CALEB DYNES MCCONNELL

Judicial specialisation: a principled approach for future
consideration

LAWS 505

Submitted for the LLB (Honours) Degree

Word count: 14,613

2014

Abstract

Judicial specialisation is a reality worldwide. The New Zealand judiciary must approach proposals for further specialisation with caution. Although there are compelling arguments in favour of specialisation, there are equally compelling arguments opposing specialisation. Therefore, a principled approach must be adopted when assessing the merits of further specialisation in any given field of law. The purpose of this paper is to develop a set of criteria that transcend the abstract advantages/disadvantages, which can be applied generally. These criteria will highlight the nuances inherent in the particular field of law that support/oppose specialisation. The purpose of these criteria is to provide a tool to a decision-maker to help inform, on a principled basis, whether judicial specialisation in any given field of law is appropriate.

Key words: judicial specialisation, administrative law, commercial law, judiciary

<i>I</i>	<i>Introduction</i>	6
A	Definition of “judicial specialisation”	8
<i>II</i>	<i>The criteria</i>	9
<i>III</i>	<i>The criteria in the context of commercial law</i>	11
A	Criterion 1: Discretionary, legal or factual decisions	13
1	<i>Discretionary decision making</i>	14
2	<i>Legal decision making</i>	15
3	<i>Factual decision making</i>	17
B	Discretionary, legal or factual decisions applied to commercial law	19
C	Criterion 2: Complexity	21
D	Complexity applied to commercial law	24
E	Criterion 3: Isolation	25
F	Isolation applied to commercial law	26
G	Criterion 4: Degree of repetition	28
H	Repetition applied to commercial law	29
I	Criterion 5: Degree of controversy	31
J	Degree of controversy applied to commercial law	31
K	Criterion 6: Clannishness	32
L	Clannishness applied to commercial law	33
M	Criterion 7: Peculiar importance of consistency	33
N	Consistency applied to commercial law	33
O	Criterion 8: Dynamism	34
P	Dynamism applied to commercial law	34
Q	Criterion 9: Case volume/demand	35
R	Case volume/demand applied to commercial law	35
S	Criterion 10: Special need for prompt resolution	37
T	Prompt resolution applied to commercial law	38
U	Criterion 11: Required special court procedures	39
V	Special court procedures applied to commercial law	39
<i>IV</i>	<i>Commercial specialisation conclusion</i>	40
<i>V</i>	<i>Administrative Law</i>	40
A	Discretion, law or fact	41
B	Complexity	42
C	Isolation	43
D	Degree of repetition	44
E	Degree of controversy	45
F	Clannishness	46
G	Peculiar importance of consistency	46
H	Dynamism	46
I	Case volume/demand	47
J	Special need for prompt resolution	48
K	Required special court procedures	48
<i>VI</i>	<i>Administrative law conclusion</i>	49

<i>VII Summary of application of criteria to commercial law and administrative law</i>	<i>50</i>
<i>VIII Interaction of Legomsky's criteria</i>	<i>51</i>
<i>IX Conclusion</i>	<i>54</i>

I Introduction

It is the great multiplication of the productions of all the different arts, in consequence of the division of labour, which occasions, in a well-governed society, that universal opulence which extends itself to the lowest ranks of people.¹

The division of labour, since before Smith, has occupied a central place in the heart of capitalist dicta. It is a theory rooted in the understanding that wealth is maximised where individuals specialise their activity. Smith went so far as to declare that the “difference of natural talents in different men, is, in reality... the effect of the division of labour”.² Whether it be education, the arts, sport, politics or individual’s chosen professions, every facet of our modern lives is influenced to some degree by specialisation. The judiciary is no exception.

This paper is a contribution to the debate surrounding specialisation in the judiciary. The debate is not new but, it has been recently rejuvenated by proposals for judicial specialisation contained in the Judicature Modernisation Bill 2013. The purpose of this paper is to suggest a principled approach to assessing whether further judicial specialisation is appropriate in a particular context. This principled approach will be grounded in a set of 11 criteria of general application. Each criterion is crafted in order to ensure due consideration is given to the vast array of advantages and disadvantages of specialisation. First, the criteria will be introduced through the lens of commercial law. They will be used to assist in concluding whether New Zealand should have further judicial specialisation in commercial law. Secondly, the criteria will be applied to administrative law. This will help inform a conclusion on the question of whether there should be further specialisation in administrative law in New Zealand. Finally, the application of the criteria to both commercial law and administrative law will highlight some of the ways in which the criteria respond to certain issues raised by the particular fields of law. These responses will help form the basis for suggesting two improvements that can be made to the criteria as a whole.

¹ Adam Smith “An Inquiry into the Nature and Causes of the Wealth of Nations” (1776) at 22.

² Smith, above n 1 at 40.

A principled approach to the question of further judicial specialisation is necessary because increased specialisation in the law and courts is a reality worldwide.³ Therefore, it has become a pressing issue for the New Zealand judicial system to decide the extent to which the New Zealand courts should specialise. Currently, the New Zealand legislature is considering whether there should be judicial specialisation in the High Court. The Judicature Modernisation Bill 2013, as reported back from the Justice and Electoral Committee, proposes to establish a commercial panel of judges to hear commercial cases in the High Court.⁴ The debate on judicial specialisation is not new. In 2004 the Law Commission recommended that a specialist list of commercial judges be set up to hear commercial cases in the High Court.⁵ Strong submissions were received by the Law Commission for and against proposals for specialisation in the judiciary.⁶ The Commission has recognised that it has been a matter of “great controversy”, which has sparked sharp debate in New Zealand over the past decade.⁷

Calls for judicial specialisation have not been limited to the commercial context. The recent Law Commission Issues Paper also considered further specialisation in other areas of law in the future.⁸ It asserts that “if a (commercial) panel framework were set up, it would be easier to include other specialties at a later date”.⁹ The following Law Commission Report recommended that the commercial panel be a “pilot project as to how a panel system will best work in New Zealand.”¹⁰ The Commission and submitters have mentioned administrative law, intellectual property law, employment law, environmental law and tax law as further potential areas of specialisation in the future.¹¹ Clause 18 of the

³ New Zealand Bar Association “Review of the Judicature Act 1908 – Towards a Consolidated Courts Act” at [38].

⁴ Judicature Modernisation Bill 2013, cl 18.

⁵ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R 85, 2004) at 267.

⁶ Submitters *for* High Court Specialisation: Buddle Findlay, New Zealand Bar Association and New Zealand Law Society. Submitters *against*: Chief Justice, Senior Courts Judges and Jack Hodder QC.

⁷ Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 10.1.

⁸ Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at 73.

⁹ Law Commission, above n 8, at 73.

¹⁰ Law Commission, above n 7, at 13 and 115.

¹¹ Law Commission, above n 7 at 110; Law Commission, above n 8, at 73.

Judicature Modernisation Bill provides for the establishment of a “commercial panel” and “other panels” of High Court judges.¹²

A Definition of “judicial specialisation”

Before proceeding to set out the various criteria, this paper must first define judicial specialisation. The term “judicial specialisation” is ambiguous. For instance the limitation of a court’s jurisdiction to one geographical area could qualify as a form of judicial specialisation. However, for the purpose of this study, “judicial specialisation” refers to subject matter specialisation of a court. It describes specialist courts that have limited and frequently exclusive jurisdiction in one or more specific fields of the law.¹³ The narrowly focused jurisdiction of that court is where all cases that fall within that jurisdiction are channelled.¹⁴ Judges who serve on the bench of specialist courts are widely considered experts in the particular fields of law that fall within the court’s jurisdiction. The New Zealand Employment Court is an illustration of judicial specialisation. It is a specialist industrial relations court with limited jurisdiction to hear all matters relating to employment disputes.¹⁵

While this paper will focus on judicial specialisation at the appellate court level, it is important to comment on judicial specialisation in tribunals. Each tribunal in New Zealand is established by legislation that sets out the tribunal’s functions, powers and extent of authority. They are expert forums of first instance where parties can be heard and have disputes resolved over facts and/or law. Unfortunately it is beyond the scope of this paper to assess further specialisation at the tribunal level and to do so would be a research paper in itself. A brief list of relevant reading and research on the subject matter of specialisation at the tribunal level is provided in the footnote below.¹⁶

¹² Judicature Modernisation Bill 2013 as reported back from the Justice and Electoral Committee, clause 18 (1) and (3); as indicated by Jack Hodder QC “The Judicature Modernisation Bill – (Personal) Submission on Three Points” (2014) at [7].

¹³ Markus B. Zimmer “Overview of Specialist Courts” (2009) 10 IJFCA 1 at 2.

¹⁴ At 2.

¹⁵ Employment Relations Act 2000, s 187.

¹⁶ Law Commission, “Delivering Justice for All: A Vision for New Zealand Courts and Tribunals” (NZLC R85, 2004); Cane, P “Administrative Tribunals and Adjudication” (Oxford, United Kingdom, 2009); Law Commission *Tribunal Reform* (NZLC SP20, 2008); Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008); Spiller, P “The Disputes Tribunals of New Zealand” (2nd ed, Brookers, 2003); Dr. W. John Hopkins “Order from Chaos? Tribunal Reform in New Zealand” (2007, Paper, University of Canterbury); Roger P. Alford “The Proliferation of International Courts and Tribunals:

II The criteria

The proceeding part of this paper will introduce a set of 11 criteria of general application, which can be used as a tool to assist in answering the question of whether further judicial specialisation in a particular field of law is necessary. The criteria will be introduced in the context of, and applied to, the question of further specialisation in commercial law. Each criterion will be introduced individually, applied to commercial law and then substantiated by the various advantages and disadvantages of specialisation that inform that criterion. The 11 criteria require an assessment of the degree to which each factor is present in the particular field of law. Broadly the criteria are the degree to which the area of law:

1. deals with questions of discretion, law or fact;
2. is considered complex;
3. is isolated;
4. is repetitious;
5. raises matters of controversy;
6. fosters clannishness;
7. requires a peculiar importance of consistency;
8. is dynamic;
9. creates a high case volume/demand;
10. requires a special need for prompt resolutions; and
11. requires special court procedures.

Criterion 1 requires an assessment of the extent to which a decision-maker adjudicating a dispute in that particular field of law will deal substantially with questions of discretion, law or fact. Questions of discretion will favour specialisation and will be present where the decision maker must apply broadly worded statutory provisions or decide a question that

International Adjudication in Ascendance” (2000, Scholarly Works, Notre Dame Law School); Laurence Baum “Judicial Specialization and the Adjudication of Immigration Cases” (2010) 59 DLJ 8.

requires a high degree of value judgment. Legal questions oppose specialisation and focus on the application of the law and legal principles. Whereas, factual decisions favour specialisation and require a decision maker to conclude on the application of facts to law. *Criterion 2* also favours specialisation and requires an assessment of how technically complicated the area of law is. *Criterion 3* favours specialisation and is concerned with how easy it is to isolate the jurisdiction of a particular field of law. *Criterion 4* supports specialisation and is an analysis of how repetitive it is for an adjudicator practicing within that field of law. *Criterion 5* disfavors specialisation and concerns itself with the degree to which the field of law presents decisions of public controversy. *Criterion 6* opposes specialisation and refers to the close/closed working relationship that the lawyers, government officials and expert witnesses have with one another. *Criterion 7* supports specialisation and asks whether the particular field of law has a peculiar importance of consistency relative to other fields of law. *Criterion 8* supports specialisation and describes an area of law that has a rapidly changing subject matter or legal framework. *Criterion 9* supports specialisation where there is a high degree of case volume/demand sufficient to justify specialisation. *Criterion 10* supports specialisation where the area of law requires a special need for a prompt resolution of the cases adjudicated. Finally, *criterion 11* supports specialisation where the area of law requires special court procedures in order to effectively adjudicate disputes.

Numerous authors have analysed the various advantages and disadvantages of judicial specialisation and then, on balance, concluded whether specialisation is a “good” thing.¹⁷ In my view, these conclusions are neither helpful nor practical to anyone that is faced with the decision of whether further specialisation is necessary in a particular context. This is because the strengths and weaknesses of judicial specialisation are greater in some areas of law than they are in others.¹⁸ What is helpful is a standard by which can be applied contextually to judge whether judicial specialisation is appropriate.

¹⁷ Markus Zimmer, above n 13, at 4; Rochelle C. Dreyfuss “Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes” [1995] 61 Brooklyn Law Review 1 at 20; Lawrence Baum “Probing the effects of judicial specialization” (2009) 58 DLJ 167 at 1676; Rifkind S, “A special court for Patent Litigation? The danger of a specialized judiciary” (1951) American Bar Association Journal at 425.

¹⁸ Stephen Legomsky “Specialized Justice : Courts, Administrative Tribunals, and Cross-National Theory of Specialization” (Clarendon Press, Oxford, 1990) at 20.

