

Article

Compulsory Acquisition

Compulsory Acquisition: Government Authorities' Duty to Act as a Model Litigant

By Helene Chryssidis

It may feel overwhelming and unjust that your land, where you have built a home or established your business, is being compulsorily acquired. In fact, many faced with the acquisition of land question whether the government has the power to do so.

However, certain governmental bodies are empowered to take land by force. All compulsory acquisitions of land must be authorised by legislation.¹ In South Australia, the *Land Acquisition Act 1969* (SA) provides the framework for the compulsory acquisition of land by government authorities without the permission of the registered proprietor under other Acts of Parliament. However, it is not an unlimited power. It must be exercised in strict accordance with legislation and carried out in accordance with other obligations, such as the duty to act as a model litigant.

This article considers the nature of the obligations of a model litigant and explores instances in which our legal system has protected people when those obligations have been breached.

Nature of the obligation to act as a model litigant

The model litigant obligation requires government agencies and their agents to, generally speaking, act honestly and fairly in handling claims and litigation brought by (or against) the Commonwealth.

This obligation to act as a moral exemplar stems from

¹ *Land Acquisition Act 1969* (SA), s 7.

the fact that they have no legitimate private interest in the performance of their functions and often have access to greater resources than private litigants.²

The Commonwealth has issued written directions, the *Legal Services Directions 2005* (Cth), which sets out the obligations that apply to the performance of Commonwealth work. Under these directions, the Commonwealth and its agents have a duty to:

- deal with claims promptly;
- not cause unnecessary delay;
- 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 to be paid;
- endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible and participate in alternative dispute resolution processes where appropriate;
- keep the costs of litigation to a minimum, including by not requiring a party to prove a matter which the Commonwealth or its agent knows to be true; and
- not take advantage of a claimant who lacks the resources to litigate a legitimate claim.

² *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 286 ALR 501.

Following the introduction of the *Legal Services Directions 2005* (Cth) at the Commonwealth level, New South Wales, Victoria, Queensland and the Australian

Capital Territory each introduced their own model litigant policies in the form of guidelines, which apply to the provision of legal services in matters involving the agencies of those respective jurisdictions. Typically, the states' and territories' policies are expressed to apply to their departments and agencies. South Australia has yet to introduce its own guidelines and is therefore subject to the principles of common law.

Common law obligation

Whilst Australia has issued written directions under the *Legal Services Directions 2005* (Cth), the obligation to act as a model litigant is derived from common law and was first identified by Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333. Later, in *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346, Beaumont andinfeld JJ held that the Crown must act and be seen to act as a model litigant.

Since then, the courts have continued to develop the common law requirements of the model litigant and have not felt constrained by the *Legal Services Directions 2005* (Cth) (or equivalent State instruments). Justice Moore of the Federal Court in *Qantas Airways Ltd v Transport Workers' Union of Australia* stated that:

"[w]hile aspects of the model litigant obligations are found in Appendix B to the schedule to the Legal Services Directions 2005 (Cth) ... they are broader and more fundamental."

The courts have expanded the model litigant obligations to include duties such as:

- making appropriate concessions, and not taking every point in proceedings, particularly where they are unreasonable;
- dealing with an individual's claims consistently and displaying consistent conduct throughout a hearing;

- providing assistance to the court and not simply submitting to the order of the court;
- demonstrating willingness to settle in appropriate cases;
- prosecuting matters in a way that, within reason, minimises costs; and
- not taking extreme, 'preposterous' or 'tenuous' points.

The courts use their powers to redress any unfairness created by the failure to comply with the model litigant obligation.

For example, as reflected in the *Legal Services Directions 2005* (Cth), in acting as a moral exemplar, a model litigant is required to deal with claims promptly, not cause unnecessary delays, endeavour to avoid litigation wherever possible, not to resist relief which it believes to be appropriate and not to decline to provide appropriate assistance to the court or tribunal whether expressly sought or not.

These duties are reflected in *Mahenthirarasa v State Rail Authority of New South Wales (No 2)* (2008) 72 NSWLR 273 when the New South Wales Court of Appeal considered that it was *"inappropriate for the [State Rail Authority] as a statutory corporation to stand by and in effect require the appellant to persuade the Court of the correctness of his position"*. The Court of Appeal drew on the principles applicable to a model litigant and used its powers to make a cost order against the State Rail Authority.

Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning [2009] NSWLEC 155 is another example in which the court used its powers to make a cost order against a government agency for breaching its obligations as a model litigant.

In this matter, the plaintiff unsuccessfully challenged the approval process for the Gullen Range Wind Farm. The project, lodged with the Department of Planning, involved the construction and operation of 84 wind turbines and associated infrastructure and was treated as critical infrastructure by the Minister for Planning and the Director-General of the Department.

During the matter, Justice Pain made a cost order against the Minister for Planning and Director-General because it was held that the Minister for Planning and Director-General failed to act as model litigants, particularly in making a positive assertion that a project comprised of the construction of a wind farm facility was critical infrastructure within the meaning of the legislation. It subsequently became clear that the project was not.

It was held that the points of defence filed on 21 April 2009 did not fairly communicate to the plaintiff the Director-General's view at the time it was filed. Under these circumstances, the plaintiff continued with litigation because it was believed necessary. Had the plaintiff known the Director-General's views in particular, it would have had an opportunity to modify or possibly seek to discontinue the proceedings at an earlier stage.

The court ordered the plaintiff to pay the Minister's and Director-General's costs up to 21 April 2009, when the points of defence were filed. However, the court used its discretion to then make an order that the Minister and the Director-General should pay the plaintiff's costs from 21 April 2009 (the date the defence was filed) because the defence was not fair to the plaintiff in the context of the litigation.

Takeaways

1. Certain governmental bodies are empowered to take land by force. All compulsory acquisitions of land must be authorised by legislation.
2. Government bodies and their agents must exercise their powers in strict accordance with legislation and carry them out in accordance with other obligations, such as the duty to act as a model litigant.
3. Government bodies and their agents are required to deal with claims promptly and without unnecessary delay.

4. The courts are willing to exercise their discretion to make cost orders against government bodies for breaching their obligations as a model litigant, even if the government body was ultimately successful in court.



[MORE INFO](#)

Helene Chryssidis

Director

p: +61 8 8124 1847

helene.chryssidis@dwft.au

DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 8124 1811 e: info@dwft.au dwfoxtucker.com.au

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