

REAL ESTATE LEGISLATION (FIDELITY GUARANTEE FUNDS) AMENDMENT BILL 1999

EXPLANATORY MEMORANDUM

The Purpose of this Bill is to extend the time period in which people who wish to make a claim against the Fidelity Guarantee Funds established under the *Real Estate and Business Agents Act 1978* and the *Settlement Agents Act 1981* are able to give notice of their claim to either the Real Estate and Business Agents Supervisory Board or the Settlement Agents Supervisory Board.

The Fidelity Guarantee Funds established under each of the Acts are intended to provide reimbursement to people who suffer loss in the course of a real estate, business or settlement transaction where a real estate and business agent or a settlement agent misappropriates monies that may be received in the transaction. The Funds are administered by the Real Estate and Business Agents Supervisory Board and the Settlement Agents Supervisory Board.

Under the current legislation, a person who wishes to make a claim against either of the Funds is required to give the relevant Board notice of their claim within twelve months of that person becoming aware of the defalcation on which the claim is based. The term defalcation includes criminal or fraudulent conduct by an agent in the course of their business which results in a pecuniary loss or a loss of property to any other person.

There is no discretion within the legislation to allow the Boards to consider a claim where notice of that claim has been given out of the time limits, and if notice of the claim is not given within that time, then the Board is not able to consider the claim.

The Boards have previously been required to decline claims against the Funds in circumstances where notice of the claim has not been given within the twelve month period.

The Bill extends the time period in which people who wish to make a claim against the Funds are able to give notice of their claim. The Bill amends section 116(2) of the *Real Estate and Business Agents Act 1978* and section 93(2) of the *Settlement Agents Act 1981*, which are similar in their terms.

With respect to each of the Fidelity Guarantee Funds, the Bill provides that:

- A person will have three years within which to give the Board written notice of their claim.

- The Board will have a discretion to deal with claim where notice of the claim is given between three years and six years of the claimant becoming aware of the defalcation on which the claim is based, provided that the Board considers that, in the circumstances, it just and reasonable to deal with the claim even though notice of the claim was not given within the three year period.

The Bill also provides for transitional arrangements, to empower the Boards to deal with claims where the notice of claim does not comply with the existing time limits, but where the notice of claim will, after enactment of the Bill, comply with the amended time limits. This includes empowering the Board to revisit claims which they have already considered and have declined on the basis of the notice of claim being given out of time.

The effect of the transitional provisions is that the Boards will be required to determine a claim in accordance with the amended time limits after enactment of the Bill in the following circumstances.

- Where notice of a claim has not previously been given to the Board and the notice of claim is within the amended time limits, even if the notice of claim is not within the existing time limits.
- Where notice of a claim has been given to the Board under the existing provisions but the claim has not yet been determined, and the notice of claim is within the amended time limits, even if the notice of claim is not within the existing time limits.
- Where notice of a claim has previously been given to the Board and the Board has declined the claim on the basis that the existing time limits have not been complied with, and the notice of claim is within the amended time limits.

Outlined below is an examination of the contents of the Bill on a clause by clause basis.

Part 1 - Preliminary

This Part contains the title of the Act and the relevant commencement provisions.

Clause 1: Short title and citation.

Clause 2: This clause sets out the commencement provision, which provides that the proposed Act will come into operation on the day that it receives the Royal Assent.

Part 2 - Real Estate and Business Agents Act 1978

This Part contains the amendments to the provisions of the *Real Estate and Business Agents Act 1978*, to allow for the extended time limits for the giving of notice of a claim.

Clause 3: This clause confirms that the amendments in this Part are to the *Real Estate and Business Agents Act 1978*.

Clause 4: This clause provides for the amendment extending the time period for the giving of notice of a claim by amending the terms of section 116(2) of the *Real Estate and Business Agents Act 1978*.

Subclause (1) provides for the repeal of the existing section 116(2) of the *Real Estate and Business Agents Act 1978*, and inserts the new subsection.

Paragraph (a) of the new subsection (2) to section 116 provides that notice of a claim against the Fidelity Guarantee Fund established under the *Real Estate and Business Agents Act 1978* is to be given in writing to the Real Estate and Business Agents Supervisory Board within three years of the claimant becoming aware of the defalcation on which the claim is based.

Paragraph (b) of the new subsection (2) to section 116 deals with the circumstances where notice of the claim is given outside the three year period referred to in paragraph (a), but within six years of the claimant becoming aware of the defalcation. If notice of the claim is given between three and six years, then the Board is given a discretion to deal with the claim.

Paragraph (b) provides that the Board may deal with a claim if notice of the claim has not been given within the three year period, provided that the Board receives notice within six years of the claimant becoming aware of the defalcation, and the Board considers that it is just and reasonable in the circumstances to deal with a claim even though notice was not given within the three year period.

