Model Litigant Law and the Legal Services Directions

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Model Litigant Law and the Legal Services Directions

Tom Brennan[1]

The Model Litigant Principle – source

The source of the model litigant principle is generally regarded as the judgment of Sir Samuel Griffith in Melbourne Steamship Co Ltd v Moorehead. [2]

Mr Moorehead was the Comptroller General of Customs. He had commenced proceedings against a number of defendants for what would today be called civil penalties.

The Comptroller General alleged that those civil penalties were payable because of the formation of 2 unlawful combinations (or what some today would call cartels). The pleadings alleged:

- Group A combined with Group B to form cartel 1;and
- The members of Group A combined to form cartel 2.

After commencing those proceedings, the Comptroller General sought to compel the members of Group B to answer a question as to whether they had entered into a cartel with the members of Group A.

An answer to that question would have facilitated proof of the allegation that Group A combined with Group B to form Cartel 1. On that basis the court held that there was no power to compel an answer to the question once proceedings had been commenced.

The Comptroller General responded by submitting that the question could have had a quite proper purpose – it could have been directed to determining whether the members of Group B were also members of cartel 2.

The Chief Justice said of that point[3]:

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.

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[1] Barrister
[2] (1912) 15 CLR 333
[3] (1912) 15 CLR 333 at 342

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in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date.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.
[emphasis added]

In Scott v Handley (No2) the Full Court of the Federal Court of Australia commented:[4]

Insistence upon that standard is a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government…..

As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases.

Three general propositions can be stated:

i. The source of the model litigant principle is the general law.
ii. The principle applies to the conduct of litigation by each of the three tiers of government.
iii. The principle is based upon a "broad generalisation." While it is best understood by reference to particular examples, the scope for its potential application is as broad as that generalization.

The Model Litigant Principle – to whom does it apply?

The model litigant principle applies to the Commonwealth, the States, public officeholders in Commonwealth and State governments and to local government authorities.

It has been said that the principle applies to statutory authorities including when they are engaged in commercial activities.

The principle has been held to bind:

- the Commonwealth, when engaged in commercial litigation[5]
- a State when engaged in common law litigation[6]
- a Minister respondent to a judicial review application[7]
- the Secretary of a Department respondent to an appeal against an AAT decision[8]
- regulators engaged in enforcement proceedings[9]

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[4] [1999] FCA 404 at [44 -45] Spender Finn and Weinberg JJ
[5] SCI Operations Pty Ltd v Commonwealth (1996) 69 FCR 346
[6] Kenny v State of South Australia (1987) 46 SASR 268
[7] Yong v Minister for Immigration and Multicultural Affairs (1997) 75 FCR 155
[8] Scott v Handley (No 2) [1999] FCA 404

- Directors of Public Prosecutions engaged in recovery of proceeds of crime[10]
- a Commission of Inquiry[11]
- Local government authorities.[12]

In Hughes Aircraft Systems International v Airservices Australia Finn J suggested that the model litigant principle applies to "a corporation constituted by statute, and discharging public functions."[13] The suggestion was in the context of a Corporation which met that description, but which was relevantly engaged in commercial litigation about a commercial transaction.

The Model Litigant Principle – Examples of requirements imposed by the principle

Compliance with case management

For more than 20 years civil litigation in Australia has been managed through case management techniques. Those techniques vary between different courts and tribunals. The common feature is that obligations are placed on each party to litigation to take defined steps in accordance with a defined timetable.

The obligation to behave as a model litigant extends to an obligation to comply with the requirements imposed through case management.

The Courts do not accept that non compliance can be excused because of funding difficulties for government parties:

In a case of a kind where the Crown was regularly not ready on the first return date, King CJ in the South Australian Supreme Court said[14]:

The Crown Solicitor, who appeared before me….referred to staffing difficulties. ... The Court and the Attorney General, to whom the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct and disposal of litigation. It is extremely important that the Crown Solicitor's office sets an example to the private legal profession as to conscientious compliance with procedures designed to minimize cost and delay and make maximum use of the

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[9] P&C Cantarella Pty Ltd v Egg Marketing Board [1973] 2 NSWLR 366
One Tel v Commissioner of Taxation (1999 – 2000) 101 FCR 548
ACCC v George Weston Foods Limited (2003) 198 ALR 592
Walter Construction Group v Fair Trading Administration Council [2005] NSWCA 65

