...And Justice for All? Reassessing the Role of the Market in New Zealand's Civil Courts.

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A major cause of inaccessibility of justice is the perception that the civil courts are a market-based, user-pays system. This policy approach has been instrumental in increasing the costs of litigation and is responsible for major cuts to legal aid eligibility. Third-party litigation funding (TPLF) is touted as a potential reform to enhance access to justice. However, TPLF is more appropriately viewed as an extension of this market-driven approach to justice. This article offers several possibilities for reform, including: recasting ethical and procedural obligations in civil procedure to enhance access to justice, encouraging the profession to reappraise its public role in the justice system, and reassessing the approach to justice policy, particularly regarding both court filing fees and legal aid. These alternative reforms aim to achieve a cultural shift amongst policymakers, the judiciary, and the legal profession.

I INTRODUCTION: A CLARION CALL FOR ACTION

> The one great principle of the English law is to make business for itself.
>
> Charles Dickens *Bleak House*, 1853.

The New Zealand legal system fails to offer meaningful access to justice. The new Chief Justice, The Right Honourable Helen Winkelmann, has rightfully made access to justice reform a cornerstone of her term.[2] She argues that:[3]

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2 Helen Winkelmann "Access to Justice — Who Needs Lawyers?" (2014) 13(2) Otago LR 229; and Helen Winkelmann, Chief Justice of New Zealand "Speech of The Rt Hon Dame Helen Winkelmann at her swearing in as Chief Justice of New Zealand" (Wellington, 14 March 2019).

3 Winkelmann "Access to Justice", above n 2, at 231.

> ... access to justice is the critical underpinning of the rule of law in our society: the notion that all, the good, the bad, the weak, the powerful, exist under and are bound by the law. That condition cannot exist without access to courts.

Winkelmann CJ is not alone: Kós P, President of the Court of Appeal,[4] and Venning J, former Chief Judge of the High Court,[5] have also called for reform. This enthusiasm from all levels of the judiciary represents an opportunity for lasting change.

This article argues that a major cause of inaccessibility of justice is litigants' perception that civil courts are a market-based, user-pays system. Justice is seen as a private benefit for those who can afford it. The prominence of third-party litigation funding (TPLF) — engaging a commercial funder to cover the cost of a legal claim in exchange for a proportion of any award — indicates the extent to which market thinking guides justice policy.

This article focuses on the cost of civil litigation in the High Court because it hears the most complex and high stakes disputes. However, it is important to note that many of the issues facing the High Court also apply to the District Court cost regimes.

Part II establishes the importance of access to justice and critiques the role of free-market thinking in this context. Part III outlines how market thinking has made litigation unaffordable, while stripping away eligibility to effective legal aid. Part IV addresses TPLF. It notes that TPLF is characterised as enhancing access to justice, before arguing that, instead, TPLF entrenches market-based values into legal practice and allows funders to profit from litigants' inability to access justice. Part V surveys a range of options for reform, shifting the policy model away from a free-market system. Such reforms include recasting ethical and procedural obligations in civil procedure to enhance access to justice, public reporting of litigation fees, reconsidering billing methods, mandatory pro bono, and reassessing the approach to justice policy, particularly regarding both court filing fees and legal aid.

4 Stephen Kós, Judge of the Court of Appeal of New Zealand "Civil Justice: Haves, Have-nots and What to Do About Them" (Address to the Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016).

5 Geoffrey Venning, Chief Judge of the High Court of New Zealand "Access to Justice – A Constant Quest" (Address to New Zealand Bar Association Conference, Napier, 7 August 2015).

II WHY ACCESS TO JUSTICE MATTERS

Access to Justice is crucial to a functioning legal system

Everyone should be able to protect their legal rights.[6] This premise derives from two fundamental legal doctrines. First, the rule of law: that laws must be applied fairly and equally. Second, the doctrine of citizenship: that all inhabitants of a country have a single legal status.

Effective access to justice is basic to all rights in a modern, egalitarian legal system.[7] Rights are meaningless without mechanisms to vindicate them. The common law recognised this principle as early as 1703.[8] Access allows organisations and citizens to hold public institutions to account and allows the judiciary to check other branches of government. Through this process of judicial decision-making, the courts renew the law by generating precedent.[9] Contentious and novel situations offer the opportunity, and illustrate the need, to continuously develop the law.

Access to justice is essential to adjudicate private disputes. Individuals ought to be able to rely on the courts to step in where rights have been breached. Those who are tempted to breach legal obligations need to know that they can be held accountable. The law's ability to influence collective behaviour hinges on a shared belief that a person's legal rights mean something, and that breaching legal rights will be met with appropriate consequences.[10]

Many New Zealanders are disenfranchised from accessing the courts to protect their legal rights.[11] This has two consequences. First, we as a community may experience more inequity. When someone cannot access the courts their legal rights exist only in name; they are powerless against those with greater means and influence. Second, restricted access to the courts may erode public confidence and undermine the integrity of the law. There are troubling signs in this regard — Frances Joychild QC notes the increasing prevalence of

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6 Tom Cornford "The Meaning of Access to Justice" in Ellie Palmer and others (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing, Oxford, 2016) 27 at 28–29.

7 Mario Cappelletti and Bryant Garth "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 2 Buff L Rev 181 at 185.

8 *Ashby v White* (1703) 92 ER 126 (KB).

9 Venning, above n 5, at 3.

10 Lady Brenda Hale "Equal Access to Justice in the Big Society" (Sir Henry Hodge Memorial Lecture 2011, London, 27 June 2011) at 4-5.

11 See Part III below.

gangs being used as debt collectors in lieu of filing in the District Court.[12]

The Market Society

In recent decades, market theory has crept beyond economics into areas previously considered the realm of the state, including the justice system.[13] Market logic has become the "common-sense" mode of thinking,[14] influencing the "whole spectrum of political life."[15] This shift, as Michael Sandel sees it, derives from trading a market economy for a market society.[16] In a market society, courts are expected to emulate the market to provide efficiency.[17] The state is no longer responsible for maintaining the courts as a public institution. Instead, its role is to reduce the "burden" on the "taxpayer". As voluntary consumers, it is up to litigants to determine whether a claim is worth its associated costs.

Rethinking the Market in Allocating Justice

Sandel argues that we should question the supremacy of the market in public life, for two reasons: inequality and corruption.[18] Both concerns are exposed in the context of access to justice.

Where market logic dominates, access is determined by material means.[19] Where money determines your ability to influence politics, receive medical care or access the court system, the unequal distribution of wealth is not only about owning material things. It demarcates who can and cannot participate in wider society.[20]

Markets are corrosive. When markets purport to allocate access to a good or service, the good or service is treated as a commodity.[21] Allowing the market to allocate access to the courts means litigation becomes a commodity. Money is exchanged for

12 Frances Joychild "Continuing the Conversation—the Fading Star of the Rule of Law" (2015) New Zealand Law Society <www.nzls.org.nz>; and New Zealand Police "OFCANZ targets illegal debt collection by gangs" (2 September 2011) <www.police.govt.nz>.

13 Jane Kelsey *The FIRE Economy* (Bridget Williams Books, Wellington, 2015) at 134–136.

14 David Harvey *A Brief History of Neoliberalism* (Oxford University Press, Oxford, 2005) at 3.

15 Kelsey, above n 13, at 128.

16 Michael Sandel *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus and Giroux, New York, 2012) at 10.

17 Joseph M Jacob *Civil Litigation: Practice and Procedure in a Shifting Culture* (EMIS Professional Publishing Ltd, Hertfordshire, 2001) at 107.

18 Sandel, above n 16, at 7–8.

19 At 111.

20 At 9.

21 At 111 and 114.

advocating one's rights. Non-market values central to justice — the rule of law, the public vindication of legal rights, the checking of public authority — fade into irrelevance.

III THE BREADTH OF THE PROBLEM

This Part first outlines the costs of litigation, court costs and legal representation costs and explains the (in)ability of most New Zealanders to meet them. Second, it examines the state of legal aid in New Zealand. Third, it looks to the unrepresented litigant as an unfortunate by-product of these circumstances.

Litigation Costs: The Litigant's Cliff-face

1 Court costs

Court fees are a substantial portion of the cost of civil litigation. The Court of Appeal has recognised that: [22]

> ... fees that are high in relation to the means of litigants inhibit access to the system of justice they administer ... If access to the courts is impeded because Court fees are set at a level that pose significant impediments to access both the constitutional principle and the fundamental right [of access to justice] are breached.

Policymakers claim that shifting the cost to litigants achieves "fairness". Underlying this shift is the neoliberal view that the cost of a "service" should be borne by "consumers" rather than taxpayers.

In 1992, it cost $100 to file a claim in the High Court.[23] In 2001, the Government increased High Court filing fees from $100 to $900 while decreasing Disputes Tribunal fees to "improve access to justice for the majority of small users of the system, and make those at the top pay a fairer share."[24]

In 2003, a Ministerial Working Party advocated a "principled approach" to court fee levels to ensure the "public and private benefits obtained through the courts were reflected in fee levels."[25] Their report stated that: [26]

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22 *Re Wiseline Corporation Ltd* (2002) 16 PRNZ 347 (CA) at [18]–[19].

