

Law Practices, Mortgage Financing and Managed Investment Schemes

This Information Sheet explains how the Legal Services Council interprets s 258 of the Legal Profession Uniform Law (Uniform Law) and rules 91A – 91D of the Legal Profession Uniform General Rules 2015 (MIS Rules).

Restrictions for law practices

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Conduct Rules) prohibit an individual solicitor from operating a managed investment scheme or engaging in mortgage financing as part of their law practice.¹

Section 258 of Uniform Law and the MIS Rules supplement and extend these prohibitions, by prohibiting law practices from undertaking some other activities related to MISs or mortgage financing.

These prohibitions can apply even where the activity does not give rise to a conflict for the individual solicitor involved.

Policy objective

The additional restrictions serve an important policy objective. Sometimes clients look to their lawyers for guidance or assistance in financial matters, which can result in role confusion. The MIS Rules protect individual clients, and broader community confidence in the legal profession, by:

- restricting the involvement of law practices in creating or promoting investment arrangements including private mortgage financing, and
- in limited situations, from acting for clients in relation to those investment arrangements.

Financial services laws

The MIS Rules operate alongside the financial services laws, administered by the Australian Securities and Investments Commission (ASIC), and are specific to law practices. Lawyers must also comply with the financial services laws which, among other things, regulate providing financial product advice and dealing in financial products.²

What is prohibited?

Who	What	Source	Practical application
A law practice or a related entity ³	<p>Must not promote or operate an MIS.⁴</p> <p>(There is an exception for arrangements connected to the internal management or operation of the law practice itself.)</p>	Section 258(1) and (1A)	<p>The statutory definition of MIS is broad. The prohibition:</p> <ul style="list-style-type: none"> • Is not limited to mortgage-based MISs. • Covers any MIS, not just an MIS that is or is not required to be registered with ASIC.⁵ • Covers promoting⁶ an MIS, not just operating an MIS. • Extends to any related entity of the law practice, including a related entity that is licensed by ASIC to operate an MIS.

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<p>A law practice</p>	<p>Must not provide legal services in relation to an MIS if any associate⁷ of the law practice has an interest in:</p> <ul style="list-style-type: none"> • the MIS, or • the entity⁸ that operates the MIS <p>that creates a conflict for the law practice.</p>	<p>Section 258(3) and rule 91B</p>	<p>The prohibition:</p> <ul style="list-style-type: none"> • Is broader than the no conflicts rule that applies to individual solicitors under the Conduct Rules – it covers the whole practice. • Means that the law practice cannot act if any associate has an interest, unless it is a personal interest of the associate and does not present a real risk of materially impacting on the duty of others in the law practice to serve the best interests of the client. <p>The definition of associate is not limited to lawyers – it captures all the law practice’s employees and agents.</p> <p>The conflict cannot be overcome or managed by obtaining the client’s consent.</p>
<p>A law practice or a related entity</p>	<p>Must not act for a client who is a private lender⁹ in respect of a mortgage if the lender was introduced to the borrower by an associate, agent or appointee of the law practice, as part of mortgage financing engaged in by the person who made the introduction.</p>	<p>Section 258(3) and rule 91B</p>	<p>The prohibition applies to negotiating the making of a mortgage and acting in respect of a mortgage for a client who is not a financial institution, where the mortgagee and mortgagor were introduced by an associate, agent or appointee of the practice engaged in mortgage financing.</p> <p>Mortgage financing is defined in the Conduct Rules.¹⁰</p>

¹ Rule 41.1 of the Conduct Rules. There are no longer any small industry-supervised schemes of the kind referred to in rule 41.1.

² See Chapters 5C and 7 of the *Corporations Act 2001* (Cth) and Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth).

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³ Related entity is defined in section 6 of the Uniform Law (for law practices that are companies) and rule 91A of the Legal Profession Uniform General Rules 2015 (for all other law practices). In the case of a law practice that is a body corporate, it means a related body corporate as defined in the *Corporations Act 2001* (Cth). For other law practices, it means a body corporate that similarly controls or is controlled by the law practice.

⁴ Managed investment scheme is defined by reference to section 9 of the *Corporations Act 2001* (Cth). It is a broad concept and is not limited to arrangements that have an investment purpose.

⁵ Some MISs are required to be registered with ASIC under Chapter 5C of the *Corporations Act 2001* (Cth).

⁶ A person or entity promotes an MIS if they formulate and establish the scheme and solicit participants for it, or play a significant role in doing so. See e.g., *Australian Securities and Investments Commission v Young* (2003) 173 FLR 441 at [53]; see also *Australian Securities and Investments Commission v Primelife Corporation Ltd* (2005) 54 ACSR 536 at 542; [2005] FCA 1229 at [22]; *Re Idyllic Solutions Pty Ltd*; *Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 1276 at [1416].

⁷ Associate of a law practice is defined in section 6 of the Uniform Law and means a person who is one or more of the following: (a) a principal of the law practice; (b) a partner, director, officer, employee or agent of the law practice; (c) an Australian legal practitioner who is a consultant to the law practice.

⁸ The Uniform Law does not define the 'responsible entity' of the MIS. This expression is taken to mean the entity that operates the MIS.

⁹ That is, a lender that is not a financial institution as defined in rule 91D of the Legal Profession Uniform General Rules 2015.

¹⁰ 'Mortgage financing' means facilitating a loan secured or intended to be secured by mortgage by –

- (a) acting as an intermediary to match a prospective lender and borrower;
- (b) arranging the loan; or
- (c) receiving or dealing with payments under the loan,

but does not include:

- (d) providing legal advice, or preparing an instrument, for the loan;
- (e) merely referring a person to a prospective lender or borrower, without contacting the prospective lender or borrower on that person's behalf or facilitating a loan between family members; or
- (f) facilitating a loan secured by mortgage:
 - (i) of which an Australian legal practitioner is the beneficial owner; or
 - (ii) held by an Australian legal practitioner or a corporation in his, her or its capacity as the trustee of any will or settlement, or which will be so held once executed or transferred.