

# INFORMATION BROCHURE

# CLAIMS ON THE LEGAL PRACTITIONERS FIDELITY FUND

Under the Legal Profession Uniform Law (NSW) 2015 and the  
Legal Profession Uniform Law Application Act 2014 (together the LPUL)



THE LAW SOCIETY  
OF NEW SOUTH WALES

## **CONTENTS**

<b>MAKING A FIDELITY FUND CLAIM</b>	<b>1</b>
<b>WHAT IS THE FIDELITY FUND?</b>	<b>1</b>
<b>WHAT DOES THE FIDELITY FUND COVER?</b>	<b>1</b>
<b>THE LPUL (AND, FOR DEFAULTS OCCURRING PRIOR TO 1 JULY 2015, THE LPUL WITH NECESSARY MODIFICATIONS)</b>	<b>2</b>
<b>WHAT DOESN'T THE FIDELITY FUND COVER?</b>	<b>2</b>
<b>WHO MAY MAKE A CLAIM?</b>	<b>3</b>
<b>WHAT ARE THE TIME LIMITS FOR MAKING A FIDELITY FUND CLAIM?</b>	<b>3</b>
<b>INVESTIGATION AND DETERMINATION OF CLAIMS BY THE COMMITTEE</b>	<b>4</b>
<b>CAN THE COMMITTEE'S DETERMINATION BE APPEALED?</b>	<b>4</b>
<b>HOW LONG DO CLAIMS TAKE TO BE DETERMINED?</b>	<b>4</b>
<b>WHAT CAN I RECOVER FROM THE FIDELITY FUND?</b>	<b>5</b>
<b>SHOULD I TAKE STEPS TO RECOVER MY LOSS BEFORE APPROACHING THE FIDELITY FUND?</b>	<b>5</b>
<b>CAN MY CLAIM BE REDUCED BY THE COMMITTEE?</b>	<b>5</b>
<b>FURTHER INFORMATION</b>	<b>6</b>
<b>DISCLAIMER</b>	<b>6</b>

## MAKING A FIDELITY FUND CLAIM

To make a claim on the Fidelity Fund you must complete a claim form which can be sent to you on request by the Manager of the Fidelity Fund. The claim form is in the form approved by the Law Society Council acting through its delegates the Fidelity Fund Management Committee (the Committee). The questions in the claim form have been prepared to obtain the information needed to determine the claim. All questions should be answered. Please complete the claim form as fully as possible; attaching any additional pages if there is not enough space on the form for your answers. It may be necessary for the Law Society to request further information from you (or your solicitor, if you are represented).

It is recommended you engage a new solicitor to assist you in the completion of the claim form and do not seek assistance from the law practice/solicitor against whom the claim is being lodged. Your reasonable costs of doing so will be paid from the Fidelity Fund if the claim is wholly or partly allowed (see below for details). You should also give this information brochure to your new solicitor.

However, you may prepare and lodge your claim on the Fidelity Fund yourself. Once a claim form is completed it should be sent to [FFClaim@lawsociety.com.au](mailto:FFClaim@lawsociety.com.au).

## WHAT IS THE FIDELITY FUND?

The Legal Practitioners' Fidelity Fund is a fund administered by the Law Society under the LPUL. The Fidelity Fund is not an insurance scheme.

## WHAT DOES THE FIDELITY FUND COVER?

The Fidelity Fund is to be applied for the purpose of compensating persons who suffer pecuniary loss because of a dishonest/fraudulent act or omission by an associate of a law practice (as defined below), in relation to trust money or trust property.

The LPUL, which commenced on 1 July 2015, replaced the Legal Profession Act 2004 (NSW) (the **2004 Act**).

If your claim arose during the period from 1 October 2005 to 30 June 2015 (inclusive) your claim will be decided under the LPUL with the necessary modifications to make it correspond to the 2004 Act. Note however that, although the LPUL will apply to claims arising between 1 October 2005 and 30 June 2015 (inclusive) you will not be entitled to make a claim under the LPUL if a corresponding claim could not have been made under the 2004 Act.

