Email 3 October 2019

Megan Pitt
Chief Executive Officer
Commissioner for Uniform Legal Services Regulation
Legal Services Council
Level 3, 19 O'Connell Street
Sydney NSW 2000

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Dear Ms Pitt

Review of Managed Investment Scheme Legal Profession Uniform General Rules 2015 (rr 91A – 91D)

Law Firms Australia ('LFA') appreciates the opportunity to provide a submission on the review of the managed investment scheme Legal Profession Uniform General Rules 2015 (rr 91A – 91D) ('the MIS Rules').

LFA represents Australia's leading multi-jurisdictional law firms, Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison and Norton Rose Fulbright Australia. LFA is also a constituent body of the Law Council of Australia, the peak representative organisation of the Australian legal profession.

This submission is comprised of the following five parts:

a) the scope of the review,
b) the policy rationale, as understood by LFA, for the managed investment scheme prohibitions,
c) the impacts of the relevant managed investment scheme prohibition on law firms and clients,
d) regulatory activity with respect to the relevant managed investment scheme prohibition, and
e) options for reform.

1. Scope of the review

1.1 The terms of reference for the review of the MIS Rules state that:

> The Review will consider and report on the effectiveness and regulatory impact of the MIS Rules in relation to the legal profession, consumers and regulators, having particular regard to :-
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> (i) The extent to which the MIS Rules are meeting the objective of consumer protection,
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> (ii) The nature and extent of any regulatory activity in respect of the MIS Rules, and
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> (iii) The nature and extent of any impact on law practices and regulated entities.

1.2 The terms of reference also state that '[t]he Review will not consider or re-visit the scope of s 258 of the Uniform Law.'

1.3 Whilst the review will not consider any possible amendments to s 258 of the Uniform Law, it is important to understand the application of the MIS Rules in context. Section 258 contains

three broad prohibitions with respect to law practices[1] and managed investment schemes. They are:

(a) that a law practice or a related entity must not promote or operate managed investment schemes ('the promoter prohibition');[2]

(b) that 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 ('the associate prohibition');[3] and

(c) that a law practice or 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 except in certain circumstances ('the mortgage prohibition').[4]

1.4 Section 258 includes limited exceptions to those prohibitions, including where managed investment schemes are connected with or related to the law practice.[5]

1.5 Further exceptions to the prohibitions are contained in the MIS Rules. Relevantly, r 91B establishes exceptions to the associate prohibition such that a law practice is permitted to provide legal services in relation to a managed investment scheme, despite an associate of the law practice having an interest in the scheme or the responsible entity for the scheme, if:

(a) those legal services are provided to the operator of the scheme,

(b) no associate of the law practice has a substantial interest in the scheme or the responsible entity for the scheme, or

(c) one or more associates of the law practice has a substantial in the scheme or the responsible entity for the scheme, but no principal of the law practice either:

(i) knows of any of those interests, or

(ii) ought reasonably to know of any of those interests.

1.6 LFA's concerns relate to the associate prohibition and the associated exceptions at r 91B.

1.7 The prohibitions in the Uniform Law are broader than the former provisions in the *Legal Profession Act 2004* (NSW) ('NSW LPA') and the *Legal Profession Act 2004* (Vic) ('Vic LPA') that related to managed investment schemes.[6] Both Acts prohibited incorporated legal

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[1] 'Law practice' means a sole practitioner; a law firm; a community legal service; an incorporated legal practice, or; an unincorporated legal practice: Uniform Law s 6 (definition of 'law practice').

[2] Uniform Law s 258(1)(a).

[3] Ibid s 258(3).

[4] Ibid s 258(4).

[5] Ibid s 258(1A).