The discretion is intended to give the Board the power to consider a claim where notice is not given within the three year time period, by considering the circumstances of the case and the reasons for the delay. However, by specifying the six year time period, the period in which notice of a claim can be made is not open-ended, and is consistent with normal limitations on civil actions. This will also

provide certainty for the administration of the Fidelity Guarantee Fund.

Subclause (2) of clause 4 provides for a person to give notice of a claim in accordance with the amended provisions, even if the time in which the notice of claim should have been given under the existing provisions has expired.

This subclause will enable claimants who have not previously lodged a claim because they considered that their claim was not within the existing time limits to have their claim dealt with in accordance with the amended provisions following enactment.

Subclause (3) of clause 4 provides that where a person has given notice of a claim under the existing provisions, that person will be entitled to have their claim considered in accordance with the amended provisions after the enactment of the provisions.

If the notice of the claim is within the amended provisions, the Board will be required to deal with the claim accordingly, and the claimant will not have to give notice of the claim to the Board again.

This subclause applies to claims of which notice has previously been given to the Board, whether or not the Board has determined the claim. With respect to claims that the Board has already determined, the effect of this subclause is to empower the Board to revisit those claims which it has already declined on the basis that the notice of claim was given out of time, where that notice is found, after enactment, to have been given within the amended time limits.

Clause 5: This clause amends section 117(1) of the *Real Estate and Business Agents Act 1978*. Section 117(1) is the provision which empowers the Board to receive and settle claims against the Fidelity Guarantee Fund. This amendment ensures that the Board is only empowered to settle claims where notice of the claim has been given in accordance with the amended time limits as provided for in section 116(2).

The effect of this provision is to ensure that the Board has no power to settle a claim where the notice of the claim was not given in accordance with the amended time limits.

Part 3 - Settlement Agents Act 1981

This Part contains the amendments to the provisions of the *Settlement Agents Act 1981*, to allow for the extended time limits for the giving of notice of a claim.

Clause 6: This clause confirms that the amendments in this Part are to the *Settlement Agents Act 1981*.

Clause 7: This clause provides for the amendment extending the time period for the giving of notice of a claim by amending the terms of section 93(2) of the *Settlement Agents Act 1981*.

Subclause (1) provides for the repeal of the existing section 93(2) of the *Settlement Agents Act 1981*, and inserts the new subsection.

Paragraph (a) of the new subsection (2) to section 93 provides that notice of a claim against the Fidelity Guarantee Fund established under the *Settlement Agents Act 1981* is to be given in writing to the Settlement Agents Supervisory Board within three years of the claimant becoming aware of the defalcation on which the claim is based.

Paragraph (b) of the new subsection (2) to section 93 deals with the circumstances where notice of the claim is given outside the three year period referred to in paragraph (a), but within six years of the claimant becoming aware of the defalcation. If notice of the claim is given between three and six years, then the Board is given a discretion to deal with the claim.

Paragraph (b) provides that the Board may deal with a claim if notice of the claim has not been given within the three year period, provided that the Board receives notice within six years of the claimant becoming aware of the defalcation, and the Board considers that it is just and reasonable in the circumstances to deal with a claim even though notice was not given within the three year period.

The discretion is intended to give the Board the power to consider a claim where notice is not given within the three year time period, by considering the circumstances of the case and the reasons for the delay. However, by specifying the six year time period, the period in which notice of a claim can be made is not open-ended, and is consistent with normal limitations on civil actions. This will also provide certainty for the administration of the Fidelity Guarantee Fund.

Subclause (2) of clause 7 provides for a person to give notice of a claim in accordance with the amended provisions, even if the time in which the notice of claim should have been given under the existing provisions has expired.

This subclause will enable claimants who have not previously lodged a claim because they considered that their claim was not within the existing time limits to have their claim dealt with in accordance with the amended provisions following enactment.

Subclause (3) of clause 7 provides that where a person has given notice of a claim under the existing provisions, that person will be entitled to have their claim considered in accordance with the amended provisions after the enactment of the provisions.

If the notice of the claim is within the amended provisions, the Board will be required to deal with the claim accordingly, and the claimant will not have to give notice of the claim to the Board again.

This subclause applies to claims of which notice has previously been given to the Board, whether or not the Board has determined the claim. With respect to claims that the Board has already determined, the effect of this subclause is to empower the Board to revisit those claims which it has already declined on the basis that the notice of claim was given out of time, where that notice is found, after enactment, to have been given within the amended time limits.

Clause 8: This clause amends section 95(1) of the *Settlement Agents Act 1981*. Section 95(1) is the provision which empowers the Board to receive and settle claims against the Fidelity Guarantee Fund. This amendment ensures that the Board is only empowered to settle claims where notice of the claim has been given in accordance with the amended time limits as provided for in section 93(2).

The effect of this provision is to ensure that the Board has no power to settle a claim where the notice of the claim was not given in accordance with the amended time limits.