

English Civil Justice Reform 1999-2015



The historic
challenge of civil
justice...

This is the **Court of Chancery**...
which exhausts finances,
patience, courage, hope

***"Suffer any wrong that can be
done you rather than come here!"***

1853
Charles Dickens
Bleak House



Features of common law adversarial systems

High **cost** of litigation

Complex procedures

Delay between issue and trial

But the solutions are
context dependent..

What are the costs drivers?

What causes delay?

Understand your context
before you devise solutions.

What is the problem you
are trying to solve?

Problem
Diagnosis
Cure

Where have we
been and where
are we going?

TWO DECADES OF REFORM 1995-2015



The background of the slide is a dense, abstract pattern of tangled, multi-colored threads or ribbons. The colors include red, blue, green, yellow, and black, creating a complex, chaotic texture. A semi-transparent white rectangular box with a thin dark border is centered on the slide, containing the text.

Policy strands

Ration procedure

Manage costs

Privatise

Reduced resources

Reduced legal aid

The Woolf “Revolution” 1995-1999



WHAT WAS THE PROBLEM?

Cost

Complexity

Delay

Cost and delay “are linked”

‘Excessive’ adversarialism

Party control of cases

Cases run for too long

Settlements occur too late



Access to Justice
Reports
1995 & 1996

Access to Justice Interim Report 1995 The Problems and Their Causes



“No control of lawyers’ worst excesses”

“A battlefield where no rules apply”

“The rules are flouted on a vast scale”

“Intentional delay that only serves the interests of lawyers”

“Sophisticated and aggressive tactics of some litigators”

“Whether by incompetence or deliberation”

“Excessive caseloads... minimum possible action occurs over the maximum possible timescale”

“Opposing legal advisers indulge each other’s misdemeanours”

Solutions?

Simplified rules

Proportionate procedure

More co-operation

Strict timetables

Judicial case management

Early settlement & diversion to ADR



Reforms implemented 1999

- New unified civil procedure
- Overriding objective:
 - **deal with cases “justly”**
- Three procedural “tracks”
 - **Small claims track**
 - **Fast track (NB proposed fixed costs)**
 - **Multi-track**
- Strict timetables
- Pre-action protocols
- Costs discretion (Part 44)

Promotion of settlement through ADR

Litigation will be avoided wherever possible.

- Court proceedings are a last resort
- Information on sources of ADR will be provided at all civil courts.

Litigation will be less adversarial and more co operative.

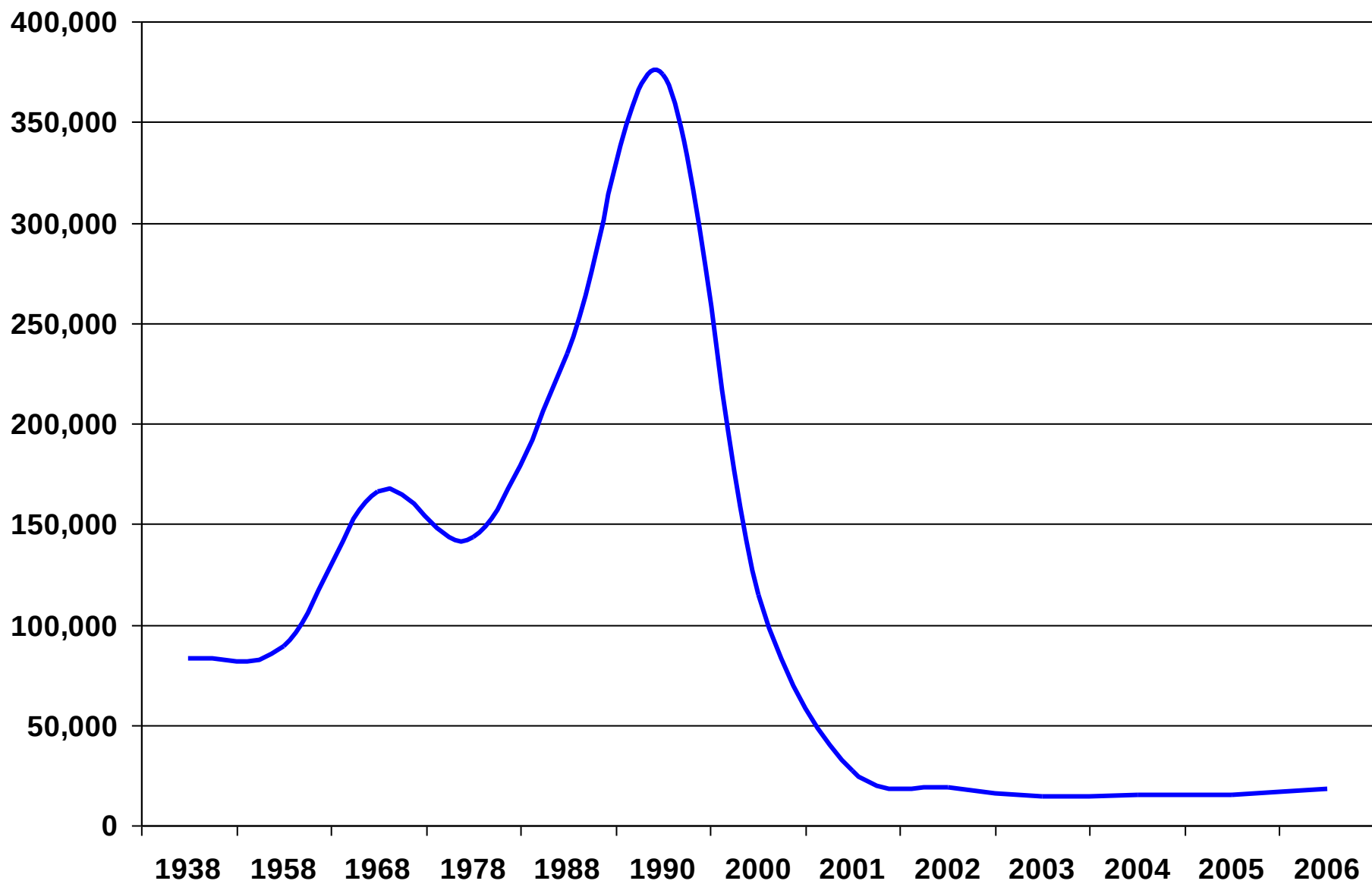
- Court will encourage use of ADR
- Court will take into account unreasonable refusal to try ADR