The Committee will decide which Act is applicable having regard to the information provided in the claim form and any other information made available to it.

## THE LPUL (AND, FOR DEFAULTS OCCURRING PRIOR TO 1 JULY 2015, THE LPUL WITH NECESSARY MODIFICATIONS)

The provisions relating to the Fidelity Fund are in Part 4.5 of the LPUL (formerly Chapter 3.4 of the 2004 Act).

The LPUL allows claims on the Fidelity Fund by persons who suffered pecuniary loss because of a **default** by a law practice.

The following criteria must be satisfied for a default to occur:

1. A failure by a law practice to pay or deliver trust money or trust property;
2. The trust money or trust property must be received by the law practice or an associate of the law practice in the course of legal practice; and
3. The law practice's failure, to pay or deliver trust money or trust property, must arise from an act or omission of an associate that involved fraud or other dishonesty.

An **associate of a law practice** is a person who is a principal, partner, director, employee or agent of the practice (and would include a non-lawyer employee or agent of the practice). An Australian legal practitioner acting as a consultant to a law practice is also an associate of that law practice.

**Trust money** is defined to include money held in a controlled money account as well as a general trust account, and also transit money and money received on account of legal costs in advance of providing legal services. Trust money is limited to money received in the course of providing of legal services and does not include investment moneys, except as explained below. The LPUL specifies that money paid to a law practice for legal services that have been provided and in respect of which a bill was issued by the law practice, is not trust money.

**Trust property** means property entrusted to a law practice in the course of providing legal services, but does not include trust money.

**Legal services** means work done, or business transacted, in the ordinary course of legal practice.

The LPUL also allows claims for a fraudulent dealing with trust property which was constituted by or arose from an act or omission of an associate of a law practice that involved fraud or other dishonesty.

A claim can also be made if there is a default which involves trust money or trust property received outside New South Wales.

## WHAT DOESN'T THE FIDELITY FUND COVER?

The Fidelity Fund does not cover claims for negligence by a solicitor or law practice.

Claims will generally not be allowed under the LPUL for any money or property received by a law practice for investment purposes (unless specific conditions are met). Similar provisions applied under the 2004 Act.

Claims for losses arising from regulated mortgages and managed investment schemes were not allowed under the 2004 Act.

Claims are not allowed under the LPUL for losses arising from a financial service or mortgage financing activities of a law practice. Those claims were also not allowed under the 2004 Act.

In the LPUL (and previously in the 2004 Act) mortgage financing is defined to include acting as an intermediary to match a prospective lender and borrower, arranging the loan and receiving or dealing with payments under the loan, but does not include providing legal advice or preparing a mortgage for a loan.

The Fidelity Fund also does not generally cover disputes about the amount of legal costs deducted by a lawyer from trust money. If you consider that the legal costs charged by a law practice are excessive, those disputes must be dealt with by means of the cost assessment process (further information about the costs assessment process and the steps required to commence costs assessment is available from the Supreme Court of New South Wales' [website](#)).

Further information regarding costs assessment can also be obtained from the following [brochure](#) prepared by the Law Society.

The right to have a law practice's costs assessed, will usually be notified in the costs agreement provided by the law practice (if one was provided) and should also be notified on any tax invoices issued by the law practice. In the case of a cost dispute, you should not attempt to lodge a claim on the Fidelity Fund until:

1. You have obtained a cost assessment order in your favour against the relevant law practice; and
2. You have taken steps to enforce that cost assessment order against the relevant law practice but have been unable to recover the trust money that the law practice has been ordered to repay to you.

In addition to the above, the failure by the law practice to repay that trust money must amount to a default (as defined above).

