also heard concerning reports of timeshare salespeople making false representations during timeshare presentations. Survey respondents reported representatives glossing over or skipping important terms and conditions, as well as making false oral representations about the timeshare product. For example, people responded:

"Not given full story when signed up. Not delivered savings in international travel that were promised."

"Was given misleading information at original interview. Was told I would accumulate free points each year. At the end of the first year I queried as to why I didn't get points and was told that was not the plan I signed up for, tried to exit, was told I could not. Did not get all the policy statement and details until after the 5 day cooling off period was up. Have used only 4 times, nothing available when I want to use it."

"The high pressure sales people that gloss over & promote something as a huge benefit without disclosing the downside is tantamount to fraud. Since no one can record the sales pitch or take away any of the pieces of paper scribbled on there is no way of proving... So now on a pension I struggle to meet the levy payments."

CHOICE is concerned about reports of misrepresentations made by salespeople at timeshare presentations. Businesses and salespeople have an obligation to not engage in misleading or deceptive conduct, and not make false or misleading representations. ASIC should investigate the extent of misleading and deceptive conduct at timeshare presentations. If misconduct is discovered, ASIC should prosecute operators for the following breaches of the law:

- misleading or deceptive conduct (s1041H of the Corporations Act and s12DA of the ASIC Act); and
- making false or misleading representations or inducing persons to deal (s1041E–1041F of the Corporations Act and s12DB of the ASIC Act);

Breaches of financial advice laws

Being sold into a poor quality and expensive timeshare contract can have a devastating impact on the financial wellbeing of an individual. **8% of respondents said they were not provided any documents stating they cannot exit their membership and a further 10% are unsure.**

CHOICE has lodged a number of complaints to ASIC about poor quality advice provided by timeshare representatives in timeshare presentations. Timeshare salespeople are subject to the best interests duty and related obligations. Financial advice laws in the Corporations Act require advisers to:

- act in the best interests of the client (s961B);
- only provide advice if it would be reasonable to conclude the advice is appropriate to the client (s961G);
- prioritise the client's interest if there is a conflict of interest between the client and the provider (s961J)

CHOICE believes that timeshare industry practices consistently and flagrantly violate these financial advice laws. Timeshare products are expensive, lengthy, and poor value financial products. In 2018, CHOICE shadow shopped timeshare presentations.[16] We found:

- timeshare contracts can cost over $450,000;
- contracts can run over 60 years;
- one timeshare provider was 938% more expensive than sourcing similar accommodation online;
- some timeshare schemes can take 38 years to work out cheaper than a consumer booking once-off their accommodation each year; others will never be cheaper; and
- CHOICE could not recommend a single timeshare product to consumers.

As an example, a salesperson can not be acting in an individual's best interests if they are recommending a timeshare product that is 938% more expensive than booking directly online.

Between 2018 and 2019, ASIC shadow shopped a sample of personal advice on timeshare schemes provided to consumers.[17] They found "high levels of non-compliance with the best interests duty and related obligations." **Despite this, ASIC has failed to prosecute a single timeshare provider for breach of financial advice laws. The industry has been given a green light to continue providing illegal financial advice that harms consumers.**

ASIC must investigate and bring enforcement action against timeshare providers who consistently breach financial advice laws.The Federal Government needs to investigate the scale of breaches of financial advice laws in Australia. CHOICE believes the extent of mis-selling and consumer harm is widespread. Customers should be remediated for the costs of purchasing a timeshare product that was not in their best interests or that was otherwise sold in breach of the law.

RECOMMENDATIONS 1- 4

1. ASIC should prosecute timeshare operators who engage in the hawking of timeshare memberships. This includes when there is not a "positive, clear and informed request" to purchase a timeshare scheme.

2. ASIC should work with the timeshare industry to initiate a remediation for people who have been sold into a timeshare product where there has been a breach of law, including:
   a. unsolicited selling;
   b. misleading and deceptive conduct; or
   c. financial advice that was not in the best interests of the customer.

3. ASIC should investigate the extent of misleading and deceptive representations made by timeshare sales representatives at sales presentations. Enforcement action should be taken against timeshare operators who break the law.