The new landscape of litigation



Not a response to
court congestion....

Writs issued in QBD

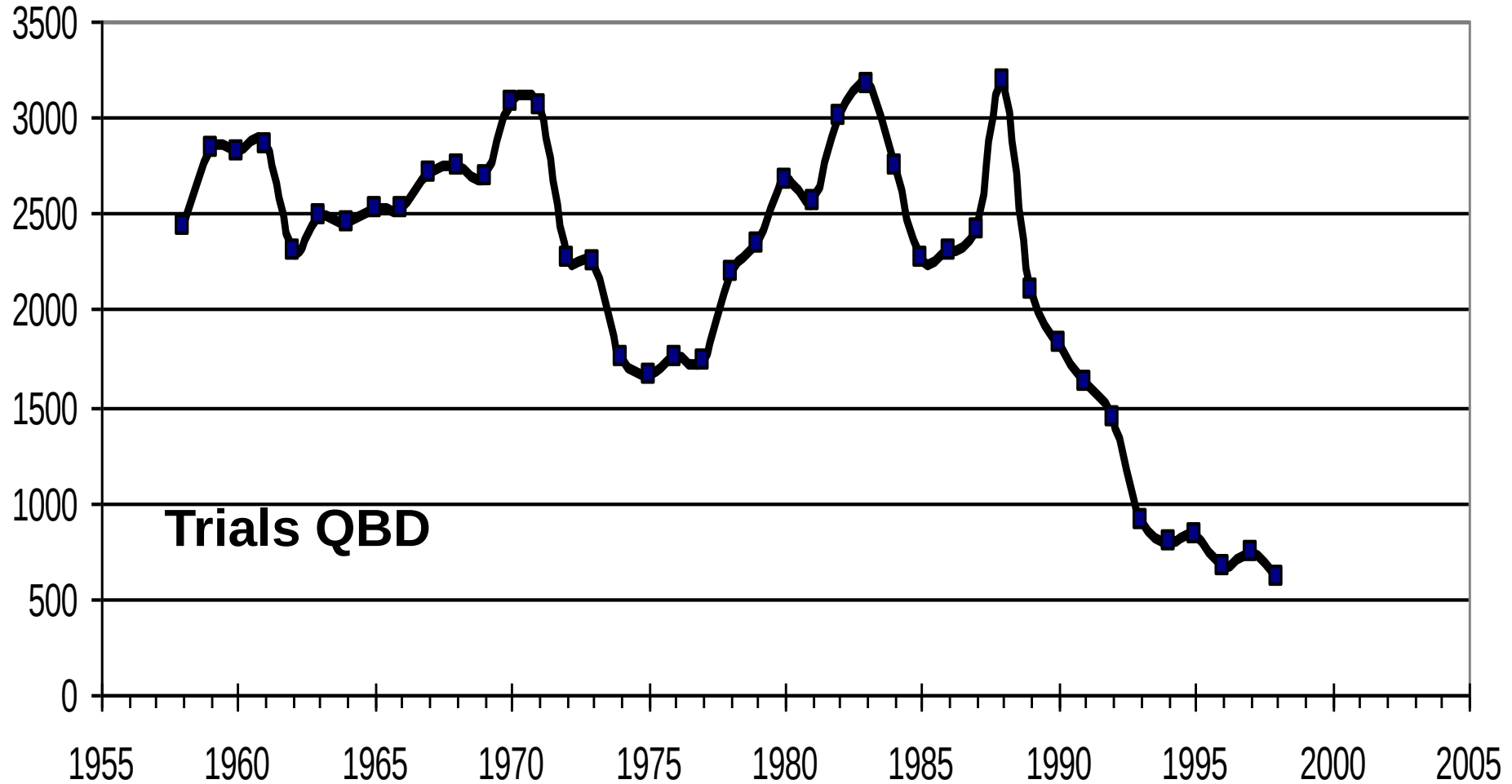


Trials Started 1958-1998

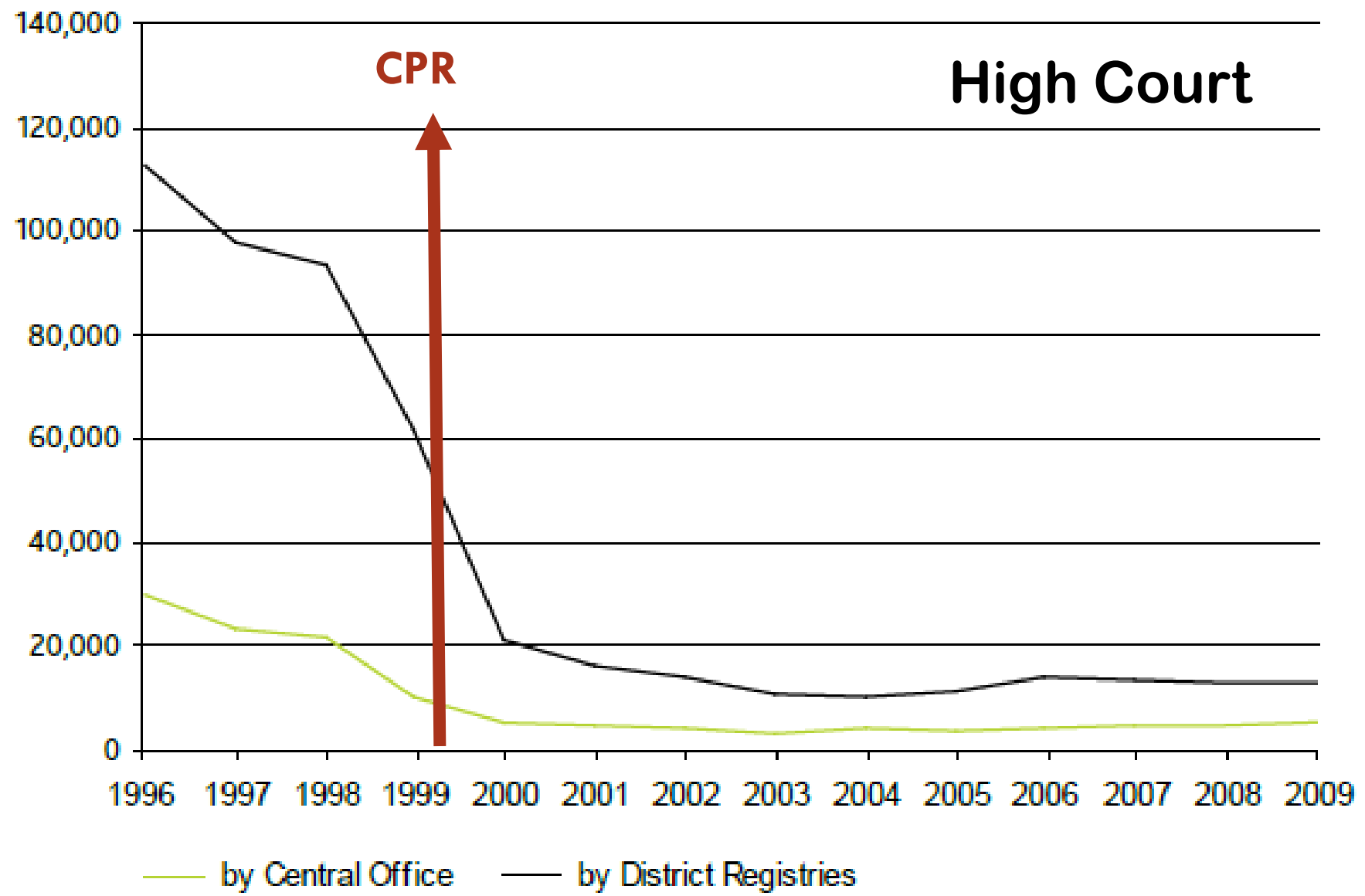
NOT A CRISIS OF PRESSURE ON CIVIL COURTS

Trials QBD

—■— Trials Started 1958-1998



Queen's Bench Division: Writs & Originating Proceedings issued, 1996-2009



Problems of Woolf Inquiry

- Inquiry method – lacked rigorous empirical evidence
 - Particular weakness in understanding relationship between cost, delay and procedure
 - Dynamics of litigation and different party configurations
- Fixed costs on fast track **not** implemented

Outcome?

Rules just as **complex** if
not more so....



The continuing problem of legal costs





**UNWARRANTED
EUPHORIA**



DENIAL



**Grudging
Recognition**



**Reflection
and
Debate**

Professor Michael Zander 2008

“Implementation of the reforms has had **significant adverse consequences.**

Costs have risen

Inconsistent decision-making and unpredictability have increased

Doubtful whether delay has reduced

System is still bedevilled by complexity

These were the big targets central to the reform project.”

Lord Neuberger MR 2010

Woolf reforms not entirely successful
Rules just as complex – possibly more so
Pre-action protocols and case
management may have increased work

“When it comes to failure, it is above all in the reduction of litigation costs where the Woolf reforms have signally failed.”



The Jackson Reforms 2009

“The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.”