23 High Court Fees Regulations 1992, sch 1 cl 1.

24 Matt Robson "New Civil Court Fees" (press release, 31 May 2001).

25 Margaret Wilson "Civil court fees discussion document" (press release, 14 May 2003).

26 Rick Barker "Civil court fees fairer across the board" (press release, 2 June 2004).

> Operating costs should be shared more fairly between taxpayers and direct users. This recognises the private gain that comes from being able to use the civil courts as a framework for dealing with disputes.

The Government subsequently increased filing fees to $1,100.[27]

The Government reassessed civil court fees again in 2011 "to provide incentives for the efficient use of civil justice services while also ensuring costs do not act as a deterrent for accessing justice."[28] Fees were adjusted for inflation, increasing to $1,329.20.[29] A consultation paper proposed a further increase, to "fairly allocate the cost between taxpayers and those using the services."[30] The Government finalised these changes in 2013, noting that while access to the courts is important, "it's not fair on the taxpayer to ask them to bear the whole cost of resolving private disputes".[31] High Court filing fees were increased to $1,350, where they remain at time of writing.[32]

Court costs also include fees for time spent at trial. A five-day hearing in the High Court in 1992 cost approximately $2,490.[33] Today that cost would be $16,000.[34] Complicated trials stretch for weeks or months. A five-week trial would incur fees of $80,000.

A litigant may apply to the court to waive the fee, provided the cost causes "undue financial hardship" or the case concerns a matter of genuine public interest and is unlikely to be commenced unless the fee is waived.[35] However, in practice this process is time-consuming and difficult, and therefore under-utilised.[36] Further, applying for a waiver may add the cost of a lawyer preparing the application.[37]

2 Legal representation

It is well known that lawyers are expensive. It is less well known *how* expensive they are. The legal industry is astonishingly opaque as to how much its services cost. The high cost is in part due to a shift

27 High Court Fee Amendment Regulations 2004, reg 9 and sch 1 cl 1.

28 Georgina te Heuheu "Access to justice a key consideration in review of civil court fees" (press release, 14 September 2011).

29 High Court Fee Regulations 2001 as at 1 July 2011, sch 1 cl 1.

30 Chester Borrows "Consultation on civil court fees begins" (press release, 26 September 2012).

31 Chester Borrows "Civil court fees finalised" (press release, 28 May 2013).

32 High Court Fees Regulations 2013, sch 1 cl 4.

33 High Court Fees Regulations 1992, sch 1 cls 5 and 7.

34 High Court Fees Regulations 2013, sch 1 cls 17(d) and 20.

35 High Court Fees Regulations 2013, regs 18–20.

36 James Farmer "The Increase in Unprecedented Litigants and Their Effect on the Judicial Process" (11 February 2011) <www.jamesfarmerqc.co.nz>.

37 Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 50.

towards prioritising profitability, as lawyers came to see their role less as a public duty and more as a profit-driven business.[38]

Litigation services are "credence goods". The purchaser is unable to assess their need for the service, or the quality of the service rendered.[39] Price is often governed by clients' beliefs about the quality of the lawyer and their willingness to pay.[40] This is compounded by the nature of litigation itself, as clients are unlikely to change lawyers once litigation commences.[41] Changing lawyers also increases costs, as new lawyers need time to get up to speed.

The primary form of billing is the billable hour, which came to dominate the way legal services were charged from the 1980s as part of a shift towards profit-driven business models.[42] The client is charged in six minute increments for time spent.[43] A 2016 survey found the average rate was $293 per hour, differing slightly between large, medium, and small firms.[44] A 2018 survey found that the average rate was between $250 and $350 per hour, although the range was very large.[45] These rates exclude equity partners' considerably higher rates that anecdotally sit around $750 per hour or more. Barristers' rates can be even higher, ranging from $250 to upwards of $1,000 an hour for an experienced senior silk.[46]

A straightforward matter can require hundreds of hours of work. Lawyers are ethically obligated to render fees that are "fair and reasonable", having regard to the interests of both client and lawyer.[47] A broad set of factors is used to assess whether fees are "fair and reasonable".[48] However, there is little practical guidance on what "fair and reasonable" fees may be.[49] The High Court has inherent

38 Rod Vaughan "A business or a profession: has the law lost its way?" Auckland District Law Society <www.adls.org.nz>; and Robert Gordon "Are Lawyers Friends of Democracy?" in Scott L Cummings (ed) *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge University Press, New York, 2011) 31 at 47–48.

39 Bridgette Toy-Cronin "Explaining and changing the price of litigation services" [2019] NZLJ 310 at 310–311.

40 Gillian Hadfield "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98(4) Mich L Rev 953 at 969.

41 At 977; and Toy-Cronin, above n 39, at 311.

42 University of Otago Legal Issues Centre *Accessing Legal Services: The Price of Litigation Services* (Working Paper, 2019) at 11. This figure is rounded up from $292.70.

43 At 8.

44 New Zealand Law Society "Charge-out rates for employed solicitors" June 2016 (27 July 2016) <www.lawsociety.org.nz>.

45 New Zealand Law Society and Niche Consulting Group *Legal Salary Survey 2018* (2018); and University of Otago Legal Issues Centre, above n 42, at 12.

46 Richard Burcher, "Pricing barristers' services" (2010) 753 LawTalk 12.

47 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

48 Rule 9.1.

49 Liora Bercovitch "The Theoretical and Practical Case for Enhanced Judicial Control over the Witness Statements Process in New Zealand Civil Litigation: A Study in Access to Justice" (LLM Thesis, University of Melbourne, 2018) at 37.

jurisdiction to order costs against a lawyer for unreasonable fees where there has been a "serious dereliction of duty to the court".[50] But the high bar means the power is rarely used.

The lack of clarity about "reasonable" fees means excessive legal fees may go unchallenged. Litigants can complain to the New Zealand Law Society (NZLS) about unreasonable fees.[51] Complaints are considered by the Lawyers Standards Committee, and the most serious of cases are referred to the Lawyers & Conveyancers Disciplinary Tribunal. However, litigants are unable to gauge for themselves the fairness of an estimate or resultant fee, as the factors that make up what is reasonable are unknown and unable to be calculated by the client.[52] Accordingly, the Law Commission has recognised that the free-market model does not regulate the provision of legal services effectively.[53] The lack of transparency reduces litigants' ability to compare prices and force practitioners to compete, potentially lowering fees.

There is no empirical research on overall costs of litigation in New Zealand. What should be a simple question — how much on average does it cost to go to court? — has no easily available answer. Since there is a glaring gap in the literature, we must draw from anecdotal evidence. Frances Joychild describes a past client on a professional negligence matter requiring a two-and-a-half day hearing who received estimates of $100,000 from other lawyers, mostly to be paid in advance.[54] It is often said that a claim for less than $100,000 in the District Court is not worth taking to court, as the legal costs involved in pursuing the claim will outstrip any potential award.

The possibility of adverse costs further increases litigants' financial risk.[55] If a claim fails, the litigant is required to pay a proportion of the opposing party's costs. Though costs are only a proportion of the opposing party's costs (calculated through a tabulated formula),[56] adverse costs can reach tens, if not hundreds, of thousands of dollars.

The average New Zealander is unable to meet these costs. Average gross income is around $47,000 a year,[57] with an average

50 At 37.

51 New Zealand Law Society "Lawyers Complaint Service" <www.lawsociety.org.nz>.

52 Law Commission, above n 37, at 36.

53 At 39.

54 Joychild, above n 12.

55 Hale, above n 10, at 13.

56 High Court Rules, r 14, and schs 2 and 3.

57 StatsNZ "Household income and housing-cost statistics: Year ended June 2019" (18 February 2020) <www.stats.govt.nz> at table 3.

gross household income of around $102,000.[58] The average household net worth is $789,000,[59] but this number is misleading. The bottom half of New Zealanders have virtually nil net worth.[60] The top half of households control an estimated 94 per cent of New Zealand's wealth.[61] The top ten per cent alone account for 53 per cent of wealth.[62] These relatively low and unequal levels of income and wealth are insufficient for most New Zealanders to meet the legal costs outlined above.

The Sorry State of Legal Aid Funding

Legal aid traditionally filled the gap between the cost of, and the need for, legal representation. However, it is now exceedingly difficult to obtain civil legal aid in New Zealand.

In 2008 the Government commissioned a report by Dame Margaret Bazley to, amongst other things, address the cost of legal aid.[63] This report resulted in the Legal Services Act 2011. Despite the report focusing on legal aid for criminal defendants, the resulting reforms impacted civil legal aid as well. These changes increased the administrative cost of gaining coverage and reduced the income limit for eligibility. User fees were also imposed — a $50 charge for most family and civil cases.[64] Applicants can apply for a special needs grant, but this generates delay and public cost.[65] Ultimately, the reforms resulted in a 47 per cent reduction in applications.[66] Conversely, community law centres reported their caseloads more than doubled.[67]

A large majority of New Zealanders do not qualify for legal aid and cannot afford legal services.[68] Even minimum wage workers do not qualify. For legal aid applications made on or after 2 July 2018,

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58 At table 1.