[10] DPP v Saxon (1990) 28 NSWLR 263

[11] Greiner v Independent Commission against Corruption (1982) 28 NSWLR 125

[12] Logue v Shoalhaven Shire Council [1979] 1 NSWLR 537

[13] (1997) 76FCR151 at 196

[14] Kenny v State of South Australia (1987) 46 SASR 268 at 273

resources committed to the court. The court cannot, of course, influence those who are responsible for staffing levels in the Crown Solicitor's office. I must point out, however, that pressure of work and lack of staff is not accepted from the private profession as an excuse for non-compliance with the Rules and it cannot be accepted from the Crown Solicitor's office. The Court could not tolerate a situation in which litigants were delayed because the opposite party was the State in a way which would not be tolerated if the opposite party were a private litigant.

The courts have criticised strongly a government party which had failed to meet court ordered timetables by reason of inadequate attention to the conduct of matters. This extended to matters where delays have been caused through a failure to make timely requests to obtain evidence from overseas.[15]

Where there is a failure to meet a timetable required by Court rules or Order the model litigant principle requires the government party to make full and frank disclosure of that fact to the court and the other side.

That obligation is particularly to be complied with when the other side is not represented by a lawyer.[16]

Avoidance of technical points

As Melbourne Steamship Co Ltd v Moorehead demonstrates the principle obliges government parties not to take purely technical pleading points.

In a more recent example the Full Federal Court commented on a submission by a government party that an application was incompetent because it failed to name the correct respondent:[17]

Before dealing with the question raised, we are bound to say that we share Hill J's reaction that an injustice was involved as a result of the taking of this point by the Crown. That is the more to be regretted when the point is taken by a party which is expected to act, and to be seen to act, as a model litigant.

Government party cannot take advantage of its own default or error

The courts apply to government parties generally a rule which has its origins in bankruptcy jurisdiction. In the bankruptcy jurisdiction the rule in Ex parte James Re Condon [18] is that an officer of the court will not be permitted by the court to

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[15] Challoner v Minister for Immigration and Multicultural Affairs (No 2) [2000] FCA 1601 Shayan Badraie by his Tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors [2005] NSWSC 1195

[16] Scott v Handley (No 2) [1999] FCA 404

[17] Yong v Minister for Immigration and Multicultural Affairs (1997) 75 FCR 155 at 166 per Beaumont, Burchett and Goldberg JJ

[18] (1874) LR 9 Ch 609

take advantage of his or her strict legal rights if this has the effect of unjustly enriching the estate at the expense of an innocent claimant.

In the government context this rule has been adopted, as part of the model litigant principle, as a basis for ordering the government to pay interest on money which had been paid over as customs duty, but which became repayable when a Customs Tariff Concession Order was made seven years after the payment of the duty.[19]

To similar effect a local authority seeking to recover rates will be met with an equitable set-off for any overpaid rates in the past.[20]

Government party has a duty to assist the administration of Justice

In P& C Cantarella Pty Ltd v Egg Marketing Board[21] Mahoney J (as he then was) said:

The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result. [emphasis added]

….

This is, perhaps, merely one aspect of what was described by Griffith C.J., in Melbourne Steamship Co. Ltd. v. Moorehead as "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."

The obligation articulated by Mahoney J has been read as extending to the imposition of an obligation to assist the Court to come to the correct view on questions of law, most particularly when the other side is not represented, or poorly represented.[22]

It has also been taken into account in deciding to order production of documents in response to a Notice to Produce where production might not have been ordered against a private party.[23]

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[19] SCI Operations v Commonwealth (1996) 69 FCR 346 at 369 per Beaumont and Einfeld JJ
[20] R v Tower Hamlets London Borough Council Ex parte Chetnik Developments Ltd [1988] AC 858 at 876-877
[21] [1973] 2 NSWLR 366 at 383
[22] SZBPM v Minister for Immigration and Multicultural Affairs [2006] FCA 215 at [31]
[23] Kamha v APRA [2005] FCA 173

In DPP v Saxon[24] this aspect of the principle featured prominently in the Court's determination limiting the operation of proceeds of crime legislation so that there could not be an interference with the accused's obtaining legal services for his defence and paying the reasonable costs of them.

No limitation on substantive rights generally

In Wodrow v Commonwealth the Commonwealth sought to enforce a costs order obtained nearly 10 years previously. Stone J said of an argument that the enforcement should be stayed because it was inconsistent with the model litigant principle[25]:

The Commonwealth's role as a model litigant influences the way in which the Commonwealth conducts litigation, it does not impinge the Commonwealth's ability to enforce its substantive rights…..