[6] *Legal Profession Uniform Law Application Act 2014* (Vic) s 170; *Legal Profession Uniform Law Application Act 2014* (NSW) sch 9, cl 10.

practices and related bodies from conducting managed investment schemes.[7] The NSW LPA also:

(a) prohibited a solicitor from negotiating the making of, or acting in respect of, a regulated mortgage unless the mortgage formed part of a managed investment scheme;[8] and

(b) specified that a solicitor was not prevented from carrying out any legal services in connection with a managed investment scheme that was operated by a responsible entity, or from having an interest in such a managed investment scheme or in the responsible entity for such a managed investment scheme.[9]

2. Policy rationale

2.1 On a plain reading of s 258, and as foreshadowed in the terms of the review, the rationale for the prohibitions is to prevent solicitors' failing to discharge their duty to clients due to interests in managed investment schemes. It is fundamentally a conflict of interest issue.

2.2 The expansion of the managed investment scheme prohibitions under the Uniform Law appears to be grounded in the failure of a number of solicitor mortgage schemes in the 1980s and 1990s. This is reflected in Professor Hanrahan's summary of the context to s 258 in the Professor's report to Council ('the 2017 Report').[10]

2.3 Indeed, the only reference to s 258 in the second reading speech for the Legal Profession Uniform Law Application Bill 2013 in the Victorian Parliament focussed solely on solicitor mortgage practices. The relevant excerpt is as follows:[11]

> *The bill provides at part 11 that Victoria will not apply, for a transitional period of three years, the prohibitions on law practices promoting, operating or providing legal services to managed investment schemes, which cover mortgage practices where investors lend funds to borrowers who mortgage land or property, or both, as security. These types of schemes have been relatively common in Victoria, especially in regional areas where historically they have facilitated important business and economic development initiatives. While their use is now declining, it would be unduly onerous to commence these prohibitions immediately.*

2.4 Similarly, in New South Wales, then Attorney-General the Hon. Greg Smith MP stated when introducing the Legal Profession Uniform Law Application Bill 2014 that:[12]

> *Part 10 carries over the provisions in the Legal Profession Act 2004 regulating mortgage practices. These longstanding provisions restrict solicitors' mortgage practices due to*

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[7] NSW LPA s 135(2); Vic LPA s 2.7.5(2).

[8] NSW LPA s 479(1)(c).

[9] NSW LPA s 486(1).

[10] Legal Services Council, *Report of an inquiry for the Legal Services Council into Section 258 of the Legal Profession Uniform Law*, Report (20 October 2017) pp 5-9.

[11] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2013, 4667 (Robert Clark, Attorney-General).

[12] New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 March 2014, 22 (Greg Smith, Attorney-General).

previous experience with the disproportionate impact of claims on the fidelity fund because of solicitors' dishonest and fraudulent activity relating to mortgage practices.

2.5 The prevention of law practices operating or promoting solicitor mortgage schemes is achieved through the promoter prohibition. However, the promoter prohibition also prevents law firms from operating or promoting managed investment schemes, for instance, related to property developments. In this regard, Professor Hanrahan identified the decision of *De Simone v Legal Services Board* [2017] VSC 471 ('*De Simone*'). The relevant facts of that decision, as helpfully stated by Professor Hanrahan, are as follows:[13]

> *…a client of a law firm made a claim against the Victorian fidelity fund in respect of money lost in an unregistered managed investment scheme formed to carry out a property development project. Under the* Legal Profession Act 2004 (Vic) *the claim depended in part on whether the law firm was undertaking a managed investment scheme. The law firm was operated by a sole practitioner, Brereton, who was also a director of and (through a corporate entity) shareholder in the company operating the scheme, and acted for the operator in certain real estate transactions related to the scheme. The court found that the law firm provided financial product advice to clients about the investment.*
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> *At issue in* De Simone *was whether the evidence established that the managed investment scheme was 'undertaken' by Brereton's legal practice. The Board argued that the scheme was undertaken by the practice because, among other things, the Information Report prepared and provided by the practice to the client disclosed that a company in which Brereton was a substantial shareholder was managing the scheme and that Brereton and another man, McLeod, were in effect joint venturers undertaking the managed investment scheme.*
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> (emphasis removed)

