athoc
Australian Timeshare and Holiday Ownership Council

Submission: Position and Consultation Paper 1
Self-reporting of contraventions by financial services and credit licensees

Australian Timeshare Holiday Ownership Council

The Australian Timeshare 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.

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.

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1.1	Would a requirement to report breaches that a reasonable person would regard as significant be an appropriate trigger for the breach reporting obligation?	ATHOC considers the current subjective test is more appropriate and should be retained for the following reasons: (a) a reasonable person test which is subject to a consideration of the factors in section 912D still contains a subjective element and will continue to result in licensees having different interpretations as to when a breach is reportable; (b) licensees, particularly smaller licensees who have limited internal or external legal support, are better able to assess the impact of a breach, or likely, breach having regard to the application of the section 912D factors to their particular circumstances, than applying a legal concept such as a reasonable person standard. Such licensees are likely to incur significant external legal costs in obtaining advice on the application of a

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		‘reasonable person’ test to a breach as they may lack the expertise, or internal legal support, to undertake such analysis themselves; (c) auditors have an obligation under section 990K of the Corporations Act to notify ASIC of certain contraventions by, and adverse matters affecting, a licensee. While the auditor’s reporting obligation does not exactly match the breach reporting obligation of a licensee, there is significant overlap and it does provide a form of independent check and balance on a licensee adhering to its breach reporting obligation; and (d) ASIC provides examples and guidance in Regulatory Guide 76 of what likely constitutes a significant breach and the types of breaches which are unlikely to be significant. ATHOC submits that such examples and guidance are generally followed by licensees in considering whether a breach is reportable and ASIC providing additional examples based on its observations will assist licensees understand ASIC’s view on the types of breaches it considers significant and assist in consistency of the nature of breaches reported.
1.2	Would such a test reduce ambiguity around the triggering of the obligation to report?	Ambiguity will continue to exist under the ‘objective’ test as a subjective element will still apply given the reasonable person standard will be considered in light of the section 912D factors. Also, for smaller licensees without internal legal support or formal legal training, an ‘objective’ reasonable person test will likely be more ambiguous than the current subjective test. Further, differing opinions will exist as to what a ‘reasonable person’ would regard as significant (though ASIC will seek to minimise uncertainty by providing examples).
2.1	What would be the implications of this extension of the obligation of licensees to report?	ATHOC submits that contraventions by representatives of the financial services laws already amount to a breach by the licensee as a result of the operation of sections 917B and 917C. There are also specific examples of a contravention by a representative constituting a breach by a licensee (for example, section 963E). Therefore, a breach by a representative of the financial service laws is already required to be reported to ASIC by the licensee if the breach is significant for the licensee. This position is recognised by ASIC in Regulatory Guide 78 (see examples 4, 5 and 6 on page 10) and the Form FS80 (which requires a licensee to disclose details of any authorised representative involved in a significant breach). Accordingly, ATHOC does not consider it necessary to expressly extend the breach reporting obligation to cover breaches (including misconduct) by a representative as ATHOC believes this is

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		currently the position. Though, ATHOC does not object to such proposal if the intention is to remove any ambiguity which may exist. However, ATHOC's position is that any express breach reporting obligation for representatives should only relate to breaches of the financial services laws (including the matters covered by 912D(1)(a)) and should not extend to circumstances, such as the representative being insolvent or not of good fame and character, which would enable ASIC to make a banning order under section 920A of the Corporations Act. It is unreasonable to impose an obligation on a licensee to make an assessment of whether it considers the circumstances exist which would warrant a representative being banned as some of these factors (in particular, good fame and character) are subjective or are subject to the application of legal principles.
3.1	Would the threshold for the obligation to report outlined above be appropriate?	ATHOC does not support extending the breach reporting threshold to cover suspected or potential breaches. ATHOC considers that lowering the threshold for when a matter is a reportable breach will unreasonably expose licensees to the risk of action from ASIC for failing to comply with the breach reporting obligation. Even if the new threshold is adopted, if a matter arises and is reported to a licensee's compliance team, the compliance team will generally still need to undertake some investigation and fact-finding in order to have the information necessary to lodge a report with ASIC to describe the circumstance and potential or suspected breach (where there is a suspected or potential breach). ATHOC's concern with the lower 'suspected or potential' breach threshold is that ASIC may contend the 10 business day time frame commenced when the compliance team became aware of the matter and take action against the licensee. While ATHOC supports the needs for timely reporting of significant breaches, it is reasonable to expect a licensee will need understand the nature and circumstances of the breach before reporting to ASIC. This position is reflected in the note to paragraph 28 of Regulatory Guide 78 where ASIC recognises that the purpose of the current reporting period is to enable a licensee 'to make a genuine attempt to find out what has happened and decide if the breach is significant'. Further, ATHOC believes adopting a lower reporting threshold (along with the Taskforce's proposal for increased penalties) may act as a disincentive for licensees to report significant breaches to ASIC and have the opposite effect to that intended. ATHOC believes the general perception in the financial services industry is that a licensee is best served if the breach report can advise ASIC that the breach can be rectified (or, at least, a