4. ASIC should take action against timeshare operators for clear breaches of financial advice laws, including the failure of salespeople to:
   a. act in the best interests of the client (s961B);
   b. provide advice if it would be reasonable to conclude the advice is appropriate to the client (s961G);
   c. prioritise the client's interest if there is a conflict of interest between the client and the provider (s961J)

CASE STUDY #2 - THE BEGBIE FAMILY

Anne Begbie, aged 87, bought a share certificate for ownership of a specific time period scheme at Pacific Palms Resort with her late husband in 1985. The Resort is listed with Classic Holidays. Ms Begbie's contract length is 99 years, ending in 2084.

Ms Begbie's daughter Lindy Mason, approached CHOICE in April 2019. Ms Mason sought advice on how to exit Ms Begbie's contract with Classic Holidays in the event of Ms Begbie's death.

At the time, Ms Begbie was paying annual fees of $824, and maintenance costs of up to $2000 every five years.

In 2017, Ms Begbie was repeatedly cold-called by Classic Holidays and offered additional weeks at $400 to $500 each without seeking information about her financial circumstances. On learning that Ms Begbie had made further commitments to Classic Holidays, Ms Mason attempted to nullify the sale.

Classic Holidays denied that the sale had occurred under duress, and made contact with Ms Begbie again to confirm that she had consented to the sale. Ms Mason subsequently requested that Classic Holidays no longer contact Ms Begbie by telephone, fearing that due to her age and difficulty asserting herself over the phone, Ms Begbie was susceptible to high pressure sales tactics.

Ms Mason raised concerns with Classic Holidays that the contract would extend beyond her mother's death and that any remaining debt would be settled out of her mother's estate. Ms Mason had received representations to this effect from Classic Holidays previously.

When Ms Mason emailed a sales consultant at Classic Holidays, seeking to clarify what would happen to the 99-year contract in the event of Ms Begbie's death, they replied,

"The liability of the annual fees will pass on to the beneficiaries of the estate. If annual fees are not paid, then first they add interest then if remain unpaid, [Classic Holidays] will get debt collectors."[18]

Classic Holidays repeatedly represented that not even death would exempt Ms Begbie from her financial obligations to the timeshare scheme.

Ms Mason sought to terminate the contract with Classic Holidays by offering to buy-out of the contract. This offer was rebuffed twice. Instead, Classic Holidays offered Ms Mason the option to trade-in the unit share certificate in exchange for a points-based 6-year contract, at a minimum cost of $12,500 (over its lifetime).

Ms Mason said, "we preferred to make a clean exit rather than deal with it after Mum passes away, or raising a complaint if they do try to insist that beneficiaries of the will are liable for timeshare obligations."

The offer to purchase the 6-year membership as hardship relief does not satisfy ASIC's requirement that members must not pay any shortfall or further payments after they forfeit their interests in hardship circumstances.

In reviewing this complaint, we assessed the Statement of Advice (SOA) provided to Ms Begbie for the new 6-year contract. The SOA is based on a holiday survey that was not provided to the member. The SOA also stated that the financial adviser has not "considered your financial circumstances or financial position in making our recommendation.

On June 26 2019, CHOICE wrote a complaint about Classic Holidays to ASIC. CHOICE was concerned that Classic Holidays had breached the following laws:

- **The length and cancellation of contracts:** Advisers selling timeshare products appear to be making misleading claims (ss 1041E of the Corporations Act) about the length and options for exiting a timeshare scheme contract. This is especially evident in representations about hardship provisions.

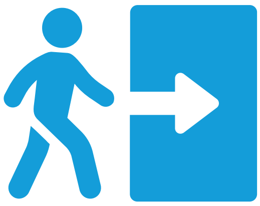
- **The scope of financial advice provided:** Advisers selling timeshare products are not meeting their best interests duty (ss 961B & 961G of the Corporations Act) when they sell single timeshare products offered by a single timeshare provider, and base their recommendations on a limited scope of advice that excludes considering the financial circumstances of the consumer.