59 StatsNZ "Household net worth statistics: Year ended June 2018" (14 December 2018) <www.stats.govt.nz> at table 1.01.

60 Max Rashbrooke "Inequality and New Zealand" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2018) at 20–22; and StatsNZ, above n 57, at table 4.01.

61 StatsNZ, above n 57, at table 4.01.

62 At table 4.01.

63 Margaret Bazley *Transforming the Legal Aid System: Final Report and Recommendations* (November 2009); and "Legal aid & access to justice" (2 July 2015) <www.lawsociety.org.nz>.

64 John Rowan (ed) *Legal Aid Handbook* (Brookers Ltd, Wellington, 2011) at 6; and Ministry of Justice "User charge for family & civil cases" (28 January 2020) <www.justice.govt.nz>.

65 Rowan, above n 64, at 6.

66 New Zealand Bar Association *Access to Justice/Āhei ki te Ture: Report of the New Zealand Bar Association Working Group into Access to Justice* (2018) at [1.1].

67 Tess McClure "Legal aid funding limits creating 'justice gap'" *Stuff News* (online ed, New Zealand, 19 July 2014).

68 New Zealand Bar Association, above n 66, at [1.16].

the maximum annual gross income for a single applicant with no dependent children is $23,820.[69] As of April 2021, a minimum wage worker working 40 hours a week earns $41,600 per year.[70]

Companies are effectively barred from legal aid eligibility, which is generally restricted to "natural persons".[71] That problem is compounded by the fact that, in most cases, companies cannot represent themselves in the High Court.[72] In practice, this means that small and medium-sized businesses, a major contributor to New Zealand's economy,[73] are unable to call on the government to assist them.

Funding operates as a loan. Interest is charged at six per cent per annum, with the amount payable depending on the claim and the applicant's income to a maximum of $10,000.[74] Security may be applied to the applicant's property.[75] An applicant may have this debt written off if they can prove "serious hardship", but the threshold is especially high — inability to meet minimum living expenses, the cost of medical treatment, or serious illness.[76] The need to repay legal aid with interest is a major deterrent for low-income applicants.

Those eligible are unlikely to find a suitable lawyer. Due to low legal aid fees, lawyers must supplement legal aid with paying clients — effectively acting pro bono.[77] Unsurprisingly, the number of lawyers providing legal aid has declined sharply. From 2011 to 2016, registered civil legal aid lawyers reduced by 54 per cent.[78] Even then, a registered lawyer is unlikely to be available. In 2018, the University of Otago Legal Issues Centre audited civil legal aid lawyers in Auckland: out of 46 respondents, only 36 currently provided civil legal services to legally-aided clients at the time of the survey.[79] The Centre tested a fictional case study, provided by the Ministry of Justice, about Mei Hsu, a university student whose business idea was

69 Legal Services Regulations 2011, reg 5(1)(a)(iii).

70 Minimum Wage Order 2021, s 4.

71 Legal Services Act 2011, s 10.

72 *Re G J Mannix* [1984] 1 NZLR 309 (CA), affirmed in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679.

73 Ministry of Foreign Affairs and Trade "Supporting SMEs" <www.mfat.govt.nz>.

74 Legal Services Act 2011, s 40.

75 Section 18.

76 Sections 42 and 43.

77 Joychild, above n 12.

78 Kayla Stewart and Bridgette Toy-Cronin *The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services Pilot Report* (University of Otago Legal Issues Centre, 2018) at 12.

79 At 13.

stolen in apparent violation of intellectual property law. The Centre found that Mei would be unable to access legally-aided assistance.[80]

In the face of these significant deficiencies, the *Legal Aid Handbook* concludes that "the great hope is that the Ministry of Justice ... take[s] steps to resuscitate its barely breathing body."[81] By all indications that has not occurred.

Unrepresented Litigants: Symptoms of a Broader Problem

With litigation costs out of reach for most New Zealanders, many litigants are forced to go unrepresented. In New Zealand, incidences of unrepresented litigants, at least anecdotally, have risen in recent years.[82] User-pays policy plays a key role in encouraging litigants to self-represent. Upfront costs deter people from engaging lawyers. Public policy broadly presents the courts as a service, accessible only if the litigant-consumer pays.[83]

While the right to represent oneself is well established,[84] our legal system rests on the fundamental assumption that parties will be represented.[85] Adrian Zuckerman argues that the existence of unrepresented litigants has two core consequences for the justice system: the efficiency deficit and the justice deficit.[86] The efficiency deficit comes from the litigant's unfamiliarity with the court system compared to that of a trained lawyer. This unfamiliarity requires the litigant and the court spend disproportionate time, effort and resources preparing for trial and ensuring compliance with court rules.[87] The justice deficit is the disadvantage unrepresented litigants endure as a result of their unfamiliarity with court processes and procedure.[88] A litigant's inability to properly plead his or her case decreases his or her chance of success, regardless of its merits.

Unrepresented litigants are the identifiable tip of what Winkelmann CJ calls the "justice gap".[89] This gap consists of potential litigants with reasonable chances of success, who have either decided not to or cannot pursue their claim. This group is difficult to

80 At 6 and 14.

81 Rowan, above n 64, at 7.

82 Winkelmann "Access to Justice", above n 2, at 235.

83 Bridgette Toy-Cronin *Keeping up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person* (PhD Thesis, University of Otago, 2015) at 209.

84 Rabeea Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015) at 1.

85 Winkelmann "Access to Justice", above n 2, at 235.

86 Adrian Zuckerman "No Justice Without Lawyers—The Myth of an Inquisitorial Solution" (2014) 33 *CJQ* 355 at 355.

87 At 355.

88 At 355–356.

89 Winkelmann "Access to Justice", above n 2, at 239.

quantify but is likely far more significant than those who choose to go it alone.

This state of affairs is truly alarming. Litigation costs have sharply risen. Court fees have increased drastically as governments push costs onto "consumers", and the cost of representation is high and difficult to predict. Most New Zealanders' incomes are unable to sustain any serious legal challenge. Traditionally, legal aid bridged this gap. Yet, due to cost-cutting measures, the legal aid system is unusable for the vast majority of New Zealanders. With no alternative, litigants are forced to go to court unrepresented, taking up disproportionate court resources and severely reducing the litigant's prospects of success. So, what should be done?

IV THIRD-PARTY LITIGATION FUNDING: JUSTICEWASHING AN INDUSTRY

TPLF has gained prominence as a potential access to justice reform. This Part first notes how TPLF is framed as empowering litigants who otherwise could not access the court system. Second, it argues that it is inappropriate to view TPLF as access to justice reform.

What is TPLF?

TPLF is the practice of engaging a third-party commercial funder to fund the cost of a legal claim in exchange for a proportion of any award.[90] In most TPLF arrangements, the funder also undertakes to pay adverse costs should the claim fail.[91] This, in theory, allows plaintiffs to pursue otherwise-unaffordable litigation. The funder weighs up the strength of the claim, potential risks and the size of the potential award, before negotiating terms of funding.

By engaging a funder, the litigant lowers their financial exposure when engaging in litigation. They also gain the benefit of an experienced funder's commercial know-how, and may access higher quality legal representation than they otherwise could have afforded.

However, the litigant gives up a significant portion of any award. In some New Zealand cases this can be over 40 per cent of any

90 Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at [1.18]–[1.19].

91 At [1.21].

monetary claim.[92] They also lose some control over the litigation as the funder has considerable input — or even de facto control — over strategy and legal representation. Non-quantifiable aspects of the claim that may be important to the litigant, and wider society, lose prominence.

TPLF as Access to Justice

TPLF is often posed as a method of improving access to justice. The courts have accepted this view to some extent. The Court of Appeal held that access to justice, as the fundamental principle of the rule of law, requires the flexibility to "meet the harsh reality of the current cost to the injured party of litigation, which is often more than a would-be plaintiff can sensibly be expected to bear."[93] TPLF is particularly modelled as an access to justice measure for representative claims, which are seen as an access to justice measure themselves.[94]

TPLF can provide litigants utility and flexibility. Three scenarios highlight the utility of litigation funding: insolvency practitioners, representative actions and large commercial parties.

Insolvency situations demonstrate where TPLF is most useful. By 2000, New Zealand courts had recognised an exception to maintenance and champerty for situations of insolvency.[95] Insolvency practitioners are experienced commercial actors in an environment where funds are often unavailable. It can make commercial sense for insolvency practitioners to consider external funding rather than risking existing recoveries to pursue claims.

TPLF is a practical option for representative actions. Representative actions can vary in size, from a small number of plaintiffs into the thousands. Representative actions use economies of scale to make uneconomic claims worthwhile and to spread the costs amongst the class.[96] However, funding arrangements can be cumbersome. Class members may not have the equity to fund the claim.[97] Arranging for a large class to share costs is difficult, and its complexity can be prohibitive. Engaging a funder makes practical

92 42.5 per cent in *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [21]. Notably, the funder's portion comes after costs for lawyers and experts have been paid, so litigants are left with an even smaller portion of the overall award.