The following criteria are based on Stephen Legomsky's criteria developed in 1987.¹⁹ However, there are considerations that Legomsky could not have contemplated in 1987, which are now important considerations to any decision maker faced with the question of further specialisation. Accordingly, the criteria have been amended and adapted to reflect considerations applicable to the modern day New Zealand judicial system. Many of these considerations are manifested in New Zealand's recent Law Commission Report on the judiciary.²⁰

Importantly, this paper has not included the stage of litigation as a criterion. This is because specialisation is most preferable at the initial decision making level and least preferable at the appellate level. It is at the trial level where the advantages of specialisation are the strongest. Litigants and lawyers invest most time and resources at trial level necessitating efficiency. Additionally, most fact finding is conducted at first instance necessitating expertise. It has been suggested that specialist judges at pre-trial will preside over case processing "that is faster, less costly (in both judicial and attorney time), and more frequently correct."²¹ Accordingly, matters on appeal may not require the same degree of specialisation as was required at the original hearing because appeals often concern more general principles of law.²² The generalist appellate review should provide a check on the disadvantages of specialisation and ultimately help protect unity of the law.

III The criteria in the context of commercial law

New Zealand currently has no commercial specialist court at the District Court level or above. The field of commercial law has been chosen because it has been the subject of sharp debate surrounding the proposals set out in the Judicature Modernisation Bill. There is also a global trend towards jurisdictions effecting further judicial specialisation in commercial law. Namely, the United Kingdom and Australia each have courts at the District Court level or above that either exclusively hear commercial cases or have specialised judges that get assigned to commercial cases.

New Zealand has a limited form of commercial judicial specialisation. It does not have a commercial specialist court. Most commercial disputes will be heard in either the District

¹⁹ Legomsky, above n 18, at 20.

²⁰ Law Commission, above n 8, at 7.26.

²¹ Jeffrey Stempel "Two cheers for specialization" [1995] 68 Brooklyn Law Review 67 at 113.

²² Law Commission, above n 5, at 263.

Court or the High Court, which are courts of general jurisdiction. The High Court has limited commercial specialisation in the form of the commercial list. The commercial list is comprised of High Court judges who are considered specialists²³ and it is intended to speed up the pre-trial proceedings relating to eligible matters.²⁴ Members of the list are empowered to give “such directions as it thinks fit for the speedy and inexpensive determination of the real questions between the parties.”²⁵ However, the list only deals with pre-trial matters and once the case is ready for hearing then it will be transferred back into the High Court general list.²⁶ Additionally, there are two Tribunals that specialise in hearing specific commercial disputes at first instance. They are the Taxation Review Authority and the Copyright Tribunal, both of which are appealed to courts of general jurisdiction.

The question of specialisation in the commercial context has been the subject of recent debate in New Zealand. The Law Commission has considered this question in its issues paper and report reviewing the Judicature Act 1908.²⁷ It considered arguments for and against specialisation in the High Court generally and specifically addressed the question of specialisation in the commercial context. It recommended that there should be a commercial panel of judges established in the High Court. The jurisdiction of the court was recommended to be similar to the jurisdiction of the Commercial Court in London, but with the addition of intellectual property.²⁸ Accordingly, the Judicature Modernisation Bill proposes to establish a commercial panel and is currently awaiting its third reading.

There is a global trend toward specialisation in the commercial courts. The United Kingdom has two separate divisions of the High Court called the Queen’s Bench Division and the Chancery Division. There are specialist courts of the Queen’s Bench Division, which include: the Technology and Construction Court; the Commercial Court; and the

²³ Courts of New Zealand “Commercial List” < www.courtsofnz.govt.nz >.

²⁴ Law Commission, above n 8, at 7.12.

²⁵ Judicature Act 1908, s 24D.

²⁶ Law Commission, above n 8, at 7.4.

²⁷ Law Commission, above n 8; Law Commission, above n 7.

²⁸ Law Commission, above n 7. The jurisdiction of the London Commercial Court is defined as: “Any claim arising out of the transactions of trade and commerce and includes any claim relating to - a business document or contract; the export or import of goods; the carriage of goods by land, sea, air or pipeline; the exploitation of oil and gas reserves or other natural resources; insurance and reinsurance; banking and financial services; the operation of markets and exchanges; the purchase and sale of commodities; the construction of ships; business agency; and arbitration. See Civil Procedure Rules (UK), r 58.2(2).

Admiralty Court. The Chancery division also has specialist courts in the Patent's Court and the Companies Court, which primarily deal with intellectual property and company law matters respectively. Australia has a similar form of commercial specialisation as is proposed by the New Zealand Law Commission. Australia has established a panel system in its superior trial courts which comprise of lists of judges specialised in dealing with certain fields of law.²⁹ The Supreme Courts of Victoria, New South Wales and Queensland each operate lists that, to varying degrees, specialise in commercial law.³⁰ The Federal Court of Australia operates a full docket system where each case is allocated to the docket of a specific judge who will manage the case right through to disposition. There is a commercial specialist list in the Federal Court that judges can opt into and serve for three years at a time.³¹

It is within this commercial context that this paper will introduce the 11 criteria. Each criterion will be introduced in abstract and then applied to commercial law. The advantages and disadvantages that prop up each criterion will also be discussed in order to substantiate the criterion's existence.

A Criterion 1: Discretionary, legal or factual decisions

The first criterion that could be deployed when considering further specialisation in any given area of law is to consider the frequency at which the particular area of law presents questions of discretion, law or fact.³² A case for specialisation can be made stronger where the area involves a large degree of discretionary decision making. Conversely, the existence of a high degree of legal questions can weigh against judicial specialisation.³³ Finally, a case for specialisation may be made stronger where the decision involves questions of fact.³⁴ In the writer's view, the involvement of factual questions favouring specialisation is greatly reduced in our modern legal system as opposed to when Legomsky originally developed his criteria.

²⁹ Law Commission, above n 8, at 7.47.

³⁰ Uniform Civil Procedure Rules 2005, r 45.1.

³¹ Law Commission, above n 8, at 7.54.

³² Stephen Legomsky, above n 18, at 22.

³³ Stephen Legomsky, above n 18, at 22 – 23.

³⁴ Stephen Legomsky, above n 18, at 23.

1 Discretionary decision making

Discretionary decision making will *generally* favour specialisation. Discretionary decision making encompasses decisions of the court where there are a range of “correct” answers available to it. These can be decisions that must apply broadly worded statutory provisions or decisions that require a high degree of value judgments.

Discretionary decision making provides the best opportunity for the advantages of specialisation to operate because: it relies on a deep understanding of the policy objectives behind that area of law;³⁵ there is greater scope for the misapplication of the law;³⁶ and there is a greater need of cohesion because of the inherent uncertainty in broadly worded legislative provisions.³⁷ Each of these advantages stem from the idea that specialisation improves consistency. Consistency refers to the extent to which the court reaches the same result in equivalent cases.³⁸ Specialist courts are able to produce more consistent decisions because they have a greater familiarity with the previous case law within their jurisdiction. There is also a greater quantity of expert judges who operate in a narrow field, enhancing their ability to discuss current and past decisions and refine their approaches.³⁹ Consistency improves the quality of decision-making because it ensures that equivalently situated litigants are treated alike.⁴⁰ Consistency in litigation is important because it reduces uncertainty and increases the predictability of case outcomes.⁴¹ Specialised expert judges with vast experience in a particular area are better positioned to exercise their discretion in a way that achieves these objectives.⁴²

Legomsky posits that the discretionary nature of decision making may also oppose specialisation in a limited number of circumstances.⁴³ This is influenced by the disadvantage of concentrating policy decision making power on a small group of people is

³⁵ Stephen Legomsky, above n 18, at 22.

³⁶ Markus Zimmer, above n 13, at 5.

³⁷ Markus Zimmer, above n 13, at 5.

³⁸ Rochelle Dreyfuss “Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes” [1995] 61 Brooklyn Law Review 1 at 12.

³⁹ Lawrence Baum “Probing the effects of judicial specialisation” (2009) 58 DLJ 1673 at 1676.

⁴⁰ Rochelle Dreyfuss, above n 38, at 13.

⁴¹ Joint project between the International Intellectual Property Institute and the United States Patent Trademark Office “Study on Specialised Intellectual Property Courts” (25 January 2012) at 6.

⁴² Stephen Legomsky, above n 18, at 23.

⁴³ Stephen Legomsky, above n 18, at 23.

more pronounced when the specialist court is dealing with discretionary decisions.⁴⁴ This is because specialisation can cause the judiciary to become insular in its focus.⁴⁵ Accordingly, there is a risk of apparent or actual bias on behalf of the specialist court. This effect can be illustrated by the influence a specialised bar can exert over shaping judicial thinking, and risk compromising the judiciary's neutrality. If a court specialises in tax cases, then its judges will interact primarily (if not exclusively) with members of the bar who specialise in tax work. That specialised bar will have greater opportunity to influence the judicial decision making in tax law than they would if they had to litigate their cases in front of generalist judges.⁴⁶ The risk of apparent bias is magnified where the specialist court is regularly engaging in discretionary decision making.

2 Legal decision making

On the other hand, the prevalence of questions of law will disfavour specialisation. Questions of law must be answered by the application of legal principles and interpretation of the law. Legal questions are unsupportive of specialisation because specialisation can lead to insularity within the specialist court, which can inhibit the development of the law and legal thought in a unified manner. Zimmer argues that specialist courts leave little room for the “cross-pollination that fosters, tests, refines, and improves new ideas and novel approaches in interpreting and applying the law”.⁴⁷ Further, an American Judge warned that specialisation “immunizes [the court] against the refreshments of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system in law”.⁴⁸ Each discipline of law, whether it be torts, contract, tax or intellectual property, does not stand isolated from one another. They all form building blocks for the civil jurisdiction of the courts. Specialist judges may lose sight of how their smaller world fits into the larger one.⁴⁹ In recognition of this argument, the New Zealand Law

⁴⁴ Stephen Legomsky, above n 18, at 23.

⁴⁵ Anthony Downs “Inside Bureaucracy” (Chicago, Real Estate Research Corporation, 1964) at 43.

⁴⁶ Markus Zimmer, above n 13, at 4.

⁴⁷ Markus Zimmer, above n 13, at 3.

⁴⁸ Rifkind S, “A special court for Patent Litigation? The danger of a specialized judiciary” (1951) American Bar Association Journal at 425.

⁴⁹ Diane Wood “Generalist Judges in a Specialized World” (1997) 50 SMU Law Review 1755 at 1767.

Commission cautions that if the generalist jurisdiction of the High Court is eroded too much then it risks “losing flexibility and may become fragmented”.⁵⁰

The disadvantage of insularity can also lead to monopolies within specialist areas of law. Commentators warn against judicial specialisation because it can create a “club culture”⁵¹ where the views of a small number of judges dominate a particular area of law.⁵² A panel of judges that becomes too small can promote matching mythology of expertise among the profession.⁵³ As a result, this can encourage monopolies and potentially constrain jurisprudence.⁵⁴ Monopolies in this context are disadvantageous for two reasons. First, they reduce diversity of ideas and approaches to problem solving.⁵⁵ Secondly, it brings about a greater concentration of judicial power resting on individual judges.⁵⁶ The Ministry of Justice analysed the potential effect of judicial specialisation and agreed that “a relatively small cohort of judges being responsible for certain case types may... harm more diverse development of the common law”.⁵⁷

The Senior Courts judges, in submitting to the Law Commission, argue that judicial specialisation would fragment the High Court’s jurisdiction and would “impoverish the development and application of the common law”.⁵⁸ Those opposed to further specialisation argue that judges operating in a generalist jurisdiction foster unity of law.⁵⁹

⁵⁰ Law Commission, above n 8, at 7.25.

⁵¹ Australian Law Reform Commission *Managing justice: a review of the federal justice system* (report 89, 1999) at 453.

⁵² Law Commission, above n 8, at 7.26.

⁵³ Diane Wood, above n 49, at 1767.

⁵⁴ Australian Law Reform Commission, above n 51, at 453.

⁵⁵ Richard Posner “Will the Federal Courts of Appeals survive until 1984? An essay on delegation and specialisation of the judicial function” (1983) 56 Cal. L. Rev. 761 at 785.

⁵⁶ Posner, at 786.

⁵⁷ Ministry of Justice *Judicial Specialisation in the High Court* (Regulatory Impact Analysis, August 2014) at <www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement>.

⁵⁸ Law Commission, above n 7, at 10.27.

⁵⁹ Law Commission, above n 7, at 10.27; Jack Hodder QC “The Judicature Modernisation Bill – (Personal) Submission on Three Points” (20 February 2014) at [7]; Sir Rabinder Singh “The Unity of Law – Or the Dangers of Over-Specialisation (2013, Society of Legal Scholars Centenary Lecture, University of Birmingham).

Sir Rabinder Singh illustrates this point with a story about three men who were asked to describe an elephant:⁶⁰

The first man was able to touch only the side of the elephant and said that an elephant is shaped like a wall. The second man could only touch a leg and said that an elephant was like a pillar. The third man could only handle the tail and said that the elephant was like a rope.

The analogy is clear: judges need to have a general knowledge of the context of the law in order to ensure the overall unity of the law.⁶¹ The disadvantage of judicial specialisation creating insularity is therefore enhanced where the court regularly deals with questions of law.

