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)

UPDATED MARCH 2024

THE LAW SOCIETY OF NEW SOUTH WALES

CONTENTS

WHAT IS THE FIDELITY FUND?

The Legal Practitioners Fidelity Fund is a compensation fund administered by the Law Society under the LPUL. The Fidelity Fund is not an insurance scheme. It is funded by compulsory annual contributions from solicitors holding practising certificates in NSW.

The laws relating to the Fidelity Fund are found in Part 4.5 of the LPUL commencing at s.218.

It is important to note that certain key words are used in the LPUL and in this brochure. Some of those key words and their meanings are as follows:

- An **associate** of a law practice is a person who is a principal, partner, director, 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.
- The **Committee** is the Fidelity Fund Management Committee, from time to time, which comprises up to 11 volunteer solicitor members of the Law Society at least three of whom must also be members of the Law Society Council. The Committee is empowered to investigate and determine Fidelity Fund claims through a delegation made by the Council pursuant to the LPUL.
- The term **default** refers to a failure by a law practice to pay or deliver trust money or trust property that was received by the law practice in the course of legal practice, where that failure arose from a fraudulent/dishonest act or omission by an associate of that law practice.
- In the case of trust property, **default** also refers to a fraudulent dealing with trust property, that was received by the law practice in the course of legal practice, arising from a fraudulent/dishonest act or omission of an associate of that law practice.
- **Pecuniary loss** is either:
  - the amount of trust money or value of trust property that was not paid or delivered; or
  - the amount of money that a person loses as a result of a fraudulent dealing.
- **Trust money** is money entrusted to a law practice, in the course of providing legal services. It is defined to include money held by a law practice 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 does not generally include investment moneys. 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.

*It should be noted that the Fidelity Fund is a fund of last resort. This means that any prospective claimant should take steps to recover their loss from all other available sources **before** lodging a Fidelity Fund claim.*

THE PURPOSE OF THE FIDELITY FUND

The Fidelity Fund was set up to compensate persons who suffer loss as a result of a default by a law practice.

It should be noted that the Fidelity Fund is a fund of last resort. This means that any prospective claimant should take steps to recover their loss from all other available sources ***before*** lodging a Fidelity Fund claim. For example, a prospective claimant should take reasonable steps to recover the alleged loss from the relevant law practice and/or associate who caused the loss, before approaching the Fidelity Fund. Prospective claimants may wish to seek independent legal advice in this respect.

REQUIREMENTS FOR A DEFAULT

All of the following requirements must be satisfied for a default to be proven:

1. A failure by a law practice to pay or deliver trust money or trust property or a fraudulent dealing with trust property.
2. The trust money or trust property must have been received by the relevant law practice (or an associate of the law practice) in the course of legal practice.
3. The law practice's failure, to pay or deliver trust money or trust property, or the fraudulent dealing with trust property, must have arisen from an act or omission of an associate that involved fraud or other dishonesty.

POTENTIAL LOSSES THAT ARE NOT COVERED BY THE FIDELITY FUND

- The Fidelity Fund does not cover claims for negligence by a solicitor or law practice. The relevant claimant must be able to prove fraud/ dishonesty on the part of an associate of the law practice, giving rise to the default.
- Claims will generally not be allowed for any money or property received by a law practice for investment purposes unless specific conditions are met.
- Claims are not allowed for losses arising from a financial service, regulated mortgage, management investment scheme or mortgage financing activities of a law practice. In the LPUL, "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. The right to have a law practice's costs assessed should be notified on any tax invoices issued by the law practice. 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 on the Law Society's website.
  In the case of a cost dispute, a claim on the Fidelity Fund should not be lodged until the prospective claimant has:
  1. obtained a cost assessment order in their favour against the relevant law practice; and
  2. taken steps to enforce that cost assessment order against the relevant law practice but has been unable to recover the trust money that the law practice has been ordered to repay.

