

Inquiry into Managed Investment Schemes and the Legal Profession

Terms of Reference

That the Inquiry consider and report on:

1. The legal nature and scope of the prohibitions in s 258 of the Legal Profession Uniform Law, having particular regard to:
 - a. The definition of 'managed investment scheme' (MIS) and its potential application to forms of financial intermediation currently provided by law practices and their related entities in Victoria and New South Wales
 - b. The definition of 'related entity' for the purposes of s 258(1) and (4)
 - c. The meaning of 'promote' or 'operate' in 258(1)(a)
 - d. The meaning of 'interest' for the purposes of s 258(3)
 - e. The meaning of 'in relation to' in s 258(3).
2. The extent to which law practices in Victoria and New South Wales are engaged in activities that will be prohibited by s 258(1), including:
 - a. The number of Mortgage Businesses (as defined in ASIC Class Order 02/238) promoted or operated by law practices or related entities of law practices, the value of the investments held in them, and the investor profile
 - b. The number of other registered and unregistered MIS promoted or operated by law practices or related entities of law practices, the value of the investments held in them, and the investor profile.¹
3. The likely regulatory impacts if s 258(1) were repealed or not repealed, and the possible impacts in policy terms of either course, with particular regard to:
 - a. The growth of multi-disciplinary law practices (incorporated and unincorporated)
 - b. The impact on small and regional law firms of either course.
4. The likely regulatory impacts if s 258(3) were repealed or not repealed, and the possible impacts in policy terms of either course, with particular regard to:
 - a. The likely nature and extent of interests held by associates of law practices in Victoria and New South Wales in MIS or responsible entities of MIS
 - b. The policies and practices in place, including under Uniform Conduct Rule 12, to identify and prevent conflicts of interest where a law practice provides legal services in relation to an MIS in circumstances where an associate of the law practice has an interest in the MIS or the responsible entity of the MIS.²

¹ It may be necessary to estimate the extent of some of these activities.

² In *Law Society of the Australian Capital Territory v Lardner* [1998] ACTSC 187 the law firm involved used the services of a separate entity with which it had a close working connection (operating from the same premises) without disclosing that relationship to the client.

5. The likely regulatory impacts if s 258(4) were repealed or not repealed, and the possible impacts in policy terms of either course, with particular regard to the nature and extent of services provided by law practices to non-ADI lenders in respect of mortgages other than those described in s 258(4)(b).
6. The policy options available to the Council in:
 - a. Defining 'related party' for law practices that are not ILPs for the purposes of s 258(1) and (4)
 - b. Making a Rule for the purposes of s 258(1)(b) extending the prohibitions to other similar services and businesses
 - c. Making a Rule for the purposes of s 258(3), and setting guidelines for approvals by designated legal regulatory authorities (DLRA), allowing a law practice to provide legal services in relation to an MIS where an associate of the law practice has an interest in the MIS or the responsible entity of the MIS
 - d. Making a Rule for the purposes of s 258(4)(c) exempting other mortgages from the prohibition
 - e. Making a Rule for the purposes of s 258(4)(a) specifying financial institutions other than ADIs.
7. Taking into account any recommendations made in respect of Terms of Reference 1 to 6 above, any steps, including communication and guidance, that the Council and the DLRA might take to help law practices, their clients and communities prepare for changes to the regulation of MIS and mortgage practices.

The Inquiry will consult with the Australian Securities and Investments Commission, the Council, the DLRA, the Law Institute of Victoria, the Law Society of New South Wales, the legal profession and other relevant stakeholders and report to the Council with recommendations by 30 September 2017.

June 2017

LEGAL PROFESSION UNIFORM LAW

258 Prohibited services and business

- (1) A law practice (or a related entity) must not-
- (a) promote or operate a managed investment scheme; or
 - (b) provide a service or conduct a business of a kind specified in the Uniform Rules for the purposes of this section.

Civil penalty: 250 penalty units.

- (2) Despite subsection (1), an associate of a law practice may promote or operate a managed investment scheme if, in the event of an insolvency or administration of the managed investment scheme, the associate is appointed as-

- (a) an administrator, liquidator, receiver, receiver and manager, agent of a mortgagee or controller of the managed investment scheme in respect of the insolvency or administration; or
- (b) a controller or external administrator of an entity acting in a similar capacity as a responsible entity where a managed investment scheme does not have a responsible entity in respect of an insolvency or administration.

- (3) Except as permitted by or under the Uniform Rules, or as approved by the designated local regulatory authority, a law practice must not provide legal services in relation to a managed investment scheme if any associate of the law practice has an interest in the scheme or the responsible entity for the scheme.

Civil penalty: 250 penalty units.

- (4) A law practice (or a related entity) must not, in its capacity as the legal representative of a lender or contributor, negotiate the making of or act in respect of a mortgage, other than-

- (a) a mortgage under which the lender is a financial institution; or
- (b) a mortgage under which the lender or contributors nominate the borrower, but only if the borrower is not a person introduced to the lender or contributors by the law practice who acts for the lender or contributors or by an associate or agent of the law practice, or a person engaged by the law practice for the purpose of introducing the borrower to the lender or contributors; or
- (c) a mortgage, or a mortgage of a class, that the Uniform Rules specify as exempt from this prohibition.

Civil penalty: 250 penalty units.

- (5) In this section-

"borrower" means a person who borrows, from a lender or contributor, money that is secured by a mortgage;

"contributor" means a person who lends, or proposes to lend, money that is secured by a contributory mortgage arranged by a law practice;

"contributory mortgage" means a mortgage to secure money lent by 2 or more contributors as tenants in common or joint tenants, whether or not the mortgagee is a person who holds the mortgage in trust for or on behalf of those contributors;

"financial institution" means-

- (a) an ADI; or
- (b) a corporation or other body, or a corporation or body of a class, specified in the Uniform Rules for the purpose of this definition;

"lender" means a person who lends, or proposes to lend, a borrower money that is secured by a mortgage.

- (6) To the extent that this section applies to an incorporated legal practice, this section is declared to be a Corporations legislation displacement provision for the purposes of section 5G of the Corporations Act.