To date, ASIC has yet to take action against Classic Holidays for this misconduct.

"...frankly I would give my share away to have this out of my life".

Colin, Classic Holidays timeshare member

EXITING TIMESHARE



Exiting a timeshare membership is an extremely challenging process for consumers. **CHOICE's survey found that 30% of respondents say they'd like to exit their schemes but can't, and another 12.5% say they're thinking about exiting.** Survey respondents report frustration, despair, embarrassment and even grief at the process of trying to sell timeshare membership.

Exiting is especially challenging for members with a title-based scheme. Consumers report that timeshare providers have told them they are unable to relinquish or sell ownership in their scheme. However, if providers do allow people to exit title-based schemes, they force people to switch to expensive points-based schemes. One survey respondent reported they would be allowed to leave a legacy scheme only if they paid $29,000 in fees on a new fixed-points timeshare product.

Timeshare providers who claim that people can not exit their timeshare contract

John and Linda Booth

CHOICE survey respondents indicated that timeshare operators regularly tell people that they are unable to exit title-based schemes. For example in January 2019, John and Linda Booth, then 69 at the time asked to exit their timeshare scheme. They were told by They were told by scheme manager, Classic Holidays,

"We wish to advise that Classic Holidays and the Resort do not provide a relinquishment option should a member or their family no longer wish to retain their ownership".[19]

Classic Holidays told the Booths they were stuck in the scheme until 2076, with no way to sell their timeshare product. This is despite the Booth's failing to ever receive any documentation that they were unable to exit the timeshare scheme.

It is common practice for financial service providers and utilities companies to offer hardship variations to customers, including a waiver of outstanding debts and costs if there is a reasonable cause such as medical illness or severe financial hardship. Timeshare providers are not providing adequate remedies for people for people trapped in legacy timeshare products who are in need. In many cases, these members are unable to travel due to illness or old age but continue to be billed their annual fees.

CHOICE believes that representations made by timeshare providers to customers that they are unable to exit title-based schemes is in breach of law. CHOICE has raised this complaint with the ASIC on a number of occasions. We believe these representations could be breach of the following laws:

- misleading or deceptive conduct provisions in s1041H of the Corporations Act and s12DA of the ASIC Act;
- general conduct obligations in the s912(A)(1)(a) of the *Corporations Act 2001* that require financial services licensees to, 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'; and
- unconscionable conduct provisions in s991A of the Corporations Act and s12CA–12CC of the ASIC Act.

Paying exorbitant fees to switch to a points-based scheme.

Survey respondents report that after repeated phone calls and correspondence, providers offered to switch people on title-based schemes to points-based schemes. However, these customers were required to pay timeshare providers a prohibitive amount of money to switch.

27 survey respondents with Classic Holidays legacy timeshare memberships report being offered but have not yet taken up the offer to switch to a fixed-term, points-based scheme.

One survey respondent, Adrian who recently had a stroke, contacted his timeshare provider, saying he wanted to exit because he could no longer travel. He was told by the timeshare provider that he had to pay approximately $29,000 in fees to switch to a fixed-term, point-based scheme.

Aspire wanted $29,000 to join up and get out of a Classic Holidays timeshare. I have had a stroke and therefore have no income. Pure greed.

Adrian, Classic Holidays timeshare member

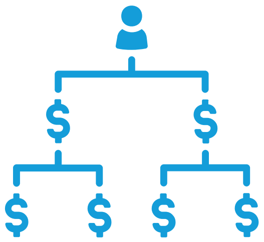
Another example was 87 year old Anna Begbie, who was offered to switch to a points-based 6-year contract for a minimum cost of $12,500. (See Case Study 2). This fee was deceptively characterised as hardship relief in accordance with ASIC regulation.

These fees lack price transparency and are unfair. We've heard from many people who simply accepted the expensive fee as a means to have a resolution to their predicament.