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		rectification plan determined) and therefore licensees will often utilise the entirety of the maximum 10 business day reporting period. ATHOC submits that, rather than amending the breach reporting threshold, the implementation of the incentives proposed at question 4.5 (to encourage early reporting) and making the breach reporting obligation a civil penalty provision as suggested at question 4.3 (to deter non-reporting) will better achieve the goal of licensees reporting significant breaches as soon as possible.
3.2	Should the threshold extend to broader circumstances such as where a licensee 'has information that reasonably suggests' a breach has or may have occurred, as in the United Kingdom?	ATHOC does not consider it necessary to extend the breach reporting to the broader circumstances proposed. ATHOC endorses the current position proposed by ASIC in Regulatory Guide 78 that a licensee becomes aware of a breach where a person responsible for compliance becomes aware of the breach that they consider could be significant.
3.3	Is 10 business days from the time the obligation to report arises an appropriate limit? Or should the period be shorter or longer than 10 days?	ATHOC considers that the 10 business day time frame is appropriate and strikes a balance between a licensee's need to find out what has happened and decide if the breach is significant and ASIC's need for timely notifications of significant breaches to facilitate effective regulation of licensees. Further, ATHOC considers the incentives proposed at question 4.5 may encourage licensees to report significant breaches earlier than at the end of the 10 business day period.
3.4	Would the adoption of such a regime have a cost impact, either positive or negative, for business?	ATHOC believes the adoption of a regime which requires suspected or potential breaches to be reported may have a negative cost impact due to duplication of breach reporting to ASIC (i.e. reporting a potential or suspected breach and then providing a further report once the breach has been investigated). Also, the lower reporting threshold exposes licensees to a greater risk of contravening its breach reporting obligation and, if the expanded penalty regimes proposed by the Taskforce are implemented, a higher likelihood for financial loss through fines and penalties.
4.1	What is the appropriate consequence for a failure to report breaches to ASIC?	ATHOC supports the view that a self-reporting system that encourages licensees to notify ASIC early of issues and a cooperative approach is more likely to yield quicker, moderate outcomes for consumers and the industry generally. Accordingly, for the reasons explained below, ATHOC submits that the current criminal penalty regime remain as is, a civil penalty apply to the breach reporting obligation and an infringement

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		notice regime not apply to the breach reporting obligation. This will give ASIC greater flexibility to choose which avenue to pursue while not deterring licensees from reporting breaches.
4.2	Should a failure to report be a criminal offence? Are the current maximum prison term and monetary penalty sufficient deterrents?	ATHOC considers an increase to the maximum criminal penalty to make the offence an indictable rather than summary offence is unnecessary. The current penalties provide a sufficient deterrent and increasing the criminal penalties may have the opposite effect of increasing instances of deliberate non-reporting.
4.3	Should a civil penalty regime be introduced?	ATHOC supports making failure to comply with a breach reporting obligation a civil penalty provision to give ASIC greater flexibility to choose which avenue to pursue. ATHOC notes this is consistent with a number of other obligations under the financial services laws (which provide for criminal and civil penalties, or civil penalties only) and reflects the position that, for breach reporting failures which ASIC decides to take enforcement action, a civil penalty will typically be more appropriate than a criminal penalty.
4.4	Should an infringement notice regime be introduced?	ATHOC does not support the Taskforce's view that ASIC should be empowered to issue infringement notices to licensees for simple or minor contraventions that involve a failure to report significant breaches. ATHOC considers an infringement notice regime, assuming it will be similar to the regime for continuous disclosure breaches, will act as a significant deterrent for small licensees to report breaches if they are outside the 10 business day time frame (whereas the self-reporting system should still encourage breach reporting even if the reporting period has passed) and not incentivise larger licensees to adopt a more rigorous breach reporting process. This is because a penalty of $33,000 for a small licensee may adversely impact its continued solvency and ongoing operation whereas a $100,000 penalty will have no impact on the approach to breach reporting for Australia's largest licensees.
4.5	Should the self-reporting regime include incentives such as that outlined above? What will be effective to achieve this? What will be the practical implications for ASIC and licensees?	ATHOC agrees that a self-reporting regime which includes incentives will encourage licensees to report breaches and to do so as early as possible. In particular, if licensees had comfort that they could notify ASIC of a breach (including where a licensee had not the opportunity to fully investigate and rectify the breach) and that ASIC would not take administrative or civil action against the licensee: (a) while the licensee was investigating the breach (provided the licensee did so in a timely

