

3 February 2020

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Dear Megan

Managed Investment Schemes Rules Review

Thank you for your letter of 2 December 2019, inviting our submission to your Consultation Paper on 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 review has succinctly identified three main issues with the current MIS Rules and we broadly support the measures put forward in the Consultation Paper to address these issues. Our specific comments on each of the issues is set out below.

Issue 1 – Clarifying the intention

The review concluded that the purpose and operation of section 258 of the Uniform Law is not well understood across the profession. The Consultation Paper helpfully sets out the regulatory environment solicitors and law practices must consider where a MIS or mortgage financing are involved. Given the complexities of this environment, the review's conclusion is not surprising.

We agree that a clear statement of the policy rationale, along with enhanced technical guidance with examples, will assist in demystifying the landscape. We support the draft wording included in the Consultation Paper but suggest more detail around the interplay of the various Uniform Law provisions and how this intersects with ASIC's oversight could be included to provide further assistance to lawyers and law practices. For example, a table or diagram to accompany the statement that sets this out may be useful.

We support the comments about section 258 and the MIS Rules being 'complicated and honeycombed'; in particular, that the legislative provision is broad but then its effect is relaxed by the MIS Rules. To address this specific issue, the LSC might consider including in the proposed statement, the rationale around a broad prohibition that is then relaxed by rules.

Issue 2 – Reducing the compliance burden of section 258(3)

We support the rationale behind the proposed modification to rule 91B. We agree a law practice should only be prevented from acting in relation to a MIS if an associate's interest creates a conflict with the law practice's duty to serve the client's best interests.

The change proposed will make it a matter for the law practice to decide if the associate's interest (which will disqualify them individually from acting) also creates a conflict for the law practice as a whole, meaning that the law practice cannot act, as it cannot serve the best interests of the client.

The Consultation Paper refers to rule 1.10(a)(1) of the American Bar Association's *Model Rules of Professional Conduct*. In our view, this wording accurately and succinctly describes what the new proposed rule 91B is trying to achieve. The effect would be that, if an associate determines they will have a personal interest conflict that offends

Victorian Legal Services BOARD

rule 12.1 of the Conduct Rules, the law practice must then determine whether that conflict means the law practice cannot serve the best interests of the client. It is a two-step process. We support this change.

We are interested in the profession's views on how law practices would satisfy themselves that they have avoided such a conflict, in the event an associate declares a personal conflict. We think the example given in the Consultation Paper satisfies the first step and should already be taking place, given the operation of rule 12.1. Perhaps looking at whether the whole firm is conflicted out could depend on factors such as the seniority of the associate with the personal conflict and the level of skill and specialisation that associate would have brought to the client's matter if not for the conflict. For example, if the particular conflicted associate is the managing partner and has specialist knowledge and skills that perhaps attracted the client to the practice, this may create a conflict for the law practice itself, as it could not provide the best level of service to the client. We also support the drafting suggestion made by the LSC as it more accurately reflects the wording and intention of section 258.

Issue 3 – Clarifying the intention of rule 91C

The review concludes that the complex drafting of section 258(4) and rule 91C are problematic and have led to errors in interpretation. We support rewording of these provisions so the drafting is clearer and less complex.

In our view, the confusion arises because one of the categories of mortgage where the law practice is permitted to act under rule 91C is where the borrower was introduced to the lenders or contributors by the law practice *as part of mortgage financing engaged in by the practice*. This is problematic because rule 41 of the Conduct Rules prohibits a solicitor from engaging in mortgage financing as part of the solicitor's practice. Rule 91C thus permits an activity by solicitors that is prohibited by rule 41 of the Conduct Rules. In practice, this means rule 91C has only limited application for non-solicitor associates and agents of the law practice as these parties are not subject to the Conduct Rules. We have highlighted below the wording the consultation paper has used to accurately describe the prohibition, noting our analysis above.

A law practice (or a related entity) must not, in its capacity as the legal representative of a lender or contributor, negotiate the making of or act in respect of a mortgage if:

(1) the lender or contributor is not a financial institution; and

(2) the borrower was introduced to the lender or contributors by:

(a) the law practice, or

(b) an associate or agent of the law practice, or a person engaged by the law practice for the purpose of introducing the borrower to the lender or contributors,

as part of mortgage financing engaged in by the practice or the associate, agent or person.

We therefore support the recommendation that Council consider a statement explaining what section 258(4) and rule 91C prohibit and how these provisions interact with the Conduct Rules. The Legal Services Council need to be clear about the intention of rule 91C so lawyers can understand the interplay between rule 91C and rule 41.

Yours sincerely

Fiona McLeay
Board CEO & Commissioner