



## Client Newsletter

# Revised Model Litigant Guidelines for the State of Victoria

March 2011

### Introduction

The Attorney General, the Honourable Robert Clark MP, has recently approved revised Model Litigant Guidelines for use by the State of Victoria, its departments, agencies and office holders in all litigation claims in all courts in Australia.

Although the Commonwealth's Model Litigant Guidelines which were introduced in 1997 were revised in 2005 and 2008, this is the first time Victoria's Model Litigant Guidelines, which were introduced in 2001, have been revised.

### New Obligations

In a nutshell, the revised guidelines impose five new express obligations upon the State of Victoria:

1. Deal with claims promptly and not cause unnecessary delay.
2. Make an early assessment of the State's prospects of success or potential liability in claims.
3. Consider Appropriate Dispute Resolution (ADR).
4. When participating in ADR, participate fully and effectively.

### Summary

Victoria's Model Litigant Guidelines have been recently revised and impose new obligations upon the State in its litigation claims.

Departments and Agencies need to be aware of these new obligations and their application to claims and litigation involving the State.

5. Consider apologising where the State or agency is aware of wrongful or improper conduct.

### Keeping costs to a minimum

In addition, the obligation of a model litigant to keep litigation costs to a minimum has been strengthened by requiring the State to take any reasonable steps to narrow the issues in dispute and, where appropriate, attempt to resolve the litigation.

### Technical arguments

The previous uncertainty about whether and in what circumstances the State could rely upon technical defences, and in particular what a 'technical' defence meant has been removed by replacing 'technical defences' with 'technical arguments'. The State cannot now rely on technical arguments unless its interests would be prejudiced by the failure to comply with a particular requirement.

## Relationship with Civil Procedure Act

The revised Model Litigant Guidelines also make it clear that they are to be read in conjunction with the provisions of the *Civil Procedure Act 2010*, in particular the paramount duty and overarching obligations imposed by Chapter 2 of that Act. The relationship between the Act and the guidelines is therefore complementary, and Government parties in litigation can and should comply with their obligations under both the Act and the guidelines.

The full text of the revised guidelines (with changes highlighted in green) is as follows:

### Guidelines on the State of Victoria's obligation to act as a model litigant

1. In order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation.
2. The obligation requires that the State of Victoria, its Departments and agencies:
  - a) act fairly in handling claims and litigation brought by or against the State or an agency;
  - b) act consistently in the handling of claims and litigation;
  - c) **deal with claims promptly and not cause unnecessary delay;**
  - d) **make an early assessment of:**
    - i. **the State's prospects of success in legal proceedings; and**
    - ii. **the State's potential liability in claims against the State;**
  - e) pay 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 paid;
  - f) **consider seeking to avoid and limit the scope of legal proceedings by taking such steps, if any, as are reasonable having regard to the nature of the dispute, to resolve the dispute by agreement, including participating in appropriate dispute resolution (ADR) processes or settlement negotiations;**
  - g) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:
    - i. not requiring the other party to prove a matter which the State or the agency knows to be true;
    - ii. not contesting liability if the State or the agency **believes** that the **main** dispute is about quantum;
    - iii. **taking such steps, if any, as are reasonable to resolve such matters as may be resolved by agreement and to clarify and narrow the remaining issues in dispute; and**
    - iv. **monitoring the progress of the litigation and, where appropriate, attempting to resolve the litigation, including by settlement offers, offers of compromise and ADR;**
  - h) **when participating in ADR or settlement negotiations, ensure that as far as practicable the representatives of the State or the agency:**

- i. **have authority to settle the matter so as to facilitate appropriate and timely resolution; and**
  - ii. **participate fully and effectively.**
- i) do not rely on technical **arguments** unless the State's or the agency's interests would be prejudiced by the failure to comply with a particular requirement;
  - j) do not take advantage of a claimant who lacks the resources to litigate a legitimate claim;
  - k) do not undertake and pursue appeals unless the State or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest; and
  - l) **consider apologising where the State or the agency is aware that it or its representatives have acted wrongfully or improperly.**

## Notes

1. The State of Victoria acknowledges the assistance of the Commonwealth in developing these Guidelines. The Guidelines are based on the Directions on the Commonwealth's Obligation to Act as a Model Litigant, which were issued by the Commonwealth Attorney General pursuant to s 55ZF of the *Judiciary Act 1903*.
2. The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other ADR processes) involving State Departments and agencies, as well as Ministers and officers where the State 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 Victorian Government Solicitor, in-house or private, will need to act in accordance with the obligation to assist their client agency to do so.
3. **Appropriate Dispute Resolution (ADR) means a process including but not limited to mediation, early neutral evaluation, judicial resolution conference, settlement conference, reference of a question to a special referee, expert determination, conciliation, and arbitration.**
4. **Where State of Victoria Departments and agencies are involved in disputes with other State of Victoria Departments and agencies, they are expected also to adhere to the 'Guidelines for the conduct of disputes between different public sector bodies within the State of Victoria', approved by Cabinet on 11 February 2008.**
5. In essence, being a model litigant requires that the State and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State 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.
6. 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.

7. The obligation does not prevent the State 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 State and its agencies and testing or defending claims against them. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests 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.
8. The obligation does not prevent the State from enforcing costs orders or seeking to recover costs.
9. **The obligation should be observed in conjunction with the provisions of the Civil Procedure Act 2010 and, in particular, the paramount duty and overarching obligations imposed by Chapter 2 of that Act.**

For further information or advice, please call:

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