

Submission – AFCA Rules of Complaint Resolution Scheme

Australian Timeshare and Holiday Ownership Council

Background to ATHOC

The Australian Timeshare and Holiday Ownership Council (**ATHOC**) 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. 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 behalf of those members.

Submission on Consultation questions

Consultation question		Submission
1	Do the AFCA Rules achieve a reasonable balance between user-friendliness and detail?	ATHOC considers the draft AFCA rules are easy to read and comprehend and are presented in a user friendly manner.
2	Before the Table of Contents is a ‘quick guide’ summarising the key aspects of the rules and their location. Is this helpful?	Yes, ATHOC considers the Quick Guide is a useful tool to facilitate navigation of the AFCA Rules.

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3	The Rules contain a number of tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary jurisdictions on AFCA's jurisdiction and compensation powers). Are the tables helpful in explaining these areas? How could they improve?	ATHOC considers the various tables are a useful tool for summarising the matters to which they relate and has no suggestions for improvements.
4	Are there aspects of the Superannuation Complaints Tribunal's jurisdiction that have not been adequately incorporated into the AFCA Rules?	No comment – ATHOC members are not Superannuation Providers.
5	Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?	ATHOC considers that the AFCA Rules adequately address AFCA's reporting obligations under the Corporations Act.
6	Are there any other issues that are required in consideration?	<p>Yes, ATHOC has identified the following matters for AFCA's consideration.</p> <p>Expert advice (Rule A.9.6)</p> <p>Pursuant to Rule A.9.6, AFCA may require the Financial Firm to pay or contribute to the costs of an expert, provided that AFCA will not require a Financial Firm to contribute more than \$5,000 per complaint to such costs unless special circumstances apply.</p> <p>ATHOC considers it is unreasonable that AFCA can unilaterally determine to seek expert advice and pass the costs of such advice to the Financial Firm without their consent. ATHOC submits that AFCA should only have the power to require a Financial Firm to contribute to the cost of an expert where the Financial Firm has agreed to pay such cost prior to the appointment of the expert by AFCA.</p>

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	<p>Independent Assessor (Rule A.16.5)</p> <p>Rule A.16.5 provides that an Independent Assessor’s recommendation is not binding on AFCA. ATHOC submits that Rule A.16.5 should provide that an Independent Assessor’s recommendation is binding on AFCA.</p> <p>ATHOC considers it is essential that Financial Firms have confidence that AFCA will handle complaints in a timely and appropriate manner in order for AFCA to be an effective dispute resolution process. Making the Independent Assessor’s recommendations binding on AFCA will give Financial Firms comfort that AFCA is accountable and confidence in AFCA as an effective dispute resolution scheme.</p> <p>Specifically, ATHOC considers this position is appropriate, reasonable and necessary for the following reasons:</p> <p>(a) the role of the Independent Assessor is enshrined in legislation (see section 1051(2)(c) Corporations Act), and provided for in AFCA’s constitution. Further, the Independent Assessor will operate pursuant to a Terms of Reference which are subject to ASIC approval, their role and function will be outlined in AFCA Operational Guidelines and they are appointed by the AFCA board. In addition, the role of the Independent Assessor is to consider complaints about the standard of service provided by AFCA and is not an appeal or review mechanism for AFCA decisions or judgments on the facts or merits of the complaint. Given the parameters of the Independent Assessor’s role, the requirements which will apply to the Independent Assessor’s exercise of its role, and the right of the AFCA board to appoint the Independent Assessor AFCA, it is appropriate for the Independent Assessor’s recommendations to be binding on AFCA; and</p> <p>(b) as the role of Independent Assessor was created in response to numerous concerns with service standards of FOS and CIO, in order to provide an effective mechanism for Financial Firms to identify and raise concerns with AFCA’s service standards, for AFCA to be held accountable for its service standards and for Financial Firms to have confidence of the efficacy and effectiveness of the role of the Independent Assessor, the Independent Assessor’s recommendations must be binding on AFCA.</p>

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	<p>If AFCA does not adopt ATHOC's recommendation and perseveres with its position that an Independent Assessor's recommendation is not binding, then ATHOC recommends the Independent Assessor Terms of Reference should require AFCA to notify ASIC where a recommendation from the Independent Assessor is not accepted and explain AFCA's reasons for not accepting such recommendation.</p> <p>Binding release (Rule A.15.3)</p> <p>Rule A.15.3 provides that the Financial Firm may ask the Complainant be provided with a binding release from liability in respect of matters resolved by the Determination provided the release:</p> <ul style="list-style-type: none"> (a) is limited to the matters dealt with in the Determination; and (b) is consistent with the Determination. <p>Rule 9.3 of the CIO Rules require the Complainant to, where it accepts a settlement offer by a financial service provider, a recommendation by CIO or an award of compensation by CIO, provide the financial service provider (if they request) with a release before or at the time the financial service provider makes good on the offer or gives effect to the recommendation or award. Similarly, Rule 8.8 of the FOS Terms of Reference mandates that an applicant must provide the financial services provider with a binding release from liability in order to accept the recommendation or determination.</p> <p>Rule A.15.3 of the proposed AFCA Rules does not mandate that a Complainant must provide the Financial Firm with a binding release from liability as a condition of accepting a determination.</p> <p>ATHOC submits that the AFCA Rules should require a Complainant to, if requested, release a Financial Firm for liability for matters relating to the dispute where they accept a Determination, recommendation or settlement offer, as is currently the position under the FOS and CIO rules. ATHOC considers such obligation is necessary and reasonable to protect the interests of Financial Firms to ensure they are not exposed to liability in another forum in relation to a matter which has been determined by AFCA or resolved by the parties via the AFCA process.</p>

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	<p>AFCA reporting obligations (Rule A.18)</p> <p>ATHOC recommends that the Rules should also impose an obligation on AFCA to report to ASIC serious breaches of the Rules or Corporations Act by AFCA, its employees, agents or contractors. In addition to ensuring Financial Firms are accountable for compliance with the Rules and the Corporations Act, it is equally important to ensure AFCA is also accountable and an obligation to self-report serious breaches will assist to achieve such accountability.</p>
	<p>Extension of time limits (Rule B.4.4.2)</p> <p>Rule B.4.4.2 enables AFCA to handle a complaint submitted outside the applicable time limits if AFCA considers the special circumstances apply. As noted by AFCA in the consultation material, this is a lower threshold than currently applying under the FOS Terms of Reference and CIO Rules which enable a complaint to be accepted outside of time limits only if exceptional circumstances apply.</p> <p>AFCA submits that Rule B.4.4.2 should be amended to enable AFCA to accept out of time complaints only if exceptional circumstances apply.</p> <p>As Complainants can make a complaint within six years of first becoming aware of suffering a loss or within two years of receiving an IDR response, ATHOC considers the time limits are appropriate, reasonable and are consistent with the legislative and common law time limits applying for various causes of action. Further, lowering the threshold for accepting complaints outside the prescribed time limits will likely increase the number of such complaints being accepted and create uncertainty for Financial Firms and their insurers as to the potential exposure to complaints and associated costs.</p> <p>Therefore, given the potentially detrimental impact, and unreasonable costs burden, which Financial Firms may face for complaints accepted outside of time limits (e.g. records may have been destroyed, personnel have changed, insurance cover may not be available due to run-off periods expiring, etc.) complaints should only be accepted outside the prescribed time limits in exceptional circumstances.</p>