CHOICE is concerned that representations by timeshare operators to people that they can only exit title-based timeshare schemes by paying an expensive fee and shifting to a points-based scheme could be breach of the law, including:

- misleading or deceptive conduct provisions in s1041H of the Corporations Act and s12DA of the ASIC Act;
- general obligations in the s912(A)(1)(a) of the *Corporations Act 2001* that 'financial services licensees must, 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'; and
- unconscionable conduct (s991A of the Corporations Act and s12CA–12CC of the ASIC Act) where an individual is in financial hardship or has a severe illness, and has no option to exit the timeshare agreement

Timeshare providers who claim that timeshare contracts pass on owner's descendants



CHOICE has heard from consumers that timeshare operators tell members that timeshare contracts will be transferred to their children. **In fact, 70% of survey respondents said their long-term schemes pass on to their children, who will have to pay the annual fees. A further 15% said they weren't sure if this was the case.**

The legality of this claim has been challenged by Melbourne University Professor Jennie Paterson. (See Appendix 1) She says:

"Children are not automatically or necessarily liable for their parent's debts. A debt doesn't transfer to children on the death of a parent. The executor is responsible for the debts of the estate. On the death of a timeshare member, what Classic Holidays has is a claim against the estate for the payment of the debt owing under the timeshare scheme. Whether that debt is paid or not depends on the assets in the estate and where Classic Holidays sits in the order of priority for the payment of debts."[20]

Professor Paterson says that when a timeshare contract doesn't mention or is not clear about a member not being able to exit - as has been in case in a number of CHOICE investigations - the member has the right to offer to pay out any remaining obligations under the contract. Paterson says,

"Because the payment is being made now, instead of over many years, this payout amount is unlikely to amount to the full cost of the fees payable to the timeshare operator for the remaining term of the timeshare."

CHOICE is concerned that this threat of passing long-term debt onto children is a coercive tactic used by timeshare operators to encourage people to pay expensive fees to switch to points-based schemes.

Unfair secondary market for people selling timeshare memberships

In the event a timeshare operator does allow an individual to sell their timeshare investment, the member is faced with a secondary market where resale prices are heavily discounted.

In normal functioning markets for goods and services, there is a secondary market where price reflects the expected future value of the product. However, for the timeshare industry there is a poorly functioning secondary market that hurts existing timeshare owners.

70%-80%
discounts of upfront fees paid for selling timeshare products. Research by Taylor Fry, 2019

Research from independent researchers Taylor Fry found that discounts of 70%-80% of upfront fees paid are typical.[21] They found "these heavy discounts significantly erode membership value".[22] Many survey respondents report shock or dismay about little money they can receive for their timeshare interest. Many are simply resigned to sell at a deflated price to get the product out of their lives. One survey respondent shared:

"It's expensive and such a waste of money but we haven't been able to find our way out. They said if we didn't want it any more we could sell it, which is technically true but unrealistic. No one buys memberships at our level and even higher level memberships are sold for peanuts."

The secondary market for timeshare memberships shows it is not an efficient or fair functioning market. If timeshare is as valuable as the advertising and marketing that timeshare providers represent to potential customers, then the secondary market would value timeshare products at a much higher price.

However the reason upfront costs are so expensive is that very few consumers actually want to purchase a timeshare contract. Timeshare operators spend large amounts of money on marketing and advertising to lure people into attending a seminar with false pretences. This raises the cost of timeshare memberships for all consumers. The testimony of the CEO of Accor Premier Vacation Club (APVC) at the Parliamentary Joint Committee on Financial Services confirms this,

"Part of the problem that you have heard is that people do not get up and buy timeshare. People do not go to presentations to buy; they are there for the gift or they are there for the free holiday, the television or the DVD player. That is why sales and marketing costs in this industry can run upwards of 50 to 60 per cent."[23]

While this figure of 50% to 60% may have shifted since 2005, the underlying principle holds that many people with timeshare contracts did not wish to purchase the product. As a result, a significant amount of money is spent on marketing to new customers, thereby inflating the costs of timeshare products.

Policy solutions are needed to assist people trapped in timeshare schemes

People trapped in legacy timeshare schemes should have certainty that they are able to leave the scheme. The Federal Government should establish a fair exit process for people trapped in title-based timeshare schemes. This exit process should not significantly disadvantage people for holding a timeshare product.

