

Replacement Explanatory Statement



ASIC
Australian Securities &
Investments Commission

Replacement Explanatory Statement

ASIC Corporations (Amendment) Instrument 2020/1064 and ASIC Corporations (Amendment) Instrument 2020/1065

This is the Replacement Explanatory Statement for the:

- (a) *ASIC Corporations (Amendment) Instrument 2020/1064*
(the ***Timeshare Instrument***); and
- (b) *ASIC Corporations (Amendment) Instrument 2020/1065*
(the ***Fees and Costs Instrument***)

(together, ***the Instruments***).

The Replacement Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Purpose of the Replacement Explanatory Statement

1. This Replacement Explanatory Statement replaces the initial explanatory statement (**Explanatory Statement**) for the Timeshare Instrument and the Fees and Costs Instrument, in accordance with paragraph 15J(1)(b) of the *Legislation Act 2003* (Cth).
2. The purpose of this Replacement Explanatory Statement is to insert a note at the end of paragraph 64 to clarify that a member may lodge a complaint with the Australian Financial Complaints Authority (**AFCA**) about a decision made by a responsible entity of a registered time-sharing scheme under the formal hardship withdrawal arrangements introduced by the Timeshare Instrument.

Summary

3. The Instruments provide enhanced consumer protections in response to ASIC's concern that certain practices in connection with time-sharing schemes can lead to consumer harm. The changes implemented by the Instruments are intended to improve consumer outcomes without significantly increasing industry costs.

The Instruments also reduce some compliance obligations under the *Corporations Act 2001* (the *Act*) for the responsible entities of time-sharing schemes, where this can be done without compromising consumer protections, and centralise requirements and licensing obligations for responsible entities of time-sharing schemes.

4. The Timeshare Instrument enhances consumer protection by:
 - (a) implementing a new ‘subject to finance’ obligation to allow consumers to withdraw applications for an interest in a time-sharing scheme and return the interest where the application is ‘subject to finance’ if the consumer fails to obtain, rejects or decides not to proceed with an offer of finance. This right may be exercised even after the cooling-off period has ended;
 - (b) implementing formal hardship arrangements so operators can allow consumers to withdraw with no further obligations to pay levies or other fees where the consumer is in hardship and the scheme’s constitution has been modified to provide for hardship;
 - (c) introducing new compliance and audit requirements for points-based time-sharing schemes to reduce the potential for dilution of members’ interests; and
 - (d) amending disclosure requirements to ensure responsible entities and promoters of time-sharing schemes provide consumers with clear and prominent information about the key features and risks of timeshare, both verbally and in writing, at sales presentations (whether presentations are conducted in person, by telephone or through other electronic communication).
5. The Timeshare Instrument also:
 - (a) continues the existing relief in relation to the valuation of property of registered time-sharing schemes;
 - (b) continues relief from the managed investment, licensing and product disclosure provisions for rental pools, for those who relied on Superseded Class Order [SCO 02/237] *Time-sharing schemes—Operation of rental pool* (SCO 02/237) before its repeal, while reducing the required audit frequency to reduce industry cost without compromising consumer protection;
 - (c) amends ASIC Class Order [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services* by expanding the definition of ‘special custody assets’ to reduce the net tangible asset requirements for responsible entities of time-sharing schemes and to reduce the audit frequency requirement so as to reduce industry cost without compromising consumer protection;

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- (d) modifies s601GA of the Act to provide that the constitution of a registered time-sharing scheme need not make adequate provision for the consideration that is to be paid to acquire an interest in the scheme (**Pricing Relief**) provided the constitution contains specified provisions for the acquisition price, forfeiture and hardship withdrawals. Formal hardship arrangements are imposed as an obligation under this modification if the time-sharing scheme's constitution is amended to reflect the provisions of notional s601GA(1A) as inserted by the Timeshare Instrument. Instrument 2017/272 previously imposed a series of obligations in connection with the Pricing Relief. These are now imposed with some modifications as licence obligations under notional s912AJ of the Act; and
- (e) provides for a consolidated set of requirements and obligations, including some previously imposed as conditions of Pricing Relief and others that are new or amended (notional s912AJ).
6. The Fees and Costs Instrument introduces modified fees and costs disclosure requirements tailored to the different types of time-sharing schemes to provide clear disclosure of the upfront and ongoing costs involved when an interest in a time-sharing scheme is purchased. This is intended to provide clarity to industry and to promote consistency and comparability to facilitate effective consumer decision-making.
7. The Timeshare Instrument amends:
- (a) *ASIC Corporations (Time-sharing Schemes) Instrument 2017/272 (Instrument 2017/272)*; and
 - (b) ASIC Class Order [CO 13/760] (**CO 13/760**).
8. The Fees and Costs Instrument amends:
- (a) ASIC Class Order [CO 14/1252] (**CO 14/1252**)
 - (b) *ASIC Corporations (Time-sharing Schemes) Instrument 2017/272 (Instrument 2017/272)*.
 - (c) *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070 (Instrument 2019/1070)*

Purpose of the Instruments

9. Since 1993, ASIC has provided technical relief from certain licensing, managed investment and product disclosure provisions, and modified the Act in some circumstances. Some of this relief has been subject to conditions. ASIC has also imposed specific licence conditions on the Australian financial services (**AFS**) licences held by responsible entities of time-sharing schemes.

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10. ASIC has provided this technical relief in recognition of the nature of time-sharing schemes. Unlike other types of managed investment schemes, time-sharing schemes are aimed at producing ‘lifestyle’ or ‘recreational’ benefits to their members. Consumers who purchase interests in time-sharing schemes are not generally acquiring a financial product for the purposes of a financial investment.
 11. ASIC has imposed conditions on some of this relief to reduce consumer harms in recognition that time-sharing schemes are complex in nature and the key features, including the long-term nature, ongoing costs and limited exit options, are often difficult for consumers to understand or compare with other products—especially in a high pressure selling environment.
 12. ASIC has also provided individual relief to State-exempt time-sharing schemes, title-based time-sharing schemes and member-controlled clubs (**legacy schemes**) from scheme registration requirements.
 13. The purpose of the Instruments is to strengthen consumer protection for prospective and existing members of time-sharing schemes, reduce some compliance burdens without compromising consumer protection, and to centralise requirements and licensing obligations for responsible entities of time-sharing schemes in one legislative instrument.

Consultation

14. In preparing the Instruments, ASIC conducted a formal public consultation by issuing [Consultation Paper 272: Remaking ASIC class orders on time-sharing schemes \(CP 272\)](#) in November 2016.
15. [CP 272](#) consulted about our proposals to remake four ASIC class orders on time-sharing schemes that were due to expire if not remade: see ASIC superseded class order [[SCO 00/2460](#)] *Time-sharing schemes – property valuations*, [[SCO 02/237](#)] *Time-sharing schemes – operation of rental pool*, ASIC superseded class order [[SCO 02/315](#)] *Time-sharing schemes – use of loose-leaf price list* and [[SCO 03/104](#)] *Relief facilitating the acquisition and sale of forfeited interests in registered time-sharing schemes*.
16. CP 272 also consulted more broadly about other proposed changes to amend the conditions attaching to the existing relief to strengthen consumer protection, reduce some compliance burdens without compromising consumer protection, reflect current legislative obligations and to centralise requirements in one legislative instrument.
17. ASIC received divergent feedback on CP 272 – see [Report 522: Response to submissions on CP 272 Remaking ASIC class orders on time-sharing schemes \(REP 522\)](#) – and in light of this feedback, conducted additional consultation with industry and consumer representatives.

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18. Following the review of policy settings for time-sharing schemes, ASIC has made the Instruments and has updated guidance on existing and new requirements in [Regulatory Guide 160: Time-sharing schemes \(RG 160\)](#).
 19. ASIC has consulted internally and with the Commonwealth Department of Treasury.
 20. ASIC has also held roundtables with industry representatives and consumer groups regarding the proposals and responses received.
 21. ASIC has prepared a Regulation Impact Statement, as the proposed changes are likely to increase the compliance costs of time-sharing schemes.

Operation of the Instruments

Commencement

22. The Timeshare Instrument commences on the day after it is registered on the Federal Register of Legislation. To facilitate the sequencing of the combined amendments, the Fees and Costs Instrument commences on the later of the time that is immediately after the commencement of the Timeshare Instrument and the day after the Fees and Costs Instrument is registered.

