

Legal Profession National Law

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Part 4.5 Fidelity cover

Division 1 Introduction

4.5.1 Objective

The objective of this Part is to establish a fidelity cover scheme to ensure that clients of law practices have a source of compensation for defaults by law practices arising from or constituted by acts or omissions of associates of law practices.

4.5.2 Definitions

In this Part:

claim means a claim under this Part, and *claimant* means a person who makes a claim under this Part.

concerted interjurisdictional default means a default of a law practice arising from or constituted by an act or omission:

- (a) that was committed jointly by two or more associates of the law practice; or
- (b) parts of which were committed by two or more associates of the law practice;

where this jurisdiction is the home jurisdiction for at least one of the associates and another jurisdiction is the home jurisdiction for at least one of the associates.

default means:

- (a) in relation to trust money or trust property received by a law practice in the course of legal practice by the law practice—a failure of the law practice to pay or deliver the trust money or trust property, where the failure arises from an act or omission of an associate that involves fraud or other dishonesty; or
- (b) in relation to trust property received by a law practice in the course of legal practice by the law practice—a fraudulent dealing with the trust property, where the fraudulent dealing arises from or is constituted by an act or omission of an associate that involves fraud or other dishonesty.

fidelity fund—see sections 4.5.4 and 4.5.6.

lawyer means:

- (a) an Australian legal practitioner; or
- (b) an Australian-registered foreign lawyer who is an associate of a law practice.

pecuniary loss, in relation to a default, means:

- (a) the amount of trust money, or the value of trust property, that is not paid or delivered; or
- (b) the amount of money that a person loses or is deprived of, or the loss of value of trust property, as a result of a fraudulent dealing.

4.5.3 Defaults to which this Part applies

- (1) This Part applies to a default of a law practice only to the extent that it occurs in connection with the provision of legal services by the law practice.
- (2) It is immaterial where a default occurs.
- (3) This Part applies to a default even though an associate involved was but is no longer an Australian legal practitioner or an Australian-registered foreign lawyer.

- (4) This Part does not apply to a default of a law practice to the extent that the default occurs in relation to money or property that is entrusted to or held by the law practice for or in connection with:
 - (a) a managed investment scheme undertaken by the law practice; or
 - (b) mortgage financing undertaken by the law practice.
- (5) This Part does not apply to defaults or classes of defaults specified in the National Rules.

Division 2 Fidelity funds and fidelity authorities

4.5.4 Fidelity fund for this jurisdiction

The fund nominated in the Legal Professional National Law Act of this jurisdiction is the *fidelity fund* of this jurisdiction for the purposes of this Part.

Note. The fidelity authority for a jurisdiction is the authority responsible for the general administration of the fidelity fund of that jurisdiction.

4.5.5 How this Part applies to this jurisdiction

- (1) This Part applies in relation to this jurisdiction, so that:
 - (a) the term “the fidelity fund” refers to the fidelity fund of this jurisdiction; and
 - (b) the term “the fidelity authority” refers to the fidelity authority for this jurisdiction.
- (2) Subsection (1) does not apply where the context indicates that the fidelity fund of another jurisdiction or the fidelity authority of another jurisdiction is referred to.

Division 3 Fidelity fund of a jurisdiction

4.5.6 Funding

The fidelity fund consists of:

- (a) the money paid on account of the fidelity fund either as annual contributions or levies under this Part; and
- (b) the interest or other income accruing from investment of the money in the fidelity fund; and
- (c) other money paid to the fidelity fund in accordance with jurisdictional legislation.

4.5.7 Annual contributions

- (1) A person who applies to the Board for the grant or renewal of:
 - (a) an Australian practising certificate; or
 - (b) an Australian registration certificate (except where the person is not and reasonably expects not to be an associate of a law practice during its currency);in relation to a financial year must pay an annual contribution for the financial year to the fidelity fund of the person’s home jurisdiction.
- (2) The amount of a contribution is to be set by the fidelity authority and is in addition to all other fees payable in relation to the application.
- (3) The fidelity authority may provide for different contributions to be payable by different classes of lawyers.
- (4) This section does not apply to:
 - (a) a barrister; or

- (b) a government legal practitioner; or
- (c) a corporate legal practitioner; or
- (d) other Australian legal practitioners of a class specified in the National Rules for the purposes of this section and to the extent so specified.

