



THIRTY-NINTH PARLIAMENT

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

REPORT 65

**EXPLANATORY REPORT IN RELATION TO
*LEGAL PROFESSION CONDUCT AMENDMENT
RULES 2013***

Presented by Mr Peter Abetz MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

October 2013

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“6. Joint Standing Committee on Delegated Legislation

- 6.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 6.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 6.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 6.4 (a) A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- (b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 6.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 6.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
- (a) is within power;
- (b) has no unintended effect on any person's existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.
- 6.7 It is also a function of the Committee to inquire into and report on –
- (a) any proposed or existing template, *pro forma* or model local law;
- (b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
- (c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 6.8 In this order –
- “instrument” means –
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
- (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

Members as at the time of this inquiry:

Mr Peter Abetz MLA (Chair)	Hon Ljiljanna Ravlich MLC (Deputy Chair) until 16 October 2013
Hon John Castrilli MLA	Hon Robin Chapple MLC (Deputy Chair) from 16 October 2013
Hon Peter Katsambanis MLC	Hon Mark Lewis MLC
Ms Simone McGurk MLA	Mr Peter Watson MLA

Staff as at the time of this inquiry:

Felicity Mackie (Advisory Officer (Legal))	Alex Hickman (Advisory Officer (Legal))
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EXECUTIVE SUMMARY AND RECOMMENDATION OF THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
EXPLANATORY REPORT IN RELATION TO THE
LEGAL PROFESSION CONDUCT AMENDMENT RULES 2013

EXECUTIVE SUMMARY

- 1 The instrument the subject of this report, the *Legal Profession Conduct Amendment Rules 2013* (**Amendment Rules**) amends the *Legal Profession Conduct Rules 2010* by introducing various exemptions to a longstanding prohibition on legal practitioners borrowing money from current and former clients.
- 2 The Joint Standing Committee on Delegated Legislation (**Committee**) was initially unable to properly perform its function in scrutinising the Amendment Rules. This was because the Explanatory Memorandum provided by the Legal Practice Board was, in the view of the Committee, deficient. The main deficiency of the Explanatory Memorandum was that it failed to adequately explain the rationale behind the making of some of the Amendment Rules. This is essential to enable the Committee to perform its scrutiny role.
- 3 The Committee had a number of concerns with some of the exemptions introduced by the Amendment Rules, which have been raised with the Legal Practice Board. The responses provided to the Committee did not initially allay the Committee's concerns. While these have now been allayed, considerable time was spent by the Committee obtaining the information that, in the view of the Committee, ought to have been in the Explanatory Memorandum.
- 4 While the Committee moved, on 23 October 2013, that the *Notice of Motion* to disallow the Amendment Rules be discharged from the Notice Paper, the Committee wishes to still draw the inadequacy of the Explanatory Memorandum to the attention of the House by this explanatory report.

RECOMMENDATION

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Recommendation 1: The Committee recommends that the Legislative Council and the Legislative Assembly note the inadequacy of the Explanatory Memorandum for the *Legal Profession Conduct Amendment Rules 2013*.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

EXPLANATORY REPORT IN RELATION TO THE

LEGAL PROFESSION CONDUCT AMENDMENT RULES 2013

1 REFERENCE AND PROCEDURE

- 1.1 The *Legal Profession Conduct Amendment Rules 2013* (**Amendment Rules**) published in the *Government Gazette* on 5 April 2013 fall within the definition of ‘*Instrument*’ in the terms of reference of the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The Amendment Rules stood referred to the Committee upon their publication in the *Government Gazette*. Once an instrument is tabled in the Parliament, it is an instrument which is subject to disallowance.
- 1.3 In order to facilitate Committee scrutiny, a *Notice of Motion* to disallow the Amendment Rules was tabled in the Legislative Council on 6 August 2013.

2 THE INSTRUMENT

- 2.1 Rule 15(6) of the *Legal Profession Conduct Rules 2010* (**Principal Rules**), provides:

15. Conflicts concerning practitioner’s own interests

(6) *Subject to subrule (7A), a practitioner must not borrow money or assist an affiliate of the practitioner to borrow money from —*

(a) *a client of the practitioner or of the practitioner’s law practice; or*

(b) *a former client of the practitioner or of the practitioner’s law practice who has indicated a continuing reliance upon the advice of the practitioner or of the practitioner’s law practice in relation to the investment of money.*

- 2.2 The Amendment Rules introduce new subrules (7A) and (7B), which provide:

(7A) *Subrule (6) does not apply in respect of a client who is —*

(a) *an authorised deposit taking institution; or*

- (b) *a listed public unit trust; or*
 - (c) *the responsible entity of a managed investment scheme registered under the Corporations Act Chapter 5C or a custodian for that scheme; or*
 - (d) *an affiliate of the practitioner who has received —*
 - (i) *full written disclosure regarding the proposed loan; and*
 - (ii) *independent legal or financial advice regarding the proposed loan; or*
 - (e) *an employer of the practitioner.*
- (7B) *The onus of establishing the requirements in subrule (7A)(d)(i) and (ii) rest with the practitioner.*