Schedule 1 – Timeshare Instrument

23. Schedule 1 to the Timeshare Instrument amends Instrument 2017/272 to:
 - (a) facilitate the changes to a scheme’s constitution required to allow hardship withdrawals;
 - (b) continue the transitional grandfathered relief for rental pools under Instrument 2017/272; and
 - (c) provide transitional arrangements for the changes made to Instrument 2017/272 by the Timeshare Instrument.
24. Item 1 omits s4 of Instrument 2017/272 and substitutes a definitions section which is specific to time-sharing schemes, including in relation to hardship applications. The amended definitions continue the requirement on all new and existing relief that a time-sharing scheme must not be promoted as a means of generating a financial return (other than by way of a rental pool).
25. Item 2 inserts a new s8A into Instrument 2017/272. Instrument 2017/272 as amended effectively inserts a new notional s601GC(1B) and s601GCD into the Act.
26. The new notional s601GC(1B) provides that the constitution of a registered time-sharing scheme may also be modified, or repealed and replaced with a new constitution, by the responsible entity in accordance with notional s601GCD as inserted into the Act by Instrument 2017/272 as amended by the Timeshare Instrument.

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27. The new notional s601GCD(1) allows the modification of a scheme's constitution by the responsible entity of a registered time-sharing scheme to include provisions to the effect of ss601GA(1A)(a) to (l) (as notionally inserted, or to be notionally inserted, as a result of the Timeshare Instrument), along with other modifications the responsible entity reasonably considers are necessary for or incidental to the inclusions of those provisions.
 28. The new notional s601GCD(2) provides that the responsible entity may modify the constitution under notional s601GCD(1) in circumstances where the responsible entity has:
 - (a) given the members of the scheme written notice of the modification of the constitution by sending each member by post or by email a copy of a notice;
 - (b) published a notice on its website in a way that is likely to come to the attention of a person looking for information about the scheme on the website, no later than the day the written notice above is given; and
 - (c) not received requests from members with at least 5% of the votes that may be cast on the resolution to call and arrange to hold a meeting as specified in the notice after at least 14 days from the date the responsible entity provides the notice to members under notional s601GCD(2)(a) and after it provides notice under notional s601GCD(2)(b).
 29. Notices provided for the purpose of notional ss601GCD(2)(a) and (b) must comply with notional s601GCD(3), which sets out content requirements of the notices. These requirements are intended to ensure that members understand the reasons for and the effect of the proposed modifications to the constitution, the circumstances in which the modification will proceed without a meeting of members, and how to respond to the notice to request that the responsible entity call and hold a meeting of members. Notional s601GCD(3)(d) requires the notice to be worded and presented in a clear, concise and effective manner.
 30. Notional s601GCD(4) provides times for when a notice sent by post or email is taken to have been given. Subject to the scheme's constitution, a notice sent by post is taken to be given three days after it is posted, and an email is taken to be given on the business day after it is sent.
 31. Notional s601GCD(5) allows a responsible entity to repeal and replace the constitution instead of modifying it if the effect of repealing and replacing would be the same as modifying the constitution in accordance with notional s601GCD(1), and if notional s601GCD(2) would have been complied with if notional s601GCD(2) and (3) referred to "repealing and replacing" rather than to "modifying".
 32. Notional s601GCD(6) provides that the constitution of a registered time-sharing scheme may be modified under notional s601GCD(1) or repealed and replaced under notional s601GCD(5) even if the scheme's constitution includes provisions to the effect that it may only be modified or repealed and replaced in accordance with s601GC(1)(a) or (b) of the Act or provisions to the effect of those provisions. Paragraphs 601GC(1)(a) and (b) of the Act provide that the constitution of a registered scheme may only be modified or repealed and replaced with a new constitution by special resolution of the members of the

scheme or by the responsible entity, if the responsible entity reasonably considers the change will not adversely affect members' rights. The effect of notional s601GCD(6) is to provide responsible entities of time-sharing schemes with a streamlined method to change the constitution under notional s601GCD(1) or (5), even if the constitution itself reflects the provisions of s601GC(1)(a) or (b).

33. Notional s601GCD(7) sets out the effect of a responsible entity failing to give a written notice to members under notional s601GCD(2)(a) or under notional s601GCD(5) as it applies to notional s601GCD(2)(a). This situation may arise if the responsible entity decides not to give members a written notice under s601GCD(2)(a) (**Modification Notice**) (for example, because it has determined that it would not be in the best interests of members to change the scheme's constitution), or because the responsible entity does not make a decision as to whether to issue a Modification Notice under s601GCD(2)(a) by 30 September 2021. In this circumstance, the responsible entity must give each member a written notice complying with notional s601GCD(8) by post or email within 21 days of making the decision under notional s601GCD(7)(a) (or if no decision has been made, by 21 October 2021), explaining:
- (a) why the responsible entity has decided not to give, or has not given, members a Modification Notice;
 - (b) the effect for members of the responsible entity not giving members a Modification Notice compared to the situation if the responsible entity had given a Modification Notice; and
 - (c) the rights of members under section 252D of the Act, to call and arrange to hold a meeting of the scheme's members to consider and vote on a special resolution to modify or repeal and replace the constitution to include provisions to the effect of paragraphs 601GA(1A)(a) to (l) at the expense of those members.
34. The notification requirements under notional ss601GCD(7) and (8) are intended to ensure that responsible entities are transparent with members about their decisions with respect to changing the scheme's constitution to include provisions to the effect of notional s601GA(1)(a) to (l) of the Act (as notionally inserted by the Timeshare Instrument) (**Hardship Provisions**), and to ensure members are provided with information about their rights to call a meeting under s252D of the Act. Subsection 601FC(1)(c) of the Act requires the responsible entity to act in the best interests of the members of the scheme in exercising the power under notional s601GCD(1) or (5).
35. Item 3 omits s9 of Instrument 2017/272 to substitute:
- (a) a new s9 to continue the grandfathered relief for rental pools covered by SCO 02/237; and
 - (b) a new s10 to set out the application of the amendments made by the Timeshare Instrument, including transitional relief.

Rental pools

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36. Item 3 omits s9 of Part 4 of Instrument 2017/272 and substitutes a new s9. Section 9 of Instrument 2017/272 as amended continues the transitional grandfathered relief under Instrument 2017/272, but has extended the relief by reducing the requirement to conduct biannual audits to annual audits, for consistency with the requirements imposed on comparable trust accounts and to reduce the regulatory cost to industry, which is ultimately passed on to members.

Application of amendments made by the Timeshare Instrument and transitional provisions

37. Section 10 of Instrument 2017/272 as amended by the Timeshare Instrument sets out the commencement and transitional provisions as they apply to the changes made by Schedules 1, 2 and 3 to the Timeshare Instrument.
38. Subsection 10(1) of Instrument 2017/272 as amended provides that the amendments made by Schedule 1 to the Timeshare Instrument apply on and from the commencement of the Timeshare Instrument. This has the effect of:
- (a) facilitating the modification of constitutions by responsible entities to include the Hardship Provisions to implement hardship withdrawals;
 - (b) continuing the transitional grandfathered relief for rental pools under Instrument 2017/272 and the extended audit relief for rental pools; and
 - (c) ensuring that the transition periods set out in s10 of Instrument 2017/272 as amended take effect immediately on commencement of the Timeshare Instrument.
39. Subsection 10(2) of Instrument 2017/272 as amended provides that the amendments made by Schedule 2 to the Timeshare Instrument apply on and from the commencement of the Timeshare Instrument in relation to a new time-sharing scheme, being a registered time-sharing scheme that was not being operated immediately before the commencement of the Timeshare Instrument. This has the effect that the amendments made by Schedule 2 to the Timeshare instrument will apply to any new time-sharing scheme that comes into operation after the commencement of the Timeshare Instrument.
40. For a registered time-sharing scheme already in operation at the date of commencement of the Timeshare Instrument, s10(3) of Instrument 2017/272 as amended provides that the amendments made by Schedule 2 apply on and from the earliest of the following events:
- (a) the constitution of the scheme being modified or repealed and replaced so that it includes provisions to the effect of the **Hardship Provisions** (s601GA(1A)(a) to (l) of the Act as to be notionally inserted into the Act as a result of the Timeshare Instrument); or
 - (b) unless s10(4) applies in relation to the scheme, 30 September 2021.

