



Email

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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 Rules

Law Firms Australia (**LFA**) appreciates the opportunity to provide comment on the December 2019 consultation paper on the review of the managed investment scheme (**MIS**) rules (**the Consultation Paper**), being rr 91A-91D of the *Legal Profession Uniform General Rules 2015 (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.

The Consultation Paper makes five recommendations:

- a) Provide stakeholders with:
 - i. a short statement of the purpose of s 258 (that it operates to protect individual clients and community confidence in the legal profession by restricting the involvement of law practices in certain forms of financial intermediation), and
 - ii. an explanation of the relationship of s 258 with the Solicitors' Conduct Rules (that it is wider than the prohibitions on individual solicitors operating MISs or engaging in mortgage financing as part of their practice, or acting for a client when they personally have a conflict).
- b) Provide industry bodies and regulators with revised technical guidance (including examples) to assist law practices in applying s 258 in practice, once any revisions to the MIS Rules are agreed. The industry bodies may be requested to provide examples to be included in the revised guidance.
- c) Revise r 91B to permit a law practice to provide legal services in relation to an MIS, in circumstances where an associate of the law practice has an interest in the MIS or MIS operator but there is no conflict between the associate's interest and the duty to act in a client's best interest.
- d) Request that industry bodies propose practical steps that law practices will take to ensure compliance with s 258(3) of the Uniform Law.
- e) Redraft r 91C to make the restriction in s 258(4) easier to interpret, apply and enforce.



Before considering each of the recommendations, LFA reiterates its view that the concerns about the purpose and effect of the MIS Rules stem from the legislative prohibitions at s 258 of the Uniform Law, and that the relevant issues would be better addressed by amendments to s 258 rather than amendments to the rules themselves. However, LFA understands that the Legal Services Council (**LSC**) does not wish to review s 258 at this time.

1. Recommendations 1 and 2

1.1 LFA supports the proposal that the LSC issue a clear statement of the purpose of s 258 of the Uniform Law and its relationship with the relevant Australian Solicitors' Conduct Rules. LFA also supports the proposal that technical guidance be issued.

1.2 It is noted from p 9 of the Options Paper that any technical guidance would be settled once any changes to the MIS Rules are finalised. The same position should apply in respect of the proposed LSC statement.

1.3 It is assumed that the proposed LSC statement and technical guidance will replace the LSC Information Sheet on MISs dated June 2018.

2. Recommendation 3

2.1 Recommendation 3 addresses concerns about the effect of r 91B on the ability of law practices to provide legal services with respect to MISs. The issues that arise from the current r 91B have been well canvassed in earlier LSC papers, and have been addressed in LFA submissions dated 31 July 2019 and 14 November 2019. The crux of those issues however, are:

- (a) that the fundamental rationale for the MIS prohibitions at s 258 of the Uniform Law, and in particular the prohibition at s 258(3), is to prevent solicitors' failing to discharge their duty to clients due to their, or their associates', interests in MISs,
- (b) that the current r 91B goes beyond the requirements that otherwise apply in respect of conflicts of interest, and
- (c) that the current r 91B unreasonably restricts the choice of legal counsel for certain clients and creates an excessive and undue administrative burden on law practices.

2.2 The Consultation Paper proposes that r 91B be revised to state:

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.


2.3 LFA supports the proposed revised r 91B. The revised rule would ensure that the regulation of legal services with respect to MISs:

- (a) reflects that the relationship between solicitor and client is of a fiduciary character, and a solicitor must always act in the best interests of their client (subject to the paramount duty to the court and the administration of justice),