4.5.8 Levies

- (1) This section applies if, at a particular time, the fidelity authority believes that the fidelity fund is not sufficient to satisfy the liabilities of the fidelity fund at or about that time.
- (2) The fidelity authority may impose a levy of an amount that the authority considers reasonable on:
 - (a) all lawyers who are liable to pay an annual contribution to the fidelity fund for the relevant financial year; or
 - (b) a class of lawyers so liable that is determined by the authority.
- (3) The fidelity authority may provide for different levies to be payable by different classes of lawyers.
- (4) The amount of a levy is payable into the fidelity fund by a date and in a way determined by the fidelity authority.

4.5.9 Failure to pay annual contribution or levy

If a lawyer fails to pay an annual contribution or a levy in accordance with this Part, the Board may suspend his or her Australian practising certificate or Australian registration certificate while the failure continues.

4.5.10 Insurance

- (1) The fidelity authority may arrange with an insurer for the insurance of the fidelity fund, whether against particular claims or particular classes of claims or otherwise.
- (2) The proceeds paid under a policy of insurance against particular claims or particular classes of claims are to be paid into the fidelity fund, and a claimant is not entitled to have direct recourse to the proceeds or any part of them.

4.5.11 Borrowing

The fidelity authority cannot borrow money for the purposes of the fidelity fund.

4.5.12 Caps on payments for claims

- (1) The fidelity authority may fix either or both of the following:
 - (a) the maximum amounts, or the method of calculating maximum amounts, that may be paid from the fidelity fund in respect of individual claims or classes of individual claims;
 - (b) the maximum aggregate amount, or the method of calculating the maximum aggregate amount, that may be paid from the fidelity fund in respect of all claims made in relation to individual law practices or classes of law practices.
- (2) Amounts must not be paid from the fidelity fund that exceed the amounts fixed, or calculated by a method fixed, under subsection (1).
- (3) Payments from the fidelity fund in accordance with the requirements of subsection (2) are made in full and final settlement of the claims concerned.
- (4) Despite subsection (2), the fidelity authority may authorise payment of a larger amount if satisfied that it would be reasonable to do so after taking into account the position of the fidelity fund and the circumstances of the particular case.

- (5) No proceedings can be brought, by way of appeal or otherwise, to require the payment of a larger amount or to require the fidelity authority to consider payment of a larger amount.

4.5.13 Sufficiency

- (1) If the fidelity authority is of the opinion that the fidelity fund is likely to be insufficient to meet the fund's ascertained and contingent liabilities, the authority may do any or all of the following:
- (a) postpone all payments relating to all or any class of claims out of the fund;
 - (b) impose a levy;
 - (c) make partial payments of the amounts of one or more allowed claims out of the fund with payment of the balance being a charge on the fund;
 - (d) make partial payments of the amounts of two or more allowed claims out of the fund on a pro rata basis, with payment of the balance ceasing to be a liability of the fund.
- (2) In deciding whether to do any or all of the things mentioned in subsection (1), the fidelity authority:
- (a) must have regard to hardship where relevant information is known to the authority; and
 - (b) must endeavour to treat outstanding claims equally and equitably, but may make special adjustments in cases of hardship.
- (3) If the fidelity authority declares that a decision is made under subsection (1) (d):
- (a) the balance specified in the declaration ceases to be a liability of the fidelity fund; and
 - (b) the authority may (but need not) at any time revoke the declaration in relation to either the whole or a specified part of the balance, and the balance or that part of the balance again becomes a liability of the fund.
- (4) A decision of the fidelity authority made under this section is final and not subject to appeal or review.

Note. Section 4.5.28 (8) provides for payment to a claimant of any additional amount (less costs) recovered by the exercise of rights of subrogation under section 4.5.28.

4.5.14 Audit

The fidelity authority must cause the accounts relating to the fidelity fund to be audited annually, and must forward a copy of the audit report to the Commissioner.