2.3 Rule 3 of the Principal Rules defines an “affiliate” as follows.

3. Terms used

In these rules —

affiliate, in relation to a practitioner, means —

- (a) *an associate of the practitioner’s law practice; or*
- (b) *a corporation or partnership in which the practitioner has a material beneficial interest; or*
- (c) *a member of the immediate family of —*
 - (i) *the practitioner; or*
 - (ii) *a partner of the practitioner’s law practice; or*
 - (iii) *a director of the practitioner’s law practice;*

2.4 In effect, the Amendment Rules introduce a number of exemptions to the prohibition on legal practitioners borrowing from a client or former client (or of their firm), broadly adopting the wording in the Law Council of Australia’s Solicitors Conduct Rules (SCR).

3 COMMITTEE SCRUTINY

Deficient Explanatory Memorandum

Generally

- 3.1 Part of the role of Parliament and its committees is to scrutinise the operations of the Executive and any other bodies to whom it delegates the role of making subsidiary legislation. Explanatory memorandums are important in assisting Parliament in performing this role by providing information on the purpose and operation of proposed legislation.
- 3.2 If explanatory memorandums are deficient, this role as well as the effectiveness of the system of checks and balances which forms part of the basis of the separation of powers in Australia's Westminster system of government is significantly undermined.
- 3.3 Also, committees are required to seek additional information from bodies making subsidiary legislation. This results in a delay in the scrutiny process which could have been avoided had a sufficient explanatory memorandum been provided. This is not ideal given the tight timeframes under which the Committee operates to report to the Parliament on subsidiary legislation.

The Legal Practice Board

- 3.4 The Parliament has delegated to the Legal Practice Board (**Board**) the role of making subsidiary legislation pursuant to Part 17, Division 2 of the *Legal Profession Act 2008*. As the delegator, Parliament is owed full disclosure and due diligence in the preparation of any explanatory memorandum by a delegate body.
- 3.5 Premier's Circular 2007/14, a copy of which is available on the Committee's webpage, sets out the information which explanatory memorandums for subsidiary legislation scrutinised by the Committee must contain.¹
- 3.6 These include:
- a description of the purpose and effect of, and justification for, the subsidiary legislation (or any amendments to or repeals of it);
 - the identification of any unusual or controversial provisions, having particular regard to the matters set out in the Committee's terms of reference; and

¹ Go to:

<http://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/E72B1759E16EF3AD4825794800070349?OpenDocument>.

- details of consultations undertaken including a list of the business and community groups consulted, a précis of their comments and the response to any suggestions put forward.

The Explanatory Memorandum for the Amendment Rules

3.7 The Explanatory Memorandum for the Amendment Rules, which is attached as **Appendix 1**, contains very little detail on the justification for the exemptions permitting legal practitioners from borrowing from clients.

3.8 While it goes into some detail on the definition of “*affiliate*”, to distinguish it from the narrower term “*associate*” used in the SCR, its main focus is to highlight the exemption covering clients whose normal business it is to lend money (such as banks and other financial institutions). It states:

It has been suggested that LPCR r.15(6) was unduly restrictive and that it be modified to permit borrowing from clients whose normal business is to lend money

The intention of the exceptions, in broad terms, is to allow borrowing from commercial lenders at arms length.²

3.9 The Explanatory Memorandum contains no justification why the list of clients in subrule 15 (7A) includes an affiliate and employer of the practitioner.

3.10 The Principal Rules are important in maintaining the integrity of the legal profession in Western Australia as well as protecting the public in their dealings with legal practitioners (including with respect to conflicts of interest governed by subrule 15(6)). The Committee, therefore, expected the Explanatory Memorandum would contain more detail on exemptions to a longstanding prohibition on legal practitioners borrowing money.

3.11 The Explanatory Memorandum also states “*None*” under the heading “*Identification of any unusual or controversial provisions*”. The Committee was concerned at the failure to include additional information in this section for the same reason.

3.12 Additionally, under “*Details of consultations undertaken*”, the Explanatory Memorandum states:

General consultations were held with:

1. The Law Society of Western Australia.

² Explanatory Memorandum to the Legal Profession Conduct Amendment Rules 2013, pp1-2.

2. *Members of the Board.*

3. *Relevant staff of the Board.*

3.13 The Committee expected there would be a wider degree and more details on consultation undertaken on the Amendment Rules as well as details of any feedback received, given their effect.