Lastly, the Fidelity Fund does not cover consequential loss, otherwise known as "indirect" loss, which is loss that was not a direct result of the law practice's default. An example of indirect loss is bank interest you may have earned on trust money had that money been received by you at the time when it was due to be paid

## WHO MAY MAKE A CLAIM?

Any person (whether real or corporate) who has suffered pecuniary loss because of a default (as defined above) or a fraudulent or dishonest dealing with trust property, by a law practice, may make a claim on the Fidelity Fund. The person who suffers pecuniary loss does not need to be a client of the solicitor or the law practice, in order to make a claim on the Fidelity Fund but the trust money or trust property must have been received by the law practice for that person.

## WHAT ARE THE TIME LIMITS FOR MAKING A FIDELITY FUND CLAIM?

### 1. NOTIFICATION OF FAILURE TO PAY

There is no claim on the Fidelity Fund, unless the prospective claimant notifies the Law Society of the default, within six months of becoming aware of the default.

If the notification is not made within the required time, the claimant will be asked to provide an explanation as to why the notification was not made in time, and the Committee may allow further time. If the Committee refuses to allow further time, the Supreme Court of New South Wales may do so.

### 2. ADVERTISEMENT FOR CLAIMS

The Law Society may advertise for Fidelity Fund claims in relation to a particular solicitor or law practice, in the press and on the Law Society website ([www.lawsociety.com.au](http://www.lawsociety.com.au)). Claims must be received by the Law Society no later than 5 pm on the final date stated in the advertisement. If you have notified the Law Society of your potential claim it will attempt to notify you of the final date for claims.

Claims on the Fidelity Fund, in relation to the particular solicitor or law practice cannot be made after the final date advertised. However, the Committee may allow further time and you will be asked to provide an explanation for not lodging the claim before the final date fixed in the advertisement. If the Committee refuses to allow further time, the Supreme Court of New South Wales may do so.

## **INVESTIGATION AND DETERMINATION OF CLAIMS BY THE COMMITTEE**

Claims on the Fidelity Fund are investigated by the Committee, who has a duty to investigate claims pursuant to the LPUL. The Law Society may make such further enquiries as are considered necessary and appropriate to fully investigate your claim. This may involve, a solicitor from the Law Society contacting the person making a claim, or their legal representative, for documents and/or more information to support/clarify the claim being made.

In the circumstances that information relevant to investigating/supporting the claim is requested and not provided, the Committee may decide to issue a letter pursuant to rule 87 of the LPUL General Rules. If a letter issued pursuant to this rule is not responded to or is responded to in an unsatisfactory manner, which does not assist the investigation of the claim, the Committee has the discretion to disallow the claim.

The Law Society reserves the right to seek proof of identification from all claimants.

The claim may be determined by the Committee wholly or partly allowing or disallowing it, or otherwise settling it. Please note that there are no fees payable either to the Law Society or the Committee in respect of the investigation process or in relation to determining your claim. As discussed below, if a solicitor is engaged by you in relation to the claim, the Committee may order that your reasonable legal costs are paid.

## **CAN THE COMMITTEE'S DETERMINATION BE APPEALED?**

If a claim is disallowed, there is a right of appeal to the Supreme Court of New South Wales within 30 days of receiving written notice of the disallowance.

## **HOW LONG DO CLAIMS TAKE TO BE DETERMINED?**

The length of time it takes for the Committee to investigate and determine a claim depends on a multitude of factors including but not limited to:

1. The material available, such as whether any files were maintained by the law practice;
2. The volume of any available material which may need to be considered;
3. The cooperation of the claimant and/or third parties, including how promptly and satisfactorily any requests for information are responded to by the claimant and/or third parties, who may have information which may assist the investigation/determination of the claim. If unsatisfactory responses are received and multiple requests have to be made by the Law Society, this can lead to delays in the Committee determining the claim.

Notwithstanding the above, claims are generally finalised within 6 to 12 months. However, the timeframe can be shorter, or indeed longer, depending on the circumstances.

