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28 August 2020

Ms Megan Pitt
Chief Executive Officer
Legal Services Council
Level 3, 19 O'Connell Street
Sydney NSW 2000



Dear Megan

Managed Investment Schemes Rules Review

Thank you for your letter of 24 July 2020, informing me of the outcome of the review of rules 91A to 91D of the *Legal Profession Uniform General Rules 2015*, known as the Managed Investment Schemes Rules (MIS Rules).

The revised Information Sheet is well drafted and clear and we look forward to receiving the new draft rule 91B when it becomes available. Thank you for taking our submission into consideration.

The only matter we would like to raise is the Information Sheet's explanation of the concept of 'mortgage financing' for the purposes of rule 91C. The Information Sheet refers to the definition of that term in the *Legal Profession Uniform Solicitors' Conduct Rules 2015* (Conduct Rules), rather than the definition in section 6 of the Uniform Law. It may be that this definition is appropriate given the relationship with rule 41 of the Conduct Rules, which of course contains the general prohibition on solicitors engaging in mortgage financing, however this is not clear to us. The Conduct Rules definition has multiple exceptions, as highlighted below, which are not part of the section 6 definition in the Uniform Law. The text in red appears only in the Uniform Law definition.

'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 (for the purposes of or) 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.*

We appreciate that the LSC's decisions are based on the assumption that rule 41 of the Conduct Rules will continue to apply. However, we note the Law Council of Australia's (LCA's) current review of the Conduct Rules has recommended deletion of rule 41 and, therefore, the definition of 'mortgage financing' in those Rules. We also note your office has indicated in its recent communications regarding the *Legal Profession Uniform General Amendment (Litigation Funding Schemes) Rule 2020* that rule 41 will be omitted from the Conduct Rules.

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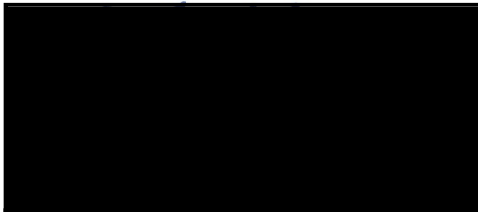
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Therefore, in light of the uncertainty around rule 41 and the associated Conduct Rules definition, the LSC may wish to consider whether the differences in the definitions are material and which one best meets the requirements of the MIS Rules.

Furthermore we do note the Information Sheet will not be released until after the new rule 91B is made, by which time the LCA's position on mortgage financing within the Conduct Rules may be clearer.

The person responsible for this matter in my office is [REDACTED], Senior Policy Officer. You can contact her on [REDACTED] or by email on [REDACTED]

Yours sincerely



Fiona McLeay
Board CEO & Commissioner