

01 July 2021

Ms Megan Pitt
Commissioner for Uniform Legal Services Regulation
Legal Services Council
PO Box H326
AUSTRALIA SQUARE NSW 1215

By email:



Dear Ms Pitt

Consultation Paper on Rules 91B and 91BA of the Legal Profession Uniform General Rules 2015

1. Thank you for your letter dated 6 May 2021 inviting the Law Council's feedback on proposed amendments to Legal Profession Uniform General Rules 91B and 91BA, which relate to the involvement of law practices in managed investment schemes and their responsible entities, including schemes that are litigation funding schemes pursuant to the *Corporations Act 2001* (Cth).

Executive summary

2. The Law Council:
 - (a) Supports the proposed Uniform General Rule 91B, but recommends a minor change as set out in paragraph 21 below.
 - (b) Recommends the *Managed Investment Scheme Information Sheet* be revised to:
 - (i) make clear that the amendment to Rule 91B does not diminish or relax the general prohibition on law practices promoting or operating a managed investment scheme.
 - (ii) make clear the importance of distinguishing between the provision of legal services and services that might constitute financial product advice.
 - (iii) draw attention specifically to ASCR Rule 12 and the availability of further guidance on the Rule and its application from professional associations and the Law Council's *Commentary* to the ASCR.
 - (iv) draws attention to the responsibility of principals under section 34 of the Uniform Law and the obligations of solicitors under ASCR Rule 37.
 - (c) Supports the proposed amendments to make Rule 91BA (Litigation Funding Schemes) a permanent Rule.

Section 258 and Rule 91B

3. Section 258 of the Uniform Law addresses two issues in relation to managed investment schemes:
 - (a) prohibits a law practice from promoting or operating a management investment scheme except in specified circumstances – sections 258(1)(a),(1A) and (2); and
 - (b) prohibits a law practice from providing a legal service in relation to a managed investment scheme if any associate has an interest in the scheme or its responsible entity, except in circumstances specified in the Rules or approved by a designated local authority - section 258(3).
4. Rule 91B(1) as presently formulated deals with point (b) above by permitting a law practice (notwithstanding that an associate has an interest in a scheme or its responsible entity) to provide a legal service in relation to a managed investment scheme in one of three situations:
 - (a) the legal services are provided to the operator of the scheme; or
 - (b) no associate has a substantial interest in the scheme or its responsible entity; or
 - (c) an associate has a substantial interest in the scheme or its responsible entity, but no principal knows of, or ought reasonably to know of, the substantial interest.

Legal services are provided to the ‘operator’ of the scheme

Current Rule 91B(1)(a)

5. Section 258(3) uses the expressions “legal services in relation to a managed investment scheme” and “an interest in the scheme or the responsible entity for the scheme”.
6. Rule 91B(1) as presently formulated similarly uses the expressions “legal services in relation to a managed investment scheme” and “an interest in the scheme or the responsible entity for the scheme”; however, Rule 91B(1)(a) also refers to legal services provided “to the operator of the scheme”.
7. The term “operator” in present Rule 91B(1)(a) is not defined in either the Uniform Law or the Uniform Rules, and thus there is an existing cause for uncertainty about whether a distinction is intended in the current Rule between the “operator” and, for example, the “responsible entity”. It is noted that the term “operator” is not defined in the Uniform Law or the *Corporations Act 2001*, although the term “responsible entity” of a registered scheme is defined in the *Corporations Act 2001* to mean the company named in ASIC’s record of the scheme’s registration as the responsible entity or temporary responsible entity of the scheme.

Proposed Rule 91B

8. The proposed amendment to Rule 91B retains the expressions “legal services in relation to a managed investment scheme” and “an interest in the scheme or the responsible entity for the scheme”; however, any reference to a specific entity to whom those legal services may be provided is omitted from the proposed Rule.
9. The proposed Rule 91B would therefore seem to permit a law practice to provide legal services to *any* client in relation to a managed investment scheme, which may presumably include a client who is an investor, as opposed the operator or responsible entity for the scheme. As such, the proposed Rule departs from the current Rule.

10. The Law Council nevertheless supports in principle the broadening of entities to whom legal services per se may be provided in relation to a managed investment scheme, noting that the proposed Rule does not relax the core proscription in section 258(1)(a) on a law practice promoting or operating a managed investment schemes as part of the law practice.
11. It is noted that the term “legal services” is defined in section 6 of the Uniform Law to mean “work done, or business transacted, in the ordinary course of legal practice”. On the other hand, the *Corporations Law 2001* uses more definitive language (see paragraph 28 below).
12. The Law Council recommends that the Legal Services Council's *Managed Investment Scheme Information Sheet* be updated to make clear:
 - (a) the amendment to Rule 91B does not diminish or relax the general prohibition on law practices promoting or operating a managed investment scheme; and
 - (b) draw attention to the importance of taking care to ensure the services provided to a client in relation to a managed investment scheme are limited only to legal services per se as defined in paragraphs 766B(5)(a) and (b) of the *Corporations Act 2001 (Cth)* and must not include financial product advice.

Substantial interest in the scheme or its responsible entity

Current Rule 91B(1)(b)

13. The objective of current Rule 91B(1)(b) is to guard against the risk that legal services provided in relation to a managed investment scheme might be unduly influenced by the fact that the solicitor involved has a significant or substantial financial or controlling interest in the conduct and operation of that managed investment scheme.
14. The Law Council agrees with the observation made in the December 2019 Consultation Paper on the *Review of Managed Investment Scheme Rules* that the ‘substantial interest’ tests in current Rule 91B(2) impose a disproportionate compliance burden for what is ultimately a subjective judgment, particularly as there is a concurrent ethical duty to avoid conflicts between the duty to serve the best interests of a client and the interests of the solicitor or an associate.
15. The Law Council therefore considers that the “substantial interest” test in current Rule 91B(1)(b) does not add any regulatory value to the well established principles underlying Rule 12 of the Australian Solicitors’ Conduct Rules (**ASCR**), and should be omitted.
16. The Law Council recommends the *Managed Investment Scheme Information Sheet* be updated to draw attention specifically to ASCR Rule 12 and the availability of further guidance on the Rule and its application from professional associations and the Law Council’s *Commentary* to the ASCR.

