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LEGAL BULLETIN NO. 2

THE DUTIES OF THE CROWN AS A MODEL LITIGANT

When engaged in any form of litigation the Crown and its many instrumentalities and agencies have an obligation to act as a model litigant. The nature of that obligation has been stated clearly by the courts on many occasions. Those principles form part of the common law. In addition, section 7(2) of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* requires the Crown Solicitor to act as a model litigant for and on behalf of the State in proceedings under that Act.

Agencies involved in any form of litigation need to be mindful of their model litigant obligation and, where relevant, comply strictly with the obligation. Nevertheless, the duties of the Crown as a model litigant do not prevent it from properly defending matters and denying liability where appropriate. The model litigant obligation does not require the Crown to be a "soft touch" when it is sued. It is entitled to act firmly but fairly when engaged in litigation.

The model litigant obligation applies in precisely the same fashion to private lawyers acting for the Crown or an agency of the Crown as it does to the Crown Solicitor and the staff of the Crown Solicitor's Office. In other words, the fact that a private lawyer may be acting for the State or an agency in a particular matter does not remove or modify in any way the model litigant obligation.

The principles set out in this Bulletin have been endorsed by the Attorney General. He has made it very clear that he expects all agencies and the lawyers acting for them to comply with their model litigant obligation.

What is meant by the Crown in this context?

The Crown includes

- the State of South Australia
- any Minister
- any separately incorporated agency or instrumentality of the Crown, eg the various statutory authorities and health units.
- any administrative unit (ie a department or attached office) of the public service, including SA Police. As these are not incorporated, they can only engage in litigation in the name of their Minister.

Why must the Crown be a model litigant?

The particular role of the Crown in litigation has long been recognised.

The Crown has been described as "*the fountain and head of justice and equity*": *Dyson v Attorney General* [1911] 1KB 410 at 421. Put simply, this means that because the State

has created the courts and the legal system it must set an example for the community which it leads and governs.

Lord Abinger in *Deare v Attorney General* (1835) 1 Y & C Ex. 197 at 208; 160 E.R. 80 at 85 stated -

"It has been the practice which I hope will never be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred."

Probably the most frequently quoted statement of the principle is that of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342:

"The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings."

I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken."

Nature of the Obligation

The obligation to act as a model litigant may often 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 and the Rules of Professional Conduct and Practice. It requires that the Crown act with complete propriety, fairly and in accordance with the highest professional standards.

More specifically, the model litigant obligation requires that the Crown 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;
 - (c) acting consistently in the handling of like claims and litigation;
 - (d) endeavouring to avoid litigation, wherever reasonably possible;
 - (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 Crown knows to be true; and
 - (ii) not contesting liability if the Crown knows that the dispute is really about quantum (although that may be appropriate where there is a real dispute as to whether a breach of duty caused the damage alleged by a plaintiff);
 - (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
 - (g) not relying on technical defences unless the Crown's interests would be prejudiced by the failure to comply with a particular requirement;
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- (h) not undertaking and pursuing appeals unless the Crown 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 Crown pending proper consideration of the matter, provided that a decision whether to continue the appeal is made as soon as practicable;
- (i) assisting the Court and opposing parties to understand the current state of the law by drawing the Court's attention to binding and persuasive relevant case-law and other aids to statutory interpretation;
- (j) being courteous and professional when dealing with witnesses, parties and their representatives;
- (k) apologising where the Crown is aware that it or its lawyers have acted wrongfully or improperly.

The model litigant obligation does not prevent the Crown 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.

In particular, the obligation does not prevent the Crown from:

- (l) enforcing costs orders or seeking to recover costs;
- (m) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
- (n) pleading limitation periods;
- (o) seeking security for costs;
- (p) opposing unreasonable or oppressive claims or processes;
- (q) requiring opposing litigants to comply with procedural obligations;
- (r) moving to strike out untenable claims or proceedings; or
- (s) testing the credibility of a plaintiff or a witness and using lawful means to establish if a claim is fraudulent or exaggerated.

What do the model litigant principles mean in practice?