The modern legal environment requires this aspect of the criterion to be reconsidered. Questions of law should disfavour specialisation to a greater extent now than they did in 1990 when Legomsky developed this criterion. This is a result of a plethora of minute areas of law that are being established or growing in importance.⁶² As each of these areas grow and develop new legal doctrine, the risk of the law developing with disunity will become greater than it was in 1990.

3 Factual decision making

Legomsky argues that the prevalence of factual questions will favour specialisation. Factual decision making often involves the judge assessing the credibility of witnesses and weighing up conflicting evidence produced by expert witnesses.⁶³ A specialist court is better positioned to assess questions of fact because they will have greater expertise in that specific area of law, which can produce more accurate decision making. Judicial expertise produces more accurate decision-making because a specialist judge, in general, is going to be more familiar with their specialist area of law than a generalist judge. It cannot be expected of a generalist judge to have close familiarity with particular facets of the law

⁶⁰ Sir Rabinder Singh “The Unity of Law – Or the Dangers of Over-Specialisation (2013, Society of Legal Scholars Centenary Lecture, University of Birmingham).

⁶¹ Ibid.

⁶² For example; intellectual property law, admiralty law, entertainment law, environmental law and immigration law.

⁶³ Stephen Legomsky, above n 18, at 23.

when they are otherwise expected to be “jacks of all trades”.⁶⁴ The Law Commission recognises that few lawyers could expect to cover a whole range of legal work from criminal jury trials to intellectual property disputes, “let alone in the same week or even day”.⁶⁵ Yet, this is what we expect of generalist judges.⁶⁶ Accuracy is measured by whether a decision arrives at an objectively “correct” result.⁶⁷ In most cases this requires an assessment of whether the facts reflect the decision arrived at by the court. Specialist judges can produce more accurate decisions through “the right questions being asked, thus reducing the likelihood of further appeal.”⁶⁸ Judicial specialisation in cases where there is a prevalence of factual decision making therefore has the advantage of allowing the adjudicators to be better positioned to assess the strength of complex facts and better understand briefs of evidence from expert witnesses.⁶⁹

This aspect of the first criterion should carry less weight today than it did in 1987. Since 1987, there has been significant reform to the law of evidence.⁷⁰ One purpose of the reform was to avoid unnecessary complexity and assist the decision maker in making findings of fact.⁷¹ In particular, the reforms assisted the decision maker in answering questions of fact presented by expert witnesses.⁷² Prior to the reforms, the Law Commission commented that the laws of evidence made questions of fact complex, uncertain, costly and slow.⁷³ These reforms have assisted in enabling generalist judges to better answer questions of fact and reduce the need for specialist judges where the area of law frequently presents questions of fact.

⁶⁴ Sir Ian Barker QC, “Is Australia and New Zealand’s IP litigation product internationally competitive?” (1997) NZIPJ 259.

⁶⁵ Law Commission, above n 8, at 7.22.

⁶⁶ Ibid.

⁶⁷ Rochelle Dreyfuss, above n 38, at 12.

⁶⁸ Petra Butler “The Assignment of Cases to Judges” (2003) 1 NZJPIL 83 at 84.

⁶⁹ Stephen Legomsky, above n 18, at 23.

⁷⁰ Law Commission *Evidence: reform of the law* (1999, LCR 55, Wellington); and New Zealand’s most recent Evidence Act 2006.

⁷¹ Law Commission, at [16]-[21].

⁷² Law Commission, at [22].

⁷³ Law Commission, at [4].

B Discretionary, legal or factual decisions applied to commercial law

In applying the first criterion to commercial law, it is certain that some areas of commercial law are highly discretionary. These areas include taxation and intellectual property. However, legal decision-making is also prevalent in commercial law. This is because of the underlying principle of certainty present in the policy behind commercial legislation. Taxation and intellectual property are also areas of commercial law that include a high degree of factual decision-making.

The area of tax can be highly discretionary. The application of the general anti-avoidance provision requires wide judicial discretion. The general anti-avoidance provision provides that a “tax avoidance arrangement is void as against the Commissioner for income tax purposes”.⁷⁴ A tax avoidance arrangement has been defined as an arrangement that avoids tax, which leaves the courts with a large degree of uncertainty as to how this provision should be applied.⁷⁵ The test has been criticised as a “sniff test” allowing judges to assess and weigh up a number of factors that “contribute to the foul smell of the transaction”.⁷⁶ Because avoidance cases comprise a high number of overall tax cases litigated,⁷⁷ it is imperative that judges hearing these cases have a sound understanding of the underlying policy objectives of tax law when exercising this discretion. In the area of intellectual property, Glazebrook J argues that discretion and policy “is inherently bound up in judicial decision-making relating to patents”.⁷⁸ Dreyfuss discusses the “ongoing balancing act” that jurists must engage in when ensuring that a patent system creates incentives to innovate while managing anti-competitive behaviour.⁷⁹

⁷⁴ Income Tax Act 2007, s BG 1.

⁷⁵ Income Tax Act 2007, s YA 1.

⁷⁶ Craig Elliffe and Jess Cameron “The Test for Tax Avoidance in New Zealand: A Judicial Sea Change” (2010) 16 NZBLQ 440 as cited in Sarah Miles “The price we pay for specialised society: do tax disputes require greater judicial specialisation in New Zealand?” (Masters dissertation, Victoria University of Wellington Faculty of Law, 2014).

⁷⁷ John Prebble “Tax Avoidance, International Tax Arbitrage, and New Zealand as a Haven for Foreign Capital and Income” (2010) 16 *Revue Juridique Polynésienne* 169 at 171 as cited in Sarah Miles “The price we pay for specialised society: do tax disputes require greater judicial specialisation in New Zealand?” (Masters dissertation, Victoria University of Wellington Faculty of Law, 2014).

⁷⁸ Suzan Glazebrook “A Specialist Patent or Intellectual Property Court for New Zealand?” (2009) 12 *JWIP* 5 at 542.

⁷⁹ Dreyfuss, Zimmerman and First “Expanding the boundaries of intellectual property” (Oxford University Press, 2001) at 317.

Legal decision-making comprises a lot of commercial litigation due to the inherent importance of certainty. This principle informs a large degree of commercial legislation, which is designed to provide commerce with confidence in the legal outcomes of decisions that affect investment. For example, the Personal Property Securities Act 1999 governs the granting of security interests over personal property. It establishes a uniform set of legal rules that relate to the enforcement of interests in personal property that secure the payment of money to creditors.⁸⁰ These rules are designed to limit discretion in an effort to bring more “clarity, certainty and predictability into the securities system”.⁸¹ Another example is the Insolvency (Cross-border) Act 2006, which was enacted to implement a framework for the courts to deal with cross-border insolvency proceedings.⁸² The Act adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on cross-border insolvency, which limits the courts discretion not to recognise proceedings as a foreign proceeding.⁸³ The preamble states that an objective of the Act is to promote greater legal certainty for trade and investment.⁸⁴

Factual decision-making is an important function of a judge in commercial disputes. A focus on taxation disputes illustrates this point. As mentioned above, the general anti-avoidance provision comprises a significant number of tax disputes.⁸⁵ *Elmiger v Commissioner of Inland Revenue*⁸⁶ explores the question of avoidance with President North declaring that the presence of avoidance is “ultimately a question of fact”.⁸⁷ Factual decision-making is also important in intellectual property given the need for judges to be called upon to assess scientific and technological evidence.⁸⁸ These decisions will be informed by an assessment of conflicting evidence presented by expert witnesses.

In applying this criterion to commercial law, it is evident that taxation and intellectual property law decisions favour specialisation because they both involve discretionary

⁸⁰ Personal Property Securities Act 1999, s 4.

⁸¹ (8 December 1998) 574 NZPD 14424.

⁸² Insolvency (Cross-border) Act 2006, s 3(b)(i).

⁸³ UNCITRAL Model Law, article 15.

⁸⁴ Insolvency (Cross-border) Act 2006, schedule 1.

⁸⁵ See John Prebble “Tax Avoidance, International Tax Arbitrage, and New Zealand as a Haven for Foreign Capital and Income” (2010) 16 *Revue Juridique Polynésienne* 169 at 171.

⁸⁶ [1967] NZLR 161 (CA).

⁸⁷ *Elmiger v Commissioner of Inland Revenue* [1967] NZLR 161 (CA) at 178.

⁸⁸ Suzan Glazebrook, above n 78, at 542.

factual decision-making. However, other areas of commercial law such as insolvency law and property law favour generalist adjudication due to the legal nature of decision making.

C Criterion 2: Complexity

Secondly, a high level of complexity traditionally favours specialisation.⁸⁹ Complexity can be present for different reasons. An area of law can be complex because of a large statutory scheme,⁹⁰ technical subject matter⁹¹ or a technical regulatory framework⁹². Complexity favours specialisation because specialist judges will be more familiar with the overall scheme of the area enabling them to apply a contextual approach to statutory interpretation and the application of the law.⁹³

Complexity also favours specialisation because a specialised judiciary is more efficient at adjudicating technically complex subject matter.⁹⁴ In 1981, when the United States was faced with the problem of a “litigation explosion” and there were limited judges to handle the increased workload, Professor Jordan answered the question of how to make the best use of a scarce commodity. He provided a typical economic answer: “division of labour through specialisation of the court system”.⁹⁵

One major contributor to improved efficiency in adjudicating technically complicated subject matter is the efficiency of judges themselves. The argument is that judges’ specialist experience can cut down hearing time and costs for litigants.⁹⁶ Former Chief Justice of the Australian Federal Court comments that “no doubt we can all work out the right result if we had time, but where a decision in a technical area has to be made on the spot... it is best to have a judge who can give the case the immediate, most instinctive, attention that it requires.”⁹⁷

⁸⁹ Stephen Legomsky, above n 18, at 24.

⁹⁰ Ibid.

⁹¹ Markus Zimmer, above n 13, at 5.

⁹² Stephen Legomsky, above n 18, at 24.

⁹³ Stephen Legomsky, above n 18, at 25.

⁹⁴ New Zealand Bar Association “Review of the Judicature Act 1908 – Towards a Consolidated Courts Act” (February 2012) at [10].

⁹⁵ Ellen Jordan “Specialized Courts: A Choice?” (1981) 76 Nw. U.L. Rev. 745.

⁹⁶ Petra Butler “The Assignment of Cases to Judges” (2003) 1 NZJPIL 83 at 84.

⁹⁷ Letter to the President of the Law Commission from the Chief Justice, Federal Court of Australia, August 2003.

Judicial specialisation improves a judge's efficiency because repeating similar tasks may allow a judge to develop routines and gives them greater familiarity with the relevant tasks. On this view, judges who are more familiar with an area of law will hear both the case and deliver the judgment more quickly.⁹⁸ Chief Judge of the American patent law specialist court analogised: "if I am doing brain surgery every day, day in and out, chances are very good that I will do your brain surgery much quicker than someone who does brain surgery once every couple of years".⁹⁹ Moreover, judges in a specialist court are responsible for remaining current in fewer areas of law. Therefore, their research efficiency is enhanced.¹⁰⁰

The efficiency of specialised judges can be contrasted with the inefficiencies of generalist judges. Barristers who appear before a generalist judge, particularly in complicated fields of law, will detail to excess all relevant and useful information about the application of the law on record.¹⁰¹ There are two reasons why the barrister must do this. First, they may need to educate the generalist judge in the particular area of law as a result of the judge being marginally familiar with the subject matter. Secondly, they disclose all of the law in anticipation of appeal in case the judge fails to grasp the elements of the law that compel the resolution.¹⁰² The high cost of litigation reflects the extensive work required by barristers and can impact on public access to the courts because of the expense.¹⁰³

In a complex area of law, specialisation can be advantageous because it enhances the development of the law. This is not only because judicial specialisation can produce better quality decisions (see above) but also because it encourages disputes to be brought to court. Supporters of specialisation argue that parties will choose other dispute resolution procedures where they perceive that litigation will prove too lengthy, costly and uncertain.¹⁰⁴ In New Zealand's commercial context, there is anecdotal evidence that suggests litigants are increasingly choosing alternative dispute resolution (i.e. commercial

⁹⁸ Law Commission, above n 8, at 7.24.

⁹⁹ Howard T. Markey, Chief Judge, Court of Customs and Patent Appeals Hearings before Subcommittee on Courts (1981) 97th Congress 42-43.

¹⁰⁰ Markus Zimmer, above n 13, at 2.

¹⁰¹ Ibid.

¹⁰² Annette Marfording "Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany" (2010) (University of New South Wales research paper, July 15) at 157.

¹⁰³ Markus Zimmer, above n 13, at 2.