Resnik 1985



Jackson Analysis

Woolf reforms increased
procedural complexity
especially pre-action protocols

The more work the rules require,
the more it will cost

Now much more work to be
done up front (**“front-loading”**)



**Review of Civil
Litigation Costs:
Final Report**

December 2009

Jackson's 'proportionate costs'

Costs management

Proportionate costs bear a reasonable relationship to:

- Value of case
- Complexity
- Extra work generated by paying party
- Wider factors

Proportionality trumps necessity

Stricter compliance with rules enforced by appeal court (Mitchell; Denton)

Vanishing trials

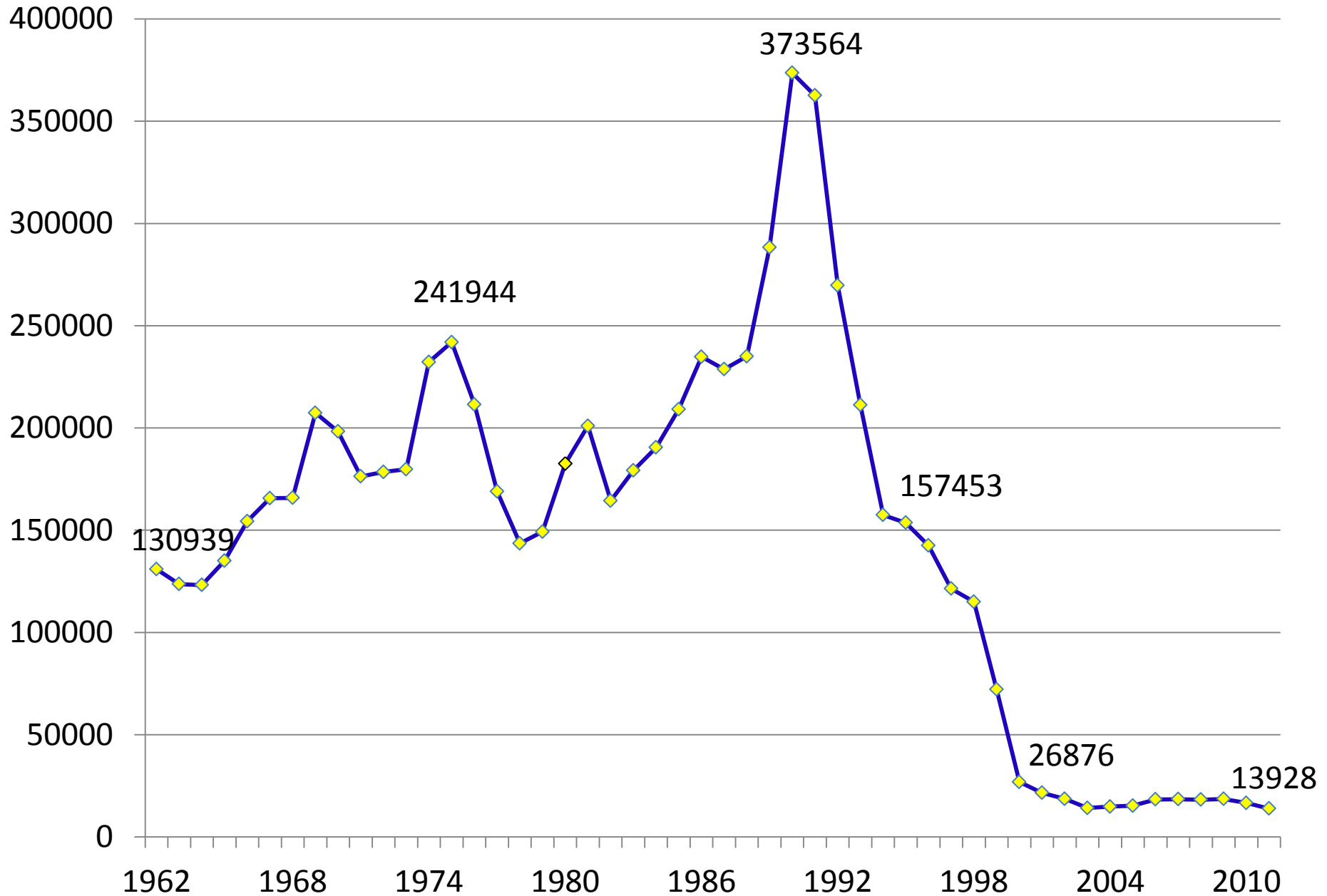
Cost

Judicial led mediation push

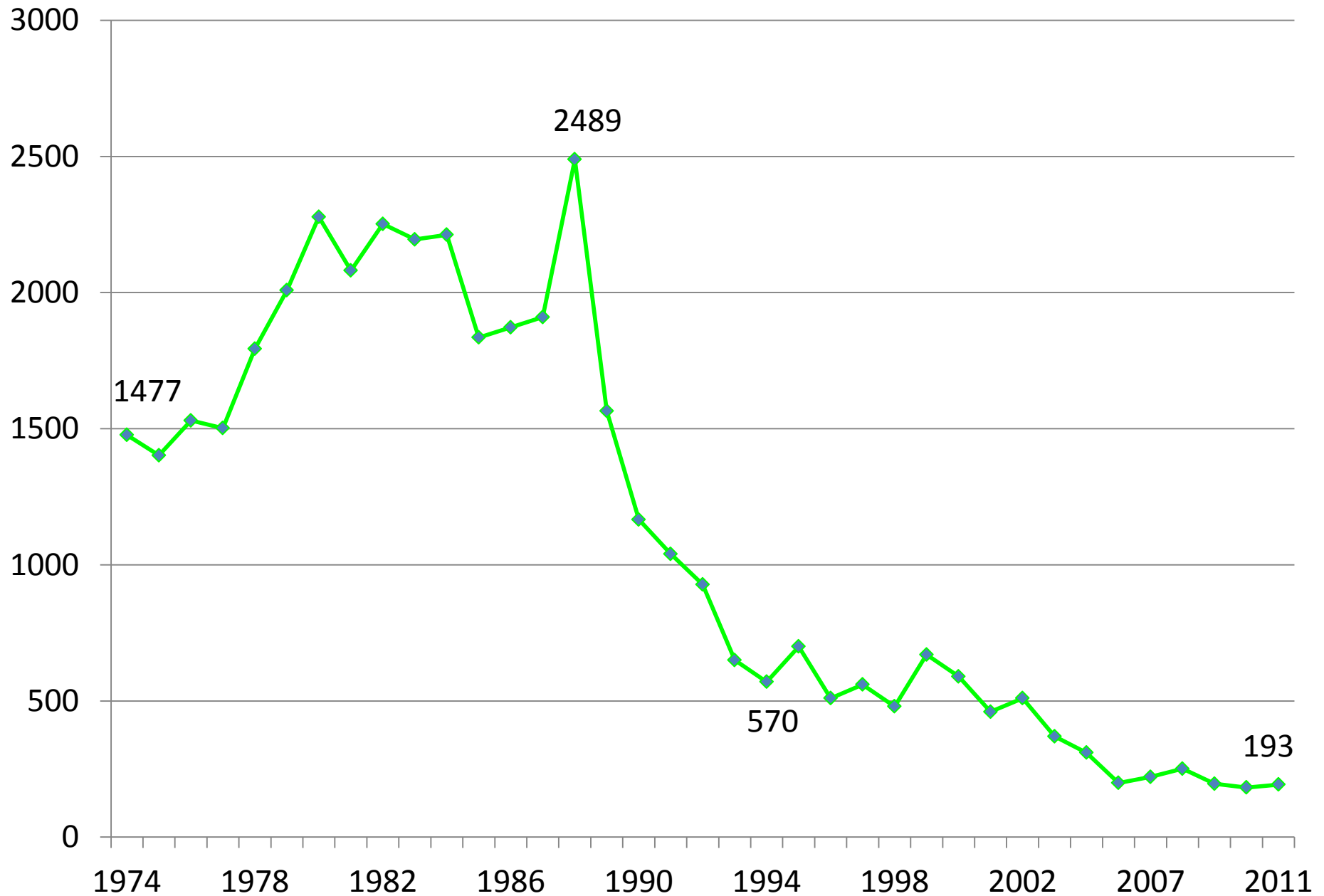
Increasing privatisation

State withdrawal

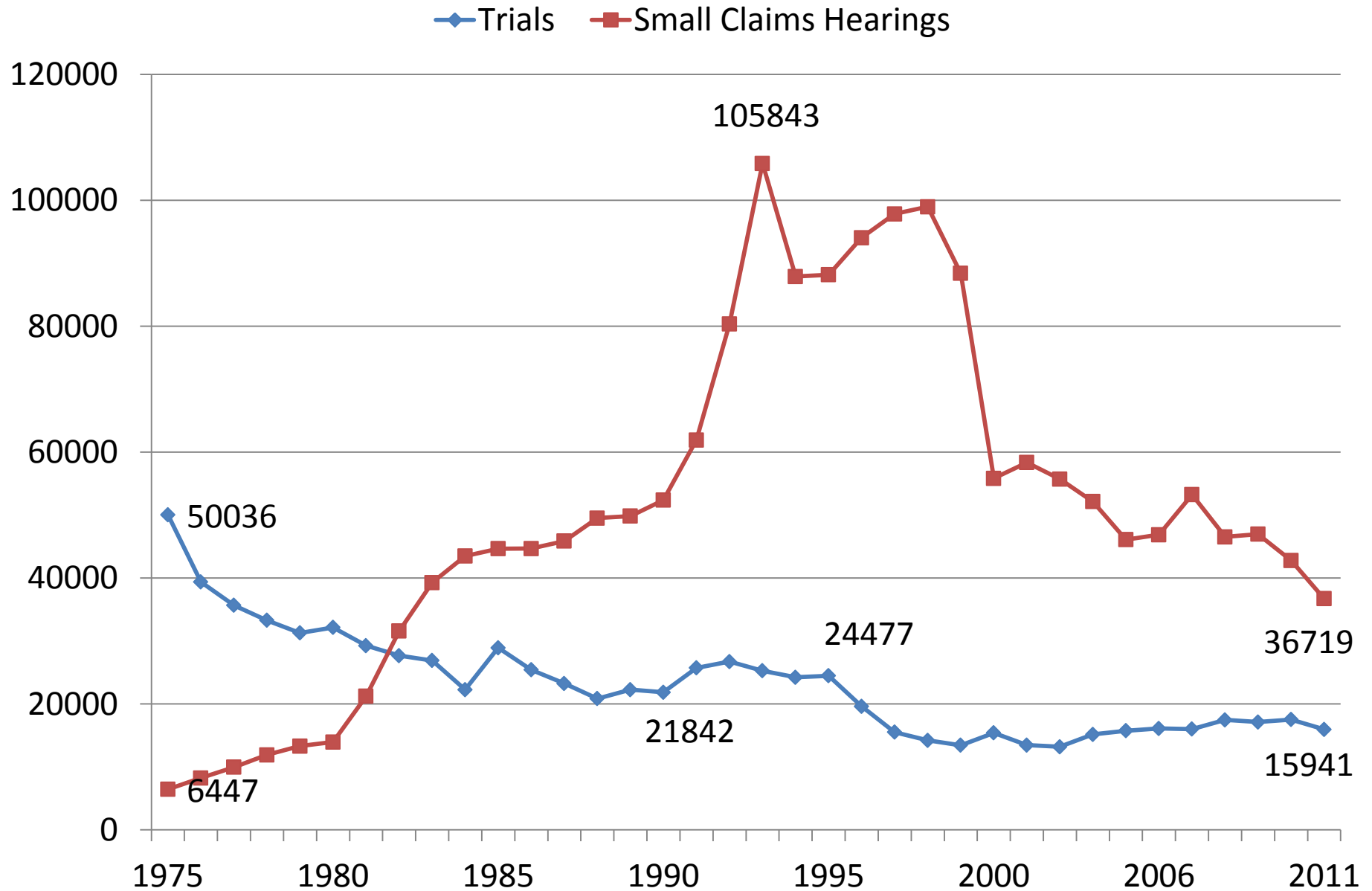
QBD PROCEEDINGS ISSUED 1962-2011



QBD Trials 1974-2011



County Courts 1975-2011



Where are we
going now?