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41. Subsection 10(4) of Instrument 2017/272 as amended has the effect that the amendments made by Schedule 2 to the Timeshare Instrument will not apply to a time-sharing scheme which was registered and in operation prior to the commencement of the Timeshare Instrument where:
- (a) a responsible entity decides that it is not in the best interests of members to modify the scheme's constitution to include the Hardship Provisions and notifies members of that decision by 30 September 2021; or
 - (b) on or before 30 September 2021, members of the scheme vote on but do not pass a special resolution to modify or repeal and replace the constitution to include the Hardship Provisions.
42. For time-sharing schemes registered and in operation before the commencement of the Timeshare Instrument, the effect of ss10(3) and 10(4) is that by 30 September 2021, the responsible entity should have decided whether to modify the constitution of the scheme to include the Hardship Provisions and;
- (a) if these provisions are adopted, the amendments in Schedule 2 will apply in accordance with s10(3)(a);
 - (b) if these provisions are not adopted as a result of either of the circumstances in s10(4), the relief previously provided by Instrument 2017/272 as it was in force immediately before the commencement of the Timeshare Instrument and which was omitted by those amendments will continue to apply.
43. In the event the responsible entity does not make a decision with respect to the Hardship Provisions under notional s10(3) or (4) or members of the scheme vote on, but do not pass a special resolution to include the Hardship Provisions in the constitution of the scheme by 30 September 2021, then it would not have the benefit of the relief in Schedule 2 of the Timeshare Instrument or the similar corresponding relief in Instrument 2017/272 as it was in force immediately before the commencement of the Timeshare Instrument. However, the constitution of the scheme may still be amended after 30 September 2021 (including under notional s601GCD(1) or (5)) and the scheme can rely on the changes made by Schedule 2 to the Timeshare Instrument from that time.
44. Subsection 10(5) of Instrument 2017/272 as amended by the Timeshare Instrument provides that the new licensing obligations contained in Schedule 3 to the Timeshare Instrument (new notional ss912AJ and 912AK) will apply from the earlier of:
- (a) the amendments made by Schedule 2 of the Timeshare Instrument applying to the scheme; or
 - (b) 30 September 2021.
45. The effect of s10(5) is that responsible entities and their associates must comply with the provisions of notional ss912AJ and 912AK as inserted into the Act by Instrument 2017/272 as amended by the Timeshare Instrument by 30 September

2021. However, if a responsible entity modifies the constitution of the registered time-sharing scheme to include provisions to the effect of the Hardship Provisions before 30 September 2021, then the provisions of ss912AJ and 912AK will apply to the responsible entity and their associates from the date of the modification (or repeal and replacement) of the constitution. If a licensee is a responsible entity of more than one registered time-sharing scheme, notional ss912AJ and 912AK will apply in respect of each scheme at the time its constitution is amended to include provisions to the effect of the Hardship Provisions, or from 30 September 2021, whichever occurs first. For new registered time-sharing schemes, the amendments made by Schedule 3 to the Timeshare Instrument will apply from the time the scheme is registered, as notional s10(2) has the effect that the amendments made by Schedule 2 to the Timeshare Instrument will apply from the commencement of a new registered time-sharing scheme and s10(5)(a) will therefore apply the Schedule 3 amendments from commencement.

Schedule 2 – Timeshare Instrument

46. Schedule 2 to the Timeshare Instrument amends Instrument 2017/272.
47. Item 1 omits s5 from Instrument 2017/272 to substitute:
 - (a) a new s5 to continue to provide Pricing Relief; and
 - (b) a new s5A to facilitate the relief provided by the Hardship Provisions.

Exemption for forfeiture due to non-payment by member

48. Section 5 of Instrument 2017/272 as amended by the Timeshare Instrument inserts an exemption for responsible entities of registered time-sharing schemes from complying with s601FG(1)(a) of the Act in relation to the acquisition and holding by the responsible entity of an interest in the scheme that is forfeited to it by a defaulting member. This exemption applies if:
 - (a) the constitution contains provisions to the effect of the Hardship Provisions, as notionally inserted into the Act by Instrument 2017/272 as amended by the Timeshare Instrument and the acquisition; and
 - (b) the acquisition and holding is in accordance with those provisions of the constitution.
49. A registered time-sharing scheme's constitution may contain forfeiture procedures which involve a transfer of the interest to the responsible entity, such that the responsible entity holds the interest and may be in breach of s601FG(1)(a) without this exemption. Relief is granted from s601FG(1)(a) to facilitate forfeiture where the constitution includes the Hardship Provisions.

Equality of Treatment

50. Section 5A of Instrument 2017/272 as amended by the Timeshare Instrument facilitates hardship withdrawals by providing that a responsible entity of a

registered time-sharing scheme does not have to comply with s601FC(1)(d) of the Act to the extent that the requirement to treat members of the same class equally would prevent it from allowing an approved hardship member to withdraw in accordance with provisions of the constitution of the scheme, if the constitution contains provisions that are to the effect of notional s601GA(1A)(b) – (l) as notionally inserted into the Act by the Timeshare Instrument.

51. If the scheme's constitution reflects ss601GA(1A)(b) to (l) as notionally inserted into the Act by the Timeshare Instrument, relief from s601FC(1)(d) allows responsible entities to treat approved hardship members in a way which is not equal to other members.

Relief for valuation of property

52. Section 6 of Instrument 2017/272 remains with no substantive changes.

Hardship Provisions

53. Item 2 of Schedule 2 to the Timeshare Instrument omits s7 of Instrument 2017/272 to substitute new sections 7 and 7A.

Disclosure of prices for the purchase of time-sharing interests

54. Section 7 of Instrument 2017/272 as amended effectively substitutes a new notional s601GA(1A) in the Act. Chapter 5C of the Act applies to a responsible entity of a registered time-sharing scheme as if s601GA were modified or varied to substitute the new notional s601GA(1A).
55. Instrument 2017/272 as in force immediately before the commencement of the Timeshare Instrument provided Pricing Relief subject to s601GA(1A), which required the scheme's constitution to contain provisions for the acquisition price, forfeiture and other requirements tied to the Pricing Relief. These requirements are now imposed (with some modifications) as licence obligations under new notional s912AJ.
56. Section 7 of Instrument 2017/272 as amended by the Timeshare Instrument modifies s601GA(1A)(a) to provide expanded Pricing Relief if the scheme's constitution contains provisions to the effect of new notional ss601GA(1A)(a)-(l). The expanded Pricing Relief allows the sale of the interest to occur at the price stated in the Product Disclosure Statement (*PDS*) for the interests that is in use at the time of the acquisition, or in the case of a sale of an interest of a defaulting member or approved hardship member by the responsible entity under a power of sale or due to forfeiture to the responsible entity—a price specified in notional s601GA(1A)(k).
57. Notional ss601GA(1A)(a)-(l) require the scheme's constitution to include provisions relating to acquisition price, hardship withdrawals, forfeiture and sales circumstances and the sale process for defaulting and approved hardship members, as well as provisions relating to acquisition price.

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58. Notional s601GA(1A)(a) provides that the consideration to be paid to acquire an interest in the scheme is the price in the PDS in use at the time of the acquisition, except in relation to the sale of an interest of a defaulting member or approved hardship member by the responsible entity under a power of sale or due to forfeiture to the responsible entity, where the price is specified in notional s601GA(1A)(k).

Hardship withdrawals

59. Notional s601GA(1A)(b) provides that a member may give the responsible entity a hardship application (as defined in notional s601GA(1B)). However, notional s601GA(1A)(b) also provides the responsible entity with a discretion not to consider the hardship application if the responsible entity has received a hardship application from the member within the three months preceding the application. If the responsible entity makes a decision not to consider a hardship application for this reason, the responsible entity must notify the member of this decision as soon as possible, and notional s601GA(1A)(c)-(l) will not apply to the hardship application.
60. Notional ss601GA(1A)(c)-(g) set out the process to be followed if a responsible entity receives a hardship application from a member (or both members, in the case of a joint membership). The responsible entity must:
- (a) confirm receipt of the hardship application in writing as soon as possible after receipt;
 - (b) consider whether further information is required to determine whether the hardship criteria have been met and if so, notify the member of this within 30 days of receiving the hardship application, providing the member at least 21 calendar days to respond to requests for additional information;
 - (c) make a decision before the end of the decision period as to whether the member meets the hardship criteria, and if so, whether to allow the member to withdraw from the scheme. If the responsible entity decides that the hardship criteria have been met and to allow the member to withdraw from the scheme, the member will become an “approved hardship member” (see notional s601GA(1B) for the definition of “approved hardship member” and notional s601GAH as inserted into the Act by Instrument 2017/272 as modified by the Timeshare Instrument in relation to the responsible entity’s discretion to allow a member who meets the hardship criteria to withdraw from the scheme);
 - (d) give the member a decision notice within seven days of making the decision; and
 - (e) not require the member to make payment of any amounts due for payment on or after the date the responsible entity received the member’s hardship application if the responsible entity has not provided the member with a decision notice. To the extent provided for in the scheme’s constitution, the responsible entity may suspend the rights of the member to use property under the scheme, receive distributions under the scheme or

otherwise enjoy benefits produced by the scheme until the responsible entity provides the member with a decision notice.