3.14 The Committee wrote to the Board to seek information on:

- the rationale for the inclusion of affiliates and employers in subrule 15(7A); and
- whether there was any consultation or feedback sought from other Australian jurisdictions with similar rules in place.³

3.15 A copy of this letter is attached as **Appendix 2**.

3.16 The Board responded on 28 August 2013. A copy of this letter is attached as **Appendix 3**.⁴

3.17 While the Board's response provided details of legal and academic authority supporting the need for legal practitioners to give full disclosure and the need for a client lending money to them to obtain independent legal advice, it did not properly address the reason why the broad categories of client covered by subrule 15(7A) have been included in the Amendment Rules. It is not sufficient to merely state that the changes bring the Principal Rules in line with the SCR.

3.18 It is notable the Board also stated:

Other Australian jurisdictions have been unable to provide an official rationale for the two exceptions to the proposed exceptions at subrule 15(7A)(d) and (e).

*However, the proposed exceptions against borrowing money from a client in the case of affiliates and employers reflect a long standing position taken by conduct rules in other Australian jurisdictions which had commenced well before the LPA or even the SCR.*⁵

³ Letter from Hon Ljiljanna Ravich MLC to Ms Libby Fulham, Acting Executive Director, Legal Practice Board of Western Australia, 4 July 2013, p2.

⁴ Letter from Mr John Syminton, Chairperson, Legal Practice Board, to Mr Peter Abetz MLA, 28 August 2013.

⁵ Ibid, p3.

- 3.19 The Committee was concerned that no official rationale was able to be provided for rules said to reflect a longstanding position. Presumably, there was a reason, in the first place, sufficient to justify the introduction of the exemptions.

Committee concerns

- 3.20 The Committee responded to the Board on 12 September 2013. A copy of this letter is attached as **Appendix 4**, in which the Committee set out a number of concerns and posed some questions to the Board.
- 3.21 The Board responded on 25 September 2013. A copy this letter is attached as **Appendix 5**.
- 3.22 While this letter allayed the Committee's concerns by providing sufficient information to explain the rationale behind the making of some of the Amendment Rules, considerable time was spent by the Committee obtaining the information that, in the view of the Committee, ought to have been in the Explanatory Memorandum.

4 CONCLUSION

- 4.1 While the Committee moved, on 23 October 2013, that the *Notice of Motion* to disallow the Amendment Rules be discharged from the Notice Paper, the Committee wishes to still draw the inadequacy of the Explanatory Memorandum to the attention of the House by this explanatory report.

Recommendation 2: The Committee recommends that the Legislative Council and the Legislative Assembly note the inadequacy of the Explanatory Memorandum for the *Legal Profession Conduct Amendment Rules 2013*.



Mr Peter Abetz MLA

Chair

24 October 2013

APPENDIX 1

EXPLANATORY MEMORANDUM TO THE *LEGAL PROFESSION* *CONDUCT AMENDMENT RULES 2013*

LEGAL PROFESSION CONDUCT AMENDMENT RULES 2013 EXPLANATORY MEMORANDUM

1. **The date of publication of the instrument in the *Government Gazette***
Government Gazette N0 58 on 5 April 2013.
2. **The title of the subsidiary legislation**
Legal Profession Conduct Amendment Rules 2013.
3. **Identification of the section(s) of the statute(s) under which the subsidiary legislation is made**

The Legal Practice Board ("**Board**") has the power to make legal profession rules regarding the following matters pursuant to Part 17, Division 2 of the *Legal Profession Act 2008* ("**Act**"):
 1. Australian legal practitioners under section 577 of the Act;
 2. Australian-registered foreign lawyers under section 578 of the Act;
 3. Incorporated legal practices and multi-disciplinary partnerships under section 579 of the Act; and
 4. The Board, Law Library and Complaints Committee under section 580 of the Act.
4. **A description of the purpose and effect of, and justification for, the subsidiary legislation (or any amendments to or repeals to it)**

Rule 15 of the *Legal Profession Conduct Rules 2010* (LPCR) deals with conflicts between the interests of legal practitioners and their clients. LPCR r.15(6) refers to borrowing from clients and presently provides:

"A practitioner must not borrow money or assist an affiliate of the practitioner to borrow money from —
 - (a) a client of the practitioner or of the practitioner's law practice; or
 - (b) a former client of the practitioner or of the practitioner's law practice who has indicated a continuing reliance upon the advice of the practitioner or of the practitioner's law practice in relation to the investment of money."
It has been suggested that LPCR r.15(6) was unduly restrictive and that it be modified to permit borrowing from clients whose normal business is to lend money, recommending the adoption of r.12.3 of the Law Council's Solicitors Conduct Rules (SCR).

Rules 12.3.1 and 12.3.2 of the SCR are identical to the existing LPCR r.15(6), save that instead of the term "practitioner" in the LPCR, the SCR refers throughout to a "solicitor", and in the relevant rules the term "associate" in the SCR is replaced by "affiliate" in the LPCR.

The two terms are not identical. The term "affiliate" in the LPCR includes an associate, but also includes a family member of a practitioner. The definition of "associate" in the LPCR is to be taken from s.6 of the Act: see s.44 of the *Interpretation Act 1984*.

