



## NOMINAL INSURER MODEL LITIGANT POLICY

This operational instruction is a statement of principles. It is intended to reflect the existing law and not amend the law or impose additional legal or professional obligations upon legal practitioners or other individuals.

This policy applies to civil claims and civil litigation (referred to in this Policy as litigation) involving the Nominal Insurer, including litigation before courts, tribunals and inquiries. It also applies to arbitration and other alternative dispute resolution processes.

Ensuring compliance with this policy is the responsibility of the Nominal Insurer and Scheme Agent, and all lawyers acting on behalf of the Nominal Insurer.

A reference to the Nominal Insurer in this policy includes a reference to all Scheme Agents retained by, or acting on behalf of, the Nominal Insurer, including lawyers engaged by Scheme Agents acting on behalf of the Nominal Insurer.

Issues relating to compliance or non-compliance with this policy are to be referred to the Chief Executive Officer (CEO) of WorkCover, acting on behalf of the Nominal Insurer. The CEO may issue guidelines relating to the interpretation and implementation of this policy.

### The obligation

The Nominal Insurer must act as a model litigant in the conduct of litigation.

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. Essentially, it requires that the Nominal Insurer act with complete propriety, fairly and in accordance with the highest professional standards.

The obligation requires that the Nominal Insurer 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, where 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, and use of alternative dispute resolution services for resolving disputes
- (e) where 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 that the Nominal Insurer knows to be true, and
  - (ii) not contesting liability if the Nominal Insurer knows that the dispute is really about quantum
- (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

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- (g) not relying on technical defences, unless the Nominal Insurer’s interests would be prejudiced, and
- (h) not undertaking and pursuing appeals, unless the Nominal Insurer 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 Nominal Insurer 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 require that the Nominal Insurer be prevented from acting firmly and properly to protect its interests. This obligation 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 Nominal Insurer 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
- (c) pleading limitation periods
- (d) seeking security for costs
- (e) opposing unreasonable or oppressive claims or processes
- (f) requiring opposing litigants to comply with procedural obligations, or
- (g) moving to strike out untenable claims or proceedings.

**References**

Deed, clause 25.10; Schedule 1, clause 5.5.1; Schedule 2, clause 2.2.14

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