61. Notional s601GA(1A)(d), provides that if the responsible entity determines that the hardship criteria have not been met, it must provide in the decision notice:
- (a) reasons why the responsible entity decided the hardship criteria were not met;
 - (b) an explanation that the member is not able to withdraw from the scheme, because the hardship criteria have not been met; and
 - (c) details of the scheme's internal and external dispute resolution schemes.
62. Under notional s601GA(1A)(e), if the responsible entity determines that the member has met the hardship criteria, but has decided not to allow the member to withdraw from the scheme, the decision notice must include:
- (a) reasons why it has decided not to allow the member to withdraw from the scheme; and
 - (b) details of the scheme's internal and external dispute resolution schemes.
63. Notional s601GA(1A)(f) sets out the protections which apply to an approved hardship member. An approved hardship member will have a right to withdraw from the scheme under notional s601GA(1A)(h), and will have no liability to make payment of any amounts due for payment on or after the date the responsible entity received the member's hardship notice application (including payment of any shortfall from the sale process referred to in notional s601GA(1A)(k) in relation to the scheme). If the approved hardship member is a defaulting member, they have no liability to make payment of any amounts that are overdue for payment.
64. An approved hardship member remains a member of the scheme until their interest is sold. Until the interest is sold, the approved hardship member's payment obligations are suspended under notional s601GA(1)(f) and their rights to benefits under the scheme may also be suspended by the responsible entity to the extent provided for in the constitution, under notional s601GA(1A)(g).

Note: A responsible entity of a registered time-sharing scheme is required by s911A of the Act to hold an AFS licence. The holder of an AFS licence is required by s912A of the Act to have a complying dispute resolution system and compensation arrangements, including membership of the AFCA scheme where they provide financial services to retail clients. As such, responsible entities of registered time-sharing schemes with retail clients as members are required to be members of AFCA and members of these schemes may lodge complaints with AFCA about decisions made under the formal hardship arrangements in the Timeshare Instrument.

Forfeiture and sale circumstances

65. Under notional s601GA(1A)(h) of the Act, the responsible entity may, in accordance with notional s601GA(1A)(i)-(l), forfeit a defaulting member's

interest or exercise a power of sale of a defaulting member's interest on behalf of a defaulting member in accordance with the scheme's constitution.

66. In the event that a responsible entity receives a hardship application from a defaulting member, notional s601GA(1A)(i) has the effect that they will not be treated as a defaulting member for the purposes of notional s601GA(1A)(h) unless the hardship application is rejected and the decision communicated to them.

Sale process for defaulting and approved hardship members

67. Notional ss601GA(1A)(j)-(l) set out the sales processes which apply to defaulting and approved hardship members.
68. While the same sales process applies to interests of defaulting members and approved hardship members, approved hardship members are not required to make any further payments from the date the responsible entity receives the hardship application, including for any shortfall (including outstanding amounts due from the member) that may arise where the proceeds of the sale of the member's interest are not sufficient to cover the amount owed by the member. A responsible entity also must not forfeit or exercise a power of sale in respect of the interests of a defaulting member who has lodged a hardship notice except in the circumstances set out in notional s601GA(1A)(i).
69. Under modified s601GA(1A)(j), the responsible entity must use reasonable endeavours to sell the interest of an approved hardship member or of a defaulting member if the interest has been forfeited to the responsible entity or if the responsible entity has decided to exercise a power of sale of the interest on behalf of the defaulting member. The responsible entity must sell the interest for a price which complies with notional s601GA(1A)(k) and must apply the proceeds according the order of priorities in notional s601GA(1A)(l).
70. Under notional s601GA(1A)(k), expanded pricing relief is provided for circumstances in which the responsible entity sells the interest of a defaulting member or an approved hardship member. The sale price must be the price shown in the most recently given PDS if one has been given in accordance with Part 7.9 of the Act at any time in the 12 months prior to the sale for interests in the scheme that are in the same class. However, if no PDS has been given in the last 12 months, the sale price may be a fair market price obtained by the responsible entity using reasonable endeavours.
71. Notional ss601GA(1B) and (1C) contains various definitions that are used for the purposes of subsections 601GA(1A) to (1C).

Hardship withdrawals

72. Section 7A of the Timeshare Instrument amends Instrument 2017/272 to facilitate hardship withdrawals under the hardship provisions by modifying Chapter 5C of the Act to allow responsible entities who have amended the

scheme's constitution in accordance with notional ss601GA(1A)(b)-(l) to provide withdrawal rights for members who meet the hardship criteria if the responsible entity approves the hardship application.

73. As time-sharing schemes are non-liquid schemes under Part 5C.6 of the Act, these modifications are required to facilitate hardship withdrawals. The modifications also give the responsible entity a discretion to decide whether to allow or refuse a withdrawal request where the hardship criteria have been satisfied, provided it is acting reasonably, and noting that the responsible entity continues to have a duty to act in the best interests of the members of the scheme.
74. Chapter 5C of the Act as modified applies in relation to a responsible entity of a registered time-sharing scheme as if the provisions of that Chapter were varied or modified to:
- (a) insert s601GAH to provide the responsible entity with a discretion whether to allow or refuse a withdrawal request which relates to a hardship application (as defined in subsection 601GA(1B) in accordance with provisions of the constitution to the effect of paragraphs 601GA(1A)(b) to (l)) where the requirements set out in the constitution for allowing a withdrawal as a result of the hardship application are otherwise satisfied and where the constitution gives the responsible entity a discretion to decide whether to allow or refuse a withdrawal request. Notional s601GAH(2) requires the responsible entity to act reasonably in exercising this discretion (and as noted in the Timeshare Instrument, remains subject to its general duties under s60IFC including the duty to act in the best interests of the members of the scheme). Notional s601GAH(3) requires the responsible entity to keep records which document how and why a decision exercising this discretion was made for a period of 7 years.
 - (b) insert s601KA(3AB) to provide that s601KA(3) and sections 601KB and 601KE of the Act do not apply to a hardship withdrawal made in accordance with the provisions of a timeshare scheme's constitution which contains the provisions of modified ss601GA(1A)(b)-(l).
75. The effect of the amendments made by s7A of the Timeshare Instrument is that if the responsible entity determines that a member who has made a hardship application meets the "hardship criteria" set out in notional s601GA(1C), and the scheme's constitution contains provisions to the effect of notional ss601GA(1A)(b) – (l) and provides the responsible entity with a discretion to decide whether to allow or refuse withdrawal requests, it may then exercise a discretion in determining whether or not to allow the member to withdraw from the scheme.

Schedule 3 – Timeshare Instrument

76. Schedule 3 to the Timeshare Instrument amends Instrument 2017/272.
77. Item 1 of Schedule 3 to the Timeshare Instrument inserts a new section 8B into Instrument 2017/272.

Obligations on a holder of an Australian financial services licence

78. Section 8B of Instrument 2017/272 as amended by the Timeshare Instrument inserts into the Act:
- (a) notional s912AJ, which imposes obligations on a responsible entity of a registered time-sharing scheme, including some previously imposed as conditions of Pricing Relief and others that are new or amended. Subject to the transitional provisions in relation to Schedule 3 discussed previously, these are imposed as obligations on licensees, regardless of the application of amendments made by Schedule 2 of the Timeshare Instrument. This is because most obligations are owed to consumers before they become members of a time-sharing scheme; and
 - (b) notional s912AK, which sets out the approved forms referred to in s912AJ(3)(a).
79. Part 7.6 (other than Divisions 4 and 8) of the Act applies as if it were modified or varied by inserting s912AJ and s912AK.
80. The obligations under notional ss912AJ(3)-(19) apply to licensees that are responsible entities of registered time-sharing schemes, however the obligations under ss912AJ(3)-(9) apply also to an associate of such a responsible entity if that associate:
- (a) holds an AFS licence authorising it to advise and deal in interests in a registered time-sharing scheme; and
 - (b) provides financial product advice to consumers about interests in a registered time-sharing scheme.

Application form requirements

81. The new notional s912AJ(3) imposes an obligation on licensees to ensure each application form relating to an offer of interests for issue or sale by the licensee in a registered time-sharing scheme:
- (a) is accompanied by a separate written statement (**cooling-off statement**) incorporating an acknowledgement of receipt of cooling-off statement in the approved form set out in notional s912AK(1) of the Act as inserted by s8B of Instrument 2017/272 as amended by the Timeshare Instrument. The cooling-off statement in notional s912AK(1) is Pro Forma 208 *Time-sharing schemes: Cooling-off statements (PF 208)*, which has been incorporated into the Act by the Timeshare Instrument, with minor updates, such as changing 'prospectus' to 'PDS'. The cooling-off statement requires the consumer to acknowledge receipt of:
 - the cooling-off statement
 - application form; and
 - the PDS.