2.6 That solicitor mortgage schemes and situations akin to *De Simone* are covered by the promoter prohibition is reflected in Professor Hanrahan's comments at p 31 of the 2017 Report, where the Professor states:

> *It may be, for example, that the law practice in* De Simone *was promoting the scheme, even though it was not undertaking the scheme. In circumstances where there is a close commercial tie between a responsible entity or other scheme operator and a law practice (for example, as discussed in Section 4.1 above) the factual question of whether the law practice is promoting the scheme may be enlivened. Second, the prohibition will now extend to related entities of all law practices, not just incorporated law practices.*

2.7 The original rationale for the mortgage prohibition relates to potential conflicts arising when a law practice or associate introduces a client (lender) to a borrower, then seeks to act for the lender in respect of the resulting mortgage. Such prohibition doesn't extend to financial institutions. LFA does not wish to raise specific concerns with this prohibition or the associated rules.

2.8 The original rationale for the associate prohibition is less clear. As Professor Hanrahan notes in the 2017 Report, on the facts of *De Simone*,[14] the prohibition would 'have prevented Brereton from acting for investors in the Seachange Village project when he was a joint venture partner in the company operating the scheme'. However, as is noted above, the situation would also have likely been covered by the promoter prohibition.

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[13] Above n 10, p 15.

[14] Ibid, p 38.

2.9 Instead, the associate prohibition appears to guard against the theoretical risk that the advice provided by a solicitor to a client may be undermined by an interest of an associate to the solicitor in a managed investment scheme. The use of the word 'theoretical' is not to underestimate the significance of such a risk, only that LFA is not aware of such situations occurring nor that regulators have observed this risk being realised.

3. Effect of associate prohibition

3.1 The associate prohibition has significant impacts on both law firms and clients.

Impact on law firms

3.2 Under the associate prohibition, and where an associate of a law practice has an interest in a managed investment scheme or the responsible entity for the scheme, law firms are only permitted to provide legal services in relation to that scheme if:

(a) those legal services are provided to the operator of the scheme,

(b) no associate of the law practice has a substantial interest in the scheme or the responsible entity for the scheme, or

(c) one or more associates of the law practice has a substantial in the scheme or the responsible entity for the scheme, but no principal of the law practice either:

(i) knows of any of those interests, or

(ii) ought reasonably to know of any of those interests.

3.3 The effect of the operator exception at r 91B(1)(a) is relatively clear, and in LFA's view, appropriate. However, the effect of the exceptions at rr 91B(1)(b) and (c) is such that the only way for law firms to be confident that they are in compliance with the associate prohibition will be to either:

(a) not provide legal services in relation to any managed investment schemes (except to scheme operators), or

(b) establish a significant disclosure regime for associates' financial interests.

3.4 It should also be noted that, if firms elect not to provide legal services in relation to any managed investment schemes, the effect will be twofold. First, they will not be able to provide legal services to managed investment schemes. Secondly, they will not be able to provide legal services to clients where a managed investment scheme is on the other side of the relevant transaction or litigation.

3.5 In respect of disclosure regimes, it is accepted that regimes will likely vary from firm to firm. However, the breadth of disclosures that are likely required at medium and large commercial practices to ensure compliance with the rules is outlined as follows:

(a) *Disclosure obligations will apply to all partners, legal employee and non-legal employees of a firm in all national offices (including, for instance, executive assistants, librarians, hospitality staff, paralegals and graduates, and human resources staff).*

'Associates' is a defined term and includes all principals, partners, directors, officers, employees, and agents of the law practice, and consultants to the law practice.

(b) *Disclosure of all financial interests (save for real property) may be required.*

'Managed investment scheme' is a broad, complex and open definition; it covers arrangements from listed trusts (including stapled groups that are constituted by one or more registered schemes, such as the Goodman Group and GPT Group) to private informal arrangements, as well as 'exotics' like horseracing syndicates and agricultural schemes.

