

Model Litigant Policy for Civil Litigation

Introduction

- 1.1 This Policy has been endorsed by Cabinet to assist in maintaining proper standards in litigation and the provision of legal services in NSW. This Policy is a statement of principles. It is intended to reflect the existing law and is not intended to amend the law or impose additional legal or professional obligations upon legal practitioners or other individuals.
- 1.2 This Policy applies to civil claims and civil litigation (referred to in this Policy as litigation), involving the State or its agencies including litigation before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes.
- 1.3 Ensuring compliance with this Policy is primarily the responsibility of the Chief Executive Officer of each individual agency in consultation with the agency's principal legal officer. In addition, lawyers, whether in-house or private, are to be made aware of this Policy and its obligations.
- 1.4 Issues relating to compliance or non-compliance with this Policy are to be referred to the Chief Executive Officer of the agency concerned.
- 1.5 The Chief Executive Officer of each agency may issue guidelines relating to the interpretation and implementation of this Policy.
- 1.6 This Policy supplements but does not replace existing Premier's Memoranda relating to Government litigation, in particular Premier's Memoranda nos. 94-25, 97-26, and 95-39.

The obligation

2. The State and its agencies must act as a model litigant in the conduct of litigation.

Nature of the obligation

- 3.1 The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.
- 3.2 The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:
 - a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

- b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;
- c) acting consistently in the handling of claims and litigation;
- d) endeavouring to avoid litigation, wherever possible. In particular regard should be had to Premier's Memorandum 94-25 Use of Alternative Dispute Resolution Services By Government Agencies and Premier's Memorandum 97-26 Litigation Involving Government agencies;
- e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - i) not requiring the other party to prove a matter which the State or an agency knows to be true; and
 - ii) not contesting liability if the State or an agency knows that the dispute is really about quantum;
- f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- g) not relying on technical defences unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum 97-26;
- h) not undertaking and pursuing appeals unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable; and
- i) apologising where the State or an agency is aware that it or its lawyers have acted wrongfully or improperly.

3.3 The obligation does not require that the State or an agency be prevented from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

3.4 In particular, the obligation does not prevent the State or an agency from:

- a) enforcing costs orders or seeking to recover costs;
- b) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;

- c) pleading limitation periods;
- d) seeking security for costs;
- e) opposing unreasonable or oppressive claims or processes;
- f) requiring opposing litigants to comply with procedural obligations; or
- g) moving to strike out untenable claims or proceedings.