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- (b) is accompanied by a PDS in relation to the offer if it is required to be given under Part 7.9 of the Act or (in the case of an offer for sale of an interest in the scheme by the responsible entity or its associate) if a PDS would have been required to be given if it had been an offer for issue;
- (c) contains a question about whether the applicant intends to seek finance to pay for the interest in the time-sharing scheme and a description of an applicant's 'subject to finance' right to withdraw under notional s912AJ(10)(b) and how those rights may be exercised; and
- (d) is accompanied by a separate written 'subject to finance' notice incorporating an acknowledgement of receipt of the 'subject to finance' notice and a cancellation form, each of which must be in the approved form, which is set out in notional s912AK(2) of the Act. This notice can be used by members who wish to exercise their right to cancel their application, where their application for interests in a time-sharing scheme is 'subject to finance'. The obligations relating to subject to finance rights are new obligations imposed by the Timeshare Instrument. Subject to finance rights are available where the applicant has:
- failed to obtain finance;
 - decided not to proceed with an application for finance; or
 - rejected an offer of finance.

82. Notional s912AJ(4) provides that a licensee must not require an applicant to accept any finance offered to the applicant. This prohibits responsible entities or their associates from doing anything that has the effect of avoiding the 'subject to finance' condition.

Verbal consumer warning

83. Notional s912AJ(5) introduces a new obligation for licensees to ensure that each applicant who is present at a seminar or sales presentation is given a verbal consumer warning consisting of the words as set out in notional s912AK(4). This obligation applies to presentations which involve the licensee or any of its representatives, whether the presentation is conducted in person, by telephone or other electronic means, such as video-conferencing.
84. The verbal consumer warning is intended to enhance consumer protection in the context of a same-day sales process involving the outlay of many thousands of dollars and ongoing financial commitments with respect to levies and other charges. Verbal consumer warnings supplement written disclosure to promote consumer understanding of the key features of interests in time-sharing schemes.

Acknowledgment of receipt requirements

85. The new notional s912AJ(6) provides that a licensee must not issue or sell an interest in the time-sharing scheme to an applicant, or allow its associates to do

so, unless the applicant has provided the responsible entity of the scheme with a signed and dated acknowledgement of receipt of the cooling-off statement and the ‘subject to finance’ notice.

86. This requirement provides additional consumer protections by ensuring all applicants receive and confirm receipt of the key documents intended to ensure they receive appropriate disclosure, including in relation to their cooling-off and subject to finance rights.

Cooling-off record keeping

87. Notional s912AJ(7) requires the licensee to maintain written records of the names of applicants who provided cooling-off statements, the dates these statements were given to the applicant and all cooling-off acknowledgements of receipt for a period of seven years. This was previously a requirement of Instrument 2017/272.

Documents to be provided to applicants

88. If a licensee receives an application for an interest in a registered time-sharing scheme, the new notional s912AJ(8) requires that the licensee gives the applicant to keep:
- (a) the applicant’s signed and dated application form (incorporating a question about whether the applicant intended to seek finance);
 - (b) the PDS if it is given under notional s912AJ(3)(b)(i);
 - (c) if there is no PDS for the interests in use before a person acquires an interest in the scheme—the information referred to in notional s912AJ(13)(b) in writing; and
 - (d) the applicant’s signed and dated acknowledgements of the cooling-off statement and ‘subject to finance’ notice.
89. Notional s912AJ(9) provides that the documents referred to in notional s912AJ(8) must be given to the applicant on the same day on which the licensee receives the application, if the applicant has given the application to the licensee in person. Otherwise, the documents must be given to the applicant by the next business day after the day the licensee receives the application.
90. This requirement is intended to promote consumer protection by requiring that all new applicants for interests in time-sharing schemes are provided and are able to retain the key disclosure documents.

Cooling-off and ‘subject to finance’ rights

91. Notional s912AJ(10) of the Act sets out the obligation of a responsible entity of a registered time-sharing scheme to confer on an applicant for the issue or sale of an interest in the scheme from the licensee (or an associate referred to in notional s912AJ(2)) a right to:

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- (a) withdraw an application made by the applicant; and
- (b) if applicable, return the interest in the scheme
- if the applicant notifies the licensee:
- (a) within the cooling-off period that they do not wish to proceed with the issue or sale of an interest in the time-sharing scheme (**cooling-off rights**); or
- (b) that the applicant failed to obtain finance or decided not to proceed with an application for finance or rejected an offer of finance (**subject to finance rights**).
92. Cooling-off obligations were previously imposed by Instrument 2017/272. Notional s912AJ(10) provides that the cooling-off period commences on the date on which the applicant signs the acknowledgement of receipt of the cooling-off statement under s912AJ(6) and ends:
- (a) if the responsible entity is a member of the Australian Timeshare & Holiday Ownership Council Limited ACN 065 260 095 — no less than 7 days later; or
- (b) otherwise—no less than 14 days later.
93. ASIC has provided cooling-off concessions to ATHOC members to encourage ATHOC membership. Membership is open to the time-sharing industry broadly, and all ATHOC members are subject to ATHOC’s Code of Ethics and Code of Practice, which specifically deals with marketing, selling, related issues and reporting to ASIC.
94. The ‘subject to finance’ right is a new right to withdraw an application which must be conferred on an applicant who applied for finance to purchase the interest in the scheme if the applicant failed to obtain finance, decided not to proceed with an application for finance or rejected an offer of finance. The responsible entity must allow applicants to provide notice that they are exercising their cooling-off rights or ‘subject to finance’ rights by post, email, facsimile or in any manner described in the PDS.
95. If an application for the sale or issue of interests in a time-sharing scheme is financed, the effect of the ‘subject to finance’ rights is that if the applicant notifies the responsible entity that the finance is not proceeding for any of the reasons set out in notional s912AJ(10)(b), then the applicant has a right to withdraw the application and return the interest in the time-sharing scheme (if applicable), even if the cooling-off period has ended.
96. The ‘subject to finance’ right is intended to provide greater certainty to:
- (a) industry, that extending ‘subject to finance’ rights to allow consumers to withdraw their application after the end of the cooling-off period will be

consistent with their obligations to the other members of the scheme;
and

- (b) consumers, by providing rights to withdraw their application which are independent of their cooling-off rights, under which they are entitled to receive a full refund of all money they have paid to the responsible entity for the issue or sale of the interest in the scheme, less the reasonable value of any administration fees associated with processing the application prior to the responsible entity's receipt of the notification of their intention to exercise their 'subject to finance' rights before the loan is provided.

Refund rights

- 97. The effects of an applicant exercising their cooling-off rights during the cooling-off period, or 'subject to finance' rights are set out in notional s912AJ(11).
- 98. The responsible entity must make arrangements to ensure that (subject to the refund rights in notional s912AJ(11)(c)):
 - (a) any contract for the acquisition of the interest in the time-sharing scheme is terminated without financial penalty to the applicant; and
 - (b) if the interest in the time-sharing scheme is constituted by a legal relationship between the applicant and the responsible entity, that relationship is terminated without financial penalty to the applicant.
- 99. Notional s912AJ(11)(c) provides that if an applicant exercises their cooling-off rights or 'subject to finance' rights, they must be provided with a refund of all monies paid to the responsible entity in relation to the issue or sale of the interest in the scheme and of any finance application fee paid to a related finance provider, less the reasonable value of any services provided by a related finance provider up to the date the application was withdrawn, or the interest was returned.

PDS disclosure of 'subject to finance' and cooling-off rights

- 100. Notional s912AJ(12) sets out the obligation of a responsible entity to ensure cooling-off and 'subject to finance' rights are prominently disclosed in any PDS for the offer of interests in a registered time-sharing scheme.
- 101. This continues the requirement of Instrument 2017/272 in relation to cooling-off rights and introduces a corresponding obligation in respect of 'subject to finance' rights.

Disclosure of hardship withdrawal and forfeiture provisions

- 102. Notional s912AJ(13) introduces requirements for the responsible entity of a registered time-sharing scheme to provide in any PDS for interests in the

scheme and on any websites maintained by or on behalf of the responsible entity for the scheme an explanation:

- (a) that a member may lodge a hardship application seeking to withdraw from the scheme;
 - (b) about the hardship criteria and procedures set out in notional ss601GA(1A)(b) to (l) (if the scheme's constitution contains provisions to this effect);
 - (c) about the reason why the constitution has not been modified to include provisions to the effect of ss601GA(1A)(a) to (l) (if applicable);
 - (d) that the responsible entity may forfeit a member's interest or exercise a power of sale on behalf of a defaulting member (if applicable); and
 - (e) about the responsible entity's procedures for forfeiting a member's interest or exercising a power of sale on behalf of a defaulting member (if applicable).
103. If no PDS is in use when an applicant acquires an interest in the scheme from the responsible entity or an associate, the applicant must be given the information above in writing.
104. The disclosure required by notional s912AJ(13) is intended to ensure consumers are provided with a clear explanation as to whether hardship criteria and procedures set out in notional ss601GA(1A)(b) to (l) as inserted by Instrument 2017/272 as amended by the Timeshare Instrument apply to the scheme (and if not, the reason why), and an explanation as to the provisions and procedures for forfeiture and exercising a power of sale that will apply in the event that the procedures set out in notional ss601GA(1A)(a) to (l) do not apply. This promotes consumer understanding and reflects the importance of ensuring the hardship criteria and forfeiture provisions that apply to defaulting members are clearly explained, given the long-term nature of a purchase of an interest in a time-sharing scheme.