RECOMMENDATIONS 5 - 6

5. ASIC should commence surveillance work on representations made by timeshare operators that trap people in timeshare contracts. Enforcement action should be taken against providers who break the law.
6. The Federal Government should establish a Parliamentary inquiry into the timeshare industry. This inquiry should focus on:
   a. what legislative and regulatory changes are necessary to protect people from harmful timeshare schemes and improve industry practice
   b. whether the current regulatory regime is fit for the purpose of protecting people from harmful timeshare schemes;
   c. the scale and extent of breaches of the law; and
   d. fair policy options for people seeking to exit title-based timeshare schemes.

ABOUT OUR SURVEY

Survey conducted between 17th December 2020 and 12 January 2021. CHOICE received 356 case studies from timeshare members.

APPENDIX

Timeshares debts: contract, succession and consumer protection

Professor Jeannie Paterson

Professor of Law, University of Melbourne

Co-Director of the Centre for AI and Digital Ethics

March 2021

Introduction

Timeshares are a curious beast. The form that was popular in the 80s involves giving members use of timeshare property for a given period. Timeshare members usually pay an upfront price, a yearly maintenance fee, and in some cases a yearly membership fee as well.[24] Timeshare schemes are typically long-term contracts – in some cases up to 99 years.

As timeshare members get older they may have less use for the time share or find the ongoing fees burdensome. However, exiting a timeshare has proven difficult for many members.[25] Choice and ASIC have reported that many timeshare members owners are concerned they can no longer use their timeshare accommodation, but can't seem to find a way to end the arrangement.[26] Compounding this anxiety is an approach by some timeshare operators that creates concerns for members about the impact of being tied to a timeshare scheme on their children.

Some time share operators are allowing members to buy into a different kind of scheme, based on points. The value of these arrangements ifs difficult to assess given the opaque nature of timeshares and a lack of clarity about the status of the ongoing debt and its effect on inheritance. So let's work through some of the details.

Member concerns

Ongoing debt

The contracts for many timeshare schemes are said to provide no option for timeshare members to terminate the arrangement, or even to preclude early termination.[27] This is difficult to assess because in some cases timeshare members no longer have a copy of their contacts, or perhaps were never given one. Choice reports that members' options for resale are low, given the long-term of most timeshare arrangements, and the age of many of the facilities offered.[28] There are many online timeshare resale sites offering timeshares for sale at a considerable range of prices.[29] Timeshare members have reported concerns about being chased by debt collectors if they don't continue to pay their fees.[30]

One reason apparently put forward by timeshare operators as to why members cannot exit the scheme is along the lines that timeshare members own a title to property at the resort, and can't just abandon that land. Choice quotes Classic Holidays CEO Ramy Filo as saying that timeshare members

> "Own land and title at the resort. You can't just magically get rid of a title. They may not have understood what they bought, but they were bound by the constitution and the by-laws. They own shares in a company and title to the land." [31]

As we will see most timeshare members do not in fact own title to specific property. Indeed when they stay at the resort in question they will usually stay in a different apartment each year (although there are exceptions).

The inheritance trap

Timeshare members have reported being concerned about passing an onerous obligation to continue to pay the timeshare membership onto their children.[32] Choice explains that:

> "Classic Holidays is on record as saying the scheme becomes part of their estate and passes on to their children – whether they like it or not." [33]

The alternative option: buying into a points based system

Some timeshare operators have offered members the option of trading their long-term title-based timeshare (the right to stay at a specific property) for a shorter-term points based scheme (a system redeeming points for holidays at reports within the scheme). Under a points scheme, timeshare members pay a fee to the operator, sometimes up to 10-15 thousand dollars, and surrender their title based time share. In return they are given membership in the points based scheme. Under this kind of scheme, members pay a yearly fee to obtain points, which they can trade for holidays at the operator's resorts.