As such, a direction to partners and employees to provide information on all managed investment scheme interests may not be effective, as it will likely be unreasonable to expect that non-legal employees (and some legal employees) will be able to identify managed investment scheme interests.[15] Further, because 'managed investment scheme' is an open definition, an exhaustive list of types of schemes cannot be provided.

Instead, it is more likely that a disclosure direction would apply to all financial interests that are not direct holdings of real property.

(c) *Disclosure of all financial interests, regardless of the significance of the interests or whether they are held directly.*

It would likely be necessary to provide guidance to employees regarding what constitutes a managed investment scheme and what constitutes a substantial interest. For reasons discussed in [4] below, this will be difficult to do for both regulators and firms. Again, the result may be that it is necessary to ask associates to provide details of most, if not all, of their investments.

3.6 The extra resources that will be required to administer such a disclosure regime will obviously vary from firm to firm, and will depend upon:

(a) how often disclosure registers need to be updated,[16]

(b) systems to identify which client work may involve the provision of services in relation to managed investment schemes, and

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[15] Many investors in, for example, GPT Group would not realise that, as a result of that investment, they owned interests in a registered managed investment scheme.

[16] Pending guidance from regulators, it is a difficult judgment call for each firm to determine what update periods will be reasonable for the purposes of r 91B(1)(c).

(c) systems to identify when matters involve managed investment schemes on the other side of a transaction or litigation.[17]

3.7 LFA emphasises that law firms are not critical of the disclosure obligations under r 91B simply because they increase the compliance burdens for law firms. Indeed, law firms generally administer several disclosure regimes for partners and employees. They include:

(a) requirements to disclose, and obtain approval for, external directorships,

(b) requirements to disclose, and obtain approval for, secondary employment,

(c) requirements to disclose, and obtain approval for, volunteer work that involves the provision of legal advice (for instance, at community legal centres), and

(d) requirements to disclose, and obtain approval for, the purchase or disposal of shares.

3.8 LFA also recognises that many other workplaces require the disclosure of financial interests for transparency and to reduce corruption risks, including politicians and senior public servants. However, such disclosure regimes are less onerous than that likely required under r 91B because:

(a) they are unlikely to require full disclosures from junior and administrative staff, and

(b) critically, a prohibited interest held by a politician or public servant does not prevent another politician or public servant in the government or department/council from acting in relation to that interest (provided of course that they do not hold a prohibited interest themselves).

3.9 The latter point is borne out by the following example. If 'Official A' in the NSW Department of Planning, Industry and Environment has a property interest within a reasonable proximity of a proposed train line, it is likely that the Department's conflict of interest policy would require the disclosure of the property interest and that the official have no involvement in decisions or planning related to that train line or associated development. However, Official A's property interest would not prevent colleagues at the department from acting in relation to the train line.

3.10 Rather, LFA is critical of the disclosure obligations under r 91B because they are greatly disproportionate to the risk that they are designed to address. If it is the case that the associate prohibition is to prevent the risk that the advice provided by a solicitor to a client may be influenced by an interest of an associate to the solicitor in a managed investment scheme from arising, then such conflicts are already prohibited by r 12 of the Australian Solicitor Conduct Rules ('ASCR').

3.11 Rule 12 of the ASCR prohibits a solicitor from acting for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor.[18] Furthermore, r 4 requires a solicitor to act in the best interests of a client in any matter in which the solicitor represents the client. Any breach of these rules may

[17] For instance, the financing of a transport or energy infrastructure project may involve upwards of ten financial institutions (funders).

[18] It is noted that r 12 contains exceptions to the prohibition, however they do not appear to be relevant to where a solicitor or associate holds a substantial interest in a managed investment scheme.

constitute unsatisfactory professional conduct or professional misconduct,[19] for which a solicitor may be subject to disciplinary proceedings, including being struck off the roll.

