



Email

28 August 2020

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

c/o: [REDACTED]

Dear Ms Pitt

Review of the Managed Investment Scheme Rules: draft information sheet

Law Firms Australia (**LFA**) appreciates the opportunity to provide a submission on the draft information sheet concerning 'Law Practices, Mortgage Financing and Managed Investment Schemes' dated July 2020 (**the draft information sheet**).

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 first provides some background to the draft information sheet before providing specific comments.

1. Background

1.1 LFA notes that consultation on the draft information sheet follows the Legal Services Council (**LSC**) review (**the Review**) of rules 91A-91D of the Legal Profession Uniform General Rules 2015 (**the MIS Rules**). The review made several recommendations, including:

- (a) to revise the existing guidance material to produce:
 - (i) a short statement of the purpose of section 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) brief plain English technical guidance summarising the operation of the MIS Rules for law practices, including the effect of rule 91C and section 258(4).
- (b) to request an amendment to rule 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 the provision of those legal services does not give rise to a conflict between the duty to serve the best interests of the client and the interests of the associate of the law practice.

1.2 LFA supports each of the recommendations and looks forward to consultation on the revised r 91B and the technical guidance concerning r 91C and s 258(4).



2. **Comments on draft information sheet**

2.1 LFA generally supports the contents of the draft information sheet, but makes one observation and two suggested corrections.

2.2 First, the draft information sheet is based on the proposed revised r 91B of the MIS Rules. LFA supports the effect of the revised rule proposed at p 4 of the LSC Review, but appreciates that responsibility for the final drafting of the rule rests with Parliamentary Counsel's Office. As such, the final information sheet should be subject to the revised r 91B as made.

2.3 Secondly, p 2 of the draft information sheet states that the effect of the proposed revised r 91B will be:

...broader than the no conflicts rule that applies to individual solicitors under the Conduct Rules [as] it covers the whole practice.

2.4 LFA disagrees with this view. Whilst r 12.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules (**ASCR**) refers to 'the interests of a solicitor or an associate of the solicitor' and the proposed r 91B refers to 'an associate of a law practice', the latter rule does not apply to a broader class of people than the former rule due to the definitions of 'associate' under the Uniform Law and the ASCR respectively.

2.5 Instead, the draft information sheet may better emphasise the breadth of the prohibition by observing that the prohibition will be engaged by a relevant interest held by any of: a principal, a director, an officer, an employee, or an agent of, or an Australian legal practitioner who is a consultant to, a law practice.

2.6 Thirdly, LFA believes that the reference to a 'personal interest' at p 2 of the draft information sheet is unnecessary and potentially misleading.

2.7 The draft information sheet states with respect to s 258(3) and proposed revised r 91B:

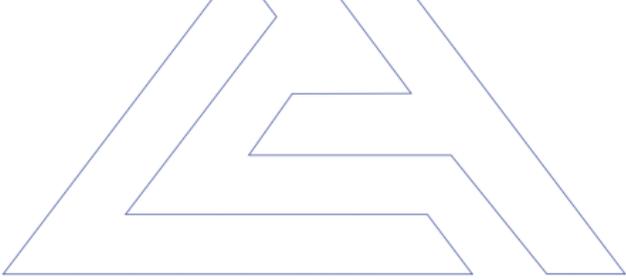
*The prohibition:... means that the law practice cannot act if any associate has an interest, **unless it is a personal interest of the associate** and does not present a real risk of materially impacting on the duty of others in the law practice to serve the best interests of the client.*

[Emphasis added]

2.8 The report to the Review makes clear at p 5 that this wording is based on r 1.10(a)(1) of the American Bar Association's Model Rules of Professional Conduct. LFA submits that the use of 'personal interest' in r 1.10(a)(1) of the American rules is not analogous to proposed revised r 91B, as the phrase is used in the American rules to distinguish between conflicts concerning solicitors' (or 'personal') interests, current client interests (r 1.7 of the American rules) and former client interests (r 1.9 of the American rules). This is made clear when r 1.10(a)(1) is considered in context with its chapeau, which refers to rr 1.7 and 1.9.

2.9 It is unnecessary to draw a similar distinction in the draft information sheet when explaining the effect of proposed revised r 91B. This is because the prohibition at s 258(3) does not, and does not need to, distinguish between different forms of conflicts of interest.

2.10 Similarly, an interest held by an associate of the law practice in a managed investment scheme or the responsible entity for the scheme will be a personal interest. It follows that the condition in the draft information sheet 'unless it is a personal interest of the associate' will always be met where a relevant interest is held and is therefore unnecessary.



2.11 Finally, LFA is of the view that lawyers and law practices should generally consider whether any relevant interest presents a 'real risk of materially impacting on the duty of others in the law practice to serve the best interests of the client'. The inclusion of the phrase 'personal interest' may serve as a distraction to this general responsibility.

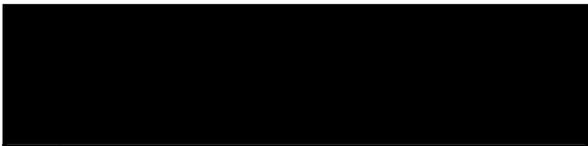
2.12 Instead, the draft information sheet may simply state:

The prohibition:... means that the law practice cannot act if any associate has an interest in a managed investment scheme or an entity that operates a managed investment scheme where that interest presents a real risk of materially impacting on the duty of others in the law practice to serve the best interests of the client.

3. **Conclusion**

3.1 As noted above, LFA appreciates the opportunity to provide a submission on the draft information sheet. 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

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M [redacted]
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