Division 4 Claims about defaults

4.5.15 Entitlement to make a claim

- (1) A person who suffers pecuniary loss as a result of a default by a law practice is entitled to make a claim about the default against the fidelity fund of the home jurisdiction of each associate of the law practice whose act or omission (whether alone or with one or more other associates of the law practice) gives rise to or constitutes the default.
- (2) Subsection (1) extends to an associate of the law practice who, or to the law practice itself in the case of an incorporated legal practice that, suffers pecuniary loss as a result of the default.

4.5.16 Making a claim

- (1) A claim is to be made in writing in accordance with the National Rules.
- (2) Claims are to be dealt with in accordance with this Part and the National Rules.

4.5.17 Advertisements

- (1) If the fidelity authority considers that there has been, or may have been, a default by a law practice, it may publish a notice in accordance with the National Rules seeking information about the default or inviting claims about the default or both.
- (2) A notice inviting claims about a default must fix a final date for making claims that is at least 3 months and not more than 12 months after the date of the first (or only) publication of the notice.

Note. Section 4.5.30 (1) provides a right of appeal against a failure to determine a claim after 12 months after the claim was made.

- (3) The fidelity authority may provide information to persons making inquiries in response to a notice published under this section.

4.5.18 Time limit for making claims

- (1) Subject to subsection (2), a claim does not lie against a fidelity fund unless the prospective claimant notifies the fidelity authority of the default concerned within:
 - (a) the period of 6 months after the prospective claimant becomes aware of the default; or
 - (b) a further period allowed by the fidelity authority; or
 - (c) a further period allowed by the Supreme Court of the jurisdiction to which the fidelity authority belongs where the authority refuses to allow a further period under paragraph (b).
- (2) If the fidelity authority publishes a notice under section 4.5.17 fixing a final date for making claims about a default, a claim may be made:
 - (a) up to and including the final date fixed under the notice; or
 - (b) within a further period allowed by the authority; or
 - (c) within a further period allowed by the Supreme Court of the jurisdiction to which the authority belongs where the authority refuses to allow a further period under paragraph (b);even though it would have been barred under subsection (1) had the notice not been published.
- (3) The Supreme Court may allow a further period referred to in subsection (1) (c) or (2) (c) if it is satisfied that it would be:
 - (a) reasonable to do so after taking into account all ascertained and contingent liabilities of the fidelity fund; and
 - (b) appropriate to do so in a particular case having regard to matters the Supreme Court considers relevant.
- (4) The fidelity authority must take reasonable steps to individually notify potential claimants of whom it is aware of their entitlement to make a claim within a reasonable specified period of at least 21 days after the notification.
- (5) Notification under subsection (4) can be made only while relevant claims can be made under subsection (1) or (2), but a claim by a potential claimant who has been so notified:
 - (a) may be made during the specified period even if it would otherwise be barred

under subsection (1) or (2); and

(b) is ineffective if made after the specified period.

4.5.19 Processing and investigation of claims

Subject to this Part and the National Rules, the fidelity authority may process and investigate a claim against the fidelity fund in any manner it considers appropriate.

4.5.20 Advance payments

- (1) The fidelity authority may, at its absolute discretion, make payments from the fidelity fund to a claimant in advance of the determination of a claim if satisfied that:
 - (a) the claim is likely to be allowed; and
 - (b) payment is warranted to alleviate hardship.
- (2) Any payments made in advance are to be taken into account when the claim is determined.
- (3) If the claim is disallowed, the amounts paid under this section are recoverable by the fidelity authority as a debt due to the fidelity fund.
- (4) If the claim is allowed but the amount payable is less than the amounts paid under this section, the excess paid under this section is recoverable by the fidelity authority as a debt due to the fidelity fund.

4.5.21 Claims by law practices or associates about notional defaults

- (1) This section applies if a default of a law practice arising from or constituted by an act or omission of an associate of the law practice was avoided, remedied or reduced by a financial contribution made by the law practice or by one or more other associates.
- (2) The default, to the extent that it was avoided, remedied or reduced, is referred to in this section as a *notional default*.
- (3) This Part applies to a notional default in the same way as it applies to other defaults of law practices, but only the law practice or the other associate or associates concerned are eligible to make claims about the notional default.