¹⁰⁴ New Zealand Law Society "Review of the Judicature Act 1908 – Towards a consolidated Courts Act" (4 May 2012); Bell Gully "Bell Gully submission to the Justice and Electoral Committee – Judicature Modernisation Bill" (2014) at [5].

arbitration) over litigating their case in court.¹⁰⁵ This diminishes the court's ability to establish binding and persuasive common law decisions.¹⁰⁶ In submitting support for specialisation, the New Zealand Law Society expressed concern about the prospect, under a generalist jurisdiction, of the law not being developed as fully as it might be due to a decline in commercial cases.¹⁰⁷

Conversely, it could be argued that complexity is less favourable of specialisation than it was in 1987 for three reasons. First, there have been significant developments to online legal databases that enable individuals in the legal profession to undertake vast legal research faster and easier. Secondly, the internet has made it easier for generalist judges to quickly come to grips with the basics of complex areas of science, technology, medicine and engineering. Thirdly, barristers who appear before judges are specialising in certain fields of law and it is their responsibility to bring the judge up to speed on complex issues relating to their case. In support of this proposition, Lord Woolf affirms in a letter to the president of the United Kingdom Law Commission that there is a trend of barristers becoming more specialised.¹⁰⁸ Furthermore, Jack Hodder QC submits that it is counsel's responsibility to "provide all relevant background and context for the trial judge in terms understandable to an intelligent and experienced lawyer".¹⁰⁹ On the other hand, this criterion could be *more* compelling in the modern legal system than it was 20 years ago because of the vast developments in areas of law that interact with science, technology, medicine and engineering. This argument would require further judicial specialisation because these developments have made areas of law such as intellectual property challenging.

It could also be argued that complexity should actually *disfavour* specialisation. There is a risk that judicial specialisation will exasperate the incomprehensibility and insularity of areas of law that are already inherently complex. Chief Judge of the United States Court of Appeals, Judge Diane Wood, advocates for the retention of generalists judges. She insists

¹⁰⁵ Laing, Righarts and Henaghan *A Preliminary Study on Civil Case Progression Times in New Zealand* (University of Otago Issues Centre, 15 April 2011) at [1.2].

¹⁰⁶ Ministry of Justice, above n 57.

¹⁰⁷ New Zealand Law Society "Review of the Judicature Act 1908 – Towards a consolidated Courts Act" (4 May 2012).

¹⁰⁸ Letter to the President of the Law Commission from Lord Woolf, August 2003.

¹⁰⁹ Jack Hodder QC "The Judicature Modernisation Bill – (Personal) Submission on Three Points" (20 February 2014) at [10].

that generalist judges “cannot become technocrats” and hide behind specialised vocabulary and “insider” concerns.¹¹⁰ She regards the need to explain complex concepts to generalist judges as a positive process. This is because it forces the bar to “demystify” the law and make it comprehensible.¹¹¹ Forcing specialist advocates to argue before generalist judges helps to ensure that the law will remain intelligible.¹¹² This can enhance the accountability of the courts to society.

D Complexity applied to commercial law

Complexity is often cited as a feature of commercial law that favours specialisation. The Law Commission acknowledged submitters that argued for specialisation in commercial law given the increasing complexity of civil litigation.¹¹³ The field of commercial law is complex for several reasons. First, many of the areas of commercial law, such as: taxation; insolvency; and company law, operate within large statutory schemes. Secondly, the subject matter of intellectual property, taxation and insolvency law is often considered complex.

Many of the statutory schemes governing commercial law in New Zealand are large and complicated. In taxation law, Professor Prebble describes tax law as “inherently complex”.¹¹⁴ One reason why tax law is inherently complex is “through the expression (drafting) of tax laws”.¹¹⁵ It has been a priority of Rewrite Advisory Panel to simplify the Income Tax Act on a number of occasions to varying degrees of success.¹¹⁶ However, any judge looking to apply the provisions of the Income Tax Act 2007 still has to wrestle with over 1,500 pages of legislation. The Insolvency Act 2006 and the Companies Act 1993 have 457 sections and 401 sections respectively, which have been described by the Commerce Commission as “increasingly complex”.¹¹⁷

¹¹⁰ Diane Wood, above n 49, 1767.

¹¹¹ Ibid.

¹¹² Jordan ER “Specialist Courts: A Choice?” (1981) Northwestern University Law Review 748.

¹¹³ Law Commission, above n 8, at 7.24.

¹¹⁴ J Prebble, “100 Years of Income Tax” (1993) Vol 47 Bulletin for International Fiscal Documentation 59, at 60.

¹¹⁵ Andrew Maples “Tax Complexity and the Capital-Revenue Distinction: Lessons to be Learnt from Two Recent New Zealand Cases” (University of Christchurch, submission for the LLM) at 3.

¹¹⁶ Most recently, Income Tax Bill 2006.

¹¹⁷ Law Commission *Insolvency Law Reform: Promoting Trust and Confidence* (2001, SP11, Wellington).

The subject matter of commercial law disputes is complex. Intellectual property is often cited as one of the more complex areas of commercial law. The International Intellectual Property Institute recommends specialist courts for intellectual property because “the laws that govern [intellectual property] are complex, and the technologies that are protected by those laws can be even more complex”.¹¹⁸ The Law Commission considers it ambitious to expect High Court judges to be able to cover the intricacies of intellectual property law on top of the work they conduct as generalist judges due to intellectual property’s complexity.¹¹⁹ Areas of taxation have been described as “an intellectual minefield in which principles are elusive and analogies treacherous”.¹²⁰ Lord Greene went so far as to say that in certain decisions involving tax law:¹²¹

“...it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons.”

In the context of insolvency law, the New Zealand Institute of Chartered Accountants submits that further regulation of the insolvency sector is needed because insolvency law has become increasingly complex and specialised. It considers that this requires insolvency practitioners to have a greater range of expertise than has historically been the case.¹²²

E Criterion 3: Isolation

The ability to isolate the jurisdiction of a specialised court will favour specialisation.¹²³ Zimmer opines that the judges of a specialised court should have complete authority over the field of law and subject matter that is placed within their jurisdiction.¹²⁴ This requires the area of law to be discrete in the sense that it does not involve the consideration of legal issues from other areas of law. It is argued that, as a general rule, if the specialist

¹¹⁸ Joint project between the International Intellectual Property Institute and the United States Patent Trademark Office, above n 41, at 6.

¹¹⁹ Law Commission, above n 8, at 7.22.

¹²⁰ *Tucker v Granada Motorway Services Ltd* [1977] 3 All ER 865, at 869, per Templeman J in discussing the capital/revenue distinction.

¹²¹ *IRC v British Salmson Aero Engineers Limited* [1938] 2 KB 482, at 492.

¹²² New Zealand Institute of Chartered Accountants and INSOL “Insolvency Practitioner Regulation (2013) consultation document submitting on the Insolvency Practitioners Bill at 5.

¹²³ Stephen Legomsky, above n 18, at 26.

¹²⁴ Markus Zimmer, above n 13, at 5.

jurisdiction cannot be wholly transferred to the specialist court, then it should be left with the generalist courts.¹²⁵

This criterion is informed by the disadvantage that specialisation can create an incentive to encourage forum shopping and reduce the efficiency of the legal system as a whole. As case law becomes more certain, litigants should be able to predict the result of their case more readily.¹²⁶ If a litigant knows that they will lose a case they could attempt to litigate jurisdictional boundaries between specialist courts.¹²⁷ This is an unnecessary cost to the judicial system. If the specialist jurisdictional boundaries are unclear then this will lead to greater litigation. On the other hand, if the courts adopt “bright line” rules clarifying boundaries, then this could lead to arbitrariness and open the door for manipulation by litigants.¹²⁸ The encouragement of forum shopping is minimised if the jurisdiction can be isolated.¹²⁹ Moreover, where the subject matter frequently requires the litigation of a variety of legal issues from other areas of law, the advantage of expertise is substantially minimised.

F Isolation applied to commercial law

The jurisdiction of commercial law is far reaching and not easily isolated. There will be particular types of cases that will certainly fall into the jurisdiction of a commercial court. However, there will also be cases on the fringe of the court’s jurisdiction that will be at risk of enabling forum shopping. Moreover, these cases will likely involve the consideration of legal issues from a variety of other areas of law, which calls into question whether the advantages of specialisation will be as strong as submitters may suggest.

It is hard to define what the jurisdiction would be for a commercial court. However, the New Zealand Law Commission has proposed that the jurisdiction of cases that would eligible to be heard by a member of a commercial panel would be similar to the jurisdiction

¹²⁵ Ibid.

¹²⁶ Rochelle Dreyfuss, above n 38, at 20.

¹²⁷ Jeffrey W. Stempel “Two cheers for specialization” [1995] 68 Brooklyn Law Review 67 at 106.

¹²⁸ Jeffrey W. Stempel, at 107.

¹²⁹ Markus Zimmer, above n 13, at 5.

of the Commercial Court in London.¹³⁰ The jurisdiction of the Commercial Court in London is defined as:

... any claim arising out of the transactions of trade and commerce and includes any claim relating to-

- a.) a business document or contract;
- b.) the export or import of goods;
- c.) the carriage of goods by land, sea, air or pipeline;
- d.) the exploitation of oil and gas reserves or other natural resources;
- e.) insurance and reinsurance;
- f.) banking and financial services;
- g.) the operation of markets and exchanges;
- h.) the purchase and sale of commodities;
- i.) the construction of ships;
- j.) business agency; and
- k.) arbitration.

The Law Commission has also recommended that intellectual property be added to this list.¹³¹

It is clear that this jurisdiction is broad. There will be numerous instances where claims that arise under these types of disputes will require reference to areas of law that are outside of commercial law. In fact, in the author's view, there are not many areas of law that could be excluded from this jurisdiction. A judge operating within this commercial jurisdiction could have to deal with issues of tort law, contract law, resource management law, private international law, maritime law and, possibly, criminal law.

¹³⁰ Law Commission, above n 8, at 10.12.

¹³¹ At 10.68. Note the Judicature Modernisation Bill does not define the jurisdiction of the commercial list, but leaves it open to the Chief High Court Judge to do so. See Clause 18 of the Bill.

While a broad jurisdiction tends to disfavour specialisation, it does also reduce some of the disadvantages of specialisation. Reference to other areas of law will ensure that commercial law avoids duplication of legal thought and prevents inconsistencies arising.¹³² It also ensures that commercial law benefits from the cross pollination of ideas from all of the other areas of law that must be canvassed in order to resolve a commercial dispute.

G Criterion 4: Degree of repetition

Legomsky considers that where issues surface frequently in an area of law then this favours specialisation.¹³³ This is because the benefits of efficiency and cost saving are particularly elevated because it allows the adjudicator to arrive at results quicker having frequently dealt with similar issues. It also ensures consistency in the application of the law as a result of continuous exposure to how the specialist area of law should be influenced by changes in fact patterns.¹³⁴

Commentators also suggest that repetition can disfavour specialisation.¹³⁵ This is because repetition can impair the court's ability to attract high quality practitioners because the subject matter is considered monotonous and unstimulating.¹³⁶ The negative effect on judicial recruitment is commonly regarded as a disadvantage of judicial specialisation.¹³⁷ The Senior Courts have cautioned that it may reduce the quality of judges.¹³⁸ Commentators speculate that, generally, specialised judges are accorded less prestige and status than judges who are generalists.¹³⁹ This is because generalist judges are expected to demonstrate the intellect to be able to resolve disputes in a broad range of fields of the law.

A more specialised court could be less appealing for a judge because may represent a less prestigious office¹⁴⁰ and it offers less interesting and challenging work than the broader

¹³² Suzan Glazebrook, above n 78, at 543.

¹³³ Stephen Legomsky, above n 18, at 27.

¹³⁴ Ibid.

¹³⁵ Ibid; and Markus Zimmer, above n 13, at 6.

¹³⁶ Ibid.

¹³⁷ Law Commission, above n 8, at 10.24; see also Senior Courts "Submission of the Supreme Court, Court of Appeal and High Court on the Judicature Modernisation Bill" (12 March 2014) at [6].

¹³⁸ Senior Courts "Submission of the Supreme Court, Court of Appeal and High Court on the Judicature Modernisation Bill" (12 March 2014).

¹³⁹ Markus Zimmer, above n 13, at 4.

¹⁴⁰ Ibid.

array of issues a generalist judge may encounter.¹⁴¹ Posner acknowledges that monotonous jobs can generally be unfulfilling. He argues that the growth of judicial specialisation gives the judicial work a degree of “monotony previously found on assembly lines”.¹⁴²

H Repetition applied to commercial law

In the context of commercial law, there will be minimal repetition. This is because of how broad the jurisdiction of the area of commercial law is proposed to be defined. The Ministry of Justice provided the Law Commission with statistics that show the number of cases that are heard within different fields of the High Court’s civil jurisdiction.¹⁴³ These statistics are set out in the table below:

TOTAL NATIONAL SAMPLE FOR 2010		
Case Category	Total	%
Bill of Exchange Act 1908	1	0.42
Breach of Fiduciary Obligation	3	1.27
Breach of Statutory Duty	2	0.84
Building Contract	2	0.84
Citizenship Act 1977	2	0.84
Companies Act 1993	19	8.02
Construction	1	0.42
Consumer Guarantees	1	0.42
Contract	35	14.77
Copyright	2	0.84
Damage to Property	2	0.84
Declaration	1	0.42
Defamation	1	0.42
Department of Social Welfare	7	2.95
Enforcement of Judgment	1	0.42
Fair Trading Act 1986	17	7.17
Family	5	2.11
Guarantee	1	0.42
Incorporated Societies Act 1908	1	0.42
Insolvency Act 2006	3	1.27
Insurance	4	1.69

¹⁴¹ Markus Zimmer, above n 13, at 4.