3.12 LFA observes that the disclosure regime implied by rr 91B(b)-(c) was not intended to add an extra compliance burden on law firms. Professor Hanrahan stated at p 37 of the 2017 Report:

> *…the purpose of linking the drafting of the proposed new Rule to the existing Legal Practice Rule 8 is to ensure that compliance with the new Rule does not require the law practice to make any more inquiry than is already expected of solicitors who must ascertain whether an associate has a substantial involvement in any other outside business, to be able to discharge their obligations under Rule 8. (In fact, the proposed new Rule only applies where the law practice has actual or constructive knowledge of the interest, whereas Rule 8 applies whenever an associate has such an interest.)*

3.13 However, Legal Practice Rule 8 ('LPR8') does not create a general obligation on solicitors to ascertain the financial interests of each associate in a legal practice. LPR8 is only enlivened where each of the three following conditions are met:

(a) the solicitor engages in the conduct of another business,

(b) that other business is conducted concurrently with the solicitor's legal practice, and

(c) that other business is not conducted directly in association with the solicitor's legal practice.

3.14 The purpose of LPR8 is to capture a specific set of circumstances, namely where solicitors offer certain non-legal services to clients from the same premises or under the same name as the firm and (but not necessarily) where those solicitors are in the practice of referring legal clients to the non-legal business and the legal practice is not structured as a multi-disciplinary practice.

3.15 This view is supported by the former Victorian rule on which LPR8 is based, being r 32 of the *Professional Conduct and Practice Rules 2005*. That rule stated:

> *32.* ***Conducting Another Business***
>
> *32.1 A practitioner who engages in the conduct of another business concurrently, but not directly in association, with the conduct of the practitioner's legal practice must:*
>
> *32.1.1 ensure that the other business is not of such a nature that the practitioner's involvement in it would be likely to impair, or conflict with, the practitioner's duties to clients in the conduct of the practice;*
>
> *32.1.2 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business;*
>
> *32.1.3 disclose to any client of the practitioner, who, in the course of dealing with the practitioner, deals with the other business, the practitioner's financial or other interest in that business; and*
>
> *32.1.4 cease to act for the client if the practitioner's independent service of the client's interest is reasonably likely to be affected by the*

[19] ASCR r 2.

practitioner's interest in the other business.32.1A A practitioner, before referring a client of the practitioner or the practitioner's firm, to another business conducted by the practitioner concurrently must first obtain from the client an acknowledgment in the form of Form 2 in the Schedule to these rules.

…

32.1B.1 A practitioner may conduct another business from the same premises as an office of the practitioner's legal business provided that the practitioner ensures that all clients of the other business are informed that the other business is not part of the legal business and sign an acknowledgment in the form of Form 2 in the Schedule to these rules.

…

32.2 A practitioner will be deemed to be engaged in the conduct of another business where the practitioner, or an associate:

32.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value;

32.2.2 exercises any material control over the conduct and operation of the business; or

32.2.3 has an entitlement to a share of the income of the business which is substantial, having regard to the total income which is derived from it.

Impact on clients

3.16 The impact of the associate prohibition on clients should also be considered. For instance:

(a) a client whose business structure includes a managed investment scheme will be prevented from engaging a law firm where any associate of that law firm holds a substantial interest, potentially directly or indirectly, in the scheme, and

(b) any client will be prevented from engaging a law firm where any associate of that law firm holds a substantial interest, potentially directly or indirectly, in a managed investment scheme on the other side of the relevant litigation or transaction.

3.17 This is an unreasonable restriction on the ability of clients to choose their legal counsel, especially when the associate prohibition does not include an exception to the prohibition for sophisticated clients.

3.18 On the other hand, the risk that the advice provided by a solicitor to a client may be undermined by an interest of an associate to the solicitor in a managed investment scheme can be properly managed by the alternatives proposed at [5] below.