Division 5 Determination of claims

4.5.22 Determination of claims

- (1) The fidelity authority must ensure that claims against the fidelity fund are determined independently, at arm's length from the legal profession.
- (2) The fidelity authority must provide written notice to a claimant against the fidelity fund of its decision in relation to a claim as soon as practicable after making that decision.
- (3) The fidelity authority may determine a claim by wholly or partly allowing or disallowing it.
- (4) The fidelity authority may wholly or partly disallow a claim, or reduce the amount of a claim, to the extent that:
 - (a) the claim does not relate to a default for which the fidelity fund is liable; or
 - (b) the claimant knowingly assisted in or contributed towards, or was a party or accessory to, the act or omission giving rise to the claim; or
 - (c) the negligence of the claimant contributed to the loss; or
 - (d) the conduct of the transaction with the law practice in relation to which the claim is made was illegal, and the claimant knew or ought reasonably to have known of that

illegality; or

- (e) proper and usual records were not brought into existence during the conduct of the transaction, or were destroyed, and the claimant knew or ought reasonably to have known that records of that kind would not be kept or would be destroyed; or
 - (f) the claimant has unreasonably refused to disclose information or documents to or co-operate with the fidelity authority, or any other authority (including, for example, an investigative or prosecuting authority), in the investigation of the claim.
- (5) The fidelity authority may reduce the amount otherwise payable on a claim to the extent the authority considers appropriate:
- (a) if satisfied that the claimant assisted in or contributed towards, or was a party or accessory to, the act or omission giving rise to the claim; or
 - (b) if satisfied that the claimant unreasonably failed to mitigate losses arising from the act or omission giving rise to the claim; or
 - (c) if satisfied that the claimant has unreasonably hindered the investigation of the claim.
- (6) In wholly or partly allowing a claim, the fidelity authority must specify the amount payable from the fidelity fund to the claimant or to another person at the claimant's direction.
- (7) Subsection (4) does not limit a fidelity authority's power to disallow a claim, and subsection (5) does not limit a fidelity authority's power to disallow or reduce a claim.
- (8) The fidelity authority must publish a statement, at least annually, about how the authority is giving effect to subsection (1).

4.5.23 Maximum amount allowable

- (1) The amount payable in respect of a default must not exceed the pecuniary loss resulting from the default.
- (2) This section does not apply to costs payable under section 4.5.24 or to interest payable under section 4.5.25.

4.5.24 Costs

- (1) If the fidelity authority wholly or partly allows a claim, it must order payment from the fidelity fund of the claimant's reasonable legal costs involved in making and proving the claim, unless it considers that special circumstances exist that warrant a reduced amount of costs or a determination that no amount should be paid for costs.
- (2) If the fidelity authority wholly disallows a claim, it may order payment from the fidelity fund of the whole or part of the claimant's reasonable legal costs involved in making and attempting to prove the claim, where it considers it is appropriate to make the order.

4.5.25 Interest

- (1) In determining the amount of pecuniary loss resulting from a default, the fidelity authority must order payment from the fidelity fund of interest on the amount payable, unless it considers that special circumstances exist that warrant a reduced amount of interest or a determination that no interest should be paid.
- (2) The interest is to be calculated from the date on which the claim was made, to the date of notification that the claim has been allowed, at the rate specified in or determined under the National Rules for the purposes of this section or at the rate of 5% to the extent provision is not made in the National Rules for the rate of interest.

4.5.26 Reduction of claim because of other benefits

- (1) A person is not entitled to recover from the fidelity fund any amount equal to amounts or to the value of other benefits in connection with the default concerned:
 - (a) that have already been paid to or received by the person; or
 - (b) that have already been determined and are payable to or receivable by the person; or
 - (c) that (in the opinion of the fidelity authority) are likely to be paid to or received by the person; or
 - (d) that (in the opinion of the fidelity authority) might, but for neglect or failure on the person's part, have been paid or payable to or received or receivable by the person;from other sources in respect of the pecuniary loss to which a claim relates.
- (2) The fidelity authority may, at its absolute discretion, pay to a person the whole or part of an amount referred to in subsection (1) (c) if satisfied that payment is warranted to alleviate hardship, but nothing in this subsection affects section 4.5.27.
- (3) Without limiting subsection (1), but subject to section 4.5.32, a person is not entitled to recover from the fidelity fund of this jurisdiction if the person has already recovered from the fidelity fund of another jurisdiction in connection with the default concerned.