New context

2008 global financial crisis –
“fiscal emergency”..





Lehman collapse sends shockwave round world

Shares and oil prices plunge, thousands lose jobs

by Duncan Economics Editor

ons of a global financial meltdown yesterday as the world's biggest corruptly plunged markets into

investors were left reeling as the apt demise of the Lehman Brothers investment bank sparked the first shake-up on Wall Street in

other of US capitalism's biggest titans, Merrill Lynch, is to be bought by Bank of America in a billion takeover to save it from

res fell as fear spread through financial system. Central banks urged measures amid concerns the world economy was entering perilous new phase. The Bank of England injected £5 billion of emergency lending into money markets. 5,000 Lehman staff in Britain

are now
questionably in
worst financial
since the
Depression'

Laletsky, page 24

article page 2

Dow Jones industrial average was down 300 points, or 2.6 per cent. Sentiment was also bolstered by steep falls in oil prices, which dropped by more than \$5 a barrel to \$96, closing under \$100 for the first time in six months and raising hopes that cheaper fuel would ease economic stresses on Western nations.

However, by close of trading the Dow had fallen by more than 500 points — its biggest one-day drop since the reopening after the September 11 attacks — as concerns mounted over the world's largest insurer. Shares in American International Group (AIG), which sponsors Manchester United, fell by 45 per cent after it made an unprecedented approach to the US Federal Reserve for \$40 billion in emergency funding.

Last night the Fed asked Goldman Sachs and J P Morgan Chase, two of Wall Street's remaining big banks, to head a \$75 billion emergency package to keep AIG afloat.

As central banks battled to stabilise the system, the Fed eased its rules for emergency lending further. It announced that it would accept company shares in return for crisis loans for the first time. In Frankfurt, the European Central Bank injected €30 billion in emergency funds into eurozone markets.

A group of ten global





Waving goodbye to civil justice?

**2010 COALITION GOVERNMENT
“TRANSFORMING JUSTICE”**

Need to save £2bn by 2014-15

- Cut out civil legal aid
- Close courts
- Raise court fees
- Diversion to ADR
- Limited resources

