

From the desk of

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CEO & Managing Director

Submission to the Treasury
on the Second Tranche of the Exposure Draft -
Corporations Amendment (Future of Financial Advice) Bill 2011
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Overview

We, Wyndham Vacation Resorts Asia Pacific Pty Limited (*Wyndham*) and Wyndham Vacation Resorts South Pacific Limited as Responsible Entity for the WorldMark South Pacific Club (*WVRSP*), wish to comment on the Second Tranche of the Exposure Draft of the *Corporations Amendment (Future of Financial Advice) Bill 2011(Bill)* released by the Treasury on 23 September 2011.

The key focus of this submission is to re-emphasise our concerns raised in our previous letter to the Treasury dated 25 July 2011.

In this letter, we suggested that we and similar timeshare companies should be exempted from the proposed ban on commission payments, volume-based payments and conflict-based remuneration structures. We also outlined the reasons why this exemption should be allowed and the grave consequences that would arise if the ban was enforced upon us.

Unfortunately, we note that our concerns have not been addressed in the Bill. In particular, there are no carve-outs or exemptions applicable to us to allow our employees to be paid commission and volume-based payments.

We cannot stress more strongly our concern that an enforcement of the Bill as it stands will have significant and adverse consequences on us and the timeshare industry without comparable benefit to consumers. Therefore, we once again urge the Treasury to consider exempting us from the prohibition of conflicted remuneration.

To support our suggestion, we have set out in this submission:

- The grounds on which we seek such an exemption in Section B.
- The consequences we anticipate will arise if an exemption is not granted in Section C. Please note that we have attached a document setting out confidential information about Wyndham. This confidential information should be considered alongside this submission to determine whether we should be exempted.
- Our suggested amendments to the Bill to address our concerns in Section C.

We would be happy to elaborate on any aspect of this submission should you require any further explanation. Please contact me on 07 5512 8709 or barry.robinson@wyn.com or David Schollenberger on 07 5512 8289 or david.schollenberger@wyn.com if you have any queries or comments or require any further information.

We thank you for your consideration.

Yours truly,



Barry Robinson

CEO and Managing Director

19 October 2011

A. Background

1. Who are we?

- 1.1 Wyndham is the developer, manager and promoter of the WorldMark SouthPacific Club (the *Club*), a registered managed investment scheme in Australia established for the sole purpose of providing unit-holders with vacation opportunities, rather than financial returns. Wyndham is one of the largest employers in the region's tourism industry and employs over 1,100 employees in Australia.

Wyndham is a wholly owned indirect subsidiary of Wyndham Vacation Ownership Inc, which is the world's largest vacation ownership company with more than 800,000 owner families worldwide.

- 1.2 WVRSP is the Responsible Entity for the Club and holds an Australian financial services license (*AFSL*) (AFSL No. 225200). WVRSP acts as the trustee for the Club and contracts on behalf of the Club.
- 1.3 The AFSL is held by WVRSP and that license covers advice and dealing in Vacation Credits. WVRSP has appointed Wyndham as an authorised representative (under chapter 7 Corporations Act); and in turn Wyndham has appointed its sales staff as authorised representatives. These sales staff are also known as "advisers".

2. What are Vacation Credits?

- 2.1 In order to holiday at Club resorts, clients purchase time-share interests, also known as "**Vacation Credits**" from WVRSP through Wyndham.
- 2.2 Clients are then able to choose where, when, how often and how long they wish to holiday at Club resorts each year, depending on the number of Vacation Credits they hold.
- 2.3 Other than a residual interest in the scheme assets at the time the Club winds up, the only benefit or return that a holder of Vacation Credits receives is the right to holiday at Club resorts. There are otherwise no returns to a holder and, in particular, no financial returns or benefits.
- 2.4 We only have one product that our sales staff can sell to clients, being the Vacation Credits. The consumer attends a presentation with full knowledge that the only product that we sell are Vacation Credits.

3. What do advisers do?

- 3.1 The advisers are direct employees of Wyndham. WVRSP distributes solely through Wyndham and does not distribute Vacation Credits to be sold through other entities such as dealer groups or other advisers.
- 3.2 These advisers are restricted under the AFSL to providing *general* financial product advice to retail clients in relation to the Vacation Credits.

4. How do we remunerate our employees?

- 4.1 Volume-related bonuses or commission payments based on the amount of Vacation Credits sold make up almost all of the advisers' remuneration packages. The advisers are paid entirely on commission based on the number of Vacation Credits sold by them but Wyndham tops up their compensation in the event they do not achieve minimum wage.
- 4.2 Sales managers and directors, as well as executive management, may also receive commission and/or a bonus linked to the sales performance of the company or specific offices or regions.