93 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28].

94 At [16].

95 *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC).

96 *Saunders*, above n 93, at [16].

97 Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 151–152.

sense: centralising and streamlining the funding process for any potential class member, incentivising the class to grow.

At the highest commercial level, litigation is often an asset and commercial interest.[98] A litigant company sees potential return and considers it worthwhile to pursue the claim by investing capital. However, litigation can be capital intensive and take several years to actualise.[99] It may be in a company's commercial interest to invest that capital in other areas and engage a litigation funder whose long-term business model operates around the typical litigation lifecycle.[100]

Why TPLF Does Not Enhance Access to Justice

Three arguments undermine TPLF as an access to justice measure. First, TPLF does not empower a significant number of litigants to access the courts. Second, TPLF's utility is only engaged where the litigant can *choose* to engage a funder, not where that is their sole option. Third, TPLF fails to address the root cause of inaccessibility of justice, instead buying into a market-driven vision of the courts and further eroding the value of public justice.

1 TPLF is ineffectual as an access reform

TPLF does not materially improve access to justice, because it helps a relatively small number of litigants. Funders are focused on claims with low risk and a high level of commercial return, and as a result, the number of funded claims is limited.[101] The vast majority of cases remain unfunded, and the actual sources of cost do not change. As Glazebrook J noted on behalf of a unanimous Supreme Court:[102]

> ... [The access to justice] justification for litigation funding can be exaggerated. Commercial litigation funders will only fund claims where the projected return is sufficient to offset the costs of litigation and the risks of failure. Litigation funding is thus not a general panacea to offset rising costs of litigation and resulting access to justice concerns.

98 Nick Butcher "Litigation funding and class actions" (2019) 929 LawTalk 66; and Rowles-Davies, above n 90, at [1.63].

99 Rowles-Davies, above n 90, at [1.66]–[1.67].

100 At [1.70].

101 Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka "The Oxford Study—Policy and Recommendations" in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing Ltd, Oxford, 2010) 1 at 98; and Rowles-Davies at [1.51] and [3.43]–[3.48].

102 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [41].

Relatively low material improvement to access does not disqualify TPLF. But it illustrates that the access to justice argument for TPLF is superficial compared with its systemic consequences.

2 TPLF preys on vulnerable litigants

TPLF can be useful where the litigant makes the choice to engage the funder. The scenarios discussed above often involve sophisticated commercial actors making such a choice.

Many users of TPLF do not have a choice. They engage a funder by necessity, unable to afford a claim themselves.[103] If the litigant has no choice, the utility of TPLF is not engaged. In such situations, the parties have unequal bargaining power; the funder can dictate terms and litigants are put at risk of exploitation.

The allegations put forward by former clients of lawyers Grant Shand Barristers and Solicitors (Shand Solicitors) and funding company Claims Resolution Service Limited (CRS) illustrate the potential dangers of litigation funding.[104] Former clients allege that Shand Solicitors and CRS operated as an undisclosed joint venture to profit from claims following the 2011 Canterbury earthquakes. CRS offered a "no win no fee" funding arrangement for homeowners who contracted with CRS through Shand Solicitors to resolve their insurance claims.[105] The Court described this offer as "attractive to many financially stretched and emotionally drained homeowners" who "often faced very difficult financial and living situations."[106]
The allegations are that:[107]

- Shand Solicitors used experts associated with, or controlled by, themselves to provide overly high estimates of claim values;
- Shand Solicitors and CRS did not advise clients of their business relationship or financial arrangements that advanced the companies' interests;
- Shand Solicitors did not raise any issues with CRS clients about the terms of their contract with CRS; and

103 Rowles-Davies, above n 90, at [1.56].

104 *Smith v Claims Resolution Service Ltd* [2019] NZHC 127; and *Claims Resolution Services Ltd v Smith* [2020] NZCA 664.

105 *Smith v Claims Resolution Service Ltd*, above n 104, at [6].

106 At [4] and [7].

107 At [9].

- Shand Solicitors and CRS preferred their own interests over their clients' interests, negotiated settlements well below what they represented as the true value, and pressured plaintiffs to settle and invoiced clients sums far more than expected.

Though not proven, these allegations highlight the potential danger of litigation funding in a low-choice, low-access environment.

Another New Zealand example of litigation funding gone wrong has recently emerged from the infamous *Kidd v van Heeren* litigation. A recent Court of Appeal judgment noted that the plaintiff's "ruinous" litigation funding arrangement resulted in a borrowed sum of USD$4.3 million, ballooning to a debt of USD$17.25 million in less than four years.[108] That figure essentially mirrored the High Court's interim award of USD$17.612 million.[109]

There are many more examples of funding going wrong in jurisdictions with mature funding industries. In the United Kingdom, a 2017 settlement left shareholders worse off than if they had settled in 2016 despite the bank almost doubling the 2016 offer. [110] A complex funding structure gave the funder half of the eventual settlement — £100 million of £200 million.

In Australia, funders take on average around 30% of the proceeds from a claim.[111] But that is not always the case. A proposed funding arrangement gave 98 per cent of a $12 million settlement to the lawyers and the funder.[112] Murphy J struck the proposal down, calling the settlement:[113]

> ... an example of an increasing problem in class action litigation in that the legal costs and litigation funding charges are disproportionate to the settlement monies to be distributed to class members.

Class members received 33 per cent of the total settlement.[114]

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108 *Kidd v van Heeren* [2021] NZCA 244 at [11].

109 *Kidd v van Heeren* [2021] NZHC 1414 at [242].

110 Michael Glackin "Litigation funders to gain most in RBS settlement" *The Times* (online ed, London, 28 May 2017).

111 Australian Law Reform Commission *Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134, December 2018) at [3.49].

112 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 at [5].

113 At [4].

114 At [15(c)].

3 TPLF embeds damaging market values into the litigation environment

TPLF threatens the overarching values of the court system. Funders act as de facto gatekeepers for what is deemed a worthwhile claim.

Funders focus on a narrow band of high profile, high return, low-risk cases.[115] This undervalues aspects of the claim important to individual litigants and to broader society. For instance, litigants may be motivated by pursuing industry change, or obtaining recognition of a wrong.[116] Such concerns are at best peripheral and at worst irrelevant to a funder. While the availability of funders is, on its face, a net benefit — more cases reach the courts than before — the factors that elevate those cases above the rest are skewed towards those favoured by commercial funders.

Funders affect the development of the common law. For example, funders may be hesitant to fund cases that require novel argument, given the risk involved in running a novel claim. On the other hand, a funder may consider a novel claim where success would be lucrative for the funder — either in that immediate case, or by opening the door to further cases. This is illustrated in two recently funded New Zealand cases. In *Mainzeal Property and Construction Ltd (in liq) v Yan*, the funded plaintiff ran a novel quantum argument to increase its recovery, and therefore funder-profits, in directors' duty claims.[117] Similarly, in *Attorney-General v Strathboss Kiwifruit Ltd*, the funded class action attempted to establish direct Crown tortious liability that would open the door to further lucrative Crown liability cases.[118] By favouring cases that support legal developments favourable to their interests, litigation funders can skew the typology of cases the courts consider.

This is the corrosive tendency of the market at work. The attitude towards legal services changes. As the market allocates access to the service, it logically follows that the service, here access to the courts, is treated as a commodity. Funders amplify that tendency, treating legal claims as a commodity to be bought and leveraged for

115 Justice Not Profit *Third Party Litigation Funding in the United Kingdom: A Market Analysis* (2015) at 12; Rowles-Davies, above n 90, at [1.51], [3.43]–[3.48] and [10.04]; and Butcher, above n 98.

116 Jenny Stevens as cited in Rod Vaughan "Debate over litigation funding heats up" *LawNews* (online ed, Auckland, 4 June 2020) at 2.

117 *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255; novel quantum argument discussed at [383]. The Court of Appeal accepted the novel quantum argument on appeal for breach of s 136 of the Companies Act 1993, but not for breach of s 135 as originally argued before the High Court: see *Yan v Mainzeal Property and Construction Ltd (in liq)* [2021] NZCA 99 at [294] and [530].

118 *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98 at [70].

profit. This undermines the prominence that needs to be given to public vindication of legal rights. A proponent of TPLF, Nick Rowles-Davies, notes how the growth of TPLF is pushing a perception of litigation as an asset to be realised, and new entrants to the market may push further for greater ability to purchase and control claims.[119] In the United Kingdom, large funders are shifting from litigation funding to litigation finance, packaging funded cases into investment portfolios.[120] Litigation is rendered a literal investment product. In this sense, litigation funding is an obvious extension of the trend towards commodifying justice.