Enhanced disclosure in the PDS

105. Notional s912AJ(14) introduces enhanced disclosure obligations by requiring the responsible entity to ensure that a PDS for an interest in the registered time-sharing scheme contains the approved boxed written consumer warning (in the form set out in notional s912AK(3)) on the front cover, and a summary of key features within the first seven pages of the PDS. The front cover of the PDS is to be counted as page 1 for this purpose. The key features which must be summarised prominently include:
- (a) the membership term;
 - (b) any criteria used by the responsible entity to identify persons the responsible entity considers most likely to be suited to the time-sharing

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- scheme and interested in acquiring an interest in the scheme through a sales presentation (if applicable);
- (c) the restrictions on ceasing to hold an interest in the scheme in the event a member no longer wants to hold an interest;
 - (d) a statement to the effect that a member should have no expectation of being able to sell the membership on any market or of getting any money back;
 - (e) a description of the cooling-off period, cooling-off rights and subject to finance rights;
 - (f) a description of key limitations on access to accommodation (such as seasonality or other factors);
 - (g) a summary of the fees and costs involved in acquiring and holding an interest, containing a cross-reference to where in the PDS further information about those fees and costs can be found; and
 - (h) for schemes with a points-based program—a summary of how the program works and a cross-reference to where in the PDS further information about the operation of the program can be found.
106. The written consumer warning and prominent summary of key features are intended to help consumers to understand interests in time-sharing schemes, which are complex. The requirement for responsible entities to disclose certain matters upfront in a PDS is intended to promote compliance with the requirement that PDSs must be worded in a clear, concise and effective manner, by highlighting certain matters that may assist consumers to make an informed decision about whether to acquire an interest in a time-sharing scheme.

Consumer rights in the event of failure to comply with specified obligations

107. Notional s912AJ(15) introduces new obligations for a responsible entity of a registered time-sharing scheme in the event of non-compliance with the obligations under notional s912AJ(3), (application accompanied by a cooling-off statement and subject to finance notice), s912AJ(5) (verbal consumer warning), s912AJ(6) (signed and dated documents received from applicant), or s912AJ(8) (give applicant copies of specified documents) by the responsible entity or any of its associates.
108. If the responsible entity becomes aware of non-compliance with any of these provisions in relation to the issue or sale of an interest in a time-sharing scheme to an applicant by the responsible entity, it must immediately provide the applicant a written notice. The responsible entity's notice must describe the failure to comply, explain that the applicant may give the responsible entity a notice by any manner described in the PDS within 21 days of the date of the responsible entity's notice to the applicant of its failure to comply, and explain the effect of giving the responsible entity such a notice.

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109. If the applicant elects to give the responsible entity such a written notice, the applicant may return their interest in the scheme to the responsible entity, obtain a refund within 14 days of amounts paid for the interest in the scheme and any application for finance from a related finance provider (less the reasonable value of the services supplied by the related finance provider up to the day of termination of any contract between the applicant and the credit provider, and less any amount paid to the applicant under a provision of the constitution of the scheme to the effect of notional s601GA(1A)(l)(vi)), and void any contract (except the constitution of the scheme) between the applicant and the responsible entity in relation to the interest in the time-sharing scheme.
110. This obligation is intended to provide applicants with a remedy in the event of non-compliance by the responsible entity with certain key obligations, and enables the applicant to return their interest in the scheme without financial penalty (except for the amounts noted above), so as to return them as far as possible to the position they would have been in had they not purchased the interest in the scheme. This is to promote consumer protection in circumstances where an applicant may otherwise be committed to a long-term obligation without having received key documentation or warnings.

Charges and levies

111. Notional s912AJ(16) continues the requirement of Instrument 2017/272 that a responsible entity must pay the same continuing charges and levies (such as maintenance levies and special levies) as a member would be required to pay in respect of the same interests in the scheme in relation to any interests it holds. The Timeshare Instrument extends this obligation so that associates of the responsible entity must also pay the same continuing charges and levies (such as maintenance levies and special levies) as a member would be required to pay in respect of the same interests in the scheme in relation to any interests they hold. This is intended to prevent members from having to incur these costs.
112. Notional s912AJ(16)(b) requires a responsible entity to provide members with a notice of levies payable and a copy of the annual budget for each period that the member is charged levies. These requirements are intended to ensure members understand their liability for charges and levies, any changes in those charges and levies, and how the money paid as charges or levies will be used, while reducing the burden on responsible entities who were previously required to disclose full details of the composition and calculation of all continuing charges and levies under notional s601GA(1A)(i) as modified by Instrument 2017/272 as it was in force before the commencement of the Timeshare Instrument.
113. Notional s912AJ(17) provides that a responsible entity of a registered time-sharing scheme may provide the levy and budget details required by notional ss912AJ(16)(b)(i) and (ii) by publishing the document on the responsible entity's website, or by any other means a member has consented to for communication of the document.

Handling of application monies relating to property development schemes

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114. Notional s912AJ(18) places limitations on the use of deposits paid by applicants and places caps on the deposit amounts required to be paid by an applicant for the purchase or issue of an interest in a property development scheme, continuing the obligations under Instrument 2017/272.
115. The deposit caps and limitations on the use of deposits in these circumstances is intended to mitigate the additional risks that consumers take on when they purchase an interest in a time-sharing scheme where the scheme relates to a property under construction or part of a property development that is not ready for occupation.
116. Notional s912AJ(18)(a) extends and continues the obligations previously imposed under s601GA(1A)(j) as modified by Instrument 2017/272 immediately before the commencement of the Timeshare Instrument by requiring a responsible entity of a property development scheme to ensure that all deposit money paid to it by an applicant is deposited with an Australian ADI on trust for the applicant not later than the business day following receipt and is not applied in any manner other than by payment to another such account until:
- (a) a registrable dealing conferring title on the applicant to any real property in relation to the scheme and in relation to the interests being acquired by the applicant is lodged with the relevant authority responsible for receiving lodgements relating to real property titles; and
 - (b) the construction of the property to which the interests being acquired by the applicant relates, and any improvements necessary to permit normal use of that property under the scheme, is substantially completed.
117. Notional s912AJ(18)(b) sets out the consequences where:
- (a) the registrable dealing conferring title on the applicant to any real property in relation to the scheme and in relation to the interests being acquired by an applicant that the member is to acquire is not lodged with the relevant authority by the date specified in the PDS; or
 - (b) if the construction of the property or improvements is not substantially completed by the dates specified in the PDS.
118. In these circumstances, the responsible entity must return to the applicant any deposit money paid by the applicant, any income earned on the deposit money (less fees and disbursements properly chargeable against the income) and any amounts paid under a contract with a related finance provider.
119. Notional s912AJ(18)(c) requires the responsible entity to ensure that until a property development or improvement is substantially complete and ready for occupation, any deposit paid by an applicant for the acquisition of an interest in the scheme from the responsible entity or its associates must not exceed 30% of the price payable for the interests if the property development or part of the property development has not been completed to the stage at which it is ready for occupation.

Points-based programs – audit and compliance measures

120. Where the time-sharing scheme is a points-based program, the responsible entity must comply with new obligations introduced in notional s912AJ(19). The additional compliance obligations for responsible entities of points-based programs are intended to address the risk that the value of current members' interests may be diluted as a result of inadequate compliance measures governing the issue of new interests in registered time-sharing schemes structured as points-based programs. Compliance with these additional obligations is expected to improve consumer access to accommodation when they want to use it and to improve the delivery of promoted benefits.
121. Under notional s912AJ(19)(a), the responsible entity of a points-based program must ensure that issues of interests only occur where the responsible entity is satisfied, on reasonable grounds, that any existing members will continue to have access to the benefits of the scheme that they would reasonably expect to have, based on disclosure in the PDSs and the advertising and promotional material for an interest in the scheme that were in use at the times the existing members acquired interests in the scheme.
122. Under notional s912AJ(19)(b), responsible entities are required to establish and maintain compliance measures for allocation points-based programs and PAYG points-based programs.
123. For allocation points-based programs, these measures are to ensure, as far as is reasonably practical, that the pricing of the points issued to members is consistent with the scheme's constitution and PDS for an interest in the scheme, that the total number of points issued to members for scheme accommodation complies with the scheme's constitution, and that allocations of periodic points are determined in compliance with the scheme's constitution and relevant PDSs.
124. For PAYG points-based programs, s912AJ(19)(b) requires that the responsible entity must ensure that the price paid for interests including in relation to PAYG points purchased by members aligns with the scheme's constitution and PDS for interests in the scheme, that the total number of PAYG points issued to members is in accordance with the scheme's constitution and that PAYG points are redeemed for the use of scheme property at the time the points are purchased.