B. Grounds for seeking exemption

We suggest we should be allowed to pay our employees conflicted remuneration for reasons set out below:

- (a) the ban does not achieve the desired result of better investor protection through the removal of adviser conflicts of interest because our advisers do not experience this conflict to begin with as they only sell one product – the Vacation Credits;
- (b) the sale of Vacation Credits by the advisers are analogous to the sale by ADI employees of basic banking products; and
- (c) the Vacation Credits are never distributed through dealer groups or advisers.

1. No conflict of interests

- 1.1 The Explanatory Memorandum (*EM*) states that product commissions may encourage advisers to sell products rather than give unbiased advice that is focused on serving the interest of the clients. The EM continues that this causes conflict of interests for the financial adviser who needs to choose between maximising its revenue from product sales and offering advice that is beneficial to clients¹.

Only one financial product sold

- 1.2 We submit that this conflict of interest does not exist for Wyndham’s advisers because these advisers can only sell one product – Vacation Credits. As a result, these advisers are never in a position of conflict where they are able to choose from a range of products and only promote the ones that deliver the highest commission payments for them.
- 1.3 Each customer is also fully informed beforehand that the adviser is selling only one product and will earn a commission for each Vacation Credit sold. The amount of commission the adviser will earn is also disclosed.

No *personal* financial advice given

- 1.4 WVRSP's AFSL only allows the advisers to give *general* financial product advice. This practically means that advisers can only give general product information on the Vacation Credits that is not tailored to any particular client. Advisers discuss the types of resorts available, how the system works and what kind of holidays clients can get. The AFSL does not allow them to provide *personal* financial advice, which is financial advice that considers the client’s objectives, financial situation or needs.
- 1.5 Therefore, we submit that as Wyndham’s employees are not in a position of a conflict of interest, they should be allowed to be compensated on a commission basis..

2. Analogous to ADI

- 2.1 We note the Bill provides a specific carve-out from the ban on conflicted remuneration for arrangements where employees of an Australian Authorised Deposit-Taking Institution (*ADI*) advise on and sell basic banking products². According to the 2011 Information Pack, this carve-out was offered because these products are “generally easier for consumers to understand and consumers more readily understand that the frontline employee of the ADI is in the business of selling the employer’s product”³.

¹ Paragraphs 1.3 to 1.6 of the EM.

² Schedule 1, item 11, subparagraph 963C(b)

³ Page 15 of the 2011 Information Pack

- 2.2 We submit that a similar carve-out or other form of exemption should be available to us on the basis that this arrangement is exactly analogous to a timeshare adviser advising on and selling Vacation Credits.
- 2.3 Like basic banking products, Vacation Credits are generally well-understood by retail customers. Despite being constituted as a managed investment scheme, it is not a complex, structured product (and would not be generally considered by consumers as a financial product). These Vacation Credits are not bought with an intention of making a financial return, but rather to offer customers options for their holidays. Indeed, the various reliefs and exemptions granted to us and the timeshare industry by ASIC is on the basis that timeshare is not promoted as an investment. Furthermore, 80% of sales of Vacation Credits are to existing owners or arising out of referrals from existing owners who are knowledgeable in the product.
- 2.4 As with ADIs, a retail customer who approaches a Wyndham adviser readily understands that the adviser will be selling Wyndham's product only, the Vacation Credits. Each adviser is also a direct employee of the employer, similar to the ADI example.
- 2.5 We submit that there is no material different between the arrangement of the ADI employee giving advice on the basic products offered by their employer – we note that they even have a choice of investments from which to make a recommendation which Wyndham does not have – and an adviser who is giving advice on timeshare products issued by Wyndham.
- 2.6 We have drafted a carve-out similar to the one for ADI employees in section C which we hope the Treasury would consider including in its next draft of the Bill.

3. Potential adverse impact to timeshare industry is not in line with the Bill's underlying policy

- 3.1 We note that not only will the Bill have no positive impact for retail customers purchasing timeshare, it will have a very detrimental effect on Wyndham, other timeshare companies, employees, the timeshare industry in Australia and the many vendors that rely on the timeshare industry. These effects are detailed below:

Loss of salespersons

- 3.2 Volume-related bonuses or commission payments based on the amount of Vacation Credits sold make up most of Wyndham's employees' remuneration packages. This model is widely used in the timeshare industry globally.
- 3.3 If these employees can no longer receive volume-related bonuses or commissions, Wyndham and the rest of the timeshare industry will stand to lose the vast majority of its salespeople. These employees are invaluable to our business as they have a strong connection to and understanding of the industry as well as an excellent grasp of the product. This compensation model is also used by the real estate industry, with which timeshares sales is more closely aligned, without harm to consumers.
- 3.4 Timeshare is also unlike a "typical" financial product in that it is not designed to generate financial returns for clients. Therefore, it is highly unlikely that financial advisers who have the qualifications and experience to advise on more "typical" financial products would be attracted to work in the timeshare industry. Likewise, this also means that advisers who are currently selling timeshare may not easily migrate their skills to other industries, including both financial and non-financial.