4. Regulatory activity in respect of the MIS Rules

4.1 The Law Society of New South Wales and the Victorian Legal Services Board + Commissioner have the opportunity to comment on this review and are obviously the best placed to provide any information on regulatory activity. However, LFA envisages that it would be difficult for the regulators to apply the MIS Rules given the following interpretation issues:

Reference	Issue	Explanation
r 91B(1)	Definition of 'interest'	It is unclear whether 'interest' includes both direct and indirect interests. Indirect interests would include an interest in an investment fund that invests in a listed trust traded on the ASX. It is also possible, with respect to the responsible entity, that the interest be held through shares in the holding company of the responsible entity - in this case, it would apply to a number of large listed financial institutions. For example, 'interests' held through a superannuation fund or a managed fund structured as a trust over which the associate has no control, may be captured.
r 91B(1)(c)	Construction of exemption	Rule 91B(1) is ambiguous as the actual knowledge and constructive knowledge limbs are stated as alternatives. The use of 'either' and 'or' may mean that: (a) one of either (i) or (ii) can satisfy the second condition, or (b) that both (i) and (ii) must be met to satisfy the second condition (being the intent expressed by the Legal Services Council). If the exemption is to the effect stated at (a), then principals of a law practice can rely on the exemption provided they do not know of any relevant substantial interests held by associates of the law practice (regardless of whether the principal ought to have known of such interests).
r 91B(2)(a)	Definition of 'significant' and 'relatively substantial value'	It is unclear whether the significance or relative substantial value of the interest is to be determined from the perspective of the scheme or the associate who holds the interest. For example, many employees use a staff superannuation fund and are likely to have selected a managed funds option in respect of their accounts. The amount in one or two of the funds may well be significant to an employee in their retirement savings. It is difficult to envisage how this could create a conflict of interest in legal practice that should prevent a firm from acting in relation to that fund for a lender, director or counterparty. Sub-paragraph (c) attempts to deal with this issue by using the qualifier 'having regard to the total income which is derived from it'. However, the fact that a similar qualifier does not apply to sub-paragraph (a) may suggest that the perspective to be considered in sub-paragraph (a) is that of the associate to the law practice.

Reference	Issue	Explanation
r 91B	Use of 'responsible entity'	'Responsible entity' is a term created by the *Corporations Act 2001* (Cth) ('Corporations Act') in respect of registered managed investment schemes under Chapter 5 of that Act. It is defined at s 9 of the Corporations Act as follows: *"responsible entity" of a registered scheme means the company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme* 'Responsible entity' is not defined in the Uniform Law nor the Legal Profession Uniform General Rules 2015. The use of the term is unclear in r 91B, especially as the rule is intended to apply to unregistered managed investment schemes. Rule 91B would be clearer if it consistently referred to the operator of the managed investment scheme. However, LFA acknowledges that 'responsible entity' is used in the enabling provision for r 91B (s 258(3)) and that consistency between the enabling provision and the rules is desirable. Whilst the scope of the prohibitions at s 258 of the Uniform Law are outside the scope of the review, the Legal Services Council may wish to consider amending s 258(3) to also refer to the operator of a managed investment scheme at an appropriate future opportunity.

4.2 If regulators determine to focus their resources on investigating situations where advice provided by a solicitor to a client is undermined by an interest of an associate to the solicitor in a managed investment scheme, they may already do so by virtue of r 12 of the ASCR.

5. Reform options

5.1 The underlying view of LFA is that any restriction of legal services in relation to managed investment schemes must be understood as a conflict of interest issue, and crafted accordingly. It is in the interests of clients, regulators and law firms that artificial distinctions in the regulation of legal services to certain types of clients are avoided, except where there are compelling reasons that necessitate specific regulatory attention.

5.2 It was identified during the introduction of the Uniform Law that the failure of a significant number of solicitor mortgage schemes, and the resultant impact on clients of those schemes, constituted such compelling reasons.[20] The specific regulatory action is the commencement promoter prohibition, and LFA does not cavil with its operation.