  In addition to the above, the failure by the law practice to repay that trust money must have satisfied the other requirements of a default, as discussed above.
- The Fidelity Fund does not cover money paid to a person or entity that is not a law practice because the principal or person providing the services (if a sole trader) did not hold a current practising certificate at the time that the money was received.
- Lastly, the Fidelity Fund does not cover consequential loss, otherwise known as "indirect" loss, which is loss that was not a direct result of a 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 a loss because of a default or a fraudulent 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 law practice, in order to make a claim but the trust money or trust property must have been received by the law practice for the prospective claimant.

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

TIME LIMITS FOR MAKING A FIDELITY FUND CLAIM

1. **Notification of failure to pay**
   Except where the Law Society has advertised for claims (see below), a person may not claim on the Fidelity Fund, unless they have notified the Law Society of the alleged default, within six months of becoming aware of that default.
   Notifications may be made by email to FFClaim@lawsociety.com.au.
   If notification is not made within the required time, the prospective claimant will be asked to provide an explanation as to why the notification was not made in time. After considering the reason provided, the alleged facts and any potential prejudice to the parties, the Committee may allow further time to provide notification. If the Committee refuses to allow further time, the Supreme Court of New South Wales may do so on application by the prospective claimant.
2. **Advertisement for claims**
   The Law Society may advertise for Fidelity Fund claims in relation to a law practice in the press and on the Law Society's website. Claims must be received by the Law Society no later than 5 pm on the date stated in the advertisement as being the final date for claims to be received. If a prospective claimant has notified the Law Society of an alleged default and an advertisement is subsequently published, the Law Society will attempt to notify that prospective claimant of the final date for claims to be received.
   Claims on the Fidelity Fund in relation to a law practice cannot be made after the date advertised as being the final date for claims to be received. If a prospective claimant attempts to lodge a Fidelity Fund claim after the final date for claims, they will be asked to provide an explanation as to why the claim was not lodged in time. After considering the reason provided, the alleged facts and any potential prejudice to the parties, the Committee may allow further time to lodge the claim. If the Committee refuses to allow further time, the Supreme Court of New South Wales may do so on application by the prospective claimant.

MAKING A FIDELITY FUND CLAIM

To make a claim for an amount exceeding $2,500, the prospective claimant must complete a Fidelity Fund claim form. If the amount claimed is less than $2,500, a letter outlining the claim and providing evidence of the right to claim may be accepted by the Committee. A claim form may be requested at the time of making a notification of an alleged default or by emailing FFClaim@lawsociety.com.au.

The Fidelity Fund claim form must be completed as fully as possible. Additional pages may be attached if there is insufficient space on the form. All supporting documentation that is requested in the claim form must be provided. The claim form includes a checklist which should be completed to ensure compliance with that requirement.

It is recommended that prospective claimants engage a new solicitor to assist in the completion of the claim form and do not seek assistance from the law practice/solicitor against whom the claim is being lodged. If a solicitor is engaged by a claimant in relation to a claim that is wholly or partly allowed, the Committee must order that the claimant's reasonable legal costs are paid from the Fidelity Fund.

A claimant may also prepare and lodge their own claim form, without the assistance of a solicitor, if they desire.

Once a claim form is completed it may be lodged with the Law Society by emailing it (with all of the required supporting documentation) to FFClaim@lawsociety.com.au.

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 a claim.

THE AMOUNT THAT MAY BE CLAIMED

A person is entitled to claim from the Fidelity Fund an amount equal to their pecuniary loss. This may be calculated as:

- the specific sum of trust money which the law practice failed to pay or the value of trust property that it failed to deliver; or
- the loss in value of trust property fraudulently dealt with.

As noted above, a person is not entitled to claim for consequential loss.

A person is also not entitled to claim an amount equal to amounts or to the value of other benefits in connection with the default that:

- have already been received by the person;
- have already been determined and are receivable by the person;
- are likely to be received by the person; or
- might, but for the person's neglect, have been receivable by the person, from other sources, in respect of the person's pecuniary loss.