4.5.27 Repayment of certain amounts

- (1) If:
 - (a) a claimant receives a payment from a fidelity fund in respect of a claim; and
 - (b) the claimant receives or recovers from another source or sources a payment on account of the pecuniary loss; and
 - (c) there is a surplus after deducting the amount of the pecuniary loss from the total amount received or recovered by the claimant from both or all sources;the amount of the surplus is a debt payable by the claimant to the fidelity fund.
- (2) However, the amount payable by the claimant cannot exceed the amount the claimant received from the fidelity fund in respect of the claim.

4.5.28 Subrogation

- (1) On payment of a claim from the fidelity fund, the fidelity authority is subrogated to the rights and remedies of the claimant against any person in relation to the default to which the claim relates.
- (2) Without limiting subsection (1), that subsection extends to a right or remedy against:
 - (a) an associate in respect of whom the claim is made; or
 - (b) the person authorised to administer the estate of an associate in respect of whom the claim is made and who is deceased or an insolvent under administration.
- (3) Subsection (1) does not apply to a right or remedy against an associate if, had the associate been a claimant in respect of the default, the claim would not be disallowed on any of the grounds set out in section 4.5.22.
- (4) The fidelity authority may exercise its rights and remedies under this section in its own name or in the name of the claimant.
- (5) If the fidelity authority brings proceedings under this section in the name of the claimant, it must indemnify the claimant against any costs awarded against the claimant in the proceedings.

- (6) The fidelity authority may exercise its rights and remedies under this section even though any limitation periods under this Part have expired.
- (7) The fidelity authority must pay into the fidelity fund any money recovered in exercising its rights and remedies under this section.
- (8) If in exercising its rights and remedies under this section the fidelity authority recovers more money than that already paid to the claimant, the authority must pay the difference to the claimant after deducting costs incurred to recover the money. This subsection applies whether or not the total amount paid would otherwise exceed any relevant maximum amount fixed under section 4.5.12.

4.5.29 Right of appeal against decision on claim

- (1) A claimant against the fidelity fund may appeal to the Supreme Court of this jurisdiction against a decision of the fidelity authority:
 - (a) to wholly or partly disallow a claim; or
 - (b) to reduce the amount allowed in respect of a claim;
 but an appeal does not lie against a decision of the fidelity authority to limit the amount payable, or to decline to pay an amount, under section 4.5.12 or 4.5.13.
- (2) An appeal against a decision must be lodged within 30 days of receiving written notice about the decision.
- (3) On an appeal under this section:
 - (a) the appellant must establish that the whole or part of the amount sought to be recovered from the fidelity fund is not reasonably available from other sources, unless the fidelity authority waives that requirement; and
 - (b) the Supreme Court may, on application by the fidelity authority, stay the appeal pending further action being taken to seek recovery of the whole or part of that amount from other sources.
- (4) The Supreme Court may review the merits of the fidelity authority's decision to the extent considered relevant by the Court.
- (5) The Supreme Court may:
 - (a) affirm the decision; or
 - (b) if satisfied that the reasons for varying or setting aside the fidelity authority's decision are sufficiently cogent to warrant doing so:
 - (i) vary the decision; or
 - (ii) set aside the decision and make a decision in substitution for the decision set aside; or
 - (iii) set aside the decision and remit the matter for reconsideration by the fidelity authority in accordance with any directions or recommendations of the Court.
- (6) The Supreme Court may make other orders as it thinks fit.
- (7) No order for costs is to be made on an appeal under this section unless the Supreme Court is satisfied that an order for costs should be made in the interests of justice.

4.5.30 Right of appeal against failure to determine claim

- (1) A claimant against the fidelity fund of this jurisdiction may appeal to the Supreme Court of this jurisdiction against a failure of the fidelity authority to determine a claim after 12 months after the claim was made and while the failure continues.