Whether the fee being charged to switch schemes represents good value for money depends partly on the value to members of the points based system, which has not ash been questioned.[34] It also depends on whether the sum paid by the member to be released from the property scheme and to move into the point scheme represents a cost effective option compared to the alternatives. This assessment is difficult to make because many members no longer have access to the documents relating to the original sale and may not fully understand the legal status of the arrangements.[35] Some members judgment may also be clouded by anxiety over the ongoing timeshare fees and the effect of these fees on their children should they die. Indeed, it appears that this consideration is used by timeshare operators as part of the persuasion to switch schemes.

My parents own a timeshare with years still to run on the arrangement. In their case, the timeshare operator has contacted them several times and offered to move them from a long-term title-based timeshare to a shorter-term points-based scheme.[36] My parents have been asked to pay a fee of several thousand dollars to make this move. It has been suggested to them that paying to be released from their current scheme and moving to a points scheme would be worthwhile as it would give them more holiday choices. It has also been suggested that this strategy means my parents would not be lumbering their children with an ongoing debt.

However, children don't automatically or directly inherit the debts of their parents. For my parents and no doubt other time share members a fuller understanding of the legal rules around these issues might be helpful in valuing the worth of the transfer offer.

Clarifying the options

What is the legal status for timeshare schemes?

The legal basis for timeshares schemes is not always clear. The schemes are commonly described as 'memberships'.[37] The timeshare peak body talks about 'ownership'.[38] In fact, in law, the timeshares purchased by many members are managed investment schemes regulated under the Corporations Act.[39] Timeshare members interviewed by Choice are unclear what kind of scheme they have bought into because they don't have documents and can't get a clear answer from the operator. Nor it seems did they understand the nature of the scheme when they entered into it.[40] Concerns about the selling method used for timeshares in the 1980's has now led to much stricter rules around the process, along with cooling off periods.[41]

What do timeshare members own?

Where timeshare members have bought into a managed investment scheme, then they don't own specific property, in the way they might own a house or land. Typically, what timeshare members own is a share of the net assets held by the timeshare scheme. The scheme will be managed by the timeshare operator, who is responsible for looking after the schemes assets on behalf of the members. Indeed, under current arrangements a timeshare operator holds the timeshare assets of a managed investment scheme on trust for the timeshare members.[42] That carries certain obligations, including acting honestly, with reasonable care and diligence and in the best interests of members.[43]

Can the timeshare contract be terminated?

Choice reports that many timeshare contracts do not contain any express rights for members to terminate the arrangement before its expiry. In these circumstances, a party who refuses to continue to perform their obligations under the contract would be in breach of contract. A party who breaches a contract is liable in damages. Alternatively, the other party, in this case the timeshare operator, may pursue them for the debt owing (subject to some limitations). Breaching the contract is not a good option for members.

However, where a contract is silent about rights to terminate, or even precludes early termination, the parties can still agree to bring the arrangement to an end. Under such agreements, the party leaving the arrangement, in this case the timeshare member, may offer to pay out the value of his or her remaining obligations under the contract. This is unlikely to amount to the full cost of the amount payable to the timeshare operator for the remaining term of the timeshare.

A party who pays out a future debt is usually entitled to a discount for the current value of the payment. What this means is that it is valuable for a party holding a debt (the timeshare operator) to get the money upfront rather than over the remaining term of the contract, particularly where that stretches over many years. The operator can make money from that current payment by investing it elsewhere and many of the risks of unforeseen future contingencies are removed (for example damage to the timeshare property or the bankruptcy of the member). Moreover, when a member pays out a timeshare the operator benefits from recovering the member's share of the timeshare assets. This means that the operator can rent out the accommodation that would otherwise be reserved for the member to someone else, or otherwise redevelop or sell the property.

All this means that in working out whether it makes sense for a timeshare member to sell their interest back to the operator and enter into a new points based scheme the price that the operator is asking the member to pay, should be compared with the 'fair' price for early repayment of the debt taking into account the current value of the debt and the opportunity to reuse the members share in the timeshare. Notably, as well, the early payment option does not require the member to enter into a new arrangement which incurs debt over a fixed period of time.