¹⁴² Richard Posner “Will the Federal Courts of Appeals survive until 1984? An essay on delegation and specialisation of the judicial function” (1983) 56 Cal. L. Rev. 761 at 781.

¹⁴³ Law Commission, above n 8, at 10.49.

Land Act 1948	1	0.42
Leaky Building Claim	17	7.17
Lease	3	1.27
Māori Customary Law	1	0.42
Maritime Transport Act 1994	1	0.42
Mortgage	2	0.84
Negligence	12	5.06
New Zealand Bill of Rights Act 1990	3	1.27
Partnership Act 1908	1	0.42
Property	4	1.69
Property (Relationships) Act 1976	1	0.42
Public Works Act 1981	2	0.84
Resource Management Act 1991	1	0.42
Sale & Purchase	9	3.80
Tax	9	3.80
Tort	2	0.84
Trust	10	4.22
Trustee Act 1956	3	1.27
Unit Titles Act 2010	1	0.42
(blank)	43	18.14

The Law Commission has expressed its concern at the possible inaccuracy of these numbers.¹⁴⁴ Nevertheless, they help illustrate the point that there would be minimal repetition in a specialist commercial court. This is because it is difficult to perceive of any of the above areas of the High Court's civil jurisdiction that would not be able to satisfy the proposed jurisdiction of a commercial court. Therefore, a commercial judge will adjudicate a broad variety of cases. The most likely area of commercial law that may provide some repetition is contract-related cases at 14% of the court's total civil workload for 2010.

¹⁴⁴ This is because the clarification was done by court staff based on their interpretation of the relevant statements of claim. These staff were not legally trained therefore they may have been inaccurate. It was also noted that the sample excluded a number of cases that settled. (see New Zealand Law Commission *Review of the Judicature Act 1908: Towards a new Courts Act* (NZLC, R 126) at 10.50).

I Criterion 5: Degree of controversy

When the subject-matter of a decision is controversial then this should disfavour specialisation.¹⁴⁵ Controversy may arise from the decision maker having discretion in deciding matters of vital public importance. It may also arise as a result of the decision having highly emotional content.¹⁴⁶ Controversy is said to disfavour specialisation because specialisation risks undue concentration of power and bias by the specialised court as a result of insularity.¹⁴⁷ Moreover, Legomsky argues that the public acceptability of having a specialist court will be aggravated where the issues are emotionally charged.¹⁴⁸

On the other hand, in some circumstances, matters of controversy should favour specialisation. This is because there could be areas of the law where the public will be more accepting of a controversial decision of a specialist court as opposed to a controversial decision of a generalist court. In the business context, a controversial decision by a commercial specialist court may be more palatable by the business community because they arguably have greater confidence in the capabilities of commercial specialist judges.¹⁴⁹

J Degree of controversy applied to commercial law

High degrees of controversy will *generally* disfavour specialisation. However, this criterion does not disfavour specialisation in the context of commercial law. There are areas of commercial law that involve adjudication over particularly controversial subject matter. Two examples are decisions in the context of intellectual property and insolvency. However, the degree of controversy is not relatively higher in commercial law than the degree of controversy in other areas of law. Moreover, the disadvantages of specialisation due to the adjudication of controversial subject matter are less pronounced in commercial law because of the broad nature of the jurisdiction.

Intellectual property involves the adjudication of controversial subject matter. Glazebrook J argues that because the area of patent law is developing so quickly, it is likely to be

¹⁴⁵ Stephen Legomsky, above n 18, at 27.

¹⁴⁶ *Ibid.*

¹⁴⁷ See the disadvantages of specialisation above.

¹⁴⁸ Stephen Legomsky, above n 18, at 28.

¹⁴⁹ See the discussion above regarding the advantage of specialisation increasing commercial competitive advantage.

controversial.¹⁵⁰ This will particularly be the case in areas such as methods of medical treatment, computer software, business method, genetic material and genetically modified animals and plants.¹⁵¹ Insolvency decisions will deal with controversial and emotionally charged subject matter. This is commonly the case where the court has to adjudicate on the distribution of assets to creditors where there are minimal assets to satisfy all claims.¹⁵² In both of these examples, if there was a specialised intellectual property court, or insolvency court then there is a risk that this would create a perception that the specialist court was biased in favour of certain litigants. Accordingly, this would tend to disfavour specialisation.

However, because the jurisdiction of the commercial court is so broad, the controversy of particular decisions within that jurisdiction does not disfavour specialisation. This is because the perception of bias would be much weaker as a result of the commercial judges adjudicating such a wide variety of cases. It would be less likely that they appear biased to certain litigants because they will not solely adjudicate that subject matter.

K Criterion 6: Clannishness

The ‘clannishness’ of a specialised community will not favour specialisation. When Legomsky discusses ‘clannishness’ he refers to the close/closed working relationship that the lawyers, government officials and expert witnesses have with one another.¹⁵³ It is true, that to superimpose specialist adjudicators on top of these relationships would not be beneficial. This is because the closed nature of the group could give rise to disadvantages of specialisation such as preventing the cross-fertilisation of ideas and the stifling of innovation.¹⁵⁴ Clannishness may have the advantage of enhancing efficiency due to the close working relationships between the parties. However, on balance clannishness should favour generalist adjudication.

¹⁵⁰ Suzan Glazebrook, above n 78, 544.

¹⁵¹ Finch, I “James & Wells Intellectual Property Law in New Zealand” (2007, Brookers, Wellington) at 2.4.8-2.4.16.

¹⁵² See for example Ross Asset Management Limited being placed into receivership.

¹⁵³ Stephen Legomsky, above n 18, at 28.

¹⁵⁴ See the disadvantages of specialisation discussed above. Particularly the discussion on insularity.

L Clannishness applied to commercial law

Clannishness is unlikely to be present in a commercial court. The broad jurisdiction prevents close working relationships between members of a particular profession, the litigants, the lawyers and the judges. The number of judges who will occupy the commercial panel has not yet been decided.¹⁵⁵ There are currently nine High Court judges that occupy the commercial list in New Zealand.¹⁵⁶ This number of judges sitting in a specialised commercial court or panel should not raise concerns from the perspective of increasing the risk of clannishness. Accordingly, this factor tends to support specialisation in commercial law.

M Criterion 7: Peculiar importance of consistency

There are some areas of law that have a peculiar importance of consistency. Where this is the case then judicial specialisation is favourable.¹⁵⁷ Consistency can be particularly important in areas of law that require long term planning necessitating a high degree of certainty and predictability. It can also be especially important in a highly competitive industry where unequal treatment of parties results in one party being severely disadvantaged.¹⁵⁸ This criterion supports specialisation because specialisation can promote consistency.¹⁵⁹

N Consistency applied to commercial law

Commercial law does give rise to circumstances where competition within an industry magnifies the importance of consistency. Where this is the case, inconsistent application of the law can compound the practical effects of its application. An example of this is provided by Legomsky in the context of competition law. He posits that if one restaurant is granted a liquor licence and another restaurant within a close distance of the first is denied one, the latter restaurant is worse off than if both had been denied a licence.¹⁶⁰ The

¹⁵⁵ Under the Judicature Modernisation Bill clause 18(4) as reported back from the Justice and Electoral Committee, the Chief High Court Judge may determine how many High Court Judges are to be on the commercial panel or any other panel and assign Judges to the panels.

¹⁵⁶ Ministry of Justice “Courts of New Zealand” < <https://www.courtsofnz.govt.nz/business/high-court-lists/commercial-list> >.

¹⁵⁷ Stephen Legomsky, above n 18, at 28.

¹⁵⁸ Stephen Legomsky, above n 18, at 29.

¹⁵⁹ See the above advantage of specialisation under the “judicial expertise” section.

¹⁶⁰ Stephen Legomsky, above n 18, at 29.

favouring of one business could in a competitive setting compound the disfavour shown to another business in similar circumstances. However, this will only be the case in a limited area of commercial law for example: licencing arrangements; intellectual property; and competition law. In the vast majority of commercial cases there will not be a peculiar importance of consistency.

O Criterion 8: Dynamism

A high degree of dynamism in the relevant area of law will support specialisation.¹⁶¹ Dynamism describes an area of law that contains a rapidly changing subject matter. This includes frequent change of the legal substance as well as evolving technologies and theories that inform the factual matrix of a decision.¹⁶² Dynamism favours specialisation because the judges will be less likely to miss recent developments in the law and will be more efficient because they do not require extensive research or further explanation from counsel.¹⁶³

P Dynamism applied to commercial law

There are a number of areas of commercial law where science and technology develop quickly, and as a consequence, so too does the law. Intellectual property often involves the adjudication of disputes concerning rights over property such as computer software, genetic material and medical treatment.¹⁶⁴ The law therefore is subject to constant change based on the development of scientific and technological thinking.¹⁶⁵ The International Bar Association recognised that intellectual property rights laws are subject to constant evolution and this supports the argument that there should be further specialisation in intellectual property law.¹⁶⁶ Resource management commonly involves the analysis of scientific evidence concerning geology and contamination. Adjudication of disputes

¹⁶¹ Ibid.

¹⁶² Joint project between the International Intellectual Property Institute and the United States Patent Trademark Office “Study on Specialised Intellectual Property Courts (25 January 2012) at 6.

¹⁶³ Ellen R. Jordan “Specialized Courts: A Choice?” (1981) 76 Nw. U.L. Rev. 745; and Lawrence Baum “Probing the effects of judicial specialization” (2009) 58 DLJ 1673; and Joint project between the International Intellectual Property Institute and the United States Patent Trademark Office “Study on Specialised Intellectual Property Courts (25 January 2012) at 6.

¹⁶⁴ Suzan Glazebrook, above n 78, 544.

¹⁶⁵ Ibid.

¹⁶⁶ International Bar Association Intellectual property and Entertainment Law Committee “International Survey of Specialised Intellectual Property Courts and Tribunals” (London, September 2007) at 6.

involving the members of the electricity, telecommunications and transport sectors also requires a high degree of scientific analysis. It is likely that commercial law satisfies this criterion in a number of circumstances therefore leans towards specialisation.

Q Criterion 9: Case volume/demand

The volume of cases in the specialist area of law must be sufficient to justify specialisation.¹⁶⁷ Additionally, the caseload of the generalist court currently dealing with the proposed specialist subject matter is relevant. If the caseload of the generalist court is minimal, then the advantages of efficiency of a specialist court are less applicable.¹⁶⁸ However, if the generalist court has a strained case load, then a specialist court can become more favourable.¹⁶⁹ Similarly, future case load must be considered. It may be that an area of law will not maintain a high case load. For example, that particular area of law could experience a temporary influx of litigation that will reduce later. If this is the case, then a generalist court is better placed to deal with fluctuations in case load relating to different areas of law. Alternatively, there may be future legislation coming into force that is going to greatly increase the future litigation workload in an area of law.¹⁷⁰

The New Zealand Law Commission placed a heavy emphasis on case volume in the New Zealand context.¹⁷¹ The primary reason for this is New Zealand's size and limited resource. The Commission commented that in London the case for a dedicated commercial court is stronger because the volume of commercial cases in the United Kingdom is much greater than in New Zealand. Where this is the case, it is easier to justify committing greater resource to setting up a specialist court.¹⁷²

R Case volume/demand applied to commercial law

In the context of commercial law, there are two questions that must be answered in order to effectively apply this criterion. First, whether there is currently sufficient commercial

¹⁶⁷ At 27.

¹⁶⁸ Stephen Legomsky, above n 18, at 30.

¹⁶⁹ International Bar Association Intellectual property and Entertainment Law Committee, above n 166, at 27.

¹⁷⁰ Suzan Glazebrook, above n 78, at 545; citing a Joint project between the International Intellectual Property Institute and the United States Patent Trademark Office "Study on Specialised Intellectual Property Courts" (25 January 2012) at 5.

¹⁷¹ Law Commission, above n 8, at 7.40 – 7.47.

¹⁷² Ibid.

litigation to justify setting up a commercial court due to the workload of the current court dealing with commercial disputes. Secondly, whether further judicial specialisation would see continued high volume or growth of the volume of commercial cases in the future. The answer to both of these questions is inconclusive and more empirical study needs to be conducted before the application of this criterion can be concluded upon.

The Law Commission has addressed the question of what the current commercial case volume is in the High Court. It discovered that this question is not easy to answer given the difficulties that arise as a result of the High Court's or the Ministry of Justice's case reporting.¹⁷³ The reporting distinguishes broadly between criminal and civil proceedings. However, it fails to describe the underlying nature of the type of "civil proceeding".¹⁷⁴ This makes it difficult to determine what claims that fall within the scope of "civil", also fall within the scope of "commercial". The Ministry of Justice provided the Law Commission with a sample breakdown of physical court files of 95 cases in the Wellington and Auckland High Court registries from between 2008 and 2010.¹⁷⁵ It was able to break down civil trials into case categories including breach of contract, Companies Act 1993, insolvency and copyright.¹⁷⁶ However, these statistics did not give the Commission a comparison with other case volumes, which would enable them to conclude on how high the commercial case volume has been in the High Court. It can be concluded that civil proceedings make up a significant percentage of the High Court's workload. The High Court's annual report for 2013 listed that civil trials make up 62% of the case volume,¹⁷⁷ but as discussed above, there is no way of knowing what percentage of civil proceedings would be considered within the proposed commercial jurisdiction.