- (2) On an appeal under this section:
 - (a) the appellant must establish that the whole or part of the amount sought to be recovered from the fidelity fund is not reasonably available from other sources, unless the fidelity authority waives this requirement; and
 - (b) the Supreme Court may, on application by the fidelity authority, stay the appeal pending further action being taken to seek recovery of the whole or part of that amount from other sources.
- (3) No order for costs is to be made on an appeal under this section unless the Supreme Court is satisfied that an order for costs should be made in the interests of justice.

4.5.31 Court proceedings

In any proceedings brought in a court under section 4.5.28, 4.5.29 or 4.5.30:

- (a) evidence of any admission or confession by, or other evidence that would be admissible against, a lawyer or other person with respect to an act or omission giving rise to a claim is admissible to prove the act or omission despite the fact that the lawyer or other person is not a defendant in, or a party to, the proceedings; and
- (b) any defence that would have been available to the lawyer or other person is available to the fidelity authority.

Division 6 Defaults involving interjurisdictional elements

4.5.32 Concerted interjurisdictional defaults

- (1) A fidelity authority for a jurisdiction may treat a concerted interjurisdictional default as if the default consisted of two or more separate defaults by reference to the different home jurisdictions of two or more associates involved in the default.
- (2) A fidelity authority may treat a claim about a concerted interjurisdictional default as if the claim consisted of two or more separate claims by reference to the different home jurisdictions of two or more associates involved in the default.
- (3) A claim about a concerted interjurisdictional default is to be assessed on the basis that the fidelity funds of the relevant jurisdictions involved are to contribute:
 - (a) in equal shares in respect of the default, regardless of the number of associates involved in each of those jurisdictions, and disregarding sections 4.5.12 and 4.5.13; or
 - (b) in other shares as agreed by the fidelity authorities involved.
- (4) Subsection (3) does not affect the application of sections 4.5.12 and 4.5.13 in respect of the amount payable from a fidelity fund after the claim has been assessed.

4.5.33 Interjurisdictional agency

- (1) The fidelity authority may request a fidelity authority of another jurisdiction to act as its agent for the purpose of processing or investigating a claim about a default if the default appears to have:
 - (a) occurred partly or solely in the other authority's jurisdiction; or
 - (b) occurred in circumstances in which it cannot be determined precisely in which jurisdiction the default occurred.
- (2) If the fidelity authority agrees to act as agent of another fidelity authority, it may:
 - (a) act as agent of the other authority for the purpose of processing or investigating the claim; and

- (b) exercise any of its powers or other functions in relation to processing or investigating the claim or aspects of the claim as if the claim had been made against the fidelity fund of this jurisdiction.

Division 7 Miscellaneous

4.5.34 Co-operation

- (1) When dealing with a claim, the fidelity authority may exercise any of its functions in co-operation with or with the assistance of other fidelity authorities, the Board or the Commissioner.
- (2) The fidelity authority, the Board and the Commissioner may exchange information about a claim and the authority may exchange information about a claim with other fidelity authorities.

4.5.35 Protection from liability

- (1) No liability (including liability in defamation) is incurred in respect of anything done or omitted to be done in good faith for the purpose of arranging for the insurance of a fidelity fund by:
 - (a) a fidelity authority or a member of a fidelity authority; or
 - (b) a person acting at the direction of any one referred to in paragraph (a).
- (2) No liability (including liability in defamation) is incurred in respect of anything done or omitted to be done in good faith for the purpose of publishing a notice or providing information under section 4.5.17 by:
 - (a) a fidelity authority or a member of a fidelity authority; or
 - (b) the proprietor, editor or publisher of a newspaper in respect of a notice under that section published in the newspaper; or
 - (c) an internet service provider or internet content host in respect of a notice under that section published on the internet; or
 - (d) a person acting at the direction of any one referred to in paragraph (a), (b) or (c).

4.5.36 National Rules for fidelity cover

- (1) The National Rules may make provision with respect to any aspect of the fidelity cover scheme under this Part.
- (2) Without limitation, the National Rules may make provision with respect to the following:
 - (a) the minimum terms and conditions of fidelity cover;
 - (b) the requirements and processes for making a claim against a fidelity fund;
 - (c) the procedure by which a claim against the relevant fidelity fund is to be processed;
 - (d) the procedure for identifying and dealing with concerted interjurisdictional defaults.