

Model Litigant



Council Policy Number	145
Date adopted	16 June 2021
Scheduled for review	June 2025

1. Preamble

To ensure that Campaspe Shire Council ('Council') and its agents act in a manner that is fair and reasonable when dealing with matters involving members of the public before and during litigation proceedings.

2. Purpose

The aim of this policy is to comply with the requirements of the *Civil Procedure Act 2010* and the Model Litigant principle to ensure that the highest standards of propriety and ethics are met.

3. Policy Statement

Council will 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, when 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 by the use of alternative dispute resolution processes;
- e. When it is not possible to avoid litigation, keeping the costs of litigation to a minimum by:
 - i. Not requiring the other party to prove a matter which the Council or an agency knows to be true;
 - ii. Not contesting liability if the Council 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 interest of the Council would be prejudiced by the failure to comply with a particular requirement;
- h. Not undertaking and pursuing appeals, unless the Council believes it has reasonable prospects for success or the appeal is otherwise justified in the public interest;
- i. Apologising where the Council is aware that it, or its lawyers, has acted wrongfully or improperly.

4. Exclusions

This policy does not prevent Council or its agents from acting firmly and properly to protect Council's interests or from taking all legitimate steps in pursuing litigation or from testing or defending claims made.

The policy does not prevent the Council or its agents 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.

5. Human Rights

This policy has considered and complies with the Human Rights and Responsibilities contained in the Victorian Charter of *Human Rights and Responsibilities Act 2006*.

6. Related Legislation

Civil Procedure Act 2010

7. Related Policies, Procedures and Strategies

Campaspe Compliance Framework - Compliance 11 Service Charter

8. Attachments

Civil Procedure Act 2010 extract

Model Litigant principle (adapted for Council)

9. Review Period

Four years

Responsible officer

Manager Governance and Strategy

10. Administrative Updates

It is recognised that, from time to time, circumstances may change leading to the need for minor administrative changes to this document. Where an update does not materially alter the policy, such a change may be made administratively. Examples include a change to the name of a Council department, a change to the name of a Federal or State Government department, and a minor update to legislation which does not have a material impact. However, any change or update which materially alters this document must be by resolution of Council.

11. Approval History

Adopted 17 September 2012
Revised 16 August 2016
Revised 17 October 2017
Revised 16 June 2021

Minute Book Reference No 1245 (Item 6.8)
Minute Book Reference No 731 (Item 6.2)
Minute Book Reference No 2865 (Item 6.3)
Minute Book Reference No 638 (Item 9.14)

Chief Executive Officer: 

Date: 19 June 2021

Civil Procedure Act 2010 extract

CHAPTER 2 OVERARCHING PURPOSE AND OVERARCHING OBLIGATIONS

PART 2.3—THE OVERARCHING OBLIGATIONS

16 Paramount duty

Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—

- (a) any interlocutory application or interlocutory proceeding;
- (b) any appeal from an order or a judgment in a civil proceeding;
- (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

17 Overarching obligation to act honestly

A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding.

18 Overarching obligation—requirement of proper basis

A person to whom the overarching obligations apply must not make any claim or make a response to any claim in a civil proceeding that—

- (a) is frivolous; or
- (b) is vexatious; or
- (c) is an abuse of process; or
- (d) does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis.

19 Overarching obligation to only take steps to resolve or determine dispute

For the purpose of avoiding undue delay and expense, a person to whom the overarching obligations apply must not take any step in connection with any claim or response to any claim in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding.

20 Overarching obligation to cooperate in the conduct of civil proceeding

A person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.

21 Overarching obligation not to mislead or deceive

A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—

- (a) misleading or deceptive; or
- (b) likely to mislead or deceive.

22 Overarching obligation to use reasonable endeavours to resolve dispute

A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—

- (a) it is not in the interests of justice to do so; or
- (b) the dispute is of such a nature that only judicial determination is appropriate.

For example, a proceeding where a civil penalty is sought may be of such a nature that only judicial determination is appropriate.

23 Overarching obligation to narrow the issues in dispute

If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—

- (a) resolve by agreement any issues in dispute which can be resolved in that way; and
- (b) narrow the scope of the remaining issues in dispute unless—
- (c) it is not in the interests of justice to do so; or
- (d) the dispute is of such a nature that only judicial determination is appropriate.

24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

- (a) the complexity or importance of the issues in dispute; and
- (b) the amount in dispute.

25 Overarching obligation to minimise delay

For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—

- (a) act promptly; and
- (b) minimise delay.

26 Overarching obligation to disclose existence of documents

(1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—

- (a) of which the person is aware; and
- (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.

(2) Disclosure under subsection (1) must occur at—

- (a) the earliest reasonable time after the person becomes aware of the existence of the document; or
- (b) such other time as a court may direct.

(3) Subsection (1) does not apply to any document which is protected from disclosure—

- (a) on the grounds of privilege which has not been expressly or impliedly waived; or
- (b) under any Act (including any Commonwealth Act) or other law.

(4) The overarching obligation imposed by this section—

- (a) is an ongoing obligation for the duration of the civil proceeding; and
- (b) does not limit or affect a party's obligations in relation to discovery.

Model Litigant principle (adapted for Campaspe Shire Council ('Council'))

Act honestly and fairly in handling claims and litigation brought by or against the Council by:

- a. Dealing with claims promptly and not causing unnecessary delay in 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 (does not prevent Council from acting firmly and properly to protect their interests). It does not therefore preclude all legitimate steps being taken to pursue claims by Council and testing or defending claims against them
- c. 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. Should not cave in to spurious or vexatious claims or take a soft approach, instead should appropriately test all claims, rely on legal professional privilege where appropriate, make public interest claims objecting to disclosure of information, seek security for costs where appropriate Act properly to protect its interests
- d. Acting consistently in the handling of claims and litigation
- e. 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 alternate dispute resolution processes where appropriate
- f. Where it is not possible to avoid litigation, keeping the costs of litigation to a minimum including by not requiring the other party to prove a matter which Council knows to be true and not contesting liability if Council knows that the dispute is about quantum
- g. Not taking advantage of a claimant who does not have the resources to litigate a legitimate claim
- h. Not relying on technical defences unless Council's interests would be prejudiced by the failure to comply with a particular requirement
- i. Not undertaking and pursuing appeals unless Council believes that it has reasonable prospects of success or the appeal is otherwise justified in the public interest
- j. Apologising where Council is aware that it or its lawyers have acted wrongfully or improperly.

Council has obligations under the *Civil Procedure Act 2010* and has chosen to act as a model litigant but does not have a statutory obligation to do so.

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.

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.

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.

The obligation does not prevent the State from enforcing costs orders or seeking to recover costs.

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.