Those in favour of litigation funding as an access to justice reform reject this criticism. Bronwyn Bailey argues that the "ick factor" felt by critics of litigation funding ignores that a modern justice system is unavoidably commodified.[121] Money is used to represent justice as the legal system values personal relationships, unquantified harms and available remedies in monetary terms.[122] Many legal practices commodify legal claims, such as the assignment of distressed debt and insurance subrogation.[123] De-commodifying justice would require a radical overhaul of the modern system towards "eye for an eye" justice and other non-monetary methods to mete out retribution.[124] Andrew Higgins extends this argument, noting that private lawyers themselves have financial interests in litigation.[125]

However, this commodification is different to that represented by TPLF. A modern justice system must, to an extent, "commodify" justice. Most claims are for economic loss with remedies expressed in monetary terms, even for unquantifiable and irremediable harm. This reflects the best way to resolve conflict within the practical confines of a modern legal system, without resorting to retributory "eye for an eye" remedies that involve scaling back fundamental rights and norms.

By contrast, TPLF buys into the notion that the market should dictate which cases are worth pursuing. Rather than expressing justice in necessarily monetary terms, TPLF attempts to decide what should and should not be justiciable. It highlights the position that only claims with a high rate of "return" are worth the courts' time.

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119 Rowles-Davies, above n 90, at [10.11]–[10.14].

120 Justice Not Profit, above n 115, at 12.

121 Bronwyn Bailey "Litigation Funding: Some Modest Proposals" (LLB (Hons) Dissertation, University of Otago, 2018) at 46–47.

122 At 47.

123 At 47.

124 At 47.

125 Andrew Higgins "The Costs of Civil Justice and Who Pays" (2017) 37(3) Oxf J Leg Stud 687 at 697.

The "need" for TPLF is generated by market dynamics that operate to prevent litigants from pursuing their legal claims. As a reform, TPLF seeks to treat the symptoms of the access to justice crisis — litigants denied access to the courts — while furthering the policy thinking that caused it. This thinking fits with a broader pattern of neoliberal policy making — attempting to "resuscitate an ailing system by prescribing more of the same rather than deciding that enough is enough."[126]

There has been a recent push for regulation of the funding industry. Such regulation is welcome and necessary. Australia recently announced that funders will be subject to the same regulatory requirements as other financial service providers.[127] Here in New Zealand, in December 2020, the Law Commission revitalised a dormant industry review.[128] However, industry regulation cannot render TPLF an acceptable remedy for the access to justice problem.

The growth of, and demand for, TPLF should be a call to action. The assertion that litigation funding acts as a welcome stopgap between New Zealanders and the court system exposes a set of dangerous assumptions underpinning our approach to justice.

V LEAVING THE MARKET BEHIND: ACCESS TO JUSTICE REFORMS

This Part outlines potential reforms to overcome inaccessibility of the New Zealand court system. These reforms are drawn from a spectrum of justice policies and involve a spread of actors, illustrating the variety of possible access to justice reforms. Some reforms make tangible changes to drive the cost of litigation down. Others promote a change in litigation culture to reinvigorate interest and engagement in access to justice.

First, reform of the philosophy of civil procedure is necessary. Concern for access to justice should be brought to the forefront. Second, the legal profession should reappraise its role in the justice system, through anonymous reporting of fees to the NZLS, exploring alternative billing methods, and making pro bono mandatory. Third, the government should reassess the policy framework behind court

126 Philip Whitehead and Paul Crawshaw "Markets, Privatization and Justice: Some Critical Reflections" in Philip Whitehead and Paul Crawshaw (eds) *Organising Neoliberalism: Markets, Privatization and Justice* (Anthem Press, London, 2012) at 229.

127 John Frydenberg "Litigation funders to be regulated under the Corporations Act" (press release, Australia, 22 May 2020).

128 Law Commission "Class Actions and Litigation Funding: Project Overview" <www.lawcom.govt.nz>.

fees and legal aid eligibility. Each option is fertile ground for, and deserving of, further scholarship. This article serves as a starting point for wide-ranging reform.

The Philosophy of Civil Procedure and Access to Justice

Lawyers' ethical and procedural obligations should be recast to enhance and promote access to justice. Currently, the High Court Rules (HCR) set out the procedural rules in litigation.[129] The overall objective of the rules is to secure the "just, speedy, and inexpensive determination of any proceeding."[130]

Separately, the Lawyers and Conveyancers Act 2006 and Conduct and Client Care Rules (RCCC) address lawyers' ethical obligations and prescribe requirements that every lawyer must comply with in the course of his or her practice. The Act states that a fundamental obligation of lawyers is to uphold the rule of law and facilitate the administration of justice in New Zealand.[131] RCCC obligations are focused on lawyers' duties as officers of the court and owing ethical obligations to clients. Most relevantly, r 2 states that a lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.[132]

But the current framework does not set appropriate obligations on the profession (or participants) to have regard to access to justice concerns in the course of legal practice. First, ethical obligations are largely cast in the negative. Lawyers are required to refrain from acting unethically rather than positively take steps to enhance accessible justice. Second, ethical obligations are framed as duties to the court, notably not to mislead or deceive the court, and separate duties to advance clients' interests.[133] These obligations are largely separate to the body of technical procedural rules for litigation. As a result, there is little obligation for New Zealand lawyers to consider the broader impact on access to justice when navigating court procedure.

1 The Victorian Civil Procedure Act 2010: A blueprint for reform

The Civil Procedure Act 2010 (CPA) in Victoria provides an alternative. The CPA contains sweeping reforms of civil procedure

129 High Court Rules 2016.

130 Rule 1.2.

131 Lawyers and Conveyancers Act 2006, s 4(a).

132 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 2.

133 Rule 11.

rules both in substance and in form, directing a "major shift in the philosophy of dispute resolution."[134] It indicates to litigants, the courts, and the public that access to justice is a priority. It empowers the courts to take active steps to prioritise access to justice. Adoption of a similar set of explicit obligations in New Zealand would reinforce and bolster the ability of the court to enhance access to justice.

The Act declares that the overarching purpose of the CPA is to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute."[135] The court must give effect "to the overarching purpose in the exercise of any of its powers,"[136] having regard to certain key objectives and the litigation conduct of the parties.[137] These objectives include:

- the just determination of the dispute;
- public interest in early settlement;
- efficient conduct and use of judicial resources;
- minimising delay; and
- proportionality to the complexity, importance, and value of the dispute.

The CPA also applies "overarching obligations" to parties, counsel, and other related parties (including litigation funders) to a civil proceeding.[138] These obligations are headed by the "paramount duty" to "further the administration of justice."[139] The obligations include duties to:[140]

- act honestly;
- have proper basis for the dispute;

134 David Bailey "Reforming Civil Procedure in Victoria—Two Steps Forward and One Step Back?" [2011] DICTUM Vic Law S J 81 at 84.

135 Civil Procedure Act 2010 (Vic) [CPA], s 7(1).

136 Section 8.

137 Sections 9(1) and 9(2). With regards to litigation conduct, courts may consider compliance with prelitigation requirements and processes, reasonable endeavours taken to resolve the dispute by agreement, the degree of promptness in conducting the litigation and undertaking interlocutory steps, whether lack of prompt action arose outside of the party's control, compliance with overarching obligations, prejudice suffered as a consequence of an order made by the court, the public importance of the issues in dispute, and the extent of legal advice received by the parties.

138 Section 10.

139 Section 16.

140 Section 17–25.

- only take steps reasonably believed necessary to facilitate resolution;
- cooperate in the conduct of the dispute;
- not mislead or deceive;
- use reasonable endeavours to resolve the dispute;
- narrow the issues in dispute;
- ensure costs are reasonable and proportionate; and
- minimise delay.

The court can consider a breach of overarching obligations when exercising any of its powers.[141] A party in breach can be required to pay some or all legal costs resulting from the breach, compensate the person for any loss that was contributed to by the breach, or to remedy the breach.[142]

On one hand, most of these obligations are already paralleled in New Zealand law through the RCCC and HCRs.[143] The current HCRs give judicial discretion to alter cost awards, including through indemnity costs, if a party has contributed unnecessarily to cost or delay.[144] Critics in Australia have argued that the Victorian Act amounts to window-dressing, echoing nothing more than existing good litigation practice.[145]

That criticism does not stand up in practice. By contrast to the RCCC, the CPA's overriding duties supplant lawyers' conventional duties to their clients.[146] The CPA extends duties beyond lawyers to litigant parties themselves.[147] Further, the paramount duty is attached to, and contextualised by, specific obligations such as the duties to minimise delay and to narrow issues in dispute.[148] These duties, backed by sanction,[149] are much more applicable to individual actions

141 Section 28.

142 Section 29.

143 Sebastian Hartley (Clerk to the Rules Committee) to Access to Justice Working Group Members regarding Written Briefs of Evidence and 'Will-Say' Statements (13 August 2019) at 23.

144 High Court Rules 2016, r 14.6.

145 Bailey, above n 134, at 91.

146 Les Arthur "Why Problem-Solving Cooperative Strategies Are Necessary to Achieve the Goals of Reforms to the Civil Justice System" (2015) 23 Wai L Rev 22 at 27; and CPA s 13(2).