5.3 However, the impact of the associate prohibition (in combination with r 91B) is, in LFA's view, disproportionate to any risk that has been identified to date. Whilst there is strong merit in reconsidering the associate prohibition itself, LFA is cognisant that the terms of reference for the review do not provide for the scope of s 258 to be revisited. As such, LFA submits that the exception at r 91B should be amended to focus on the risk that advice provided by a solicitor to a client is undermined due to an interest of an associate to the law practice in a managed investment scheme.

[20] See above at [2.2]-[2.4].

5.4 LFA proposes two alternative amendments to r 91B. LFA strongly prefers Option 1 for the reasons set out below.

Option 1: Conflict focus

5.5 Rule 91B should be amended to create a clear exception (and by extension, a clear prohibition) that is squarely focussed on the conflict of interest risk. Amended rule 91B would state in full:

> For the purposes of section 258(3) of the Uniform Law, a law practice is permitted to provide legal services in relation to a managed investment scheme, despite an associate of the law practice having an interest in the scheme or the responsible entity for the scheme, if the provision of those legal services does not give rise to a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor.

5.6 This proposal has the following benefits:

(a) The obligation under r 12 to avoid a conflict between the duty to serve the best interests of a client and the interests of the solicitor (or an associate of the solicitor) attaches to solicitors in an individual capacity. By adopting the wording of r 12 in a revised r 91B exception, the obligation will also attach to law practices in a consistent manner.

(b) The exception as amended is centred on protecting a primary interest of legal consumers; that is, to receive legal advice that is in their best interest.

(c) A client's choice of legal counsel will not be restricted, except in circumstances where a relevant conflict of interest arises.

(d) The exception as amended does not rely on the definition of 'substantial interest', which is difficult to apply for law firms, associates of law firms, and regulators.

(e) By focussing on the conflict risk, the exception as amended also captures relevant non-substantial interests in managed investment schemes that may give rise to a conflict risk.

(f) The current exclusion for providing services to operators of managed investment schemes can be omitted.

(g) The exception as amended reflects the longstanding ethical duties of the profession.

Option 2: Control focus

5.7 Rule 91B could be amended to focus on the types of interest that are most likely to give rise to a conflict of interest. LFA submits that those interests are where an associate controls a managed investment scheme within the meaning of s 50AA of the *Corporations Act 2001*. Amended rule 91B would state in full:

> For the purposes of section 258(3) of the Uniform Law, a law practice is permitted to provide legal services in relation to a managed investment scheme, despite an associate of the law practice having an interest in the scheme or the responsible entity for the scheme, if:
>
> (a) those legal services are provided to the operator of the scheme, or
>
> (b) no associate of the law practice controls the responsible entity[21] of the scheme within the meaning of s 50AA of the *Corporations Act 2001* (Cth).

6. Conclusion

6.1 As noted above, LFA appreciates the opportunity to provide a submission on the review of the MIS Rules. The options presented at part 5 above are intended to address the conflict of interest issue that underpins the rationale for the managed investment scheme prohibitions, and to do so in a manner that is proportionate to the risks involved. LFA strongly prefers Option 1 (conflict focus), and if this option is endorsed by the Legal Services Council, LFA notes that:

(a) the prohibition on law practices operating or promoting solicitor mortgage schemes will be unaffected, and

(b) solicitors, as reflected in the ASCR, and law practices, under the revised r 91B, would each be required to ensure that the best interests of the client are protected.

6.2 However, LFA acknowledges that there are likely to be other possible amendments to r 91B to achieve these goals. LFA would welcome discussions with the Legal Services Council and other interested stakeholders on any other proposed reformulations of r 91B.

[21] 'Responsible entity' is used for consistency with s 258(3) of the Uniform Law. However, 'operator' may be more appropriate – see [4.1] above in respect of 'responsible entity' issue.

6.3 Please do not hesitate to contact me if the points above require clarification or if LFA can provide further information that will be of assistance.

Yours faithfully

Mitch Hillier
Executive Director