(a) Act fairly

- An overriding obligation that applies at all stages of the litigation process.

(b) Act consistently

- Do not treat citizens arbitrarily - you should not settle one claim and fight an identical claim. Similar claims must be treated similarly.
- The Crown should distinguish between different plaintiffs in class action or multiple plaintiff litigation, if proper basis for distinction exists eg different causes of action, different wrongdoers, different damage suffered by plaintiffs, differing degree of involvement by plaintiffs in underlying facts, etc.

(c) Avoid litigation

- Where it is relevant, always be open to Alternative Dispute Resolution at all stages of the litigious process.
- However, some cases involving the Crown often cannot be settled eg contempt of court or judicial review. .

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- Be clear on reasons for not wanting to settle claims.
- (d) Pay legitimate claims**
- Where liability is clear and no defences are available the Crown should pay.
 - The guidelines do not require the Crown to accede to spurious, vexatious or dubious claims. The Crown should properly defend such claims.
- (e) Minimise costs**
- Truth in pleadings.
 - Admit liability where appropriate.
 - Deal with Matters in a timely fashion.
- (f) Do not take technical defences**
- Nevertheless, the Crown can and should plead defences properly open to it.
 - The obligation arguably extends to technical points of litigation practice and procedure eg late service of documents where no prejudice will be suffered.
- (g) Do not take advantage of claimant who lacks resources**
- Do not issue applications without a proper purpose just to increase costs.
 - Avoid litigation by paper warfare.
 - Nevertheless, the Crown should seek to strike out unmeritorious claims. If the Crown fails to do so, the Crown may be embroiled in lengthy litigation over a number of years, culminating in a potentially lengthy and expensive trial.
- (h) Do not appeal unless reasonable prospects for success or in public interest**

The fair but firm principle

It has often said that the model litigant principle requires fairness but does not preclude firmness. As to firmness, a number of principles can be stated to guide the Crown in its conduct of litigation:

- There is nothing in the principles which precludes the Crown seeking to win cases.
- The Crown must properly maintain any claim to legal professional privilege and protect public interest immunity, especially in relation to sensitive documents such as Cabinet documents.
- The Crown should seek to set aside subpoenas where it is appropriate to do so. The Crown should generally claim costs for setting aside subpoenas and legal costs incurred in responding to subpoenas.
- The Crown can and should use the rules of the court to maximum but proper advantage. For example, in relation to costs and offers to settle.

It must also be recognised that in some types of litigation (eg native title and industrial relations claims) a decision by the court may affect the interests of many persons. In those circumstances the Crown may potentially have an obligation to take account of the interests of the wider public. That may sometimes require the Crown to draw the attention of the court to issues even where that may not be in the interests of any party to the proceedings.

Sometimes an opposing party adopts the tactic of making broad but non-specific assertions about the obligations of a model litigant so as to dissuade the Crown from

properly defending its interests. Where that occurs the opposing party should be asked to specify the basis for their concern and their response should be tested against the policy set out in this Bulletin.

Behaviour not expected of a model litigant

As a result of the model litigant principles, there are a number of things the Crown should avoid in conducting its litigation:

- The Crown should not play litigation “fast and loose” nor adopt a “win-at-all-costs” strategy.
- The Crown should not use delaying tactics to extract a litigation advantage. Whilst experience suggests that certain time limits and orders are occasionally not complied with due to workload or oversight, such non-compliance should never be a deliberate strategy designed to frustrate an opponent or to secure a practical advantage.
- The Crown should not commence any legal proceedings for any ulterior or improper purpose.
- Maintain objectivity and professional independence. The right advice should always be given from a whole of Government perspective even if that is not what the client was hoping to hear. The client should be constructively assisted to understand why the advice was necessary.
- Avoid personality-driven litigation.
- Avoid oppression in litigation. Avoid flurries of interlocutory applications to scare plaintiffs into submission. “Fight fair”.

If you are in doubt about the scope of the model litigant obligation, seek advice from the Crown Solicitor's Office.

Greg Parker
Crown Solicitor