4. Impact on business operations and timeshare industry

- 4.1 It is our understanding that the implementation of fixed salary-based remuneration by other timeshare companies within our region and through the United States and Europe have not yielded successful results and has not been ultimately viable for these businesses.
- 4.2 It is important that you also consider the **confidential document** we attach to this submission which details the specific impact implementing fixed-based salary will have on our business. We request that you treat this as highly confidential information that is not to be disclosed to members of the public.
- 4.3 We further submit that the ban on conflicted remuneration could potentially result in loss or limitation of the following (without achieving any positive impact on consumer protection):
- (a) future resort development;
 - (b) direct timeshare related employment jobs;
 - (c) indirect timeshare related employments jobs (community marketing employment);
 - (d) other businesses that rely on the timeshare industry (vendors and other business that are supported by the timeshare industry) e.g. hospitality suppliers, such as cleaning services, linen suppliers and construction contractors;
 - (e) substantial taxable income and revenue lost; and
 - (f) substantial contributions to charities made each year.

5. WVRSP does not distribute its Vacation Credits to or through any dealer groups or advisers

- 5.1 We note that the Government is seeking to encourage the generation of competition by preventing the payment of volume bonuses to dealer groups or advisers⁴. While we support these intentions, we seek an exemption on the basis that WVRSP does not distribute Vacation Credits to or through other entities such as dealer groups or advisers. WVRSP only sells Vacation Credits directly through Wyndham's own sales offices.
- 5.2 Any secondary market that exists in Vacation Credits is not as a result of distribution of the credits to dealer groups by WVRSP. Also, in no circumstances do we ever pay a commission or volume-based fee to advisers employed by any third party dealer groups.

⁴Page 9 of the 2011 Information Pack.

C. Suggested amendments to the Bill

We suggest that our concerns above can be addressed if the Bill is redrafted to exempt us and other timeshare companies from the ban on conflicted remuneration. We propose two alternatives in which the Bill can be redrafted:

- (i) by providing a specific carve-out that is similar to the one offered to employees of Australian ADIs advising on and selling basic banking products; or
- (ii) that amendments should be made to subparagraph 963A so that volume-based payments or commissions payments paid in our circumstances, or those similar to ours will not be caught as *conflicted remuneration*.

1. Carve-out for timeshare employees

1.1 We propose that the changes as marked up below should be made to Schedule 1, item 11, subparagraph 963C:

963C Certain benefits given by an employer to an employee not *conflicted remuneration*

Despite section 963, a monetary or non-monetary benefit given to a financial services licensee, or a representative of a financial services licensee, by the employer of the licensee or representative is not *conflicted remuneration* if:

- (a) the benefit:
 - (i) is remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of that employer; and
 - (ii) is not of a kind mentioned in subsection 963(2) (volume based benefits); or
- (b) the benefit is remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of that employer and:
 - (i) the employer is an Australian ADI; and
 - (ii) access to the benefit, or the amount of the benefit, is dependent on the licensee or representative recommending a basic banking product; and
 - (iii) the licensee or representative does not, in the course of recommending that basic banking product, give other financial product advice that does not relate to a basic banking product; or
- (c) the benefit is remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of that employer and:
 - (i) the employer operates a time-sharing scheme⁵ and is a member of the industry trade association, the Australian Timeshare and Holiday Ownership Council; and
 - (ii) access to the benefit, or the amount of the benefit, is dependent on the licensee or representative recommending a time-sharing interest and

⁵ "Time-sharing scheme" is defined in section 9 of the *Corporations Act 2011* (Cth) as "a scheme, undertaking or enterprise, whether in Australia or elsewhere:

(a) participants in which are, or may become, entitled to use, occupy or possess, for 2 or more periods during the period for which the scheme, undertaking or enterprise is to operate, property to which the scheme, undertaking or enterprise relates; and;

(b) that is to operate for a period of not less than 3 years.

- (iii) the licensee or representative does not, in the course of recommending that time-sharing interest, give other financial product advice that does not relate to a time-sharing interest.

1.2 An item should also be inserted in the Bill to add the definition of "time-sharing interest" to section 761A of the Corporations Act. This phrase has been used by ASIC and we propose to use ASIC's definition of the term found in its Regulatory Guide 160 as follows:

time-sharing interest means an interest issued in a time-sharing scheme.

