



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Megan

Review of managed investment scheme rules

Thank you for your letter dated 4 September 2019 inviting the Law Society of NSW to provide a submission on the review of the managed investment scheme (MIS) rules contained in the *Legal Profession Uniform General Rules 2015*. We note that the terms of reference for the review exclude consideration of s 258 of the *Legal Profession Uniform Law* (LPUL).

As set out in my letter of 3 July 2019, I am advised by the Law Society's Professional Support Unit that we have received one query from a practitioner in relation to MIS since 1 July 2018. This means it is difficult for the Law Society to express a view on the impact of the MIS rules on either the designated local regulatory authority (DLRA) or law practices. However, even in the absence of this direct experience, the Law Society suggests there are issues arising from the formulation of the MIS rules which should be addressed by the review. In particular, changes should be considered to rule 91B to ensure it is clearer in scope and manageable for law practices while mitigating the risk of conflict of interest it was intended to overcome.

In this context, we note that rule 12 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (ASCR) sets out the general obligations of solicitors where their interest conflicts with the duty to serve the best interests of a client. While there is some overlap between rule 91B and rule 12 of the ASCR, rule 91B is necessary to modify the application of s 258 LPUL. Without rule 91B the prohibition on providing legal services to a MIS under s 258(3) LPUL would be absolute (without approval by the DLRA), even where the relevant "interest" was insignificant. Rule 41 of the ASCR also prohibits a solicitor from engaging in "mortgage financing". However, we note that the Law Council of Australia is considering whether it is necessary to retain rule 41 as part of its review of the ASCR.



Key issues arising from the formulation of rule 91B include:

“Associate” of a law practice

“Associate” is defined in s 6 of LPUL and includes employees and agents of the law practice. Given the intention of the MIS rules is to prevent conflict of interest, it is not clear why a law practice should be prohibited from providing legal services where an unqualified, junior member of staff has an interest in the MIS. It may also be unreasonable to expect these staff members to engage in disclosure about those interests. The review may wish to consider whether the scope of the rule should be reduced to exclude those associates in relation to which the question of conflict does not arise.

“Substantial interest”

Rule 91B(2) describes the circumstances in which an associate’s interest in a MIS is “substantial”. Under rule 91B(2)(a), these include where the associate is entitled to an interest in the assets of the MIS which is “significant or of a relatively substantial value”. This does little to clarify the threshold which should be applied and the review may wish to consider an alternate formulation or further guidance.

“Responsible entity”

Section 258(3) LPUL and rule 91B extend to the “responsible entity” for a MIS. The term is defined under the *Corporations Act 2001* (Cth) with reference only to schemes registered with ASIC. There is no definition included in LPUL or reference to the Corporations Act definition. Professor Hanrahan’s October 2017 report states that “the Council in the past has taken the view that the reference to the responsible entity should be read in this context as referring also to the operator of an unregistered scheme” (at 3.2). We cannot see any policy reason to support a contrary view. The review may wish to consider whether provision could be made in the MIS rules to clarify the application of the prohibition in relation to trustees of unregistered schemes.

No principal either knows or ought reasonably to know of the interest

We understand the intention of rule 91B(1)(c) is to operate so that both limbs must be satisfied. Should the review form the opinion that the operation of the exception is ambiguous, we would support a clarifying amendment.

The Law Society would welcome the opportunity to engage with the review on any specific proposals for a revised rule 91B or other changes to the MIS rules.



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We hope this feedback is helpful.

Yours sincerely

Michael Tidball
Chief Executive Officer