147 Section 10.

148 Section 23 and 25.

149 Part 2.4.

taken by parties to dispute.[150] Also, the court's obligation to give effect to the overarching purpose is not restricted to the specific duties, it applies to all of the court's powers.[151]

The Victorian courts have not shied away from enforcing these obligations, recognising that the CPA provisions are not merely aspirational, but obligatory and enforceable. In *Yara Australia Pty Ltd v Oswal* the Victorian Court of Appeal noted that the powers provided in the Act are intended to make all those involved in the conduct of litigation accountable.[152] The Court observed that, rather than restating existing statutory and common law obligations, the CPA creates obligations that extend well beyond the existing Rules and the court's inherent jurisdiction, providing it with a "panoply of [new] powers".[153]

In *Kuek v Devflan Pty Ltd* the Victorian Supreme Court rejected an argument that the Act "contains generalities and 'rhetoric'" relating to "abstract concepts of justice".[154] Instead, the Court recognised that the CPA imposes specific statutory obligations on the court, parties, and counsel. That judgment concluded by stating that:[155]

> The Act must be taken seriously by litigants and their lawyers. In an appropriate case, the Court is entitled to—and will—say to a party seeking to enforce its rights in a manner that is antithetical to the overarching purpose and to that party's overarching obligations that 'enough is enough' and will act to curtail those rights in the interests of the administration of justice.

The CPA ties *positive* obligations to act consistently with access to justice principles into actual litigation practice. It recognises that litigation culture and practice are inseparable from the goal of preserving access to justice.[156] The positive obligation to only take steps reasonably believed to be necessary reinforces the notion that litigants are not using civil procedure solely to further their own ends. It requires practitioners to consider their actions in the round, rather than relying on bare compliance with procedural technicalities. As noted by the Rules Committee, such a structure would expressly

150 Arthur, above n 146, at 27–28.

151 CPA s 8.

152 *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337, (2013) 41 VR 302 at [20].

153 At [25].

154 *Kuek v Devflan Pty Ltd* [2012] VSC 571 at [51].

155 At [53].

156 Hartley (Clerk to the Rules Committee), above n 143, at 23.

require lawyers to "observe of not only the letter of civil procedure but also demonstrate a practical commitment to its spirit."[157]

Access to justice should be front of mind for judges and the legal profession. Adopting a rule structure like the CPA would endorse and reflect the tenor of Winkelmann CJ's call to action and provide an explicit judicial counterweight to litigation conduct that does not rise to the occasion.

The Profession: Fee Reporting, Billable Methods and Pro Bono

This section discusses the bulk of legal fees: the cost of legal representation. First, it argues for mandatory fee reporting, whereby fees are reported to the NZLS to be published anonymously. Second, it argues that a variety of billing methods should be used. Third, it argues that pro bono services should play a larger role in legal practice and considers the possibility of mandatory pro bono requirements.

1 Transparency in legal fees

This article has focused on how poorly markets regulate justice. However, one area in which the market is the most appropriate mechanism to facilitate access to justice is in regulating legal fees: lawyers are private individuals and law firms are businesses.

However, due to information asymmetry between the profession and clients the market is unable to function properly. This has two consequences. First, it hides the extent of the access to justice problem. This is a major impediment to consequential reform. Second, there is less pressure on practitioners to offer competitive rates. Potential clients have a limited ability to "shop around". That is particularly acute for one-off clients and those who are less familiar with litigation.

A simple proposal to lessen information asymmetry is to require practitioners and firms to publish their rates.[158] This requirement extends the existing obligation to provide fee estimates on request.[159] It would allow prospective clients to compare lawyers' fees before the point of contact and put pressure on lawyers to ensure their rates are reasonable.

157 At 42.

158 Toy-Cronin, above n 39, at 314.

159 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 9.4.

2 Public fee reporting

A more radical proposal is to require mandatory reporting of litigation fees. All lawyers providing litigation services should be required to report how much they charge clients for each service. The anonymised data would then be published by the NZLS to indicate the approximate cost of legal action.

Published data would allow policymakers, the courts and the profession to understand the scope of the current problem and track progress towards addressing it. Access to justice reforms could be more targeted and their tangible effects better understood. Potential clients could also use the reported data to consider whether they can afford to bring litigation. The NZLS could also potentially use the data to monitor charging abuses.[160]

There are two potential criticisms of compulsory fee reporting. First, it is unprecedented. There is no other analogous industry with such a system. However, we already recognise the law as a unique industry, with lawyers as officers of the court, mediating access between the public and the legal system. This unique industry requires unique regulatory procedures to ensure it functions appropriately.

The second criticism is that both firms and the NZLS would face considerable administrative costs. Firms would need to develop capacity to report their billing information. Firms could pass the cost of these obligations to clients through increased fees. The NZLS would be burdened with the difficult task of aggregating, anonymising, and reporting the data. The reporting would need to be highly sophisticated to capture case scaling and complexities that impact on fees.

As with other industries, law firms have AML/CFT obligations that require them to report risks and carry out procedures to ensure funds received are legitimate.[161] Large law firms are also required to report Continuing Professional Development (CPD) obligations to the NZLS.[162] With appropriate infrastructure in place, reporting fee data would become routine. The larger the firm and the more complicated its reporting, the greater the capacity to carry out that reporting.

Reporting litigation costs furthers the NZLS's statutory purpose and functions, in particular, assisting and promoting the reform of the law for the purpose of upholding the rule of law and

160 Toy-Cronin, above n 39, at 314.

161 Anti-Money Laundering and Counter Financing of Terrorism Act 2009.

162 Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013, r 9.

facilitating the administration of justice.[163] It sits comfortably with other NZLS functions including managing disciplinary proceedings and overseeing CPD. Though such reform would be challenging, we should not shy away from implementing ambitious procedures to address the inaccessibility of the courts.

3 Calling time on the billable hour

The problem with legal costs is not only how much lawyers charge, but how they charge. Often the latter informs the former. The profession should move away from time-based billing where possible.

Much of the criticism levelled at the legal profession is that the profession has failed to grasp the distinction between operating as a business and as a profession.[164] As Director of Wellington-based Juno Legal, Helen Mackey has argued that the law should be viewed not simply as a high income-generating business, but as a vocation and a service.[165] This cognisance should filter into decisions on how lawyers bill their clients.

Time-based billing has played a role in raising legal costs. Nigel Hampton QC argues that time-costed fees are the single most significant factor in taking legal services out of the reach of ordinary people.[166] The importance of service to the public in the minds of the legal community declined alongside the change to time-based billing.[167] Professor Warren Brookbanks points to the corporatisation of legal practice and the growth of New Zealand's mega-law firms as indicative of this shift.[168]

A system predicated on time-based billing may not continue to be profitable or defensible as this method of payment becomes unaffordable to more New Zealanders.[169] However, that is not to say that time-based billing should be eliminated. It remains useful and appropriate in some circumstances. Rather, the rules governing lawyers' fees should be revised to encourage the use of a greater variety of billing methods.[170]

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163 Lawyers and Conveyancers Act 2006, s 65(e).

164 Allan C Hutchinson *Fighting Fair: Legal Ethics for an Adversarial Age* (Cambridge University Press, New York, 2015) at 2–3 and 16–19.

165 Vaughan, above n 38.

166 Shoeshine "Access to civil justice is no easy fix" *The National Business Review* (New Zealand, 23 September 2019).

167 Vaughan, above n 38.

168 Vaughan, above n 38.

169 James Greenland "Mind the Gap: Closing the justice gap" (2015) 878 LawTalk 6.

170 Toy-Cronin, above n 39, at 314.

Flat fee arrangements — charging a prearranged fee for the provision of legal services — are gaining increasing favour in New Zealand. Practitioners argue that flat fees are not suitable for litigation work given the unavoidable shifts in circumstances.[171] Flat fees also run the ethical risk of lawyers doing poor quality work.[172] However, many other uncertain industries operate with flat fees, and litigators should explore the use of flat fees where possible.

Value-based billing considers the value of the work when billing the client.[173] There are limitations on this approach: fees cannot be calculated as a proportion of the amount recovered,[174] and any "premium" cannot include calculations based on "time and labour".[175] But it is one way to ensure the cost is commensurate to the value realised by the client.

"Unbundled services" allow clients to choose services they need rather than defaulting to a full-service retainer.[176] They are particularly useful for litigants who may otherwise be forced to litigate unrepresented.[177] Engaging a lawyer to help articulate the legal issues in dispute can steer the litigant in the right direction. Notably, the High Court Rules were recently amended to allow lawyers to provide legal services under a limited retainer.[178]

4 Pro bono

Pro bono services, where a lawyer either waives or reduces their fee, have played an important role in providing access to justice. The rationale for pro bono is straightforward. Access to legal services is a fundamental societal interest, essential to maintaining individual rights and to avoid compounding social inequalities.[179]

Existing pro bono efforts in New Zealand are promising. A recent survey of 360 New Zealand lawyers reports that 73 per cent of respondents engaged in some form of pro bono work in the last

171 William G Ross *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Carolina Academic Press, Durham, 1996) at 245.

172 At 240–241.

173 Bridgette Toy-Cronin and others *New Business Models for Legal Services* (University of Otago Legal Issues Centre, August 2016) at 8.

