

The Commonwealth's obligation to act as a model litigant

(Appendix B of the Legal Services Directions 2005)

The obligation

- 1 Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

- 2 The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:
 - (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
 - (aa) making an early assessment of:
 - (i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth; and
 - (ii) the Commonwealth's potential liability in claims against the Commonwealth
 - (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, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
 - (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 Commonwealth or the agency knows to be true
 - (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
 - (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and
 - (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
 - (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
- (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Note 1 The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

Note 2 In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

Note 3 The obligation to act as a model litigant may require 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.

Note 4 The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth 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. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

Note 5 The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Merits review proceedings

- 3 The obligation to act as a model litigant extends to agencies involved in merits review proceedings.
- 4 An agency should use its best endeavours to assist the tribunal to make its decision.

Note The term 'litigation' is defined in paragraph 15 of these Directions in terms that encompass merits review before tribunals. There are particular obligations in relation to assisting a tribunal engaged in merits review to arrive at a decision. Agencies should pay close attention to the legislation under which a tribunal is established, and any practice directions issued by the tribunal. In the case of the Administrative Appeals Tribunal see in particular subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975* and the explanatory memorandum to the Administrative Appeals Tribunal Amendment Bill 2005.

Alternative dispute resolution

- 5.1 The Commonwealth or an agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).

- 5.2 When participating in alternative dispute resolution, the Commonwealth and its agencies are to ensure that their representatives:
- (a) participate fully and effectively, and
 - (b) subject to paragraph 2 (e) (iv), have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.