

Submission: ASIC’s directions powers – Policy and Consultation paper 8

Australian Timeshare and Holiday Ownership Council

The Australian Timeshare and Holiday Ownership Council (**ATHOC, we, our, or us**) is the industry body for the timeshare industry. ATHOC is a not-for-profit industry body established in 1994 to represent all interests involved in the Australian timeshare industry, and to work toward national industry best practice.

ATHOC operates nationally with an elected board representing a range of membership categories covering resorts, timeshare owners, developers and promoters, marketers, exchange companies and organisations providing professional advice to the timeshare industry.

ATHOC aims to foster a high standard of ethics and adherence to industry best practice amongst its members and to maintain good standing with all stakeholders (by requiring its members to abide by a code of ethics and a code of practice), to continually promote the benefits of the industry and to protect the goodwill of both members and consumers, and to assist members to achieve growth and profitability.

ATHOC’s members include several AFS licensees, in particular responsible entities of timeshare schemes and sellers of timeshare and this submission is made on behalf of those members.

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.

Questions		Response
Position 1: ASIC should have the power to direct financial services or credit licensees in the conduct of their business where necessary to address or prevent compliance failures.		
1	Should ASIC be able to give a direction to a financial services or credit licensee requiring them to take or refrain from taking specified action in the conduct of their business where necessary to address or prevent compliance failures?	<p>ATHOC agrees that the ability for ASIC to give directions will assist ASIC to regulate licensees in a more efficient, effective and timely manner. However, the ability for ASIC to give directions must be balanced with the rights of licensees to operate their business and to have the opportunity to respond to ASIC’s concerns prior to the direction being issued.</p> <p>Accordingly, ATHOC supports the ability for ASIC to give directions provided:</p> <ul style="list-style-type: none"> (a) it is only given in the circumstances outlined at question 4 (and subject to the proposals suggested by ATHOC response to question 4); and (b) it is subject to the process of prior notice outlined at question 9; and

Questions		Response
		(c) the licensee has the power to appeal the issue of a direction to the Administrative Appeals Tribunal.
2	Should the directions ASIC can make be prescribed in the legislation (with an ability to extend the list by regulation)? If so, is the above list appropriate?	ATHOC agrees the directions should be prescribed in the legislation (with an ability to extend by regulation). ATHOC also considers the list proposed is appropriate.
3	Alternatively, should a directions power be drafted broadly to allow for a wider variety of directions?	ATHOC does not consider the directions power should be drafted broadly as this will create uncertainty for licensees as to the nature of directions which ASIC can make.
Position 2: The Directions power should be triggered where a licensee has, is or will contravene financial services or credit licensing requirements (including relevant laws)		
4	<p>Should the directions power be triggered if ASIC has reason to believe that a licensee:</p> <p>(a) has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes, or would constitute a contravention of a law relevant to the provision of services by the licensee?</p> <p>(b) has refused or failed, is or is proposing to refuse or fail to do an act or thing that the legislation requires a financial services or credit licensee to do?</p>	ATHOC submits that the circumstances in which the directions power can be triggered should be limited to actual or potential contraventions which would result in significant detriment to consumers or correspond to the circumstances in section 912D where licensees are required to report significant breaches to ASIC (that is, the direction of power will be triggered where a licensee has, or is likely to, breach an obligation under section 912A or 912B, the financial services laws or other matters listed in section 912D). ATHOC considers adopting these thresholds, which prioritise the interest of consumers and provide a threshold which licensees are familiar with in a breach reporting context, will provide greater certainty as to the circumstances in which the directions of power can be triggered.
5	Alternatively, should broad public interest considerations or objectives provide the basis for ASIC making a direction? If so, are the objectives outlined above appropriate?	ATHOC does not consider that broad public interest considerations or objectives should provide the basis for ASIC making a direction as this proposal lacks certainty as to the circumstances in which a direction may be made. If ATHOC's recommendation at question 4 above is not agreed, ATHOC supports the directions power being triggered in the circumstances identified in question 4 rather than based on public interest considerations.

Questions		Response
Position 3: ASIC should be able to apply to a court to enforce the direction and take administrative action if an AFS or credit licensee does not comply with a direction.		
6	Should ASIC be able to apply to a court to seek an order requiring a licensee to comply with the direction?	ATHOC agrees it appropriate for ASIC to be able to apply for a court order requiring a licensee to comply with directions. However, as a licensee and ASIC may be in disagreement as to whether compliance has been achieved, the licensee should also have the right to appear or make submissions to the court.
7	If so, should there be sanctions, in addition to those relating to contempt, for a licensee and/or its directors if the licensee breaches the court order?	ATHOC does not consider any further sanctions are required. As acknowledged by the Taskforce, failure to comply with the court direction would constitute contempt and also, adopting ATHOC's recommendation set out at question 8, would constitute a breach of financial services laws.
8	Should failure to comply with an ASIC direction be a: (a) criminal offence? (b) civil penalty provision? (c) breach of a financial services law or credit legislation and therefore a basis for administrative action?	ATHOC submits that failure to comply with an ASIC direction should be a breach of a financial services law or credit legislation and the basis for administrative action and should not be a civil penalty provision or criminal offence. This is because the conduct which ASIC is trying to address by the direction may not be a civil penalty provision or criminal offence and failure to comply with a direction to address certain conduct should not carry a greater penalty than the underlying conduct itself.
9	Should ASIC be required to give written notice to a licensee before making a direction setting out: its intention to make a direction, reasons and a period of time for the licensee to respond that is reasonable in the circumstances?	Yes, in interests of procedural fairness, a licensee should be afforded the opportunity to respond to ASIC's intention to make a direction.

Questions		Response
10	Alternatively, should ASIC be required to offer the affected licensee an opportunity to appear, or be represented at a hearing and to make submissions on the matter before making a direction? If so, should ASIC also be able to make an interim direction without providing a hearing and be required to provide a hearing within a certain time frame?	<p>In addition to having the opportunity to respond to ASICs' intention to make a direction, a licensee should also have the opportunity to participate in a hearing or make submission before a direction is made. Further, as with current practice, the hearing should be conducted by an ASIC delegate who is not involved in the decision to seek a direction.</p> <p>Also, ATHOC does not consider ASIC should be able to make an interim direction without a hearing for urgent matters. If ASIC is concerned that the matter needs to be dealt with urgently as there are serious risks to consumers or the conduct is of a serious nature, then there are more appropriate avenues for ASIC to take (such as seeking court injunctions).</p>