174 Lawyers and Conveyancers Act 2006, s 333.

175 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.1(a).

176 Andrew Caplan "Access to Justice: The View from the Law Society" in Ellie Palmer and others (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing, Oxford, 2016) 13 at 20.

177 Toy-Cronin, above n 173, at 3.

178 High Court Rules 2016, r 5.40(1A).

179 Deborah L Rhode *Access to Justice* (Oxford University Press, New York, 2004) at 146.

year.[180] The median amount of true pro bono work was 20 hours, increasing to 27 hours when including wider volunteering efforts and acting under a legal aid grant.[181]

New Zealand should consider mandatory pro bono services.[182] Every lawyer or firm could be required to carry out a minimum number of pro bono hours a year. Mandatory pro bono would help address unmet legal needs and ground lawyers in the reality of justice. Making pro bono services a positive obligation would encourage the profession to become more invested in the needs of the community

Effective enforcement may be challenging, but would be made easier when taken in concert with other mechanisms. A pro bono clearing house and community law centres, for example, could allow for verifiable pro bono matters. A random audit system could also be adopted, alongside a robust complaints process. Firms would be mindful of how being seen to shortcut their obligations would impact their brand, and most lawyers will not risk their professional reputation to shirk their obligations.

The first criticism of mandatory pro bono is that of fairness. Critics argue that lawyers should not be responsible for solving broad social problems that require broad social solutions.[183] It is arguably inappropriate that fundamental rights should be expected to be met by part-time volunteer efforts — we should instead expand public efforts, such as legal aid, and put the financial burden on wider society.[184] Pro bono is also often seen as a charitable service, and when that charity is forced, it arguably ceases being charitable and becomes a tax enforced by the law.[185] But, to some degree, it is the duty of the legal profession to provide for unmet legal needs in the community.[186] Lawyers have a virtual monopoly on legal services. Stringent admittance requirements and prohibitions on unauthorised practice, alongside complicated law unintelligible to those without legal training, act as an effective delegation of this duty to lawyers.[187]

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180 Kayla Stewart, Bridgette Toy-Cronin and Louisa Choe *New Zealand lawyers, pro bono, and access to justice* (University of Otago Legal Issues Centre, March 2020) at 13–14.

181 At 13.

182 This idea originated from a conversation with Nikki Chamberlain.

183 Roger Cramton "Mandatory Pro Bono" (1991) 19(4) Hofstra L Rev at 1134.

184 At 1132-1133.

185 Lisa Tudzin "Pro Bono Work: Should it be Mandatory or Voluntary?" (1987) 12 JLP 103 at 115-116.

186 At 111.

187 David Luban "A Workable Plan for Mandatory Pro Bono" (1985) 5(1) Philosophy and Public Policy Quarterly 10 at 12; and Tudzin, above n 185, at 111–112.

The obligation also stems from lawyers' status as officers of the court.[188] Lawyers facilitate justice. This role is central to the operation of society in a way unmatched by any other profession.[189] This carries with it an obligation to help address systemic deficiencies. Pro bono legal work is not a "philanthropic exercise", but a professional responsibility that lawyers accept when joining the profession.[190]

Improving pro bono contributions is in the interests of the legal profession. Lawyers are poorly perceived by the public, particularly for how much they cost.[191] Robust mandatory pro bono obligations would uphold the profession's commitment to the public and improve confidence in the profession.[192] There is also value in exposing lawyers to the underside of the law, which may be the necessary impetus to increase professional buy-in on access to justice reform.[193] Pro bono work can widen a lawyer's area of expertise and understanding of the law, a benefit for both the individual and the profession. Pro bono work is an opportunity for junior lawyers to develop practical skills — managing matters, working with clients, negotiating with opposing counsel, drafting front-facing documents, and appearing in court — in ways often not available until many years into practice.[194]

Critics argue that mandatory pro bono work results in low quality representation.[195] Reluctant lawyers pressed to provide public services may provide low quality advice.[196] Even well-intentioned lawyers may provide poor quality or inefficient advice, particularly if specialist lawyers are required to help in areas in which they have no expertise. This also poses an efficiency problem. It may be more efficient to have lawyers fund a specialist pro bono organisation than carry out work themselves.

188 Rhode, above n 179, at 148.

189 Michael Mogill "Professing Pro Bono: To Walk the Talk" (2012) 15 Notre Dame J L Ethics & Pub Pol'y 5 at 24; and Rhode, above n 179, at 148.

190 Rhode, above n 179, at 149.

191 Saskia Righarts and Mark Henagan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12 Otago LR 329 at 340–341.

192 Tudzin, above n 185, at 112.

193 Rhode, above n 179, at 148–149.

194 Pam Feinstein "Gain experience through pro bono" *GPSolo Magazine* (online ed, Chicago, January / February 2012) at 17–18.

195 Cramton, above n 183, at 1127.

196 Rhode, above n 179, at 150.

The argument that many lawyers are unequipped to help pro bono clients is questionable.[197] Commercial lawyers can use experience within their area of competency to aid their client but applied on a different scale. Compliance with court procedure, negotiating with intransigent landlords, interpreting complicated tax obligations, for example, can all be relevant in the pro bono context.[198] Other reforms, such as a pro bono clearing house, would also help direct lawyers to types of cases with relevance to their practice. Moreover, normal legal practice involves learning new areas of law to suit clients' needs. Pro bono clients are no different.

Even if practitioners are unequipped, the status quo is hardly preferable.[199] If a trained lawyer would have genuine difficulty, this highlights the dire situation an otherwise unrepresented litigant finds themselves in.[200] A lawyer of any speciality can put a potential client in a far better situation than they would be in without assistance.

Funding a specialist pro bono legal team to mitigate against inaccessibility of the court system is a good idea. A financial contribution as a substitute for pro bono could be considered. It may also make the proposal more palatable to the profession. But we should note that financial substitutes sit uncomfortably with the principle underpinning pro bono work: the obligation as an officer of the court to provide access to the legal system.

The most significant obstacle to mandatory pro bono work is the profession itself. In a recent survey only 35 per cent of participants agreed that pro bono work should be mandatory.[201] Many participants echoed the criticisms addressed above.[202] This will make implementing mandatory pro bono work difficult. However, its unpopularity does not undermine its merit — a vote on CPD requirements before their implementation would have no doubt produced polarising results, despite the value they represent.

Still, pro bono services alone cannot be relied on to provide access to the courts. It is only one of a suite of strategies needed to improve access to justice.[203] It is inappropriate to expect lawyers to entirely "fill the gap" by doing work for free that they were once paid

197 Michael Millemann "Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question" (1990) 49 Md L Rev 18 at 60.

198 At 61.

199 Rhode, above n 179, at 150–151.

200 Millemann, above n 197, at 62.

201 Stewart, Toy-Cronin and Choe, above n 180, at 19.

202 At 19–21.

203 At 4; and Toy-Cronin, above n 39.

to do, without institutional reform in other areas.[204] In any event, the underlying causes of inaccessibility would remain. Mandatory pro bono work cannot be a substitute for wider institutional reform — but it would be a step in the right direction.

The Role of Government: Court Fees and Legal Aid

The cost of litigation has increased, in part, due to the market-driven, user-pays policy adopted by successive governments. This approach is driven by an overemphasis on the degree of personal choice involved in pursuing a legal claim.[205] Litigants largely do not choose to be involved in disputes. Often the only choice available is between the stress and expense of a legal claim or no redress at all. Defendants have even less choice, either to accept summary judgment against them, or the expense of defending the claim. Policymakers should see legal disputes as an unavoidable by-product of our social and economic lives.

The state has, to some extent, an obligation to ensure access to justice. It bears responsibility for ensuring an appropriate safety net for its citizens.[206] If it fails to do so "principles of equality before the law, which underpin the rule of law and in turn ... democracy, will remain unrealised."[207] Unlike many other spheres of public responsibility, the law is itself a product of the state. This brings a special responsibility to ensure that all have access to it.[208] In particular, because the state has designed a legal system that cannot be easily operated by ordinary people, it is responsible for providing for those who cannot afford access.[209] Though creating a hierarchy of public responsibilities is laden with difficulty and subjectivity, by any measure the ability to access legal services ranks highly among state responsibilities.[210] Unlike in other areas, the state's obligation does not arise solely due to market failure. Instead, justice is an essential element for the state itself to function..[211]

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204 Caplan, above n 176, at 20–21.

205 Sarah Moore and Alex Newbury "Legal aid in crisis: Assessing the impact of reform" (Bristol University Press: Bristol, 2017) at 70.

206 Law Council of Australia *The Justice Project: Final Report* (Australia, 2018) at 38.

207 At 38.

208 E J Cohn "Legal Aid for the Poor: A Study in Comparative Law and Legal Reform" (1943) 59 Law Q Rev 359 at 256.

209 David Luban *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton, 1988) at 246–247.

210 Higgins, above n 125, at 693.

211 Albert Weale "Principles of Access: Comparing Health and Legal Services" in Ellie Palmer and others (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing, Oxford, 2016) 41 at 51.