## WHAT CAN I RECOVER FROM THE FIDELITY FUND?

The loss for which the Fidelity Fund compensates a claimant in relation to a successful claim is generally as follows:

- The specific sum for which there has been a default (or the value of trust property fraudulently dealt with); and
- Interest at the Reserve Bank of Australia Cash Target Rate + 1% as at the date the claim was received by the Law Society, paid from date of receipt of the claim form by the Law Society up to the date you are notified of the allowance; and
- The reasonable costs of a solicitor acting for you regarding your Fidelity Fund claim. Where costs are payable, they will generally be paid for work reasonably performed by a solicitor at the maximum rate of \$400 per hour (plus GST).
- The amount that can be recovered from the Fidelity Fund may be impacted by a statutory cap of \$1,000,000 for all claims for default per law practice. However, where total claims exceed \$1,000,000 in respect of a law practice, the Law Society Council may consider and decide to increase the statutory cap above \$1,000,000 as appropriate. The claimant will be advised if impacted by this statutory cap.

## SHOULD I TAKE STEPS TO RECOVER MY LOSS BEFORE APPROACHING THE FIDELITY FUND?

The Committee will take into account if a claimant has “unreasonably failed to mitigate losses arising from the act or omission giving rise to the claim” (s.240(5) (b) of the LPUL). In the circumstances, a claimant should take reasonable steps to recover the alleged loss from the relevant law practice and/or solicitor, before approaching the Fidelity Fund and may wish to seek independent legal advice in this respect.

If a claimant does not take steps to mitigate the loss suffered, the Committee may reduce any amount payable by the Fidelity Fund.

## CAN MY CLAIM BE REDUCED BY THE COMMITTEE?

Section 240 of the LPUL outlines circumstances pursuant to which a claim may be disallowed, partly disallowed or reduced by the Committee. The circumstances outlined in section 240 include but are not limited to:

- A claimant knowingly assisting or contributing towards the act or omission giving rise to the claim;
- A claimant’s negligence contributing to the loss the claimant has suffered;
- A claimant’s dealing/transaction with a law practice being illegal and the claimant knew or ought to have reasonably known of that illegality; and
- A claimant failing to take steps to mitigate losses arising from the act or omission that gave rise to the claim (referred to above).

Section 244 of the LPUL also outlines certain circumstances pursuant to which a claim can be reduced by the Committee. Section 244 anticipates scenarios in which monies have already been paid to the claimant, are payable to the claimant or might have been recoverable by the claimant, including but not limited to the following:

- The monies the subject of the claimant’s claim on the Fidelity Fund have been repaid by the solicitor/law practice;
- The claimant has obtained a judgment against the solicitor/law practice (potentially following costs assessment (outlined earlier)) but has failed to take any steps to enforce the judgment; and
- The Committee considers that the money might have been receivable by the claimant from a source other than the Fidelity Fund, but for the neglect or failure by the claimant.

In the circumstances referred to above, which are not exhaustive, a claimant is not entitled to recover from the Fidelity Fund the monies repaid to a claimant or the monies the subject of a judgment in favour of a claimant, on the basis that this may lead to what is sometimes termed a “double recovery” by the claimant. As a result, any amount the Committee determines to be payable to the claimant from the Fidelity Fund may be reduced pursuant to s. 244 of the LPUL if the relevant criteria is satisfied.

## **FURTHER INFORMATION**

If you require further information please contact the Fidelity Fund Manager on [FFClaim@lawsociety.com.au](mailto:FFClaim@lawsociety.com.au) or alternatively please call the Law Society on 02 9926 0333 and ask to speak with the Fidelity Fund Manager.

## **DISCLAIMER**

This document is not intended as legal advice. The purpose of this document is to provide potential claimants a brief summary of some information in relation to Fidelity Fund claim procedures.



THE LAW SOCIETY OF NEW SOUTH WALES

ACN 000 000 699 ABN 98 696 304 966

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney

[lawsociety.com.au](http://lawsociety.com.au)

T +61 2 9926 0333 F +61 2 9231 5809

E [lawsociety@lawsociety.com.au](mailto:lawsociety@lawsociety.com.au)