The term "associate" is used in the SCR where it is defined to be "a partner, employee, or agent of the solicitor or of the solicitor's law practice".

Consistently with the general scheme of the LPCR, the proposed amendment uses the term "affiliate". This reflects the position taken by the Board when it originally approved the LPCR as a whole. The intention of this amendment to the LPCR is not to alter the categories of those who might be caught by the conflict of interest provisions. It is to bring into line with the national rules (represented by the SCR) the limited exception for borrowing from a particular class of client. To use the term "associate" in the LPCR would significantly reduce the ambit of this regulation. This was not what the Board was asked to consider.

The intention of the exceptions, in broad terms, is to allow borrowing from commercial lenders at arms length.

Because the term "affiliate" used in the LPCR is broader than the term "associate" used in the SCR, and includes a member of the family of the legal practitioner, the Board considered that the scope of exception (ii) in the SCR would be too wide. Consequently, that rule was amended to refer to "a listed public unit trust".

5. Identification of any unusual or controversial provisions

None.

6. Details of consultations undertaken

General consultations were held with:

1. The Law Society of Western Australia.
2. Members of the Board.
3. Relevant staff of the Board.

7. If applicable, reasons justifying any change in fee, charges and penalties and details of the amount of the fee, charge or penalty before the change

Not applicable.

8. **Where relevant, confirmation that a National Competition Policy Review has been conducted and the outcome of that review**

Not applicable.

9. **The name and telephone number of person whom the Committee can contact regarding the subsidiary legislation**

Should further information be required, please contact Ms Libby Fulham, Acting Executive Director of the Board at 6211 3600 (telephone), 9325 2743 (facsimile) or general@lpbwa.com.

10. **The printed names and signature of the CEO and printed name and signature or initial of the responsible Minister**



**Ms Libby Fulham
Acting Executive Director
Legal Practice Board**



**The Hon Mr Michael Mischin, MLA
Attorney General of Western Australia**

11. **Disclaimer:**

This explanatory memorandum is intended only to be an aid to understanding the subsidiary legislation and must not be substituted for the subsidiary legislation or other instrument gazetted, or made available to the public in any way.

APPENDIX 2

LETTER FROM THE COMMITTEE TO THE LEGAL PRACTICE BOARD OF 4 JULY 2013



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our Ref: 38113/10

Ms Libby Fulham
Acting Executive Director
Legal Practice Board of Western Australia
PO Box 5720
St George's Terrace
Perth WA 6831

By email: lfulham@lpbwa.com

4 July 2013

Dear Ms Fulham

Legal Profession Conduct Amendment Rules 2013

I refer to the subsidiary legislation above and to the explanatory material received by the Committee on 13 June 2013. The Committee considered the *Legal Profession Conduct Amendment Rules 2013* at its meeting on 26 June 2013 and resolved to write to the Legal Practice Board of Western Australia (**Board**) regarding the issues set out below.

Prohibition on borrowing

The Committee notes, by virtue of new subrule 15(7A) of the Legal Profession Conduct Rules (**Rules**) that the lifting of the prohibition on borrowing by practitioners from clients also applies to:

- (d) an affiliate of the practitioner who has received —*
 - (i) full written disclosure regarding the proposed loan; and*
 - (ii) independent legal or financial advice regarding the proposed loan;*
- or*
- (e) an employer of the practitioner.*

However, the Explanatory Memorandum does not address the question of why the list of clients in subrule 15 (7A) includes an affiliate and employer of the practitioner, who may now lend to practitioners, beyond stating they were adopted from the Australian Solicitor's Conduct Rules. Instead, its focus is on lending by commercial lenders who are clients of legal practitioners.

Bearing in mind an affiliate is defined in the Rules as including:

- an associate of the practitioner's law practice;*
- a corporation or partnership in which the practitioner has a material beneficial interest;*
- a member of the immediate family of the practitioner;*
- a partner of the practitioner's law practice; or*

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a director of the practitioner's law practice,

the Committee requests the Board provide it with the following information.

- The rationale for the inclusion of affiliates and employers in the Rules.
- Whether there was any consultation or feedback sought from other Australian jurisdictions with similar rules in place.

Feedback on scenarios

The Committee would also be interested in feedback from the Board on the following scenarios.

- **Scenario A**

A family member of a practitioner seeks legal advice from the practitioner's firm (this could be from the practitioner themselves or a colleague). They then propose to lend money to the practitioner on commercial terms. This would be permitted as long as the conditions of 7A(d)(i) and (ii) are satisfied?

- **Scenario B**

A partner of the firm seeks advice from the practitioner in the firm as a paying client. A practitioner requests their employer to lend them money on commercial terms. Would this be permitted if the loan is being made by the employer or by the partner in their capacity as the principal of the practitioner?

