



THE LAW SOCIETY
OF NEW SOUTH WALES

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21 August 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: murray.hawkins@lawcouncil.au

Dear Dr Popple,

Policy Proposal Paper – Water Markets Intermediaries Code and Statutory Trust Accounting regulations

The Law Society appreciates the opportunity to provide input to the Law Council's response to the Department of Climate Change, Energy, the Environment and Water Policy Proposal Paper, *Water Markets Intermediaries – Code and Statutory Trust Accounting regulations*. The Law Society's Rural Issues and Property Law Committees contributed to this submission.

Background

We note the Department is consulting on the development of regulations following the introduction of the *Water Amendment (Restoring Our Rivers) Act 2023* (ROR Act). The ROR Act will amend the *Water Act 2007* (Cth) on 1 July 2025 (unless another date is proclaimed) to provide that the regulations may prescribe:

- a Water Markets Intermediaries Code to regulate the conduct of eligible water markets intermediaries towards participants and potential participants in the water market,
- a statutory trust accounting framework to govern the activities of water markets intermediaries that receive money on behalf of another person in the course of providing water markets intermediary services, and
- exemptions from regulation under the Code where approved by the responsible Minister or the ACCC, and from the statutory trust accounting framework where the eligible water markets intermediary maintains a trust account in accordance with a law of a State or Territory that makes provision for a statutory trust accounting scheme.

General Comments

The Law Society's comments are informed by our earlier submissions made in response to the 2014 Independent Expert Panel Review of the *Water Act 2007*¹ and the 2020 ACCC

¹ [Law Society submission to Independent Expert Panel Review of the Water Act 2007 dated 11 July 2014](#)

Murray-Darling Basin water markets inquiry Interim Report.² In those submissions we expressed concern that, while water trading had traditionally been conducted by real estate agents and solicitors in connection with the sale of land, water brokers had entered the market and were acting as both agent and conveyancer in the sale of water. In particular, we expressed our concern about the risks to clients' funds held by water brokers who were not subject to the same statutory standards in relation to the keeping of trust accounts that applies to legal professionals and real estate agents.

The Law Society supports the regulation of water markets intermediaries as outlined in the Department's Policy Proposal Paper to ensure effective and efficient water trading, while preserving the integrity of transactions. We also endorse the Law Council view that legal practitioners who provide a water markets intermediary service as a legal service should be exempt from both the proposed Code and the statutory trust accounting framework, consistent with the principle of avoiding dual regulation of the legal profession.

Exempting the legal profession

As stated above, the Law Society maintains that the legal profession should be exempt from the proposed Code and statutory trust obligations.

Code obligations

The Policy Proposal Paper identifies a number of obligations and issues that it is intended the Code will address as follows:

- Best interest obligations
- Conflict of interest
- Information provided to clients
- Complaints-handling processes
- Insurance, and
- Record keeping.

The Law Society submits that existing fiduciary duties to clients, which all legal practitioners must observe under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and the *Legal Profession Uniform General Rules 2015*, are equivalent in substance to the proposed Code obligations. These duties include:

- Acting in a client's best interests
- Being honest and courteous in all dealings in the course of legal practice
- Delivering legal services competently, diligently and as promptly as reasonably possible
- Avoiding any compromise to their integrity and professional independence
- Providing clear and timely advice to assist their clients
- Following a client's lawful, proper and competent instructions
- Avoiding any conflict of interests
- Maintaining a client's confidences
- Disclosing any updates or changes regarding costs to the client, and
- Honouring any undertakings given in the course of legal practice.

² [Law Society submission to ACCC Murray-Darling Basin water markets inquiry dated 20 October 2020](#)

In addition, we note existing complaints handling protocols apply³ and that legal practitioners are required to hold or be covered by a policy of professional indemnity insurance before they engage in legal practice.⁴

Trust accounts

We note that, to prescribe a State or Territory law in the proposed regulations as an exception to the statutory trust framework for water markets intermediaries, the Minister must be satisfied that the law is equivalent in substance, having regard to prescribed matters that may include:

- (a) audit requirements,
- (b) external examination requirements,
- (c) requirements in relation to accounting records and practices,
- (d) obligations in relation to the deposit and receipt of trust funds,
- (e) the capacity for the scheme to deal with the trade or transfer of eligible tradeable water rights including, but not limited to, a trade or transfer that is not part of the transfer of land,
- (f) the adequacy of the protection of trust monies,
- (g) any other matter that the Minister considers relevant.⁵

The Law Society submits that the provisions under the *Legal Profession Uniform Law* (NSW) regulating trust accounts maintained by legal practitioners are equivalent in substance to the proposed statutory trust accounting framework for water markets intermediaries. Trust accounts under the Uniform Law must comply with a scheme for the receipt, holding, and disbursement of trust money, and for the annual examination of trust records by an external accredited specialist.⁶ Reporting irregularities (or suspected irregularities) in relation to trust money is also a mandatory requirement.⁷ The Law Society has the power to appoint a trust account investigator to a law practice to investigate the general or specified affairs of a law practice.⁸ This regime is integral to maintaining integrity, transparency and fiduciary responsibilities of the legal profession.

Other matters

Policy Paper items

Proposal 11 – Prohibition on trade where the water markets intermediary has an interest

The Department has proposed an obligation to be included in the Code to prohibit a person providing water markets intermediary services when that person, or a related party, has an interest in the eligible tradeable water rights which are proposed to be traded or transferred.

We consider this obligation may be overly onerous, and that any potential conflict of interest that may arise can be adequately managed by way of prescribed disclosures. A similar model to that which applies for agents under the *Property and Stock Agents Act 2002* (NSW)⁹ might be suitable as an alternative.

³ Complaints about lawyers in NSW are dealt with in accordance with the Uniform Law, as is the case in Victoria and Western Australia. Complaints must first be made to the Office of the NSW Legal Services Commissioner (OLSC).

⁴ *Legal Profession Uniform Law* (NSW), s 45.

⁵ *Water Amendment (Restoring Our Rivers) Act 2023*, s 100Q(3) and (4).

⁶ *Legal Profession Uniform Law* (NSW), Chapter 4, Part 4.2.

⁷ *Ibid* s 154.

⁸ *Ibid* s 162.

⁹ Part 3, Div 4 – 5.

Feedback point 3 - Disclosure of enforcement outcomes

The Department has sought feedback whether the Code should require an intermediary to disclose any enforcement outcome, including payment for an infringement notice or the issuing of a warning in relation to a Code or trust accounting obligation. Our preliminary view is that this obligation may be excessive, and that disclosure of an enforcement outcome should only be required where it is a condition imposed by the enforcement authority.

Water markets intermediaries performing legal and financial services

We reiterate our concern, expressed in our earlier submissions,¹⁰ that some activities engaged in by intermediaries may constitute legal services, including the giving of advice in relation to a client's legal rights and obligations under a water contract. Furthermore, the water market is becoming more complex, and there is the potential for derivative type products and contracts to form part of the product range of some service providers. In our view, the Code should clarify that relevant qualifications and authorities are required to perform certain legal and financial services. We suggest that the Code include a statement or qualification to the following effect:

"Nothing in this Code permits a water markets intermediary to:

- a. provide legal services or engage in legal practice contrary to the *Legal Profession Uniform Law Act* of a jurisdiction; or
- b. provide financial services contrary to Chapter 7 of the *Corporations Act 2001 (Cth)*".

Please do not hesitate to contact Sonja Hewison, Policy Lawyer on 02 99260219 or sonja.hewison@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Brett McGrath
President

¹⁰ n1 and n2.