1 Court fees

The rationale for changes to New Zealand court fees has been reallocating the cost away from the taxpayer. As a result, fees have greatly increased. Fees should be reduced to lower the cost burden for litigants who may struggle to afford access to the courts.

The market model holds that it is appropriate for litigants to pay these court fees. Litigants who use the courts enjoy access to the court process, a sizeable monetary return if successful, and the ability to vindicate their rights. The Australian Productivity Commission argues that, given the low level of cost recovery, even current court fee levels effectively subsidise litigation for businesses and the very wealthy, because they make up the majority of litigants.[212]

However, the court system plays an important role in organising societal and economic behaviour, with considerable public benefits. To access the benefits of this system, litigants agree that the outcome of the dispute will become part of the public record. The subsequent judgment decides the outcome and provides a blueprint for future disagreements. It is appropriate that much of the cost is borne by wider society. Further, despite their high levels, court fees cover a mere 15 per cent of the courts' operating costs.[213] Even if court fees are reduced, the increased public cost is relatively low compared with the benefit of lowering the cost burden for litigants.

2 Legal aid reform

As noted by the New Zealand Bar Association Working Group, the current legal aid system contributes to limitations on access to justice.[214] In his retirement address, Tipping J strongly criticised cuts to legal aid.[215] He questioned whether current funding is consistent with the Bill of Rights, and argued that the money spent deciding whether legal aid should be granted would be better spent on legal representation itself.[216]

Critics point out that a legal aid regime capable of meeting the unmet need for legal services would be expensive. Kós P has argued

212 Productivity Commission *Access to Justice Arrangements: Productivity Inquiry Report, Volume 1* (December 2014) at 550.

213 Venning, above n 5, at 2.

214 New Zealand Bar Association, above n 66, at [1.26].

215 Tipping, Judge of the Supreme Court of New Zealand "Final Sitting: The Right Honourable Justice Andrew Tipping" (Wellington, 17 August 2012); and "Longest-serving judge hits out at legal aid" *Sunday Star Times* (online ed, New Zealand, 26 August 2012).

216 Tipping, above n 215, at 11.

that increasing legal aid eligibility is not the answer.[217] New Zealand is a small economy, with an aging population-base already straining our ability to provide core welfare benefits.[218]

However, high legal aid expenditure can also be interpreted as evidence of a well-funded, accessible system. The market focus on the cost of legal aid to the taxpayer is "anathema to the original conception of legal aid as a provision available to nearly all, according to their need."[219] Access to the courts through legal aid carries important social value — as John Halford and Mike Schwarz note "legal aid is not a welfare benefit; it is an equalising measure."[220] Its aim is to guarantee that everyone can meaningfully enjoy their rights, and that the merits of a court case determine its outcome rather than the relative wealth of the opposing parties.[221]

Reducing eligibility is costly for individuals and the wider community. Individuals cannot achieve redress, leading to negative consequences including mental health problems, family breakdown, homelessness and other social crises.[222] This has broader implications on social spending, downstream effects increase the economic burden on the community, applying pressure on other public programs in other areas including social services, health systems and the police.[223]

This policy perspective has been adopted in Scotland. The focus is on addressing the underlying causes of demand for legal aid, rather than reducing legal aid itself.[224] Unlike New Zealand (and England and Wales), Scotland's legal aid has not been reduced, in fact eligibility limits have increased. An estimated 70–75 percent of the population are eligible for some form of civil legal aid.[225] Even so, Scotland manages to spend less per capita than England and Wales, who have followed a similar approach to New Zealand.[226] Scottish legal aid expenditure is currently dropping year on year, not due to

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217 Kós, above n 4, at 7.

218 At 7.

219 Moore and Newbury, above n 205, at 69.

220 John Halford and Mike Schwarz "Legal aid cuts: more detail, more devils" *Solicitors Journal* (United Kingdom, 6 September 2013) as cited in Caplan, above n 176, at 19.

221 At 19.

222 Moore and Newbury, above n 205, at 74.

223 Asher Flynn and Jacqueline Hodgson "Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes" in Asher Flynn and Jacqueline Hodgson (eds) *Access to Justice & Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, New York, 2017) 1 at 12; Moore and Newbury, above n 205, at 75.

224 Sarah O'Neill "How Scotland Has Approached the Challenge of Austerity" in Ellie Palmer and others (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing, Oxford, 2016) 287 at 294.

225 At 294; see also Martyn Evans *Rethinking Legal Aid: An Independent Strategic Review* (Edinburgh, February 2018) at 18.

226 At 299.

budgetary restrictions, but because of other societal changes and changes to the justice system that result in lower demand for legal aid.[227] Legal aid is viewed as part of the broader justice and social ecosystems — by avoiding problems in the first place, the load on the civil justice system is reduced, alongside achieving better outcomes for communities.[228] This approach can be adopted in New Zealand. As Tipping J noted, we have the ability, if we choose, to lead the way by re-examining how legal aid is delivered.[229] What we need is "a proper recognition of the fundamental rights and values that are at stake."[230]

VI CONCLUSION: THE NEED FOR ONGOING REFORM

The civil justice system is unacceptably inaccessible. The premium society places on the courts has been replaced with a premium service for the wealthy and big business.

The average New Zealander struggles to access the court system because they cannot afford it. The cost of accessing the courts has risen through growing court fees and cost of representation. Meanwhile, the willingness of the state to provide support through legal aid has withered.

This shift in ethos can be seen in the recent prominence of TPLF, marketed as a potential solution to the access to justice crisis. If treated as enhancing access to justice, TPLF alters the values that underpin civil justice. The rise in demand for these services is symptomatic of the market-driven approach that has caused our justice system to drift from its most fundamental principles.

New Zealand civil justice needs an urgent course correction. This article has outlined several reform possibilities. These reforms will not resolve the access to justice crisis. However, they would go a long way towards reorienting the justice system and opening the door for further necessary steps. The legal community and broader society must decide what the justice system should be, what values it promotes, and whom it serves.

227 Evans, above n 225, at 15.

228 O'Neill, above n 224, at 294–296

229 Tipping, above n 215.

230 Tipping, above n 215.

VII POSTSCRIPT

The course correction urged by this article may have already begun. Shortly before this article was published, the Rules Committee circulated a consultation document that proposed major structural reform to New Zealand's civil procedure.[231]
In short, the Rules Committee proposed that:

- the Disputes Tribunal's jurisdiction should be increased, with greater rights to appeal;[232]
- the civil capabilities of the District Court be significantly enhanced, and inquisitorial elements be introduced to its procedural rules;[233] and
- fundamental changes to civil procedure in the High Court be made, including, but not limited to, replacing discovery with enhanced initial disclosure, determining interlocutory applications primarily on the papers, evidence being given primarily by way of affidavit and introducing proportionality as a "guiding purpose" of the High Court Rules.[234]

These proposals could be momentous. Though they do not mirror this article's recommendations, they aim to address the same concerns — in the Committee's words, shifting the culture away from the "maximalist" approach to litigation.[235] For instance, the introduction of proportionality as a guiding purpose of the HCR is a similar approach to the overarching purpose of the Victorian CPA, which this article advocates for.

Shifting the presumption away from an exhaustive process, towards one geared to the specific dispute, could reduce costs for litigants. Discovery, for example (a process where a party searches for and discloses to the other side documents relevant to the dispute), can be an enormously time and labour-intensive process, even where the

231 The Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community*, 14 May 2021.

232 At 12–17.

233 At 17-20.

234 The Rules Committee *Improving Access to Civil* Justice at 20–25

235 At 8.

parties are already aware of the vast majority of the relevant material. Shifting the presumption away from full discovery, so that it is only required where necessary, is a positive step in reducing procedural barriers to justice. New Zealand's civil justice system has been called a "Rolls-Royce" justice system—it comes with all the procedural bells and whistles, and you can be reasonably sure that the outcome will be right. But sometimes you do not need, nor can you afford, a Rolls-Royce. Sometimes public transport will suffice.

However, these proposals require stress testing, and raise important questions to be answered. I highlight three here. First, the proposed addition of proportionality lacks the "teeth" of the Victorian model. There are still no positive and specific obligations on parties and the judiciary to act consistently with access to justice principles. Further, the existing r 1.2 objectives of securing a just and inexpensive determination arguably already capture the need for proportionality. On its own, the addition of proportionality may achieve nothing.

Second, for the proposals to be effective, judges will need to take a significantly more hands-on approach in case management. The lacklustre effect of previous case management reforms indicate that they may be reluctant to do so. And many of the desired outcomes of the proposals are already possible under the current rules. For example, r 8.5(1) of the HCR allows a judge to not make a discovery order if they consider the proceeding can be justly disposed of without it.

Third, the feasibility and effectiveness of these reforms will likely come down to adequate resourcing of the judiciary. Many of the proposals pass administrative burdens from counsel to the judiciary and their administrative staff. Under its current infrastructure and funding, the judicial system's ability to take on this burden is questionable.

Nonetheless, these proposals indicate that the judiciary are motivated to cure the rot underlying the civil justice system. While further reform in this and other areas remain crucially important, the Rules Committee's proposals are a heartening development.