

MODEL LITIGANT GUIDELINES

Introduction

1. These guidelines apply to civil proceedings brought by or against the State, its instrumentalities, including its agencies and authorities ('the State').

“civil proceedings” includes actions, applications, appeals, claims, proceedings or suits of any nature in the civil jurisdiction of any Federal Court or a Court of any State, or in the jurisdiction of any commission, tribunal, arbitrator or other body.¹
2. The obligation of the State to act as a model litigant arises from the Crown’s status as a moral exemplar.² The obligation extends beyond legal practitioners acting for the Crown. It is possessed by every State instrumentality, its officers and employees.
3. The administration of these guidelines is primarily the responsibility of the head of each instrumentality, in consultation with the Office of the Solicitor-General.
4. All legal practitioners³ acting on behalf of the State and State service officers or employees instructing them must be made aware of these guidelines and required to comply with them.
5. The guidelines reflect the existing common law and do not impose further obligations on the State.

Object

6. The object of these guidelines is to assist in maintaining consistent and high professional standards in legal proceedings brought by or against the State.

Primary obligation

7. The State, its agencies and authorities must act as a model litigant in the conduct of civil litigation.
8. The obligation does not prevent the State from acting in the public interest, or firmly pursuing a legitimate claim or defence to protect its interests.

Nature of the Obligation

9. Subject to clause 8, the obligation requires the State and its agencies to:
 - a. deal with matters efficiently and expeditiously;
 - b. make an early assessment of the prospects of any claim or defence;

¹ Proceedings under the *Crime (Confiscation of Profits) Act 1993* are not to be taken to be civil proceedings.

² *Dyson v Attorney-General* [1911] 1 KB 410 at 421-22; See also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 per Griffith CJ; *Kenny v South Australia* (1987) 46 SASR 268, 273; *Yong Jun Quin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 and *ASIC v Hellicar* (2012) 247 CLR 345.

³ Including legal practitioners engaged by the State in compliance with Treasurer’s Instruction No 1118.

- c. settle legitimate claims promptly, without resort to litigation. This includes partial or interim settlements, where liability is clearly established for the part of the claim to which the settlement gives effect;
 - d. not contest liability where the only issue is quantum of damages, or the application of a remedy;
 - e. avoid resort to litigation and encourage and participate in alternative dispute resolution where possible;
 - f. keep the costs of litigation to a minimum;
 - g. not require a party to prove a matter that the State knows to be true;
 - h. not rely on technical issues where the State will not suffer prejudice, unless it is necessary to do so in the public interest, or to protect the State's interests;
 - i. not take advantage of a party who lacks resources to pursue a legitimate claim;
 - j. only undertake and pursue appeals where it is considered, on proper advice, that the State has reasonable prospects of success, or the appeal is otherwise justified in the State's interests;⁴
 - k. provide reasonable assistance to claimants and their legal representatives to identify the proper defendant.
10. The State is not prevented from:
- a. seeking or enforcing orders for costs;
 - b. protecting any privileges or immunities that are available to it;
 - c. pleading limitation periods (other than in child abuse claims⁵);
 - d. seeking security for costs;
 - e. opposing unreasonable, or oppressive claims or processes;
 - f. requiring opponents to comply with procedural obligations;
 - g. applying to strike out, or oppose claims or defences which are untenable or an abuse of process.

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SOLICITOR-GENERAL

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⁴ It may be in the State's interest to commence an appeal to avoid prejudice to its interests where it is awaiting, or needs to consider legal advice, provided it makes a decision about whether to continue the appeal as soon as practicable.

⁵ Limitations of actions in child abuse proceedings are subject to the *Limitation Act 1974*, s 5B.