Although the Commonwealth, through its delay, may have fallen short of its own standards in pursuing the costs order made in 1993, this does not lead to the conclusion that it should be precluded from enforcing the order. I do not think the applicant's case is assisted by the model litigant policy.

Her Honour's comment that the principle "*does not impinge the Commonwealth's ability to enforce its substantive rights*" probably goes too far. SCI Operations v Commonwealth is an example where the principle was the decisive factor in the exercise of a discretion to impose a liability to pay pre judgment interest on the government.

Nevertheless it is the case that the principle does not limit the substantive legal rights of the government generally.

Obligations to disclose evidence

In the Comcare jurisdiction of the Administrative Appeals Tribunal there have been suggestions that the model litigant principle requires the government party to disclose to the applicant material in its possession relevant to matters in dispute.

The suggestions seem to have commenced with the undoubtedly correct proposition that the model litigant principle was relevant to the Tribunal's decision whether to take into account material which the government party was obliged to produce at an early stage but did not produce until late in a hearing.[26]

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[24] (1990) 28 NSWLR 263 at 267
[25] [2003] FCA 403 at [42 – 43]
[26] Re Moline and Comcare 77 ALD 224 at 234

Government parties in the Tribunal have extensive obligations to disclose relevant material.[27] Further, the role of a departmental representative in the Tribunal is to assist the Tribunal rather than take an adversarial position seeking to defeat the application. [28]

However that position does not flow from the model litigant principle. If it did, similar obligations would apply in Courts, and they do not.

Rather it flows from the fact that a departmental representative in the Tribunal has no "interest" in the proceedings. The decision made by the department has no relevance in a merits review context beyond providing the foundation for the Tribunal's jurisdiction.[29] Just as a prosecutor has no interest to be advanced in seeking a conviction, a departmental representative's only interest is that the correct decision be made.

Consequently, the Courts have drawn an analogy between the role of departmental advocates before merits review tribunals and prosecutors in a criminal context.

The duties of prosecutors in the criminal context are compendiously described in the various advocacy rules in force.[30] Many of those duties derive from the accusatorial nature of criminal proceedings and would make little sense in a merits review context.

The clearest guidance as to the principles to be applied in a merits review context may be found in those parts of a prosecutor's duties which the advocacy rules apply to counsel assisting inquests and commissions of inquiry. Those duties are[31]:

- *A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.*
- *A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.*
- *A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.*

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[27] Administrative Appeals Tribunal Act s37
[28] Re Cimino and Director General of Social Services (1982) 4 ALN N 106
[29] Collins v Minister for Immigration and Ethnic Affairs (1981) 4 ALD 201 - 202
[30] See for example NSW Bar Rules 62 – 72.
[31] See for example NSW Bar Rule 72

Duties analogous to those would be consistent with the duty now confirmed by s33(1AA) of the Administrative Appeals Tribunal Act:

In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

The Legal Services Directions and Judiciary Act – application of the Model Litigant Principle

Coverage

The Legal Services Directions (Commonwealth) provide that all Commonwealth government bodies, other than Government Business Enterprises (declared under the Commonwealth Authorities and Companies Regulations) and Corporations Act companies, are to handle claims and litigation (as plaintiff or defendant) in accordance with the Directions on The Commonwealth's Obligation to Act as a Model Litigant.[32]

The coverage of the Direction may be narrower than the general law. The reasoning in Hughes Aircraft Systems International v Airservices Australia[33] contemplates that the model litigant principle applies to Government Business Enterprises. Status under either the Commonwealth Authorities and Companies Act or Corporations Act is unlikely to be a significant factor in determining whether the principle applies to a governmental body.

The Directions include a requirement that FMA Agencies entering into insurance or other arrangements which include a right of subrogation to the Commonwealth's rights, use their best endeavours to ensure that the insurer is obliged to conduct any claim or litigation in accordance with the model litigant principle.[34]

While that may be very influential in the management of non litigious claims it is unlikely to have significant practical effect in the conduct of litigation .

In the conduct of litigation there is no reason why a court would permit an insurer to conduct litigation in the name of a government party on any basis that it would prevent the government party itself from pursuing.

Content

[32] Legal Services Directions 2005 paras 4.2,12.2 and 12.3
[33] (1997) 76FCR151
[34] Para 11A

The Directions on The Commonwealth's Obligation to Act as a Model Litigant provide some detail of the obligation, which is nevertheless expressed in broad terms as based on Melbourne Steamship Co Ltd v Moorehead.