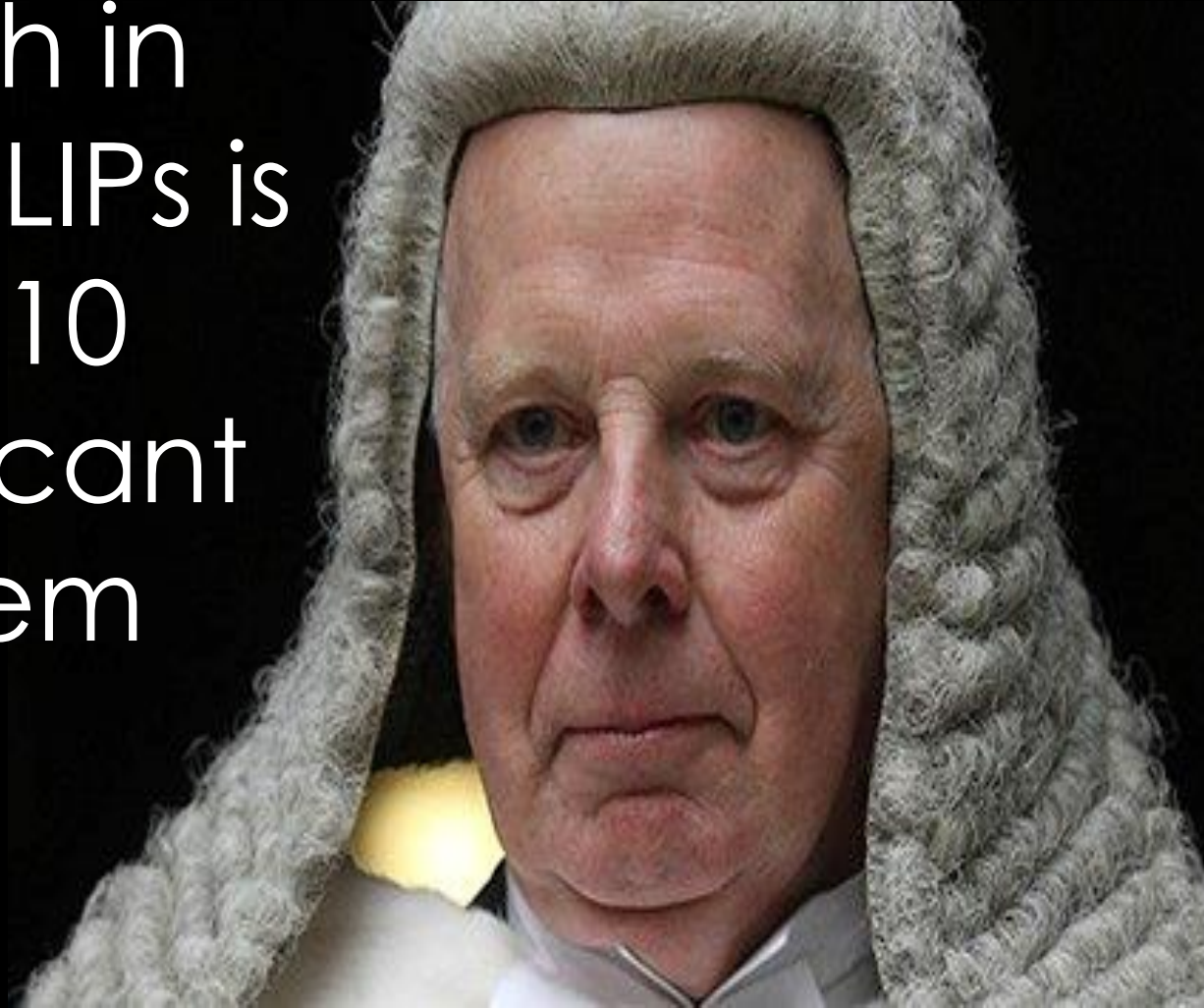


England LASPO 2012



“Legal Aid in its current form is no longer sustainable if the government is to reduce debt”

“The growth in number of LIPs is one of the 10 most significant justice system issues...”



Lord Thomas
Chief Justice of England & Wales

The future?

Demand control
and decline of
public justice?

Policy strands

- Encourage commercial cases
- Limit access to court - reduce legal aid and raise court fees
- Push work down court hierarchy
- Limit judicial capacity
- Invest in technology
- Promote ADR in and out of court

“Court as a service not a place”

ODR

The Future of Justice



How Technology is Shaping the
Dispute Resolution Ecosystem

Aspiration for courts

affordable

accessible

intelligible

appropriate

speedy

consistent

trustworthy

focused

avoidable

proportionate

fair

robust

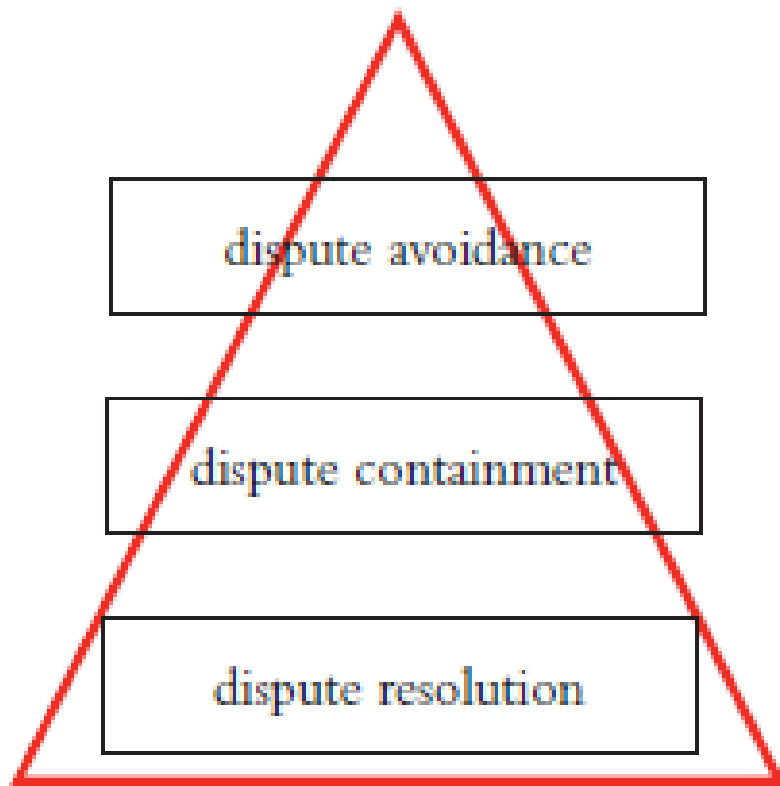
Streamlining is not the
answer!





ODR the legal world's “fluoride moment”