The District Court statistics are equally inconclusive. The District Court annual report for 2013 recorded 622 new defended civil cases for the 2013 period, down from 1,708 in the same period for 2009.¹⁷⁸ Prima facie, this suggests that the civil workload of the District Court is low due to a 63% decrease over the past four years. However, similar to the High Court statistics, it is impossible to know the volume of commercial cases that make up the

¹⁷³ Law Commission, above n 8, at 10.42.

¹⁷⁴ Ministry of Justice "Annual Statistics for the High Court 2012" <www.courtsofnz.govt.nz>.

¹⁷⁵ Law Commission, above n 8, at 10.48.

¹⁷⁶ Ibid.

¹⁷⁷ Ministry of Justice "Annual Statistics for the High Court 2012" <www.courtsofnz.govt.nz>.

¹⁷⁸ District Courts of New Zealand "Annual Report 2013" (2013) at 39.

civil statistics. Moreover, these statistics only provide the “defended” civil trial volume. There is no mention of the volume of civil claims filed, which would be a more helpful indicator of case volume as it would include claims that go through the pre-trial procedures but settle before the hearings.

Therefore, it is difficult to conclude whether the current commercial case volume justifies judicial specialisation. It is clear that the civil workload of the District Court and the High Court is significant. It is also clear that the proposed commercial jurisdiction is significantly broad and should make up a large amount of the civil cases heard by the relevant generalist courts. However, until further empirical analysis is conducted on the underlying nature of civil proceedings in the District Court and High Court, this paper cannot conclude on the application of this criterion.

The second question on the future case load of a commercial specialist court is similarly speculative. The Law Commission suggests that there has been a decrease in the High Court’s commercial case load as a result of an increase in the use of alternative dispute resolution (ADR).¹⁷⁹ Furthermore, it speculates that commercial specialisation may result in more cases being heard in the High Court instead of being diverted to ADR.¹⁸⁰ On this analysis, it can be argued that commercial specialisation could increase the case volume of a commercial specialist court in the future. However, William Steel criticises this conclusion based on a distinct lack of empirical evidence that demonstrates there has been, first, an increase in the use of ADR and, secondly, evidence that develops a causal link between the increase in ADR and the High Court’s generalist structure.¹⁸¹ The primary reason for this appears to be that there no central dispute resolution body to collate or produce any meaningful ADR statistics.¹⁸²

S Criterion 10: Special need for prompt resolution

If the area of law requires a special need for a prompt resolution of the legal dispute then this will favour specialisation. Legomsky’s main example is areas of law where there is an

¹⁷⁹ Law Commission, above n 8, at 10.53.

¹⁸⁰ Law Commission, above n 8, at 10.55.

¹⁸¹ William Steel “Judicial Specialisation in a generalist jurisdiction: Is commercial specialisation within the high court justified?” (2014, dissertation for the LLB (hons) degree, Victoria University of Wellington) at 21.

¹⁸² Ibid, where he notes that there are two professional ADR bodies in New Zealand, however, neither of them compile statistics on the use of ADR in New Zealand.

incentive to file frivolous actions in order to delay or prevent a litigant from achieving an outcome which they may be entitled to.¹⁸³ The need for prompt resolution is favourable to specialisation because specialisation can increase efficiency therefore reduce the time it takes to adjudicate time sensitive disputes.¹⁸⁴ The Law Commission indicated that there is increasing criticism over the time taken for litigants to have disputes resolved using the court system.¹⁸⁵ Advocates of judicial specialisation argue that the enhanced efficiency reduces the time delay for litigants and ultimately provides a more just outcome for those involved in the judicial system.¹⁸⁶

It is arguable that Legomsky's example of areas of law that give rise to frivolous claims has been somewhat mitigated in the modern legal system. This is because the New Zealand Courts have been granted powers to more effectively deal with vexatious litigants. Recently, the Judicature Modernisation Bill proposes to further increase the ability of all Courts to make orders restricting vexatious litigant's ability to continue to file frivolous claims.¹⁸⁷

T Prompt resolution applied to commercial law

Commercial law does contain situations where there is a need for a prompt resolution but, it does not raise a *special* need for a prompt resolution. This is generally the case where a property right or reputational harm is at stake. Shinohara considers that one of the three major needs in an intellectual property dispute is an expedient trial.¹⁸⁸ One reason for this is because intellectual property disputes can involve rapidly evolving subject matter. Another example is where a party is seeking the enforcement of a judgement to pay a debt in circumstances where the counter-party may move the relevant money off-shore. However, in the author's view commercial law does not raise a *special* need for a prompt resolution. In most cases a party will have various mechanisms available to it to speed up their hearing. In an intellectual property dispute, the court can order an injunction preventing a party from taking action that it may be unjustified in taking. In a debt

¹⁸³ Stephen Legomsky, above n 18, at 31.

¹⁸⁴ See advantage of specialisation above being efficiency.

¹⁸⁵ Law Commission, above n 8, at 104.

¹⁸⁶ Markus Zimmer, above n 13, at 2; Annette Marfording "Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany" (2010) (University of New South Wales research paper, July 15) at 157.

¹⁸⁷ Judicature Modernisation Bill 2013, cl 162.

¹⁸⁸ Shinohara "Outline of the Intellectual Property High Court of Japan" (2005) AIPPI 30(3) 131 at 136.

collection case, the court can issue freezing orders and conduct ex-parte hearings where there is time sensitivity.

U Criterion 11: Required special court procedures

Finally, if an area of law requires unique court procedures then this will favour specialisation. This can be present where there are complex rules of litigation, or the litigation frequently includes multiple parties to a dispute.¹⁸⁹ Specialist procedures offer flexibility for the specialist court to tailor procedures that suit the profile of litigants they deal with. This can save time, cost, enhance efficiency and improve that area of law's competitive advantage. The reason why this criterion favours specialisation is because judicial specialisation enhances procedural efficiency. Procedural efficiency can be improved by setting up specialist procedures in a court's case management systems that are designed to deal with the peculiarities of the particular specialist field of law.

V Special court procedures applied to commercial law

Commercial law gives rise to the need for special court procedures. This is illustrated by the establishment of the commercial list. The purpose of the commercial list is to provide a service to the commercial community by enabling commercial disputes to be decided as quickly and cheaply as the circumstances allow.¹⁹⁰ It is comprised of a list of High Court judges who are considered commercial law specialists¹⁹¹ and it is intended that it speed up the pre-trial stages of proceedings relating to eligible matters.¹⁹² Members of the list are empowered to give "such directions as [they] think fit for the speedy and inexpensive determination of the real questions between the parties."¹⁹³ The special procedures that the list establishes seek to confine discovery processes to relevant matters, eliminate unnecessary pleadings, and grant the judge the discretion to take all necessary steps at the interlocutory stage of trial to minimise cost and reduce delay.¹⁹⁴ The drivers behind the establishment of special procedures are the goals of saving time and achieving flexibility for commercial litigants.

¹⁸⁹ Law Commission *Delivering justice for all: A vision for New Zealand courts and tribunals* (NZLC, R 85) at 263.

¹⁹⁰ *Cellier Le Brun Ltd v Le Brun* [2002] 16 PRNZ 376 at [14].

¹⁹¹ Courts of New Zealand "Commercial List" < www.courtsofnz.govt.nz >.

¹⁹² Law Commission, above n 7, at 7.12.

¹⁹³ Judicature Act 1908, s 24D.

¹⁹⁴ *Cellier Le Brun Ltd v Le Brun*, above n 190, at [14].

IV Commercial specialisation conclusion

Prima facie, Legomsky's modified criteria support commercial specialisation. However, one problem with this conclusion, that is manifest in the application of most of the criteria, is the broad nature of what can be considered a "commercial case". It seems that the proposed jurisdiction of a commercial court is so broad that it means any case that essentially has a "commercial flavour".¹⁹⁵ This is an issue because it is not hard to find specific arguments as to how each of the criteria could apply either for or against commercial specialisation. The result is that the criteria frequently raise examples in the areas of tax, competition law and intellectual property that supported specialisation. Other areas such as torts, contract and company law tended to disfavour specialisation, which are the areas of commercial law that have the highest volume of cases.¹⁹⁶ In the author's view, this problem would be alleviated by analysing the establishment of a more tightly defined jurisdiction such as an intellectual property court or a tax court.

V Administrative law

The next section of this paper will apply the criteria to the question of whether New Zealand should have further judicial specialisation in the area of administrative law. Currently, the New Zealand High Court exercises the jurisdiction to hear appeals from administrative tribunals on matters relating to administrative law.¹⁹⁷ This has not always been the case. From 1968 through until 1991 there was an administrative division of the High Court that exercised this jurisdiction.¹⁹⁸ The administrative division was abolished in 1991.¹⁹⁹ The area of administrative law has been chosen because it has been suggested as an area of specialisation in the past and it offers a contrast to issues that are raised by the application of the criteria to commercial law. As is the case in commercial law, there is a global trend towards having specialist administrative courts. The most relevant jurisdictions to New Zealand that have followed this global trend include the United Kingdom and the United States of America, which both have their own dedicated administrative court to hear administrative law appeals.

¹⁹⁵ This was one court's interpretation of what a "commercial case" means in 1988. See *Cromwell Corp Ltd v Sofrana Immobilier (NZ) Ltd* (1988) 1 PRNZ 352 (HC).

¹⁹⁶ Law Commission, above n 8, at 10.48.

¹⁹⁷ Judicature Act 1908, s 16.

¹⁹⁸ Judicature Act 1908, s 25.

¹⁹⁹ Judicature Amendment Act 1991, s 3(2).

In 1968 the Administrative Division of the Supreme Court (as it was then) was established. It was established as a result of recommendations from the Public and Administrative Law Reform Committee (*PALRC*), which recommended its establishment in order to bring some order to the system of appeals from administrative tribunals.²⁰⁰ In 1991 the Judicature Amendment Act²⁰¹ abolished the operation of the Administrative Division and transferred the jurisdiction to hear appeals from administrative tribunals back to the High Court. The repeal was prompted by a Law Commission report, which, for a number of reasons discussed below, recommended the Division's abolition.²⁰²

The global trend towards specialisation in administrative law is apparent in the United Kingdom and the United States. In the United Kingdom, the Queen's Bench Division of the High Court of Justice of England and Wales is home to the specialist Administrative Court. This court consists of the administrative law jurisdiction of England and Wales as well as a supervisory jurisdiction over inferior courts and tribunals.²⁰³ The supervisory jurisdiction mainly consists of judicial review.²⁰⁴ In the United States, the Administrative Procedure Act 1946 provides for the appointment of Administrative Law Judges (ALJ). ALJs preside over trials and adjudicate claims involving the application of administrative law.

A Discretion, law or fact

Legomsky uses administrative law as an example of how this criterion can apply. He comments that the application of this criterion exposes the difficulty of viewing administrative law "monolithically".²⁰⁵ As will be seen below, administrative law contains examples of requiring adjudication to deal with questions of discretion, law and fact. This is a result of having such a wide variety of bodies dealing with discrete executive functions, which can be appealed for adjudication by the courts.

²⁰⁰ Public and Administrative Law Reform Committee "Appeals from administrative tribunals" (1968) at [35]-[40].

²⁰¹ Judicature Amendment Act 1991, s 3(2).

²⁰² Law Commission *Structure of the Courts* (NZLC R7, 1989) at [465].

²⁰³ Courts of England and Wales "Administrative Court" at <<http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court>> .

²⁰⁴ *Ibid.*

²⁰⁵ Stephen Legomsky, above n 18, at 71.

Adjudication in administrative law can involve questions of discretion. In some fields of administrative law there is said to be a “prevalence of policy questions”.²⁰⁶ The minority view in the PALRP Report advocated for greater specialisation in administrative law because the powers likely to be vested in an administrative court would “involve value judgments on matters of social or economic policy”.²⁰⁷ Decisions from many administrative tribunals will primarily be concerned with questions of law. Examples of tribunals where this is the case for appeals include: the Accident Compensation Appeals Authority,²⁰⁸ the Alcohol Regulatory and Licencing Authority,²⁰⁹ the Copyright Tribunal,²¹⁰ the Immigration and Protection Tribunal²¹¹ and the Real Estate Agents Disciplinary Tribunal.²¹² In each of these cases the appeals from various tribunals and authorities are statutorily restricted to questions of law. On the other hand, there are tribunal decisions and appeals that are heavily concerned with questions of fact. Commentators cite the Land Valuation Tribunal as a tribunal that deals primarily in fact questions.²¹³ In particular, Legomsky posits that fact questions “typify the land valuation cases”.²¹⁴

B Complexity

Administrative law frequently deals with technically complex legal and factual subject-matter. Sir Robin Cooke described the subject-matter of administrative law as “difficult”.²¹⁵ Legomsky considers administrative law to be an area of high complexity.²¹⁶ He points to the issues that judges have to grapple with in welfare cases or liquor licence

²⁰⁶ Ibid.