Compliance with the section has the following effect:

125. A licensee who complies with notional ss912AJ(3), (7), (10), (11) and (13) is taken to comply with any condition to which its licence is subject, dealing with adherence to mandatory cooling-off periods for time-sharing schemes.
126. A responsible entity who complies with notional s912AJ(16) is taken to comply with any condition to which its licence is subject, dealing with charges and levies for time-sharing schemes.

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127. A responsible entity who complies with notional s912AJ(18) is taken to comply with any condition to which its licence is subject, dealing with handling of application monies for time-sharing schemes relating to property development.

Definitions

128. Notional s912AJ(21) as inserted by Instrument 2017/272 as amended by the Timeshare Instrument sets out definitions for the purpose of s912AJ.

Approved forms of statements

129. Notional s912AK as inserted by Instrument 2017/272 as amended by the Timeshare Instrument sets out approved forms for the:
- (a) cooling-off statement;
 - (b) subject to finance notice;
 - (c) boxed consumer warning; and
 - (d) verbal consumer warnings.

Schedule 4 – Timeshare Instrument

ASIC Class Order [CO 13/760]

130. Item 1 of Schedule 4 to the Timeshare Instrument amends paragraph 4 of [CO 13/760] (notional subsection 912AA(11) of the Act) by omitting notional paragraph (g) of the definition of special custody assets and inserting an amended definition of special custody for registered time-sharing schemes to provide concessional net tangible assets (NTA) requirements.
131. The modified definition of special custody assets is intended to reduce the compliance burden on responsible entities of registered time-sharing schemes by expanding the definition of ‘special custody assets’ under [CO 13/760], such that a responsible entity of a registered time-sharing scheme is generally expected to only hold ‘special custody assets’ under the expanded definition. Concessional NTA requirements apply to assets that fall within the definition of ‘special custody assets’.
132. The modified definition for special custody assets also reduces the audit requirement for levies held in an Australian ADI styled as a trust account from six monthly to annually, and expands the definition of “special custody assets” to also include:
- (a) cash held in an account with an Australian ADI or a body formed or incorporated outside of Australia which is authorised to accept deposits and is prudentially regulated by a government or agency of a government in relation to its deposit taking activities in the jurisdiction the deposits are made, and styled as a trust account that is audited annually by a registered company auditor (or a foreign equivalent to a registered company auditor

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- where applicable) where the report from the auditor is provided to the responsible entity's board or compliance committee and states that in the auditor's opinion the account has been operated in accordance with the trust;
- (b) general insurance products relating to real property and other assets of a time-sharing scheme;
 - (c) interests in real property;
 - (d) interests in other registered time-sharing schemes and interests in time-sharing schemes that are exempt from complying with s601ED where the holding of these assets is to be audited by a registered company auditor annually and a report from the auditor is provided to the responsible entity and states that in the auditor's opinion the assets have been held in accordance with the constitution for the registered time-sharing scheme; and
 - (e) interests in other time-sharing schemes established outside Australia that the responsible entity reasonably considers, for documented reasons, are subject to adequate regulation under foreign law where the holding of these assets is to be audited by a registered company auditor (or a foreign equivalent) annually and a report from the auditor is provided to the responsible entity's board or compliance committee and states that in the auditor's opinion the assets have been held in accordance with the constitution of the registered time-sharing scheme.
133. These changes are intended to reduce compliance costs while addressing the lower risk of loss or misappropriation of these assets due to custodial failure, which is particularly the case where additional controls are applied, such as audit arrangements.
134. Item 2 of Schedule 4 to the Timeshare Instrument inserts a new s7A and 7B into CO 13/760 to provide transitional arrangements for the amendments made by Schedule 4 to the Timeshare Instrument.
135. The amendments made by Schedule 4 to the Timeshare Instrument apply to a responsible entity of a registered time-sharing scheme on and from the earlier of:
- (a) the date specified in an election made by the responsible entity under paragraph 7B; and
 - (b) 30 September 2021.
136. Section 7B as inserted into CO 13/760 by the Timeshare Instrument provides that a responsible entity of a registered time-sharing scheme makes an election for the purposes of s7A(a) if the responsible entity makes a written record that records:

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- (a) that the amendments made by Schedule 4 to the amending instrument will apply to the responsible entity on and from a specified date (not being a date before the record is made); and
 - (b) the date the record is made.

137. An election made under s7B of CO 13/760 as amended cannot be withdrawn and will apply in relation to all registered time-sharing schemes of the responsible entity.

Schedule 1 – Fees and Costs Instrument

Disclosure of price, fees and other costs

138. The modified fees and cost disclosure regime is intended to provide the timeshare industry with greater clarity in disclosing fees and costs in PDSs and periodic statements by providing standardised fees and costs templates which are tailored to time-sharing schemes. It is also intended to promote comparability and consumer understanding by facilitating accurate and consistent disclosure in accordance with the *Corporations Regulations 2001* (the **Regulations**) and to inform consumers of any upfront and ongoing costs that will apply in connection with acquiring an interest in the scheme including finance where the financing arrangement is facilitated by the responsible entity.
139. The Fees and Costs Instrument substitutes a modified Schedule 10 to the Regulations to set out enhanced fee disclosure requirements which apply to registered time-sharing schemes, including:
- (a) tailored standardised templates which capture all the upfront and ongoing costs for the different types of time-sharing schemes (allocation points-based programs, PAYG points-based programs and interval-based programs), and providing examples of the fees and costs payable based on the most common membership options and;
 - (b) instructions for completing the standardised templates;
 - (c) terminology and explanations of concepts tailored to time-sharing schemes; and
 - (d) a boxed consumer advisory warning.

Operation of Schedule 1 to the Fees and Costs Instrument

140. Item 3 of Schedule 1 to the Fees and Costs Instrument inserts a definition of “Regulations” into s4 of Instrument 2017/272 to mean *Corporations Regulations 2001*.
141. Item 4 of Schedule 1 to the Fees and Costs Instrument inserts a new s8B into Instrument 2017/272, which modifies or varies Part 7.9 of the Regulations as they apply in relation to registered time-sharing schemes.

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142. Section 8B as inserted by s4 of the Fees and Costs Instrument substitutes subregulation 7.9.16N(2) of the Regulations and Schedule 10 to the Regulations to tailor the fees and costs disclosure to time-sharing schemes, and also enables the responsible entity of a time-sharing scheme to replace specified defined words or expressions with a corresponding word or expression used by the responsible entity in relation to the scheme.
143. Under substituted regulation 7.9.16N(2), the fees section of a PDS for a registered time-sharing scheme must include the following as described in Part 2 of Schedule 10:
- (a) the applicable ‘Purchase Price and Upfront Fees and Costs Summary Template’;
 - (b) the ‘Fees and Costs Summary’;
 - (c) the ‘Example of Annual Fees and Costs’;
 - (d) the applicable ‘Cost of Product Information’;
 - (e) the boxed Consumer Advisory Warning; and
 - (f) the ‘Additional Explanation of Fees and Costs’.
144. Part 3 of the modified Schedule 10 provides details of the disclosure required in periodic statements for a registered time-sharing scheme, including:
- (a) the ‘Fees and costs’ information; and
 - (b) the ‘Additional Explanations of Fees and Costs’.

Transitional arrangements

145. Item 5 of Schedule 1 to the Fees and Costs Instrument inserts new sections 11, 12 and 13 into Instrument 2017/272 to provide transitional arrangements for the changes made by the Fees and Costs Instrument.

Transitional arrangements – PDSs

146. Subsection 11(1) of Instrument 2017/272 as amended by the Fees and Costs Instrument provides that PDSs given on or after 30 September 2022 must comply with the declaration in s8C of Instrument 2017/272 as modified by the Fees and Costs Instrument.
147. Subsection 11(2) of Instrument 2017/272 as amended by the Fees and Costs Instrument allows a responsible entity of a registered time-sharing scheme to elect to comply with the declaration in s8C of Instrument 2017/272 as modified by the Fees and Costs Instrument in relation to any PDS dated on or after 14 December 2020 by making a written record:

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- (a) identifying the PDSs the election relates to; and
 - (b) identifying the date or dates the election is made.