Notice of Motion to Disallow

At its meeting on 26 June 2013, the Committee resolved to move a Notice of Motion in the Legislative Council to disallow the *Legal Profession Conduct Amendment Rules 2013* on 6 August 2013, should the Committee recommend disallowance to the Parliament. The giving of the notice in Parliament, however, should not be taken to indicate that the Committee has resolved to recommend disallowance and allows time for the information above to be provided to and considered by the Committee.

Given the strict timeframes under which Parliament operates for disallowance, the Committee requests your response to this letter by **5pm, 19 July 2013**.

If you have any queries in relation to this letter, please contact Mr Alex Hickman, Advisory Officer (Legal) on 9420 7633 or via email at delleg@parliament.wa.gov.au.

Yours sincerely



Hon Ljiljanna Ravlich MLC
Deputy Chair

APPENDIX 3

LETTER FROM THE LEGAL PRACTICE BOARD TO THE COMMITTEE OF 28 AUGUST 2013

Private & Confidential

Your ref: 38113:10:AH

28 August 2013

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

By post

Dear Mr Abetz

Legal Profession Conduct Amendment Rules 2013

I refer to Ms Ravlich's letter to the Legal Practice Board (**Board**) dated 4 July 2013 in relation to the *Legal Profession Conduct Amendment Rules 2013 (Rules)*, and your letter to the Board dated 8 August 2014.

The Joint Standing Committee on Delegated Legislation (**Committee**) has requested the Board to provide it with the following information:

- The rationale for the inclusion of affiliates and employers in the Rules.
- Whether there was any consultation or feedback sought from other Australian jurisdictions with similar rules in place.

The Committee has also asked for some feedback on 2 scenarios.

I will address the questions and scenarios in turn.

1. Questions

1.1 Rationale for the inclusion of affiliates and employers in the Rules

Firstly, the Board's intention in using the word 'affiliate' instead of 'associate' was a considered choice of words, not an oversight. As explained in the explanatory memorandum, the word 'affiliate' in the Rules includes an 'associate', but also includes a family member of a practitioner. This reflects the position taken by the Board when it originally approved the *Legal Profession Conduct Rules 2010 (LPCR)* as a whole. The intention of this amendment is not to alter the categories of those who might be caught by the conflict of interest provisions, but to bring into line with the Solicitors Conduct Rules (**SCR**) the limited exception for borrowing from a particular class of client. To use the word 'associate' in the LPCR would significantly reduce the ambit of this regulation.

LEGAL PRACTICE BOARD
OF WESTERN AUSTRALIA

OFFICE OF THE BOARD



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(a) Prohibition on practitioners borrowing from clients

Rule 15(6) of the LPCR creates a general prohibition on practitioners from borrowing from clients or former clients, subject to certain exceptions in proposed subrule 15(7A). In particular you have requested further information about 2 of the exceptions to the prohibition.

Proposed subrule 15(7A)(d) allows a practitioner to borrow from a client where:

- The client is an affiliate of the practitioner;
- To whom the borrowing practitioner has provided written disclosure; and
- The lender's interests are protected by obtaining independent legal or financial advice about the loan.

Proposed subrule 15(7A)(e) allows a practitioner to borrow from a client where the client is the employer of the practitioner.

The ethical rule proposed in r.15(6) is supported by caselaw, including *Law Society of NSW v Moulton* [1981] 2 NSWLR 736 (**Moulton**). In *Moulton*, a practitioner had borrowed monies from his clients over a considerable period at rates of interest below the commercial rate and often on inadequate security. The practitioner had not given any or any adequate, advice to his clients about the desirability or need for obtaining independent legal advice.

Professional misconduct has been found where a practitioner borrows from a client or has business dealings with a client in circumstances where the practitioner has failed to make adequate disclosure of their personal interests and has failed to ensure that the client obtains independent legal advice (see *Moulton* per Hope JA [740] and [747-748]).

Professor Dal Pont, in *Dal Pont G Lawyers Professional Responsibility* 5th Ed, 2013 at [6.55], mentions that at general law, a lawyer who wishes to borrow from a client is *prima facie* in a conflict situation which can only be cured by the client's free and informed decision about the proposed transaction. He takes the view that independent advice is the most effective way to achieve informed client consent.

Moulton's case is authority for the proposition that absent independent advice, the practitioner would bear a heavy burden to show that everything within the practitioner's power has been done to protect the client and ensure that the client is aware of every circumstance that is or might be relevant to the decision in question (per Hope JA at [739] to [740]. *Hutley* JA held the client needs to know the risk that attached to the loan and the advantages to the lawyer that may flow from the loan. In terms of the extent of disclosure that would be required, he said, at [758] to [759] '*it goes without saying that there would be a very rare occasion in which a solicitor, using his client's money could ever satisfy these tests*'.

Without the exception to the prohibition for affiliates, the general prohibition could affect practitioners borrowing from an immediate family member, a partner in the lawyer's law firm or any immediate family member of a partner in the practitioner's firm. The prohibition would prevent the practitioner borrowing from an affiliate holding shares in a company that is in dispute with, or possibly even on the other side of a proposed transaction with, the client. The proposed exception requires the practitioner to disclose their interest and ensure that the affiliate has obtained independent legal or financial advice regarding the proposed loan.