Death of the timeshare member

What happens to the share of a member in a timeshare scheme on their death? Under the law of succession, the ongoing contractual debt becomes a liability on the deceased member's estate.[44] The debt does not move to a beneficiary under the will – it is attached to the estate. The role of the executor is to apply the estate to the payment of the deceased person's debts. The executor cannot distribute the assets of the estate without paying those debts. In performing this role the executor must discharge the contractual obligations of the deceased person.[45]

Normally, this may mean performing the remaining contractual obligations. But how is this done in the case of an obligation lasting over many years, as may be the case with a timeshare? Case law suggests that the executor should also seek to pursue the arrangement that is advantageous to the estate, including through negotiations around outstanding contractual obligations.[46] If we apply this reasoning to timeshare schemes, then in order to distribute the assets of the estate in a timely manner, an executor might reasonably seek to pay out the ongoing debt.[47] The executor who sought to pay out the debt would be paying its (discounted) present value, as discussed above.

The timeshare operator might refuse to accept the suggestion of the executor to compromise the ongoing obligation to pay the timeshare fees through a lump sum payment by the executor. It could in theory hold the executor to paying the debt over the life of the contract. Given the long-term nature of the timeshare contract – which may have a good proportion of the very long term to run – this seems an unwieldy, and potentially unfair, outcome. Alternatively, the executor might deposit a sum of money to meet the debt for the remaining term, discounted by the present value of money but allowing for contingencies). The remainder of the estate could then be distributed to beneficiaries.

If the estate is insufficient to meet the debts of the deceased, these debts do not pass to the beneficiaries. Instead, the assets of the estate are divided between creditors according to priorities set by law. (Unsecured debts like timeshare memberships rank below secured debts such as mortgages). If the estate of a timeshare member was insufficient to continue to pay the remaining years of his or her timeshare then certain creditors may bankrupt the estate. Debts will be repaid or extinguished according to the rules around bankruptcy.[48] This generally means that the beneficiaries of the estate wont inherit but nor does the timeshare debt 'follow' them for the remaining timeshare period. Beneficiaries such as children are simply not liable for their parents debts – recognising their parents debts may take up any inheritance.

Australian Consumer Law

These insights cast a different light on the conduct of some timeshare operators in responding to questions by timeshare members about exiting early from a timeshare scheme. Representations made by timeshare operators to the effect that members own real property that cannot be disposed of other than by sale or exchange may be inaccurate. Statements that the debt associated with timeshare membership will continue to burden the family for the remaining term of the timeshare may also be incorrect. False statements of these kinds may in some circumstances be misleading and contrary to the prohibition on misleading conduct in trade or commerce under the ASIC Act.

Further problems may arise under consumer protection law if these kinds of statements are used to persuade a timeshare member to forfeit their title based timeshare in order move into a points based timeshare, while paying a substantial fee to do so. The prohibition on unconscionable conduct provides relief against conduct that involves a 'sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable'.[49] On one view, the conduct of a timeshare operator to pressure elderly members into paying significant money to move to a different scheme by using inaccurate information and leveraging the concern of parents not to burden their children is close to the advantage taking behaviour that, in the right circumstances, will be unconscionable under the ASIC Act. The fact that many timeshare members don't have access to the legal documents that apparently bind them and didn't understand at the time the commitment they were assuming only contributes to this conclusion.

Prospective regulation

ASIC has been concerned about timeshare arrangements and has introduced a new regulatory guide outlining its approach to regulating timeshares in the future.[50] It is possible that long term property based timeshares will become a thing of the past. Timeshares that are managed investment schemes will be subject to the new distribution and design obligations in the Corporations Act. These obligations require issuers and distributors to consider whether the financial product is suitable for its target market. It would seem difficult to see timeshares as suitable for most consumers – for the reason the timeshare imposes a financial obligation over a long period of time expanding beyond the life of the any individual members.

