

## IMF SUBMISSION TO NADRAC

1. The focus of the System must be on achieving its Overriding Purpose. This will involve the parties (and their funders), judges and the legal profession overcoming entrenched cultural and structural obstacles that have, for many consumers of the System, resulted in the principles of “just, quick and cheap” resolution of disputes being illusory rather than a reality.
2. Lawyers ought to owe a duty to the Court to assist it in achieving its Overriding Purpose and to the extent that client instructions are provided in unequivocal breach of the Overriding Purpose, lawyers must give precedence to the Overriding Purpose rather than their instructions.
3. Litigation funders and insurance companies should also be required to assist the court in achieving its Overriding Purpose by informing the Court, at the commencement of proceedings, of their identity and that the conduct of the case is to be funded, in whole or in part, by a third party.
4. The Courts should commence collation of data including:
  - (a) the number, type and value of claims managed by each law firm, funder and insurer;
  - (b) the cost of the litigation to the funders, insurers and the Courts;
  - (c) the levels at which the parties were prepared to settle the case;
  - (d) the value of settlements or judgments; and
  - (e) the time each proceeding took to resolve.
5. Mandatory procedures should be created to facilitate the full and frank exchange of information between the parties, and hence identification of the real issues in the proceedings, at the earliest possible stage in the process.
6. Civil Procedure Rules should be amended to introduce a system of Pre-Litigation Conferences which parties must attend before engaging in the System. A recent report of the Civil Justice Reform Working Group in Canada provides a model for consideration.
7. Disclosure by lawyers to clients about liability and quantum alone is not sufficient; advice about the litigious process is necessary. Budgets and timelines for any litigation should be provided to each party, the Court and the opposing party at or shortly after the pre litigation conference.

8. NADRAC ought to comment upon the adequacy of cost disclosures pursuant to the Legal Professions Act and the Law Society Guideline.
9. Amendment to Civil procedure rule should be made so that orders should be, *prima-facie*, capped at the cost budgeted at or shortly after the initial PLC, with increases to the cap only possible where it is shown to the Court that the opposing party extended the project from that which was envisaged in the original budget.
10. Additionally, where solicitor client costs are in issue, the same cap should be imposed, except where the client declines protection at the PLC, with an entitlement for the lawyers to seek an increase from the Court.
11. Orders to pay costs against parties and / or their agents for not assisting in the achievement of the Overriding Purpose of the Court would change behavior and make significant inroads to eradicating the attitude held by some lawyers that litigation is a game, and tactics which deliberately prolong the proceedings or their cost, or both, are part of the game.
12. Open offers ought to be required to be made at or shortly after the Pre Litigation Conference (when disclosure of material information has been made), which should not only have cost consequences but also be relevant to the project line and budgets either agreed or set by the Court.

**Dated: 11 June 2009**  
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