

# **MODEL LITIGANT POLICY**

## Contents

Model Litigant Policy.....	3
Introduction .....	3
The obligation .....	3
Nature of the obligation .....	3
Status of this policy.....	5

## Model Litigant Policy

### Introduction

1. This policy has been developed by the Financial Markets Authority (FMA). It is a statement of principles and embodies the commitment made by FMA on how we will conduct litigation. It is intended to reflect the existing law and is not intended to amend the law or impose additional legal or professional obligations on legal practitioners or other individuals.
2. This policy applies to civil claims and civil litigation conducted by or involving FMA (referred to in this policy as **litigation**). Principles governing the conduct of criminal litigation are also contained in the Solicitor-General's Prosecution Guidelines.<sup>1</sup> These guidelines apply to FMA.
3. FMA considers it important, as a public enforcement agency and regulator, to commit to acting as a model litigant. This policy sets out FMA's interpretation of the term Model Litigant.
4. Ensuring compliance with this policy is primarily the responsibility of the Chief Executive Officer and the Head of Enforcement of FMA. Any issues relating to compliance with this policy should be referred to the Head of Enforcement of FMA. Lawyers engaged in litigation on behalf of FMA, whether they are in-house or external, are expected to act in accordance with the principles stated in this policy.
5. FMA may issue further guidance relating to the interpretation and/or implementation of this policy.

### The obligation

6. FMA will act as a model litigant in the conduct of litigation.

### Nature of the obligation

7. The obligation to act as a model litigant requires FMA to act honestly and with complete propriety, fairly and in accordance with the highest professional standards.
8. Specifically, the obligation requires FMA to:

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<sup>1</sup> Solicitor-General Prosecution Guidelines, Crown Law, 1 January 2010.

- a. Take and defend litigation in accordance with FMA's statutory functions arising under financial markets legislation, and to act at all times in accordance with FMA's main objective of promoting and facilitating the development of fair, efficient, and transparent financial markets.
  - b. Act honestly and fairly in handling litigation brought by or against FMA.
  - c. Deal with litigation promptly and efficiently, without causing unnecessary delays or expense.
  - d. Act consistently and even-handedly in the conduct of litigation.
  - e. Make an early assessment of the prospects of success and/or potential liability in litigation that may be brought against FMA.
  - f. Consider any proposal by the other party to litigation for any alternative means of avoiding or resolving litigation, including by co-operation or other agreed resolution, but for the avoidance of doubt FMA is not bound to accept any such proposal.
  - g. Responsibly spend public funds in relation to litigation.
  - h. Not require the other party to litigation to prove a matter which FMA knows to be true or seek to take unmeritorious points for tactical reasons.
  - i. Not seek to take advantage of a claimant who lacks the resources to litigate a legitimate claim.
  - j. Not pursue appeals unless FMA considers it has reasonable prospects of success and/or the appeal is otherwise justified in the public interest.
9. The policy permits FMA to act promptly, decisively and properly to protect its interests. It does not preclude FMA taking all legitimate steps to pursue litigation, clarify the law, test claims or defend claims made against FMA.
10. FMA will operate consistently with the public interest at all times.
11. In particular, as a model litigant FMA may:
- a. Seek to recover costs and enforce costs orders.
  - b. Seek security for costs.
  - c. Rely on legal professional privilege and other forms of privilege and claims for public interest immunity.
  - d. Plead limitation and other defences.

- e. Oppose unreasonable, vexatious, oppressive or unmeritorious claims or processes.
- f. Require opposing litigants to comply with their procedural obligations.
- g. Decline to settle litigation or enter into alternative dispute resolution, if that will not be consistent with or satisfy FMA's regulatory objectives.
- h. Move to strike out untenable claims, defences or proceedings.
- i. Oppose applications for leave to appeal where it is in the public interest to do so.
- j. Test the boundaries of the law for the overall benefit of all market participants and investors including bringing test cases or "grey area" cases in order to provide clarity to the market.

### **Status of this policy**

- 12. This policy was published on 28 June 2013. It is intended to be a living document, and FMA may revise it from time to time in accordance with its statutory objectives and priorities.
- 13. This policy is not exhaustive and is not intended to be legally binding.