²⁰⁷ G.S. Orr “Report on Administrative Justice in New Zealand” (1964) at 39.

²⁰⁸ Accident Compensation Act 2001, s 162(1).

²⁰⁹ Sale and Supply of Alcohol Act 2012, s 162(1).

²¹⁰ Copyright Act 1994, s 224(1).

²¹¹ Immigration Act 2009, s 246.

²¹² Real Estate Agents Act 2008, s 120.

²¹³ Gill Nieuwland “Gill Nieuwland’s guide to property tribunal survival (1) (1 January 2014) <<http://www.leaseholdknowledge.com/an-lvt-survival-guide-for-lay-applicants>> ; also Stephen Legomsky, above n 18, at 71.

²¹⁴ Stephen Legomsky, above n 18, at 71.

²¹⁵ Sir Robin Cooke “The Struggle for Simplicity in Administrative Law” (seminar presented 20 February 1986 at Victoria University of Wellington) as published in Michael Taggart “Judicial Review of Administrative Action in the 1980s: Problems and prospects” (2002, Oxford University Press, Auckland) at 1.

²¹⁶ Stephen Legomsky, above n 18, at 71.

cases, which often raise similar technical problems to those encountered in “technical trade cases, scientifically technical patent cases, or financially technical securities cases”.²¹⁷ Numerous leading texts on administrative law, from various jurisdictions, assert the complexity of administrative law is a result of its interaction with innumerable aspects of political, commercial and private life.²¹⁸

On the other hand, one of the primary reasons why the PALRC recommended *against* a separate specialist administrative court is because of its complexity. It commented that the nature of appellate work in administrative law demanded the legal qualifications of generalist judges.²¹⁹ There was no further discussion as to why this is the case, however, this could be because, in appellate administrative law decisions, judges have to grapple with a much wider variety of legal issues. This is reflective of the broad array of administrative tribunals that deal with anything from licencing to charities registration to accident compensation issues.

This is an interesting illustration of how this criterion can be either supportive of or negate arguments for a specialist court. Perhaps a distinction should be drawn between complexity of the subject matter and the complexity of the legal questions raised. Where the subject matter is complex, as is illustrated in taxation and intellectual property, then this will support specialisation. However, the complexity of legal decision making should support a generalist jurisdiction due to the enhanced exposure generalist judges have to a broad manner of legal issues.

C Isolation

The jurisdiction of an administrative court is easily isolated with minimal cross over in considering other areas of law. In 1964 Orr produced a report (the *Orr Report*) recommending the establishment of an Administrative Court in New Zealand. It proposed that the jurisdiction of the Court should include most appellate functions of the High Court and District Courts (then Supreme Court and Magistrate’s Court respectively) in respect of

²¹⁷ Ibid.

²¹⁸ Matthew Grooves “Modern Administrative Law in Australia: Concepts and Context” (2014, Cambridge University Press, Australia) at 1; Christopher Enright “Federal Administrative Law” (2004, The Federation Press) at 585; Philip A Joseph “Constitutional and Administrative Law in New Zealand (4th ed, Thompson Reuters, 2014).

²¹⁹ Public and Administrative Law Reform Committee, above n 200, at [35].

tribunals and other administrative authorities.²²⁰ It later recommended that the jurisdiction of the proposed Court should be extended to appeals from some decisions of officials and administrative authorities other than tribunals.²²¹ The PALRC Report recommended a similar jurisdiction to the Orr Report, however, in addition it recommended that the court be granted the general supervisory jurisdiction of the High Court (the Supreme Court) to review “administrative adjudication”.²²²

D Degree of repetition

There is some degree of repetition in administrative law decisions. This repetition is manifest in the similarities of legal issues that come before an administrative decision-maker. Issues such as: when is procedural fairness in adjudication required and, additionally, what does it require when it is? What are the particular procedures that certain administrative bodies must follow when they craft rules? What is the scope of judicial review and appeal?²²³

Within the substance of administrative law there will be particular fields that will raise similar fact patterns. For example, appeals or the review of decisions from the Accident Compensation Appeal Authority will often allow a judge to draw on factual analogies from cases dealt with in the past, in deciding whether a certain claim for compensation is legitimate. Similarly, appeals from the Taxation Review Authority will enforce the efficiency gains for a judge who is frequently confronted with taxation questions. However, this observation to an extent is impractical because it relies on administrative judges concentrating on particular administrative tribunal appeals. The problem with this is that there are 30 major administrative tribunals listed on the Ministry of Justice’s website and many more that go unmentioned.²²⁴ Currently, there are only 47 High Court judges available for sitting in the High Court’s generalist jurisdiction.²²⁵ There would not be enough judges to dedicate each of their time only to appeals from certain tribunals. Accordingly, specialist judges would have to deal with appeals from a wide variety of tribunals, substantially decreasing the degree of repetition.

²²⁰ G.S. Orr, above n 207, at 82.

²²¹ Ibid.

²²² Public and Administrative Law Reform Committee, above n 200, at [9].

²²³ Stephen Legomsky, above n 18, at 70.

²²⁴ Ministry of Justice “Tribunals” <<http://www.justice.govt.nz/tribunals>> .

²²⁵ Ministry of Justice “Courts of New Zealand” <<https://www.courtsofnz.govt.nz/about/high/judges>> .

E Degree of controversy

More so than commercial law, administrative law involves the adjudication of cases that involve a high degree of controversy. Controversial decisions arise in the context of administrative law because it is concerned with the judicial oversight of the executive.²²⁶ The primary powers of public authorities are statutory, and administrative law concerns the courts invoking their “constitutional warrant to superintend” the exercise of such power.²²⁷ It can be perceived as particularly controversial because it often concerns cases where there has been a possible abuse of power. The judicial review powers of the High Court have been described as enabling the judiciary to “operate as a bulwark against the abuse of power”.²²⁸ The House of Lords have described administrative law as providing remedies “invented by the judges to restrain the excess or abuse of power”.²²⁹

Controversial administrative law decisions in New Zealand include: the illegality of an announcement by the New Zealand Prime Minister,²³⁰ judicial review of the decision to grant overseas investment consent to a Chinese company to purchase a large New Zealand dairy farm,²³¹ judicial review into a police search of an investigative journalist’s home following the release of a political book criticising the government,²³² application for judicial review of the Justice Minister’s refusal to grant an individual, who was acquitted from a murder charge, compensation²³³ or a failed application for the judicial review of the Hamilton Council’s decision to fluoridate Hamilton’s water supply due to alleged negative health impacts.²³⁴

²²⁶ Philip A Joseph “Constitutional and Administrative Law in New Zealand (4th ed, Thompson Reuters, 2014) at 853.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL) at 715.

²³⁰ *Fitzgerald v Muldoon and Others* [1976] 2 NZLR 615.

²³¹ *Tiroa E & Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147.

²³² Brendan Manning “Judicial review hearing for Hager” (2014, New Zealand Herald, 18 December).

²³³ Stuff News “Bain seeks judicial review” (2013, 30 January) at <
<http://www.stuff.co.nz/national/8242038/Bain-seeks-judicial-review>>.

²³⁴ *Safe Water Alternative New Zealand Inc v Hamilton City Council* [2014] NZHC 1463.

F Clannishness

Clannishness is unlikely to be present in administrative law for similar reasons to why this criterion was not applicable to commercial law. The broad array of administrative tribunals and decision-makers from which appeals can be brought, prevents any unhealthy relationships between the lawyers, tribunals and judges in an administrative court. However, if it was suggested that the judges within the administrative court should be assigned to hear cases only from tribunals that they have experience in dealing with, then the risk of clannishness would be much higher.

G Peculiar importance of consistency

The peculiar importance of consistency in administrative law is limited. Consistency may be important in the context of adjudicating appeals or reviews from licencing authorities. This is for the same reasons as in the competition law context where inconsistency in the application of decision making power can have a compounded effect on those who are shown disfavour by a licencing authority. This would be the case in the issuance of liquor licences by the Alcohol Regulatory and Licencing Authority²³⁵ where one competitor would be severely disadvantaged if it was denied a licence and another nearby competitor was granted one under similar circumstances.

H Dynamism

This criterion also highlights why it is problematic to view public law monolithically. There are various areas of public law that are subject to constant change. This is manifest in administrative decisions regarding copyright, land valuation and planning and environmental tribunal decisions. These factual cases are influenced heavily by changes to the economy, technology and the advances of scientific theory.²³⁶ Other areas of administrative law may be subject to rapid change as a result of constant policy changes. This is likely going to be the case regarding disputes from tribunals such as the Social

²³⁵ The authority in New Zealand that deals with applications or renewals for licences and manager's certificates that are referred to it by district licensing committees. See Ministry of Justice "Courts of New Zealand" <<http://www.justice.govt.nz/tribunals/alcohol-regulatory-and-licensing-authority>> .

²³⁶ Stephen Legomsky, above n 18, at 72.

Security Appeal Authority and the Accident Compensation Appeal Authority. However, there will also be areas of administrative law that are less dynamic.²³⁷

I Case volume/demand

There is an insufficient caseload in administrative law to justify further specialisation. One of the foremost reasons why the Law Commission recommended the abolition of the Administrative Division of the High Court in 1989 was because there were insufficient cases to justify a separate court.²³⁸ In 1989 there were 7 judges appointed to the division²³⁹ and it was estimated that one tenth of the administrative law decisions were decided by non-Divisional judges.²⁴⁰ In 1991, Divisional Judges gave about 30 decisions a year with a low of 16 in 1975 and a high of 47 in 1984.²⁴¹ It was thought that the case load of the Division was so low that it stunted any ability to grow the judge's expertise in administrative law. Justice Holland illustrated this point where he stated "how does one acquire expertise in broadcasting law from two cases?"²⁴²

The question, therefore, is whether the case volume of administrative appeals would have changed sufficiently since 1991. In the 12 months ending 30 June 2014, there were 183 new judicial review cases brought before the High Court, and 97 remaining active as at 30 June 2014.²⁴³ This is in the context of a total number of new cases in the High Court of 7,147.²⁴⁴ Accordingly, administrative law cases comprised 2.6% of the High Court's workload in 2014. It does not appear that the current number of administrative law cases is producing a considerable workload for the High Court to the extent that it would support the establishment of a separate administrative court or a specialist panel within the High Court.

²³⁷ Ibid.

²³⁸ Law Commission *Structure of the Courts* (NZLC R7, 1989) at [470].

²³⁹ Law Commission, above n 238, at [468].

²⁴⁰ Ibid.

²⁴¹ Law Commission, above n 238, at [469].

²⁴² Stephen Legomsky, above n 18, at 76.

²⁴³ High Court National Workload Statistics 2014 sourced from <
<http://www.courtsofnz.govt.nz/from/statistics/annual-statistics/latest-june-2014/high-court/high-court-executive-summary-workload-for-the-12-months-ending-30-june-2014>> .

²⁴⁴ Ibid.

J Special need for prompt resolution

Administrative law is not a field of law that presents a pressing need for the prompt resolution of disputes relative to other fields of law. It could be argued that this particular field of law inherently takes longer to arrive at decision relative to others. This is because, often, if the administrative law appeal is successful, it is referred back to the original decision maker who is required to reconsider the decision based upon the ruling of the appellate court. This longer process does not appear to detriment plaintiffs because tribunal decisions are often of a nature that can be reversed retrospectively if it was found that the tribunal's decision requires reversal.²⁴⁵

K Required special court procedures

There is a case to be made that administrative law necessitates special court procedures. The Public and Administrative Law Reform Committee regarded it implicit in its recommendation for an administrative division of the High Court that the “atmosphere [of the division] should not be more formal than that of... administrative tribunals”²⁴⁶ and that there “should be no bar to the appointment of lay members... to sit with the Court if and when desirable”.²⁴⁷ Once established, the Administrative Division Rules provided for special procedures for appeals to the division.²⁴⁸ The rules were described as “designedly less formal and freer from the technicalities which bedevil ordinary court proceedings”.²⁴⁹ In part this is because of Rule 4, which provides that the rules are to be construed to ensure “the just, speedy and inexpensive determination of any proceeding”.²⁵⁰ In the context of taking evidence, there is wide discretion for the manner it can be done.²⁵¹ It may be taken “orally on oath or affirmation, or by affidavit, declaration or otherwise as the Court thinks fit”.²⁵²

²⁴⁵ N. March Hunnings “Current Legal Developments: Administrative Law” (1970) 19 Int'l & Comp. L.Q. 508 at 510.

²⁴⁶ Public and Administrative Law Reform Committee, above n 200, at [36].

²⁴⁷ Ibid.

²⁴⁸ N. March Hunnings “Current Legal Developments: Administrative Law” (1970) 19 Int'l & Comp. L.Q. 508 at 509.

²⁴⁹ Ibid.

²⁵⁰ Administrative Division of the High Court Rules, r 4

²⁵¹ N. March Hunnings, above n 248, at 509.

²⁵² Administrative Division of the High Court Rules, r 23(1).