The exception to the prohibition for employers would apply to corporate practitioners (a law practice employer would not be a client of its employees), you would be dealing with a sophisticated client operating under appropriate governance requirements, i.e. an entity consistent with those identified in paragraphs (a)-(c) of proposed subrule 15(7A). There remains the overarching requirement of disclosure of personal interests.

(b) Consultation or feedback from other Australian jurisdictions

Other Australian jurisdictions have been unable to provide an official rationale for the two exceptions to the proposed exceptions at subrule 15(7A)(d) and (e)

However, the proposed exceptions against borrowing money from a client in the case of affiliates and employers reflect a long standing position taken by conduct rules in other Australian jurisdictions which had commenced well before the LPA or even the SCR.

The historical position in Victoria, Queensland and New South Wales is briefly considered as follows.

Victoria

In 2005 the Law Institute of Victoria (LIV) completed its update of the *Professional Conduct and Practice (amendment) Rules 2003*. In the LIV's *Professional Conduct and Practice Rules 2005 (2005 Rules)*, the exceptions relating to proposed subrule 15(7A)(d) and (e) correspond in almost identical terms with the LIV's 2003 rule 11.2 at (vi) and (v).

The LIV Rule at 11.2(vi) of the 2005 Rules requires that the associate '*...client's interests were fully protected in the circumstances, whether by legal representation or otherwise*'. While the proposed subrule in the Rules requires that the affiliate of the practitioner receives '*independent legal or financial advice regarding the proposed loan*'.

In drafting the proposed amendment to the Rules, the Board was informed by Parliamentary Counsel that the term '*legal representation or otherwise*' is quite broad. Parliamentary Counsel preferred to narrow this requirement to receiving advice from a legal or financial professional person.

'associate' in the LIV Rules is defined in reference to a practitioner to mean:

- (a) a partner, employee, or agent of the practitioner or, in the case of a practitioner not being a firm, of the practitioner's firm;
- (b) a corporation or partnership in which the practitioner has a material beneficial interest;
- (c) in the case of an incorporated practitioner, a director of the corporation or of a subsidiary of the corporation;
- (d) a member of the practitioner's immediate family; or
- (e) a member of the immediate family of a partner of the practitioner's firm or of the immediate family of a director of an incorporated practitioner or a subsidiary of the corporation.

Queensland

On 1 June 2012 the *Australian Solicitors Conduct Rules 2012 (SCR)* commenced in Queensland. The SCR replaced and repealed the *Queensland Law Society's Legal Profession (Solicitors) Rule 2007 (2007 Rules)*. The 2007 Rules at Rule 11.2 on Solicitor and Client – Borrowing Transactions provides the exceptions under discussion at Rule 11.2(h) and (i) as follows.

Rule 11.2 does not prevent a solicitor or an associate borrowing from a client which is:

- (h) the employer of the solicitor;
- (i) a member of the family of the solicitor or any corporation, partnership, syndicate, joint venture or trust in which or the shares in which the whole of the beneficial interest is presently vested or is capable only of being vested in one or more members of the immediate family of such solicitor...

'associate' in reference to a solicitor is defined to mean:

- (a) a partner, employee, or agent of the solicitor or of the solicitor's law practice;
- (b) a corporation or partnership in which the solicitor has a material beneficial interest;
- (c) a member of the solicitor's immediate family; or
- (d) a member of the immediate family of a partner of the solicitor's law practice.

The terms and order in which the exceptions under the SCR appear are not identical to the exceptions provided by the 2007 Rules. However they strike a resemblance that is sufficiently strong to suggest that Queensland rule makers are satisfied of the need for what is arguably a common sense approach in mitigating the harshness of the general prohibition.

New South Wales

On 26 July 2013, the Council of the NSW Law Society publicly notified its intention to adopt the Australian Solicitors Conduct Rules under the NSW legal profession legislation. The Notice was published in Sydney Morning Herald (under Legal Others column) and NSW Gazette.

The *Law Society of New South Wales' Revised Professional Conduct and Practice Rules 1995* were made by the Council of the Law Society of New South Wales, pursuant to its power under section 57B of the *Legal Profession Act 1987*, on 24 August, 1995. Rule 12 provides the general prohibition on Practitioner and client - Borrowing transactions.

However, the exceptions to the rule are specified by way of r.12.2- which says that the Clause does not prevent a practitioner, or an associate of a practitioner borrowing from a client, which is a corporation or institution described in the Schedule to this rule, or which may be declared by the Council of the Law Society to be exempt from this rule.

The Schedule provides for an expansive list of allowable exceptions. There is no employer specific exception that is comparable to the proposed subrule 15(7A)(e). However, Item 14 allows an exception for a member of the immediate family of the practitioner or a corporation, partnership, syndicate, joint venture or trust in which, or

in the shares in which, the whole of the beneficial interest is presently vested in one or more members of the immediate family.