The Direction states that the obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency 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, 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 alternative dispute resolution processes where appropriate

(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 Commonwealth or the agency knows to be true, and
    (ii) not contesting liability if the Commonwealth or the 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 Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement

(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and

(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Each of the paragraphs listed undoubtedly reflects an aspect of the principle as it has developed in the general law. However the list is not exhaustive of the requirements of the principle.

The Direction deals specifically with alternative dispute resolution and provides that when participating in alternative dispute resolution, the Commonwealth and its agencies are to:

(a) participate fully and effectively, and

(b) wherever practicable, ensure that their representatives have authority to settle the matter, or at least clear instructions on the possible terms of settlement that would be acceptable to the Commonwealth, so as to facilitate appropriate and timely resolution of a dispute.

This is accompanied by a note that when participating in alternative dispute resolution processes, regard is still to be had to the requirements for settling major claims against the Commonwealth. In practical terms, this may mean that a representative attending an alternative dispute resolution process may not be able to be given authority to settle a matter to finality. This is to be made clear to the other party when discussing the use of this process.

Enforcement

The Judiciary Act 1903 provides for the making of the Legal Services Directions. On their enforcement it says (at s55ZG):

> *(2) Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General.*
> *(3) The issue of non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.*

Enforcement of the Model Litigant Principle against the Commonwealth or an agency does not require raising any non compliance with the Legal Services Directions. The Principle exists at general law and is enforceable through the general law. The Directions, if relevant, will serve merely to elucidate the content of the Principle in a particular case.

Practical issues for lawyers acting for government

Case management

Steps which are fundamental to achieving compliance with the requirements of case management include, before the first return date (if respondent/defendant):

- Identify the lawyer/s and officers responsible for the conduct of each matter
- Locate all relevant document holdings
- Read into the documents enough to be able to assess how complex the factual issues may be

- Think about the size of discovery
- Think about whether necessary witnesses are still employed by your agency or are otherwise available
- Don't agree a timetable because it is usual – settle a timetable that you can meet
- Be prepared to explain the logistics that face you.

When you are the plaintiff/applicant do not commence without first having:

- Located all relevant documents
- Read and understood all relevant documents
- Produced and analysed a chronology
- Proofed all officers who had a significant role
- Thought about discovery
- Thought about witnesses – availability and credibility.

Once running, the key dynamic to manage is the confusion as to responsibility for the litigation. That confusion is often contributed to by the fact that no one is happy to be involved in the litigation. Indeed, except where the business of a unit is a portfolio of litigation, engaging in litigation is usually resented by public servants (as it is by business people).

The legal unit must have a very clear line of communication with the line area.

The starting point is a document which lists the roles and responsibilities of each unit in a practical way, and which is agreed by relevant managers.

To be useful the document cannot be theoretical.

For example, on discovery the document needs to address who conducts searches in the line area, who conducts searches in other areas of the Department, who deals with other Departments if relevant files may be with them, who reads the file, who prepares the schedule, who considers privilege issues. It will usually be a very valuable investment to spend a couple of hours at the start talking through the detail of what will be done by whom.

Going forward it is important that there is a nominated lawyer and an identified manager in the line area with responsibility to deliver against an agreed timetable.

The manager should not be a potential witness – you will need the manager to liaise with one or more of your witnesses – to get them to deliver. You cannot risk that liaison becoming an improper consultation between witnesses about the evidence they might give – but that is exactly what it will be if the manager is a witness and does their job as a manager.

The timetable needs to be practical.

For example if you have a large discovery task in which the line area is finding the documents and the legal area is producing the schedule your timetable might specify a number of files or folders or pages that will be delivered by the line area each week or each day.

A diary/reminder system is essential for the lawyer – so that every time a date is let slip the legal area can follow up immediately. Where dates slip such that there will be non compliance with any order of the Court consider early and full disclosure to the other side.

An escalation process is desirable. Best practice involves regular reporting on all significant litigation to the Chief Executive. Any escalation system should dovetail with that report – so that managers know that non compliance with timetables carries internal risk.

Where you fail to comply with an order or rule remember that all is not lost. It is no fluke that the leading cases which demonstrate that case management ultimately yields to the dictates of justice have involved non compliant government parties successfully obtaining the indulgence of the Court.[35]

In every case make full disclosure of your failure to comply, consider carefully the prejudice that that might have done to any other party and act reasonably in seeking to accommodate that prejudice.