The election cannot be withdrawn and will be taken to apply to any subsequent PDS for the financial product, with the effect that the declaration in s8C of Instrument 2017/272 as modified by the Fees and Costs Instrument will apply to subsequent PDSs for that product.

148. Item 1 of Schedule 1 to the Fees and Costs Instrument inserts a new s12B into CO 14/1252, with the effect that CO 14/1252 does not apply to a PDS covered by s8C of Instrument 2017/272.
149. Item 6 of Schedule 1 to the Fees and Costs Instrument amends Instrument 2019/1070 by inserting a new s7(1A) to provide that the declarations in Instrument 2019/1070 do not apply to a PDS covered by s8C of Instrument 2017/272.
150. The effect of these amendments is that:
 - (a) The declaration in s8C of Instrument 2017/272 will cover a PDS if:
 - it is given on or after 30 September 2022; or
 - the responsible entity has elected to apply the declaration in s8C before this date under subsection 11(2) of Instrument 2017/272 as amended by the Fees and Costs Instrument
 - (b) From the commencement of the Fees and Costs Instrument and until one of the conditions in (a) above results in the PDS being covered by the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument, CO 14/1252 will continue to apply until the general “collective investment product” enhanced fees and costs disclosure regime under Instrument 2019/1070 begins to apply to the PDS.
 - (c) Under Part 4 of Instrument 2019/1070, that instrument will apply to a PDS dated on or after 30 September 2020 if the issuer has elected to apply the new requirements under Instrument 2019/1070, or otherwise to a PDS given on or after 30 September 2022.
 - (d) Notwithstanding (b), as soon as a condition in (a) is satisfied such that the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument applies, neither Instrument 2019/1070 nor CO 14/1252 will apply to the PDS.

Transitional arrangements – Periodic statements

151. Section 12 of Instrument 2017/272 as modified by the Fees and Costs Instrument has the effect that the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument applies to periodic statements for reporting periods commencing on or after 30 September 2021.

152. Subsection 12(2) provides responsible entities of time-sharing schemes with the ability to elect to apply the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument for an earlier reporting period commencing on or after 14 December 2020, or ending on an exit date on or after 14 December 2020 if the reporting period ends on the exit date because the holder of the product ceased to hold the product on the exit date. The responsible entity elects to apply an earlier reporting period if it makes a written record:

- (a) of the financial products and reporting periods to which the election relates; and
- (b) the date of the election.

If the responsible entity elects to apply the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument to an earlier reporting period, it will apply to periodic statements for subsequent reporting periods and cannot be withdrawn.

153. Item 2 of Schedule 1 to the Fees and Costs Instrument inserts a new s14A into CO 14/1252, with the effect that CO 14/1252 does not apply to a periodic statement covered by the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument.

154. Item 7 of the Fees and Costs Instrument amends Instrument 2019/1070 by inserting a new s8(1A) to provide that the declarations in Instrument 2019/1070 do not apply to periodic statements covered by the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument.

155. The effect of these provisions is that:

- (a) The declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument will cover a periodic statement for:
 - reporting periods commencing on or after 30 September 2021; or
 - earlier reporting periods if the responsible entity has elected to apply the declaration in s8C to those earlier reporting periods under s12(2) of Instrument 2017/272 as amended by the Fees and Costs Instrument;
- (b) From the commencement of the Fees and Costs Instrument and until one of the conditions in (a) above applies to result in the periodic statement being covered by the declaration in s8C of Instrument 2017/272 as amended, CO 14/1252 will continue to apply until the general “collective investment product” enhanced fees and costs disclosure regime under Instrument 2019/1070 begins to apply to the periodic statement.
- (c) Under Part 4 of Instrument 2019/1070, that instrument will apply to a periodic statement (ongoing or on exit) for reporting periods that

commence on or after 1 July 2020 if the issuer has elected to apply the new requirements under Instrument 2019/1070, or otherwise to reporting periods that commence on or after 1 July 2021.

- (d) Notwithstanding (b), as soon as a condition in (a) is satisfied such that the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument applies, neither Instrument 2019/1070 nor CO 14/1252 will apply to the periodic statement.

Transitional exemption from ongoing disclosure of material changes and significant events

156. Section 13 of Instrument 2017/272 as amended by the Fees and Costs Instrument provides an exemption from s1017B(1) of the Act to the extent that s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument directly results in a change or event that, but for the declaration under s8C, would be required to be notified under that subsection of the Act. However, this relief only applies to the first time the responsible entity makes changes to a PDS as a direct result of s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument.
157. The effect of this exemption is that a significant event notification is not required in respect of the first change made to a PDS as a direct result of the declaration in s8C of Instrument 2017/272 as amended by the Fees and Costs Instrument.

Legislative Instrument and primary legislation

158. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
- (a) the Instruments utilise powers given by Parliament to ASIC that allow ASIC to modify or affect the operation of Ch 7 and Ch 5C of the Act to provide a tailored and flexible regulatory environment that is fit for purpose for certain financial products. Time-sharing schemes are unable to operate as they do currently without relief from various provisions of the Act. For example, they are generally unable to comply with the obligations to include prices in scheme constitutions, to value scheme property on a regular basis and to not acquire interests on a different basis to other members of the scheme. Therefore, since 1993, ASIC has provided relief from these obligations by legislative instrument;
- (b) the Instruments modify existing ASIC instruments which have previously been made for the purpose of imposing detailed, complex requirements which are specific to time-sharing schemes;
- (c) the existing requirements are not found in the primary legislation because the imposition of complex, detailed requirements is not suitable for primary legislation, and is more suitable to legislative instruments; and

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- (d) the requirements that govern cancellation rights in prescribed circumstances and the disclosure of fees and costs and other key features of time-sharing schemes are not found in primary legislation such as Part 7.9 or Chapter 5C of the Act.
159. To the extent that the Instruments amend Instrument 2017/272, the amendments will effectively sunset on 1 April 2027, which is the date Instrument 2017/272 (including the substantive modifications to the Act) will sunset.
160. The duration of the amendments is appropriate because industry feedback through the consultation process has highlighted the importance of certainty in the regulatory regime that applies to time-sharing schemes. Further, the length of the transitional periods effectively reduces the period of time the Instruments will be in force.

Incorporation by reference

161. The Timeshare Instrument incorporates SCO 02/237 (as in force immediately before the repeal of that class order) by referring to its contents for the purposes of s9 of the Instrument 2017/272 as substituted by the Timeshare Instrument. Such incorporation by reference is permitted by s14 of the *Legislation Act 2003*. A copy of the superseded class order can be found on the Federal Register of Legislation.

Legislative authority

162. ASIC makes the Timeshare Instrument under ss601QA(1), 926A(2) and 1020F(1) of the Act.
163. ASIC makes the Fees and Costs Instrument under s1020F(1) of the Act.
164. Subsection 601QA(1) of the Act provides that ASIC may exempt a person from a provision of Chapter 5C of the Act or declare that Chapter 5C applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
165. Subsection 926A(2) of the Act provides that ASIC may exempt a person or financial product, or class of persons or financial product, from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8) or declare that provisions of Part 7.6 (other than Divisions 4 and 8) apply in relation to a person or financial product, or class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
166. Subsection 1020F(1) of the Act provides that ASIC may exempt a person or financial product (or class of persons or financial products) from all or specified provisions of Part 7.9 of the Act or declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of Part 7.9 were omitted, modified or varied as specified in the declaration. For the purposes of s1020F(1), Part 7.9 of the

Act includes regulations made for the purposes of the Part; see s761H of the Act.

167. There are no pre-conditions to the exercise of the powers under ss601QA(1), 926A(2) and 1020F(1).
168. The Timeshare Instrument is made under ss601QA(1), 926A(2) and 1020F(1) and the Fees and Costs Instrument is made under s1020F(1), having regard to s33(3) of the *Acts Interpretation Act 1901*. Where an Act confers a power to make an instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend the instrument.
169. The classes of financial products to which the Instruments relate are collective investment products.
170. The Instruments are disallowable legislative instruments.

Statement of Compatibility with Human Rights

171. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under s9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Amendment) Instrument 2020/1064

ASIC Corporations (Amendment) Instrument 2020/1065

Overview

1. The *ASIC Corporations (Amendment) Instrument 2020/1064* and the *ASIC Corporations (Amendment) Instrument 2020/1065* amend existing obligations and impose new obligations on licensees who are responsible entities of time-sharing schemes and their associates, and provides conditional relief from the managed investment, licensing and product disclosure provisions of the *Corporations Act 2001*.

Assessment of human rights implications

2. The Instruments do not engage any of the applicable rights or freedoms.

Conclusion

3. The Instruments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.