INVESTIGATION OF CLAIMS

Claims on the Fidelity Fund are investigated by the Committee, which has a duty to investigate claims pursuant to the LPUL. The Committee may make such further enquiries as are considered necessary and appropriate to fully investigate a claim. This may involve a solicitor from the Law Society contacting the claimant, or their legal representative, for documents and/or additional 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 the LPUL General Rules that specifies a final date by which the information must be provided. If the claimant does not provide the information by that final date or provides an unsatisfactory response that does not assist the investigation of the claim, the Committee has the discretion to disallow the claim.

PROCEDURE FOR DETERMINING CLAIMS

Once a claim has been investigated, the Committee will consider whether there is sufficient information for it to be referred to an independent reviewer called the "Presiding Administrator" for a non-binding recommendation as to how it should be determined.

Following receipt of the Presiding Administrator's recommendation, the claim will be determined by the Committee at its next monthly Committee meeting.

A claim may be determined by the Committee wholly or partly allowing it or disallowing it. In rare circumstances, the Committee may offer to otherwise settle a claim.

DISALLOWANCE OR REDUCTION IN ALLOWED AMOUNT

Some additional grounds upon which a claim may be disallowed, partly disallowed or reduced by the Committee are where:

- the claimant knowingly assisted in or contributed towards the act or omission giving rise to the claim;
- the claimant's negligence contributed to the loss the claimant has suffered;
- the claimant's transaction with the law practice was illegal and the claimant knew or ought to have reasonably known of that illegality;
- the claimant knew or ought reasonably to have known that proper and usual records were not going to be brought into existence during the conduct of the transaction or would be destroyed; and
- the claimant unreasonably failed to disclose information or cooperate in the investigation of the claim.

The Committee may also reduce the amount otherwise payable on a claim to the extent that it considers appropriate, if satisfied that the claimant:

- assisted in or contributed towards the act or omission giving rise to the claim;
- failed to take steps to mitigate losses arising from the act or omission that gave rise to the claim; or
- hindered the investigation of the claim.

MAXIMUM AMOUNT PAYABLE PER LAW PRACTICE

The amount that a successful claimant will recover from the Fidelity Fund may be impacted by the statutory cap of $1,000,000, that exists for all law practices in relation to the total claims that may be paid for defaults by that law practice. Where the total of claims received in relation to a particular law practice exceeds $1,000,000, the Committee may decide to apply to the Law Society Council for the cap to be increased above $1,000,000. It should be noted that there is no obligation upon the Committee to apply for a cap to be increased for a particular law practice, nor is there any obligation on the Law Society Council to increase the cap, if an application is received from the Committee.

LENGTH OF TIME TO DETERMINE CLAIMS

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.

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

INTEREST AND LEGAL COSTS ON SUCCESSFUL/PARTLY ALLOWED CLAIMS

Interest is payable on the allowed amount of a claim, at the Reserve Bank of Australia Cash Target Rate + 1%, as at the date the claim was received by the Law Society. Interest is payable from the date the claim form was received by the Law Society to the date the claimant is notified of the allowance. In special circumstances (e.g. where there has been an unreasonable delay in responding to requests by the Law Society to provide additional information) the amount of interest payable may be reduced.

The reasonable costs of a solicitor acting for a claimant are also payable from the Fidelity Fund where a claim is wholly or partly allowed. Where costs are payable, they will be paid at the maximum rate of $400 per hour (plus GST).

APPEALS REGARDING DISALLOWED CLAIMS

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.

REPAYMENT REQUIREMENT

If a claimant receives compensation from the Fidelity Fund in relation to a pecuniary loss and later receives money from one or more other sources in relation to that pecuniary loss, the claimant must repay the excess amount received to the Law Society. The excess is the amount by which the amount paid from the Fidelity Fund (excluding interest and legal costs) plus the total amount received from other sources, exceeds the amount of the original pecuniary loss.

FURTHER INFORMATION

If you require further information please contact the Fidelity Fund Manager on **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 a brief summary of some information in relation to Fidelity Fund claim procedures to potential claimants.

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

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

LS3737