Richard Susskind
2015

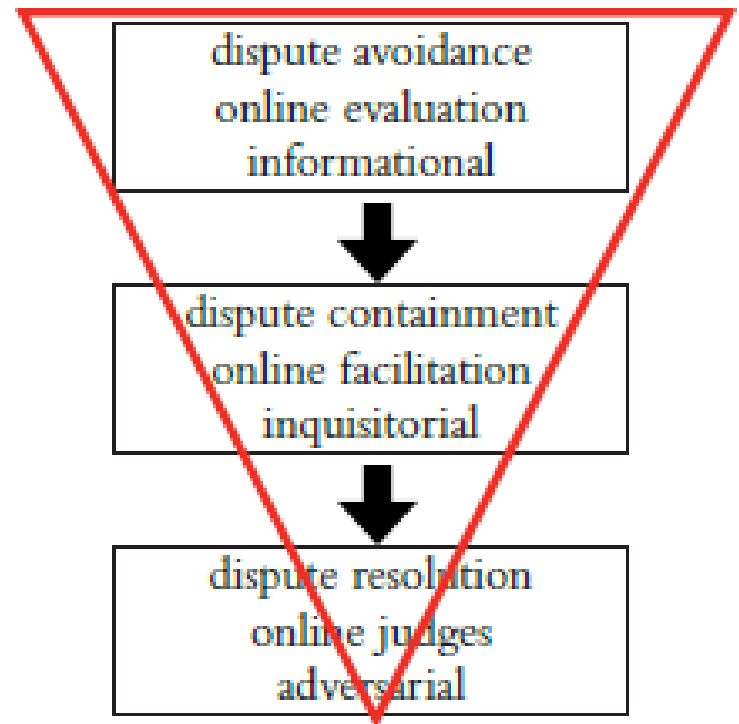


State dispute
resolution now

ODR

**Beyond dispute
resolution**

Proposed



Embracing preventative philosophy

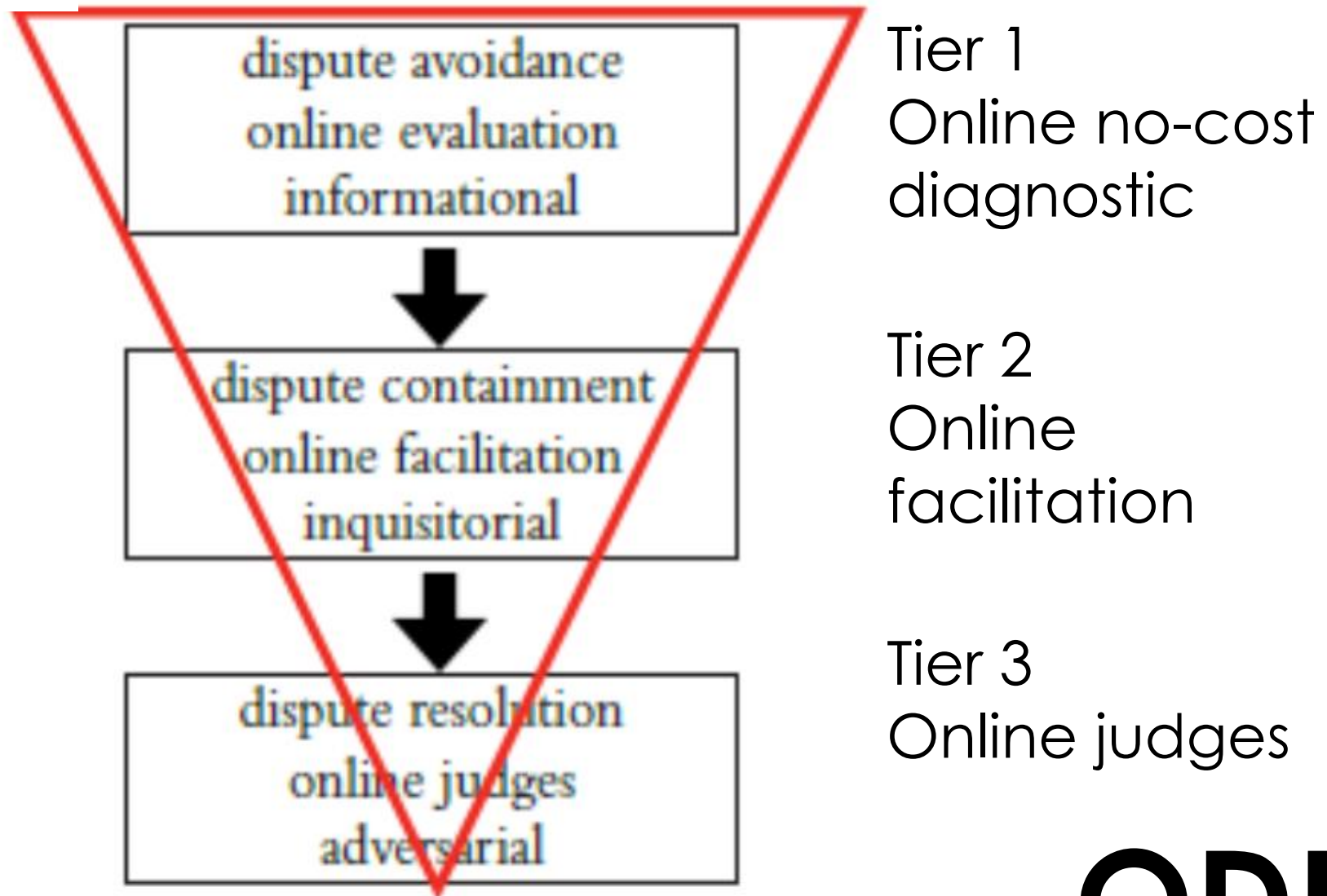
- Online evaluation - dispute avoidance
- Online facilitation - dispute containment
- Judges only involved at resolution stage

HM Online Court (HMOCS)

Integrated 3 tier service

ODR

HM Online Court - Integrated 3 tier service



ODR

“I have no doubt that ODR will play an important role in the future of civil justice.”

Lord Dyson
Head of Civil Justice



“Although our terms of reference are restricted to civil claims under £25,000 we believe that HMOC should also be extended to... family disputes and ... tribunals.”

**Civil Justice Council
ODR Report February 2015**

**ONLINE DISPUTE
RESOLUTION**
FOR LOW VALUE CIVIL CLAIMS
Online Dispute Resolution Advisory Group

In the 2020s there will be scope for **AI systems** to provide solutions without the direct involvement of human beings



Two Questions

Is ODR an imaginative way of
delivering modern,
accessible justice?

Or is it all that we can afford?

Is this
the future?

And does it
matter?



ANY
QUESTIONS
?