I write in support of the general thrust of the streamlining reform proposals, but within the context of an overriding, fundamental principle — that ‘justice' and 'access to justice' are very different things, that must not be confused.

The starting point is that ‘justice' is the outcome of the dispute process. (That is, ‘justice' is not the dispute process itself. A dispute process in a free society should be ‘just’, but that is a different point.)

The aim of ‘access to justice’ can never be achieved under the current approach of costs (including security for costs) awards. Costs (including security for costs) mean that in addition to the justice (the outcome of the case) a party is required to pay some portion of the legal costs of another party, as an additional component to the outcome of the legal process. Costs (including security for costs) are illogical (and plainly wrong) for justice in a free society.

The ability to bring a claim, and the ability to defend a claim, in a court that is neutral and unbiased, are the bedrock foundation of a just dispute process in a free society. No person should ever be penalised (or even criticised) for having exercised those abilities to claim and to defend against a claim. The fact that, as regards outcome (justice), one side in due course ‘wins’ on disputed factual, legal or mixed factual and legal issues, and that the other side loses, is what happens —it is the outcome, the ‘justice' resulting from the dispute process the parties are entitled to commence, and to defend. (Similarly, it is never a judge’s role to comment, as if in some paternalistic over-view role, on whether or not a case should have been brought or defended — the judge’s role (indeed duty) is always simply to decide, in an independent and neutral way, the case that has been brought. If doing that, making a decision without commenting on a party's decisions to bring or defend a case, is too hard for a judge, the judge concerned should not have been appointed to the bench, and should resign on the basis that the appearance that their duty of independence and neutrality has been breached).

Without the unfettered ability of persons to bring, or to defend a claim, people will and do engage in activities that are marginal in terms of complying with the law. People push the boundaries, instead of living within them. The general position that any person can bring, or can defend, a case in a neutral, unbiased court, without fear of costs (and security for costs) awards for being found to have been wrong, is the proper base-line for access to justice. That ability is what enables 'access to justice’, and, in due course, ‘justice’ in a free society.

‘Justice', being outcome of the dispute, is never served by steps that inhibit or deny access to justice. And justice is always denied where access to justice is inhibited. The Feltex prospectus case is a prime, disgraceful, example. Parliament enacted a law that a prospectus should not be misleading — because the old common law style position of ‘buyer beware’ was unacceptable. The company and its private equity owners were fully aware of the law when they created a prospectus to take Feltex public. Feltex duly collapsed shortly after it went public. The ‘informed' private equity holders had got out in the nick of time. The ‘uninformed’ new shareholders brought a claim against the ‘informed’ selling private equity shareholders, and the company directors, who had created the

prospectus, claiming it was misleading. Following contorted reasoning process (harking back to ‘buyer beware’ law and thinking), the High Court and the Court of Appeal held the prospectus was not misleading. But the Supreme Court rejected that contorted reasoning — finding the prospectus had been misleading. The case was returned to the High Court, where the defendants then promptly obtained an order for $1.6m of security for costs. The plaintiffs appealed, and the Court of Appeal and Supreme Court have upheld the security for costs order. Presumably the case will be dismissed based on the non-payment of costs aspect rather than on the merits of the claim. 'Access to justice' is denying ‘justice’. ‘Justice’ is being thwarted by 'access to justice’.

The idea that the floodgates of litigation will be opened unless the court can award costs against losing parties is wrong thinking — as a matter of public policy, litigation in NZ should be encouraged and made easier and cheaper (including with stream-lined procedures), so that people will think much more carefully before engaging in activity that could see others wish to make legal claims against them. That creates a level playing field. There are already ample procedures (indeed too many, in my submission) for justice to be delivered in the form of a summary outcome for cases considered by judges to be ‘unmeritorious'. The system of ‘costs’ tilts the level playing field, encouraging potential defendants in undertaking dodgy actions, and discouraging plaintiffs from then challenging such actions — 'access to justice' is turned into a game, the game of costs, that can be used to defeat the outcome that is supposed to be ‘justice'.

Further, the idea of 'user pays’ is entirely consistent with a system of 'no costs awards’ (such as in the USA). It is up to each party to fund their own claim, or their own defence. If a party chooses to hire expensive (or cheap) lawyers, that is their choice, and, as with any purchase made in a shop, should be at their own cost — not an extra cost for the losing (or challenging in the case of security) party.

Finally, a short word about 'silly political economics thinking’ and particularly about 'silly financial cost to society and taxpayers is too great thinking' and ‘government must live within its means thinking’ that is traditionally raised, in my submission based on ignorance, in support of costs awards as an appropriate economics tool to discourage too much litigation and keep government expenditure on providing a justice system under control relative to levels of government income (mainly from taxation). Taxation does not fund government expenditure — rather taxation takes currency out of circulation (by returning it to its issuer) so as to control inflation. When this point, and its full implications regarding the nature of money as debt of the issuer, the creation of currency by the Crown through its agent, the Reserve Bank, the nature of Crown NZ$ issued debt, and the place of the the Reserve Bank as an asset in the Crown’s financial statements, are properly appreciated and understood, the nonsense trotted out by so-called ‘experts' claiming the Crown’s inability to fund a proper justice system in a free society becomes apparent. The Crown is not the same as a business entity or an individual operating or living in NZ, because, amongst other things, it controls the creation of NZ currency. If the Crown has fettered its powers by making policy decisions regarding the exercise of those powers, it is the Crown policy that is the problem — and should be identified as such. The Crown should not pretend that it 'does not have the money'. But there is not the time, in this context, for me to explore these matters in more detail.

Robbie Cullen
Barrister