In considering prejudice, address the special position of self represented litigants. A very useful listing and consideration of the issues is in the brochure "Guidelines for barristers on dealing with self-represented litigants."[36]

Consider whether to provide a full explanation as to why the non compliance occurred. Apart from the effect that it has in enhancing your prospects of obtaining the Court's favorable consideration, the process of drafting an affidavit explaining the Department's failure to comply can have an educational effect on a recalcitrant line manager.

Before every directions hearing consider carefully what will actually be involved in the next steps of the proceeding, explain it fully to the line area and form sensible judgments of how long you will need.

Avoid technical points

Many parts of the public service are staffed by very clever people. All parts are staffed by people with an eye for detail.

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[35] Queensland v J L Holdings (1997) 189 CLR 146; Jeanes v Commonwealth [2005] VSC 488
[36] NSW Bar Association at http://www.nswbar.asn.au/Professional/Publications/contents4.htm

That provides government litigants with a great advantage – it is rare that important points go unnoticed.

However it also provides government lawyers with a special challenge. You will often be faced with very clever people who are well capable of reading a set of court documents and coming to their own conclusions. Your clients will sometimes have clever ideas of what to do.

In facing that challenge a couple of simple rules are helpful.

First, if an idea seems like a clever idea to you, it will seem like a clever idea to the tribunal of fact. Litigation is usually about the ordinary discourse of life, not the clever idea. Being seen to run with clever ideas will rarely help you.

Second, if anyone thinks of a sharp point on the pleadings ask first about amendment. Rarely does taking a pleading point help any litigant. The cases demonstrate the real risks for a government party doing so.

Remember that the Legal Services Directions have special rules on limitation periods[37]. Except in judicial review matters the rule is generally that if a limitation defence is available you must plead it, or get the Attorney-General's agreement not to do so.

Where the pleading of a limitation period, on the facts, appears to be the taking of a technical point refer the matter to the Office of Legal Services Coordination.

[37] Paragraph 8

Assisting the administration of justice

Make time to closely consider all draft pleadings. Do not permit your pleadings to put in issue facts which are clear from an examination of your files.

A good test is to ask “what would we do if we got a Notice to Admit” a particular fact. If you would admit it in the face of adverse costs orders, as a model litigant you will not place it in issue from the outset.

The moment there is the suggestion of an argument about discovery or Notices to Produce get a cup of tea for everyone!

The other side will usually be entitled to inspect everything of real relevance to the issues in dispute. Approach the question by asking how that can best be done efficiently and at minimum cost. You do not need a Court order to behave reasonably! Be prepared to talk to the other side. If you do get to arguments on these questions you are best served by being able to demonstrate that you have attempted to facilitate, not frustrate, proper access to documents.

Recognise that you are usually more expert on the issues that your agency deals with than any lawyer for the other side or any judicial officer. Having recognised that, accept the responsibility that flows from it, rather than concentrate on the opportunities it presents.

The responsibility is to run your case so that you can clearly and quickly educate the tribunal of fact about the issues, and to elucidate the full legal framework which bears on them.

Do not assume that external lawyers know anything at all about the FMA Act, Appropriations, the CAC Act, the systems of delegations and authorizations and so forth that are bread and butter within the public service.

Consider preparing a document to be included in your initial brief to Counsel that sets out the detail of the schemes involved and the legislative frameworks that impact on the case. That document may be used as a basis for written submissions to be filed at the outset.

Alternative Dispute Resolution

If it is possible that an officer of your agency could make the decision to settle the matter such an officer should attend any mediation. The Legal Services Directions and the various Rules relating to mediation require that.

Before you go to any mediation you must understand the detail of what you can agree and what you cannot.

Where approval from another agency (usually the Department or Minister for Finance) will be required before you can agree, ensure that you have discussed the matter fully with them beforehand – and that you understand their parameters.

Consider requesting the attendance of Finance at the mediation when their approval will be required.

In every case explain, before the mediation or in your opening statement, the precise limits on your representative's authority to settle and the processes that will be necessary for decisions outside that authority. In doing that, do not disclose the boundaries of your settlement position.

Before agreeing to any process for arbitration, binding expert determination or the like carefully consider whether the regulatory framework for the settlement of claims would require approval of any other agency for the outcome. If so, you must either:

- Obtain that approval up front
- Make any agreement for resolution conditional on that approval being obtained, or
- Arrange for the arbitration etc to occur by reason of Court order (which could be by consent) rather than agreement.