- (b) recognises that potential conflicts of interest exist where a law practice provides legal services in relation to a MIS, and solicitors or associates of that law practice have an interest or interests in that MIS; the potential conflict of interest is between the duty to serve the best interests of the client, and the interests of the solicitor or an associate of the solicitor,
 - (c) seeks to address any such potential conflict in a manner consistent with any other potential duty-interest conflict; that is, in alignment with r 12(1) of the Australian Solicitor Conduct Rules 2015 (**ASCR**).
- 2.4 Importantly, the amendment will not affect the critical prohibition with respect to solicitor mortgage schemes; that is, s 258(1). Save for the current exceptions, law practices will still be prohibited from promoting or operating MISs.
- 2.5 The Consultation Paper invites, at p 11, the LSC to consider whether it 'agrees with the basic policy argument – that the restriction on the law practice acting in relation to an MIS where an associate of the law practice has an interest in the MIS or the MIS operator should only apply where the law practice has a conflict'.
- 2.6 LFA submits that the policy argument should be supported for the simple reason that preventing law practices acting with respect to MISs in situations of duty-interest conflict is the very purpose of the legislative prohibition. This is reflected in Professor Hanrahan's 2017 report to the LSC, which states:¹
- As enacted, the prohibition in s 258(3) is extremely broad and it is appropriate that it be adjusted in the Uniform Rules. Assuming its purpose is to protect clients (other than the scheme operator itself) in circumstances **where the law practice or an associate has a commercial interest in the scheme or operator that may conflict with its obligations to the client...**
- (emphasis added)
- 2.7 Finally, p 13 of the Consultation Paper queries whether a revised r 91B should refer to 'the interests of an associate of the law practice' or 'the interests of the solicitor or an associate of the solicitor'. LFA does not have a firm view on this issue, but notes that the former would better reflect the Uniform Law definitions.
3. **Recommendation 4**
- 3.1 Recommendation 4 requests 'that industry bodies propose practical steps that law practices will take to ensure compliance with s 258(3) of the Uniform Law'. Page 13 of the Consultation Paper makes clear that this request is on the basis that r 91B is amended as proposed.
- 3.2 As noted above, if r 91B is amended as proposed, it will reflect the position that law practices must otherwise comply with for any duty-interest conflict. Given that solicitors are currently required to comply with r 12(1) of the ASCR regardless of whether a matter relates to a MIS, a company, or some other business structure, it is expected that law practices' existing conflict of interest structures and training will be able to be used to ensure compliance with the revised r 91B.

¹ 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) p 35.



3.3 Different law practices implement different conflict of interest programs, and the complexity of those programs likely varies with the size of the firm. However, it is generally the case at LFA member firms:

- (a) That firms implement and regularly review sophisticated conflict of interest and compliance policies. The policies cover a broad range of issues, including:
 - (i) duty-interest conflicts,
 - (ii) conflicts of duties concerning current clients,
 - (iii) conflict of duties concerning former clients,
 - (iv) commercial conflicts, and
 - (v) confidentiality issues.
- (b) That potential matters are reviewed for conflicts, or potential conflicts, of interest prior to engagement,
- (c) That firms implement a process by which conflicts, or potential conflicts, of interest must be reported to firms' general counsel teams or other designated law practice associates,
- (d) That firms implement, maintain and monitor information barriers, where permissible and appropriate,
- (e) That solicitors are required to undertake training on their professional obligations, including in relation to conflicts of interest, both as part of their onboarding process, ongoing firm training, and as part of their continuing legal education requirements, and
- (f) That policies and training are updated for relevant amendments to professional obligations or rules.


3.4 It follows from this general model that if a solicitor becomes aware of a potential conflict of interest at the commencement of, or at any time during, a matter, that potential conflict of interest must be reported to the appropriate team. This is so regardless of the type of potential conflict and regardless of whether it is in respect of a MIS, company, other business structure or individual.

3.5 Dependent on the type of potential conflict of interest and other circumstances, a law practice may address a potential conflict of interest in a range of ways, including by: implementing an information barrier; obtaining informed consent from relevant clients, or; declining instructions from a client or clients.

4. **Recommendation 5**

4.1 The Consultation Paper observes that r 91C, which relates to law practices (or related entities) acting for lenders or contributors in connection with a mortgage, is 'difficult to interpret, apply and enforce'.

4.2 LFA recognises the difficulty in crafting an appropriate rule given the structure of the prohibition at s 258(4) of the Uniform Law. However, the effect of the rule is very important and LFA has not received any complaints from its member firms regarding its operation.



4.3 The suggestion in the Consultation Paper at p 15 that the LSC may consider issuing an explanatory statement as to the effect of s 258(4) and r 91C is a sensible first step. Should the LSC determine that redrafting the rule is necessary, LFA requests that the profession be consulted on the revised wording to ensure that there are no unintended consequences.

5. **Conclusion**

5.1 As noted above, LFA appreciates the opportunity to provide comment on the Consultation Paper, especially given the importance of reviewing r 91B. 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
Law Firms Australia