Knowledge of principals about a substantial interest

Current Rule 91B(1)(c)

17. The objective of current Rule 91B(1)(c) is somewhat unclear on its language, but has the effect of drawing the attention of the principals of a law practice to the possibility that an associate may have a substantial interest in a managed investment scheme for which an associate is providing legal services to the responsible entity for that scheme.

18. The Law Council notes that section 34 of the Uniform Law makes clear the responsibility of the principals of a law practice to ensure reasonable steps are taken to ensure compliance by the legal practitioner associates, and the provision of legal services by the law practice, comply with the Uniform Law, Uniform Rules and other professional obligations. Also relevant is ASCR Rule 37 which requires a solicitor with designated responsibility for a matter to exercise reasonable supervision over solicitors and all other employees engaged in the provision of legal services for that matter.
19. The Law Council therefore recommends the *Managed Investment Scheme Information Sheet* be updated to draw attention specifically to section 34 of the Uniform Law and ASCR Rule 37, and the availability of further guidance on ASCR Rule 37.

Proposed Rule 91B

20. While proposed Rule 91B essentially paraphrases ASCR Rule 12.1, the Law Council considers that the proposed Rule serves a regulatory benefit by drawing explicit attention to the responsibility of avoiding conflicts between the duty to serve the best interests of a client and the interests of the associate of the law practice.
21. However, unlike current Rule 91B(1)(c), the proposed Rule does not draw attention to the fact that the principals of the law practice also have responsibilities. The Law Council suggests that this might be usefully addressed if the chapeau to the proposed Rule was amended as follows:

91B Managed investment schemes-general

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 the services **by the law practice** does not give rise to a conflict between-

Context

22. There has been a long-established public policy position, reflected in legal profession legislation, that solicitors and law practices should not promote or operate managed investment schemes, or provide mortgage financing arrangements, as part of their legal practice. This public policy addresses a number of mischiefs:
 - (a) the risk of financial loss to clients who enter into arrangements whereby the law practice is actively involved in investing client money entrusted to the law practice and operating the investment arrangements;
 - (b) the risk to law practices and clients generally from defalcations arising from investment of client money placing substantial calls on fidelity schemes;
 - (c) the risk to clients that arises, or may potentially arise, from a conflict between the duty to act in the best interests of the client, and the interests of the law practice in operating the investment arrangements.
23. In September 2004, during the development of the Legal Profession Model Laws, upon which the Legal Profession Acts were based, the Law Council expressed the following positions:
 - (a) the provision of financial services, investment services and mortgage financing (**financial services**) are not legal services, and hence monies received during the course of those activities should not be treated as trust monies or attract fidelity fund protection under legal profession laws; and

- (b) legal profession legislation should state that a failure by legal practitioners to comply with licensing requirements that are imposed by any Australian law for the provision of any type of non-legal services (and specifically financial services) is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.
24. Prior to the Uniform Law, the long-standing prohibitions or controls relating to managed investment schemes and mortgage financing arrangements have been:
- (a) the exclusion of money entrusted to a law practice for or in connection with a managed investment scheme or mortgage financing from the statutory protections afforded other trust money;
 - (b) the exclusion of fidelity scheme cover for trust money defalcations arising in connection with a managed investment scheme or mortgage financing; and
 - (c) a prohibition on conducting a managed investment scheme or engaging in mortgage financing except where done pursuant to specific oversight and regulation by legal profession associations.
25. Legal profession laws also provide that money involved in financial services or investments generally is not trust money when it is entrusted to or held in connection with a financial service provided by the law practice:
- (a) that would require the law practice or associate to hold an Australian financial services licence;
 - (b) that is provided in circumstances in which the practice or associate provides the service as a representative of another person who carries on a financial services business.¹
26. Money received by a law practice for or in connection with a financial service it provides does not attract the statutory protections relating to:
- (a) trust money²; and
 - (b) fidelity scheme cover.³
27. Although perhaps not perfectly expressed, there is a distinction made in legal profession laws (continued by the *Legal Profession Uniform Law*) between legal services and financial services, and that financial services (including managed investment schemes and mortgage financing) are not to be regarded as aspects of legal practice.
28. A corresponding distinction is apparent in paragraphs 766B(5)(a) and (b) of the *Corporations Act 2001 (Cth)*, which provide that advice given by a lawyer in relation to a financial product is not financial product advice (and hence does not require an AFSL) if the advice is given in his or her professional capacity, about matters of law, legal interpretation or the application of the law to any facts; or any other advice given by a lawyer in the ordinary course of activities as a lawyer, that is reasonably regarded as a necessary part of those activities.

¹ See for example, *Legal Profession Act 2007 (Qld)* at s238(1)(b) and *Legal Profession Uniform Law* section 129(2)(c)

² Uniform Law, section 129(2)(b)

³ Uniform Law, section 221(4) and Uniform General Rule 85.

Summary

Thank you for the opportunity to comment on the proposed amendments to Uniform General Rules 91B and 91BA. The contact officer at the Law Council for this matter is [REDACTED]

Yours sincerely

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Michael Tidball
Chief Executive Officer