Legal regulators and courts have strongly and consistently condemned solicitors allowing their personal interests to come into conflict with the interests of their clients, particularly as a result of commercial dealings between lawyers and clients. However, even prior to the SCR, the relevant exceptions to the general prohibition against borrowing from clients has existed and found expression in Australian jurisdictional conduct rules.

In liaising with other jurisdictions, it is on this basis that the exceptions to the rule have come into existence.

2. Scenarios

You have asked for feed back on 2 scenarios.

The first scenario suggests a situation where a family member of a practitioner seeks legal advice from the practitioner's firm, making them an affiliate of the practitioner. Any proposed loan to the practitioner by the affiliate would be permitted as long as the conditions of proposed subrule 15(7A)(d)(i) and (ii) are satisfied.

The second scenario suggests a situation where a partner of the firm seeks advice from a practitioner of the firm as a paying client, and the practitioner asks the law practice to loan them money. As I have indicated above, this scenario would only apply to a practitioner employed by a corporate entity as a law practice employer would not be a client of its employees, therefore the exceptions under proposed subrule 15(7A)(a) to (c) would apply.

As indicated above, the caselaw is clear that practitioner would bear a heavy burden to show that everything within the practitioner's power has been done to protect the client and ensure that the client is aware of every circumstance that is or might be relevant to the decision in question.

Section 581 of the *Legal Profession Act 2008 (LPA)* provides that the Rules are binding on Australian legal practitioners. However, the Rules are essentially a guide, not a code. Section 404(a) of the LPA provides that conduct consisting of a contravention of the LPA or a previous LPA is capable of constituting unsatisfactory professional conduct or professional misconduct. In other words, conduct which breaches the Rules is not necessarily unsatisfactory, and conduct which does not breach the Rules may nonetheless be held to be unsatisfactory, or to constitute professional misconduct. The effect of this is even if the proposed amendment appears to relax a norm of professional behaviour, there may be instances where conduct which is not prohibited by the proposed subrule 15(7A) is still capable of resulting in disciplinary action. Even though the Rules bind practitioners, they do not bind the State Administrative Tribunal or the Supreme Court, which can take the full circumstances into account in disciplinary proceedings.

I trust the above information is sufficient to satisfy the Committee that the Board has considered any ethical concerns relating to the proposed exceptions under subrule 15(7A)(d) and (c) and recommends that Parliament allow the amendment.

Should you need any further information, please contact me or the Board's acting Executive Director, Ms Libby Fulham.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Syminton', written in a cursive style.

John Syminton
Chairperson
Legal Practice Board

APPENDIX 4

LETTER FROM THE COMMITTEE TO THE LEGAL PRACTICE BOARD OF 12 SEPTEMBER 2013

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Your Ref:
Our Ref: 38113:10:AH

Mr John Syminton
Chairperson
Legal Practice Board of Western Australia
PO Box 5720
St George's Terrace
Perth WA 6831

By email: lfulham@lpbwa.com

12 September 2013

Dear Mr Syminton

Legal Profession Conduct Amendment Rules 2013

Thank you for your letter of 28 August 2013 regarding further information requested by the Committee in relation to the *Legal Profession Conduct Amendment Rules 2013 (Amendment Rules)*.

The Committee considered the letter at its meeting on 11 September 2013 and does not believe it adequately addresses the issues raised in its letter of 4 July 2013.

In addition to noting your advice that other Australian jurisdictions have been unable to provide an official rationale for the two exceptions to the proposed exceptions at subrule 15(7A)(d) and (e), the Committee has the following further concerns.

- It is not necessarily the case that an employer of a practitioner will be a “*sophisticated client*” of a type identified in subrule 15(7A)(a)-(c) as claimed on the top of page 3 of the letter. For instance, it may be a small charity that does not have the necessary understanding of the conflict of interest issues that may arise out of a practitioner borrowing from a client who is their employer. It is arguable it should have the benefit of the same safeguards that are set out in (d)(i)-(ii).
- This lack of clarity could be addressed by providing more information in the Amendment Rules about what an “*employer of the practitioner*” is meant to be. Why not classify it with the entities in (a)-(c)?
- “*Affiliate*” is defined to include a corporation or partnership in which the practitioner has a material beneficial interest. Bearing in mind there was previously an absolute prohibition on borrowing from an entity of this description, is it sufficient if borrowing is permitted as long as this entity has received full written disclosure regarding the proposed loan and independent legal or financial advice regarding the proposed loan? This does not remove the potential for conflict of interest.
- The Committee does not believe it is sufficient to say on page 5 of the letter that:

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even if the proposed amendment appears to relax a norm of professional behaviour, there may be instances where conduct which is not prohibited by the proposed subrule 15(7A) is still capable of resulting in disciplinary action.