2. **Amendments to subparagraph 963A**

2.1 Alternatively, we propose that volume-based payment should not be considered *conflicted remuneration* in circumstances where:

- (a) the licensee can only sell one product to retail clients; or
- (b) where there is more than one product that the licensee can sell, the amount of commission it receives is fixed and does not vary depending on which product is sold; and
- (c) general financial product advice is given in respect of the product(s) above.

2.2 We suggest that the changes as marked up below should be made to Schedule 1, item 11, subparagraph 963A:

963A Monetary benefit given in certain circumstances not *conflicted remuneration*

(1) Despite section 963, a monetary benefit given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients is not ***conflicted remuneration*** in the circumstances set out in any of the following paragraphs:

- (a) the benefit is given to the licensee or representative by general insurer (within the meaning of the *Insurance Act 1973*) and is given in relation to a general insurance product;
- (b) the benefit is given to the licensee or representative by a company registered under section 21 of the *Life Insurance Act 1995* and is given in relation to a life risk insurance product, other than:
 - (i) a group life policy for members of a superannuation entity (see subsection (2)); or
 - (ii) a life policy for a member of a default superannuation fund (see subsection (3));
- (c) each of the following is satisfied:
 - (i) the benefit is given to the licensee or representative in relation to the issue or sale of a financial product to a person;
 - (ii) financial product advice in relation to the product, or products of that class, has not been given to the person as a retail client by the licensee, the representative or an associate of the licensee or the representative;
- (d) each of the following is satisfied:

- (i) the benefit is given to the licensee or representative in relation to the issue or sale of a financial product to a person;
- (ii) only one financial product is available for the issue or sale by the licensee or representative;
- (iii) general financial product advice in relation to this sole product is given to the person as a retail client by the licensee, the representative or an associate of the licensee or the representative;
- (iv) the financial product is a time-sharing interest.

and/or

each of the following is satisfied:

- (i) the benefit is given to the licensee or representative in relation to the issue or sale of a financial product to a person;
 - (ii) more than one financial products is available for the issue or sale by the licensee or representative;
 - (iii) the value of the benefit given to the licensee or representative in relation to the issue or sale of each financial product is equal;
 - (iv) general financial product advice on each product is given to the person as a retail client by the licensee, the representative or an associate of the licensee or the representative;
 - (v) each of the financial products are time-sharing interests.
- (e) the benefit is given to the licensee or representative by a retail client in relation to:
- (i) the issue or sale of a financial product by the licensee or representative to the client; or
 - (ii) financial product advice given by the licensee or representative to the client;
- (f) the benefit is a prescribed benefit or is given in prescribed circumstances.

2.3 These are provided as examples only and we will be grateful for amendments in any other form to the Bill that will in substance exempt us from the conflicted remuneration prohibition.

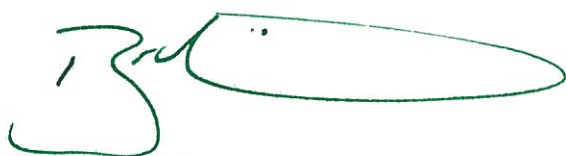
D. Conclusion

- 1.1 We have always supported reasonable regulation. In fact, our timeshare product offering and authorised representatives are extensively regulated today by Australian federal law and regulations. As an example, we have embraced and adopted the NCCP legislation into our policies and procedures without any objection because we believe it genuinely helps protect the consumer from purchasing a product it cannot afford. In contrast, however, the FOFA proposals are broadly written to regulate all companies that offer financial products and services, even those that only offer a single product, such as timeshare Vacation Credits.
- 1.2 As noted above, our timeshare product has no direct or indirect connection to the providing of personal financial advice or financial planning services. In addition, the method of how timeshare representatives are compensated through commission has never resulted in any consumer harm.
- 1.3 Without a carve-out for companies such as Wyndham that offer a single timeshare product, the legislation as proposed with respect to financial products could have the unintended consequence of causing uncertainty, limiting consumer choice, and harming many Australian businesses, adding to the difficulties of a national economic recovery.
- 1.4 We urge the Government to give serious consideration to the potential adverse impact of such a broad-brush approach for issuers of Vacation Credits such as Wyndham, which bases its entire remuneration structure around rewarding staff for sales volumes of its only product - a product which itself is not an investment product in the typical sense. For the reasons set forth above, we submit that no policy outcome has been cited to justify such consequences that cannot equally be achieved by carving companies such as Wyndham out of the scope of the ban on conflicted remuneration structures.

Please contact me on 07 5512 8709 or barry.robinson@wyn.com or David Schollenberger on 07 5512 8289 or david.schollenberger@wyn.com if you have any queries or comments or require any further information.

Thank you for your consideration of our submission.

Yours sincerely



Barry Robinson
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