Endnotes

1 Survey conducted between 17th December 2020 and 12 January 2021 (n=356 timeshare members)

2 ASIC 2019, REP 642 - Timeshare: Consumers' experiences

3 CHOICE, 2018, " Are holiday timeshare resorts worth it?" www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2018/marriott

4 CHOICE, 2018, " Are holiday timeshare resorts worth it?" www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2018/marriott

5 CHOICE, 2018, " Are holiday timeshare resorts worth it?" www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2018/marriott

6 Law Council of Australia, 2021, Law Council President's response to questions from CHOICE, March 26.

7 ASIC 2019, REPORT 642: Timeshare: Consumers' experiences

8 CHOICE, 2018, " Are holiday timeshare resorts worth it?" www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2018/marriott

9 CHOICE 2020, 'Timeshare scheme with no contract and no way out' www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-the-matchams-story

10 Consumer Action Law Centre and Financial Rights Legal Centre, 2017, Submission in response to Consultation Paper 272 – Remaking ASIC class orders on time-sharing schemes consumeraction.org.au/wp-content/uploads/2017/02/Consumer-Action-CP-272-Submission-Final.pdf

11 Legal Aid 2019, 'Unsolicited telephone sales of direct life insurance and consumer credit insurance' submission to ASIC, www.legalaid.nsw.gov.au/__data/assets/pdf_file/0015/32424/190828-Legal-Aid-NSW-submission-to-ASIC-Consultation-Paper-317-Unsolicited-telephone-sales.pdf

12 ASIC 2019, Report 642: Timeshare: Consumers' experiences

13 Section 992AA Corporation Act (2001)

14 ASIC Regulatory Guide 160: Time-sharing schemes, RG 160.98

15 ASIC Regulatory Guide 160: Time-sharing schemes, RG 160.98

16 CHOICE, 2018, " Are holiday timeshare resorts worth it?" www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2018/marriott

17 ASIC, RG160.114 asic.gov.au/media/5893343/rg160-published-11-december-2020.pdf

18 Email from Classic Holidays to Lindy Mason, May 2019

19 Email from Classic Holidays to John and Linda Booth.

20 Professor Jeannie Paterson, 2021 'Timeshares debts: contract, succession and consumer protection', 2021, University of Melbourne.

21 Taylor Fry, 2019, ' The Financial Value of Timeshare Memberships'

22 Taylor Fry, 2019, ' The Financial Value of Timeshare Memberships'

23 Parliamentary Joint Committee on Corporations and Financial Services, 2004, 'Timeshare: The Price of Leisure', Final Report, p.44

24 moneysmart.gov.au/property-investment/timeshares#:~:text=Costs%20of%20timeshare%20schemes,a%20membership%20fee%20each%20year.

25 ttps://moneysmart.gov.au/property-investment/timeshares#:~:text=Costs%20of%20timeshare%20schemes,a%20membership%20fee%20each%20year.

26 moneysmart.gov.au/property-investment/timeshares#:~:text=Costs%20of%20timeshare%20schemes,a%20membership%20fee%20each%20year; www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case. See also ASIC Report p 9.

27 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case.

28 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case.

29 See eg www.sellmytimesharenow.com/timeshare/Australia/country/buy-timeshare/.

30 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case.

31 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case.

32 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case.

33 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-the-matchams-story; www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case

34 CHOICE has demonstrated that timeshare schemes in general do not offer good value for money.

35 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case.

36 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-the-matchams-story.

37 www.classicholidays.com.au/about-us.

38 www.athoc.com.au/.

39 moneysmart.gov.au/property-investment/timeshares.

40 www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case.

41 moneysmart.gov.au/property-investment/timeshares.

42 Corporations Act s 601FC(2).

43 Corporations Act s 601FC(1).

44 See generally The Law of Succession ch 14.

45 Dal Pont & Mackie The Law of Succession (2nd ed) [12.15].

46 Dal Pont & Mackie The Law of Succession (2nd ed) [12.15].

47 On the power to compromise a debt under the estate see Dal Pont & Mackie The Law of Succession (2nd ed) [13.28-13.31].

48 mccabecurwood.com.au/till-debt-do-us-part-deceased-estates/.

49 Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40, [92].

50 asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-321mr-asic-releases-updated-regulatory-guide-on-time-sharing-schemes/.