This is not a substitute for an explanation for why the “*norm of professional behaviour*” is being relaxed and even suggests an element of uncertainty where a practitioner has complied with the Amendment Rules. The Committee requires an explanation in the first place about why this relaxation is taking place.

The Committee also poses the following questions to the Board.

- Has it encountered any instances that come within subrule 15(7A)(d) and (e) before the amendments came into effect?
- Has it taken any action against such conduct and if not, why?
- Were the Amendment Rules made as a result of any changes in consumer protection laws or any other laws?

Given the strict timeframes under which Parliament operates for disallowance, the Committee requests your response to this letter by **5pm, Monday 16 September 2013**. It is open to the Committee, if its concerns are not adequately addressed in this response, to recommend disallowance of the Amendment Rules.

If you have any queries in relation to this letter or require further information, please contact Mr Alex Hickman, Advisory Officer (Legal) on ph: 9420 7633, fax: 9222 7805, or via email at delleg@parliament.wa.gov.au.

Yours sincerely



Mr Peter Abetz MLA
Chairman

APPENDIX 5

LETTER FROM THE LEGAL PRACTICE BOARD TO THE COMMITTEE OF 25 SEPTEMBER 2013

Private & Confidential

LEGAL PRACTICE BOARD
OF WESTERN AUSTRALIA

OFFICE OF THE BOARD

25 September 2013

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

By post

Dear Mr Abetz

Legal Profession Conduct Amendment Rules 2013

I refer to your letter to the Legal Practice Board (**Board**) dated 4 July 2013 in relation to the *Legal Profession Conduct Amendment Rules 2013* (**Rules**).

You have raised 4 concerns and asked 3 further questions of the Board.

In relation to your concerns:

- The proposed amendments to the Rules seek to accommodate the relationships which a practitioner may have with persons that may reasonably involve financial dealings but do not involve any conflict of interest with the practitioner's duties to their client. For example, a practitioner who is employed as in-house counsel may have a relationship which involves small financial dealings, such as obtaining a weeks' pay in advance, or other small borrowings not impacting on the practitioner's conduct as an Australian legal practitioner. The practitioner sought to obtain a loan or advance in salary to assist in an emergency situation. In those circumstances it remains incumbent on the practitioner to avoid conflicts of interest, such as those referred to in the balance of Rule 15 and Rules 12-14. The practitioner will also remain subject to fiduciary obligations, breach of which may constitute professional misconduct or unsatisfactory professional conduct. The difficulty with the existing Rule 15(6) is that it is cast in absolute terms, and was considered to be unduly restrictive in operating even where no conflict of interest or breach of fiduciary obligation arose.
- It would not be beneficial to specify in the Rules what an 'employer of the practitioner' is meant to be, other than the normal interpretation of the term 'employer'. The term "employer" has a well-established legal meaning.
- The provision of full written disclosure regarding a proposed loan and the obtaining of independent legal or financial advice regarding the proposed loan will ordinarily deal with a conflict of interest, as the prima facie conflict situation has been cured by the client's free and informed decision about the transaction. If a conflict of interest does in fact still exist then other provisions of the Rules will continue to operate to protect the affiliate.

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- The rationale for introducing the exceptions is explained in the first dot point above. The amendments have been drafted to recognise and take action to address the issue that a practitioner is currently prohibited from borrowing from clients or former clients in all circumstances. This affects the practitioner's ability to borrow from a variety of affiliates and employers as part of the ordinary incidents of relationships which a practitioner may have with a variety of persons, even if the borrowing occurs in circumstances which do not give rise to any conflict of interest or breach of fiduciary obligation.

The amendment does not affect the overarching fiduciary duty on all practitioners to avoid conflicts between the interests of the client and the interests of the practitioner, or the practitioner's law practice, or an affiliate of the practitioner. Breach of fiduciary duty may also constitute unsatisfactory professional conduct or professional misconduct¹. Professional misconduct may result in a finding that the practitioner is no longer a fit and proper person to remain in the legal profession. In other words, the Rules will not diminish the practitioner's duty to disclose any personal interest and will not excuse a practitioner from a finding of professional misconduct or unsatisfactory professional conduct by the operation of ss.402 and 403 of the *Legal Profession Act 2008*.

In relation to your further questions, in turn:

- The Board has not encountered any instances that come within subrules 15(7A)(d) and (e). This is not an indication that the Rules are not unduly restrictive, as it is to be expected that practitioners will be aware of and will comply with the Rules.
- Not applicable.
- The Rules were not made as a result of any changes in consumer protection laws or any other laws.

Finally, as previously advised, the proposed amendment to the Rules reflects a long standing position taken by conduct rules in other Australian jurisdictions, such as Victoria, Queensland, and NSW.

Should you require any further information, please contact me or the Board's Legal Officer, Ms Libby Fulham.

Yours sincerely



John Syminton
Chairperson
Legal Practice Board

¹ See, for example, *Legal Practitioners Complaints Committee and Edward* [2006] WASAT 113.