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		and transparent manner); and (b) provided the licensee cooperated with ASIC and ultimately addressed the matter to ASIC's satisfaction, ATHOC believes this would foster early reporting by licensees. For an incentive program to be effective, licensees would need to have certainty of the circumstances where, or conditions to be met so that, ASIC will not take civil or administration action in response to a breach report. In particular, if licensees had comfort and certainty that they could report a breach and then fully investigate the breach and report further to ASIC in a timely manner without ASIC exercising its investigative powers or taking enforcement action in the intervening period, it would encourage reporting of breaches at the earliest opportunity. ATHOC appreciates that in some circumstances it may not be palatable to ASIC to take no action until a licensee has completed an internal assessment and ASIC would need to outline circumstances where ASIC may need to take action immediately (such as to prevent the loss of client funds or prevent the occurrence of a criminal offence).
5.1	Is there a need to prescribe the form in which AFS licensees report breaches to ASIC?	ATHOC endorses a proposal to prescribe the form for breach reporting, provided the form is developed in consultation with licensees. Further, ATHOC accepts that the form should facilitate electronic lodgment but ATHOC proposes there should still be the ability for paper lodgment where a licensee is unable to lodge electronically (as is currently the case with AFSL applications and variations). Also, while the form should be flexible and allow licensees to submit relevant supporting documentation and provide additional information, it should not be mandatory to include such documentation or information. The more onerous the breach reporting process and the more comprehensive the information required for the breach reporting form, the less likely ASIC will achieve its goal of early reporting by licensees.
5.2	What impact would this have on AFS licensees?	Provided the form is developed in consultation with licensees, is flexible, and facilitated (but not did not mandate) the provision of additional information and documents, ATHOC considers such process would have a positive impact for licensees and assist them to meet their breach reporting obligations.

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6.1	Should the self-reporting regime for credit licensees and AFS licensees be aligned?	ATHOC members, who are a related body corporate of, or have an association with, a credit licensee, do not support the imposition of a self-reporting breach regime for credit licensees. These ATHOC members consider a self-reporting breach regime will place an unreasonable and onerous compliance and cost burden on those credit licensees with smaller businesses or operations and may result in such licensees incurring significant legal and external costs in reviewing and characterising breaches (for example, to determine if there has been a breach of the responsible lending obligations) and reporting to ASIC.
6.2	What will be the impact on industry?	ATHOC submits, on behalf of those members referred to in question 6.1, the introduction of a self-reporting breach regime for credit licensees will have a significant adverse direct and indirect impact on the credit provider industry, in particular credit licensees with smaller operations. The direct cost will be the legal and other costs that credit licensees incur in obtaining assistance to evaluate and report breaches, particularly for small credit licensees who may not have the internal legal or similar resources to handle such matters. The indirect costs will arise from the additional resources ASIC will require to review, consider and respond to breach reports (and, in certain cases, investigate and take enforcement action)and such costs will likely be passed on to credit licensees under ASIC's industry funding model.
7.1	Should the self- reporting regime for responsible entities be streamlined?	ATHOC supports the Taskforce's suggestion to streamline the self-reporting regime for responsible entities by removing the section 601FC(1)(l) reporting obligation and including the 'material adverse effect on the interests of members' consideration as a significant factor in section 912D.
7.2	Is it appropriate to remove the separate self-reporting obligation in section 601FC? If so, should the threshold for reporting be incorporated in the factors for assessing significance in section 912D?	Refer to question 7.1 above.
8.1	What would be the implications for licensees of a requirement for ASIC to report breach data at the licensee level?	ATHOC does not support the public naming of licensees based solely on breach reporting. Such course of action would deter licensees from reporting breaches to ASIC and undermine the intention of the breach reporting regime. This would still be the case even if thresholds applied, as such thresholds would act as a disincentive for licensees to report breaches where the licensee is approaching a threshold for being named by ASIC.

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8.2	Should ASIC reporting on breaches at a licensee level be subject to a threshold? If so, what should that threshold be?	For the reasons outlined at question 8.1, ATHOC does not support ASIC reporting on breaches at licensee level, even if such reporting is subject to a threshold.
8.3	Should annual reports by ASIC on breaches include, in addition to the name of the licensee, the name of the relevant operational unit within the licensee's organisation? Or any other information?	ATHOC does not consider that ASIC's annual report should include any identifying information regarding licensees who have submitted breach reports (unless ASIC has taken enforcement action against that licensee). However, the disclosure by ASIC of de-identified information in its annual report regarding breach reporting (such as the nature of the breach and action take by ASIC), which ASIC already does, is beneficial to licensees by highlighting particular risk issues for the industry for a licensee to consider when reviewing its compliance procedures.