Because a large majority of appeals in administrative law involve judicial review, the principle grounds upon which the court will review a decision maker's decision are illegality, irrationality and procedural unfairness.²⁵³ This will often involve an assessment of the considerations to which a decision maker had regard to when arriving at its decision.²⁵⁴ The focus on the considerations to which a decision maker has regard to is viewed as peculiar to administrative law, necessitating a further special court procedure in the rules which provided for the court to direct a decision maker to lodge:²⁵⁵

“a report setting out the considerations to which it had regard to in making the order of decision, including any material indicating the effect that the order or decision might have on the general administration of the enactment under which the order or decision was made, and any other matters relevant to the order or decision or to the general administration of the enactment to which it wishes to draw the attention of the court.”

It is therefore apparent that administrative law is a field of law that can be adjudicated more effectively if there are special court procedures.

VI Administrative law conclusion

An overwhelming majority of the criteria support further specialisation in administrative law at the appellate court level, however, the lack of case volume has the effect of overriding all of the supportive criteria and undermining the case for further specialisation. Support is gleaned from the prevalence of discretionary and factual decisions, the complexity of the subject matter, the ease at which the jurisdiction can be isolated, the repetition of legal and factual questions, its dynamism and the requirement for special court procedures. These were all supporting factors that the PALRC originally highlighted either explicitly or implicitly when recommending the establishment of an administrative division in 1968.²⁵⁶ They are just as prevalent (if not more prevalent as discussed above) today as they were in 1968.

²⁵³ Philip A Joseph, above n 246, at 854.

²⁵⁴ Philip A Joseph, above n 246, at 861.

²⁵⁵ Administrative Division of the High Court Rules, r 37.

²⁵⁶ Public and Administrative Law Reform Committee, above n 200.

Nevertheless, the presence of those factors alone was not enough to support the maintenance of the administrative division which was abolished in 1991.²⁵⁷ The primary reason was insufficient case load/demand. This is an interesting observation because nearly all of Legomsky's other criteria supported the maintenance of an administrative division in the High Court but they were all overridden by the lack of workload for the division. Upon analysis of the present statistics involving case workload of the High Court there is still insufficient workload in administrative law to justify further specialisation at the appellate level. Therefore, in the current New Zealand environment, there is not sufficient support for further specialisation in administrative law at the appellate court level.

VII Summary of application of criteria to commercial law and administrative law

The application of the criteria can broadly be summarised in the table set out below. Each criterion is ranked on the degree of presence it manifests within that particular field of law based on the analysis above.

Criterion		Support/oppose specialisation	Commercial Law	Administrative Law
<i>Criterion 1 -</i>	Discretionary decision-making	Support	High presence	High presence
	Legal decision-making	Oppose	High presence	Medium presence
	Factual decision-making	Support	Medium presence	Medium presence
<i>Criterion 2 - Complexity</i>		Support	High presence	High presence
<i>Criterion 3 – Isolation</i>		Support	Low presence	High presence
<i>Criterion 4 – Repetition</i>		Support	Low presence	Medium presence
<i>Criterion 5 – Controversy</i>		Oppose	Medium presence	High presence
<i>Criterion 6 - Clannishness</i>		Oppose	Low presence	Low presence
<i>Criterion 7 – Peculiar importance of consistency</i>		Support	Medium presence	Low presence
<i>Criterion 8 – Dynamism</i>		Support	High presence	Medium presence
<i>Criterion 9 – Case workload</i>		Support	Inconclusive	Low presence

²⁵⁷ Judicature Amendment Act 1991 (No 60), s 3.

<i>Criterion 10</i> – Special need for a prompt resolution	Support	Medium presence	Low presence
<i>Criterion 11</i> – Required special court procedures	Support	High presence	High presence

It is immediately apparent most criteria that are supportive of specialisation manifest themselves in some way in both commercial and administrative law. Both areas have a high degree of complexity, which, as mentioned above, is often cited as a significant factor that favours specialisation. It is also interesting that both fields of law have a high / medium presence of legal decision making and controversy, which oppose specialisation. Each area of law seems to differ significantly on the application of criterion 3, which assess the ability of the specialist court to isolate the jurisdiction. The primary reason for this seems to how wide the Law Commission proposed the jurisdiction of the Commercial List to be. This had the effect of making it near impossible to isolate the court's jurisdiction as opposed to the ease at which you can isolate the jurisdiction of an administrative court.

Importantly, case workload had a low presence in administrative law and was inconclusive in commercial law. If it was concluded that case workload was equally low in commercial law then it would be likely that this would undermine any support for further specialisation. Therefore, it is imperative that more statistical work needs to be undertaken on the caseload of the High Court before an informed decision can be made on further specialisation in commercial law.

VIII Interaction of Legomsky's criteria

Having applied the criteria to commercial law and administrative law, two observations can be made about the interaction of the criteria as a whole. The first observation identifies the problem of viewing the particular area of law monolithically, which the application of the criteria demands. The second observation suggests that the criteria should be weighted so as to recognise that each criterion carries a different level of influence.

The first observation that is apparent in applying the criteria as a whole to commercial law and administrative law is that they require the areas of law to be viewed monolithically and indivisible. Each criterion is aimed at assessing whether the specific area "as a whole"

manifests the certain attributes of that specific criterion. This has proved problematic in the case of both commercial law and administrative law because they are not monolithic subject areas. Commercial law is comprised of a plethora of sub-areas of law including taxation, intellectual property, insolvency, bankruptcy, contract and resource management. Similarly administrative law is comprised of assessing the exercise of executive power in respect of many different tribunals and executive decision makers. The various tribunals include the Copyright Tribunal, Taxation Review Authority, Tenancy Tribunal, Legal Aid Tribunal, Waitangi Tribunal and the Accident Compensation Appeal Authority to name a few.

Consequentially, in applying each criterion, there are examples that support specialisation and equally examples that oppose specialisation. For example, in the context of applying the criterion of consistency to commercial law and administrative law there were discrete cases within the fields of law that required a special need for consistency such as competition law adjudication, and licencing decisions. However, viewed as a whole it is hard to say that commercial law or administrative law requires a special need for consistency. Dynamism in the context of commercial law is present for adjudication regarding resource management, taxation and intellectual property but not for other areas such as insolvency. Similarly, when applying repetition to administrative law, there is repetition of facts and legal issues in appeals from discrete tribunals but administrative law is not particularly repetitious as a whole.

One of the reasons why the application of the criteria produces problems when viewing commercial law and administrative law monolithically could be because the criteria were designed by an academic from the United States of America. The United States is a legal system that has effected judicial specialisation in the sub areas of both commercial law and administrative law. In commercial law there is a United States Tax Court, Patent Trial and Appeal Board, International Trade Commission, United States Court of International Trade and United States Bankruptcy Court.²⁵⁸ Administrative law courts include the Court of Federal Claims, Court of Appeals for Federal Claims and Foreign Intelligence Surveillance Court of Review.²⁵⁹ Legomsky may have been influenced by such a high degree of specialisation in the United States where the criteria could be applied much more easily due to the discreteness of subject matter that the criteria would be applied to. However, in

²⁵⁸ "United States Courts" (2014) < <http://www.uscourts.gov/Home.aspx> > .

²⁵⁹ "United States Courts" (2014) < <http://www.uscourts.gov/Home.aspx> > .

New Zealand this degree of specialisation would not be practicable. New Zealand is under much greater resource constraints and does not have the case volume of the United States.

The second observation is that the criteria cannot carry equal weight. There are some criteria that are significantly more influential than others. This is clearly illustrated by the influence that a low case volume has had on the question of whether New Zealand should have further specialisation in administrative law. In the context of commercial specialisation, case volume was a significant factor assessed by the Law Commission when making its recommendation for a Commercial List, whereas, the question of repetition was not mentioned once.²⁶⁰ Accordingly, it would be helpful to identify the criteria that carry significant weight and the criteria that are less influential in deciding whether further specialisation is necessary.

Based on the application of Legomsky's criteria to commercial law and administrative law, it appears that in the New Zealand context case volume/demand is the most important criterion. If there is insufficient case volume to justify specialisation then it is highly unlikely that specialisation will occur. Technical complexity and dynamism both seem to be factors that also carry a high degree of influence when considering specialisation. Every submission received to the recent Law Commission Issues Paper on commercial specialisation, which supported specialisation, cited complexity and dynamism as reasons why further specialisation should be effected.²⁶¹ The requirement for special court procedures in some circumstances will carry significant weight. In the context of establishing the Family Court in New Zealand, the Royal Commission on Courts placed heavy emphasis on the need to maintain special Family Court procedures in order to provide a "conciliation service".²⁶²

On the other hand, the degree of controversy and clannishness seem less important considerations. Perhaps this is another reflection of a difference between New Zealand and the United States. The disadvantages of specialisation that inform these two criteria are primarily the risk of bias and apparent bias within the judiciary. It could be argued that the risk of bias in the United States is much greater due to the political role that judges play and the proliferation of lobbying in order to obtain political favour. These risks are less

²⁶⁰ Law Commission, above n 8, at 10.41.

²⁶¹ Buddle Findlay, New Zealand Bar Association, New Zealand Law Society and Bell Gully.

²⁶² Royal Commission on Courts *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978) at 88.

present in the New Zealand judicial system. This could justify attaching less weight to these two criteria. Additionally the criterion in assessing whether the area of law has a special need for a prompt resolution is less influential. This is because in most cases parties will have legal mechanisms available to them that transcend specialist jurisdictions, which are designed to speed up hearings or provide relief when legal proceedings are time sensitive. These procedures include injunctions, ex parte hearings and freezing orders.

IX Conclusion

This paper has been a *contribution* to the debate on judicial specialisation. It is important that this debate is given careful consideration because it is a question that will increasingly face decision-makers in the future. The paper has contributed to the debate by offering a decision-maker a set of 11 criteria to apply when facing the question of whether to effect further judicial specialisation in any given area of law. These criteria can help form a template that, upon application, will draw out the issues with specialisation inherent in that given field of law. Taking a principled approach to the question of further specialisation has not been the practice of decision-makers to date.

Perhaps, just as important as recognising what this paper *has* done, is the recognition of what this paper *has not* done. This paper has not provided a “magic formula” to a decision-maker which can be applied in such a way so as to provide a definitive answer on specialisation. This is not possible because it requires an assessment of degrees and weightings, which can only be achieved making value judgements as to how the criteria interact. This paper has also *not* assessed how the criteria might apply to further specialisation at the lower court level. As mentioned earlier, specialisation can be most beneficial at the initial trial level. Therefore, it would be highly beneficial for more research to be undertaken adapting the criteria to apply to lower courts and tribunals.

I Bibliography

A Legislation

1 New Zealand

Accident Compensation Act 2001.

Administrative Division of the High Court Rules.

Copyright Act 1994.

Employment Relations Act 2000.

Evidence Act 2006.

Immigration Act 2009.

Insolvency (Cross-border) Act 2006.

Judicature Act 1908.

Judicature Amendment Act 1991 (No 60).

Judicature Modernisation Bill 2013.

Personal Property Securities Act 1999.

Real Estate Agents Act 2008.

Sale and Supply of Alcohol Act 2012.

Tax Administration Act 1994.

B Case law

Attorney-General v Ahmed Zaoui 2 NZLR 181.

Cellier Le Brun Ltd v Le Brun [2002] 16 PRNZ 376.

Cromwell Corp Ltd v Sofrana Immobilier (NZ) Ltd (1988) 1 PRNZ 352 (HC).

Elmiger v Commissioner of Inland Revenue [1967] NZLR 161 (CA).

Finnigan v New Zealand Rugby Football Union (No 2) 2 NZLR 181.

Fitzgerald v Muldoon and Others [1976] 2 NZLR 615.

IRC v British Salmson Aero Engineers Limited [1938] 2 KB 482.

R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 (HL).

Safe Water Alternative New Zealand Inc v Hamilton City Council [2014] NZHC 1463.

Tiroa E & Te Hape B Trusts v Chief Executive of Land Information [2012] NZHC 147.

Tucker v Granada Motorway Services Ltd [1977] 3 All ER 865.

B Submissions to legislation

Howard T. Markey, Chief Judge, Court of Customs and Patent Appeals Hearings before Subcommittee on Courts (1981) 97th Congress 42-43.

New Zealand Bar Association “Review of the Judicature Act 1908 – Towards a Consolidated Courts Act” (February 2012).

Jack Hodder QC “The Judicature Modernisation Bill – (Personal) Submission on Three Points” (20 February 2014).

C Official commission publications

Australian Law Reform Commission *Managing justice: a review of the federal justice system* (report 89, 1999).

Bell Gully “Bell Gully submission to the Justice and Electoral Committee – Judicature Modernisation Bill” (2014).

G.S. Orr “Report on Administrative Justice in New Zealand” (1964).

International Bar Association Intellectual property and Entertainment Law Committee “International Survey of Specialised Intellectual Property Courts and Tribunals” (London, September 2007).

Jack Hodder QC “The Judicature Modernisation Bill – (Personal) Submission on Three Points” (20 February 2014).

Joint project between the International Intellectual Property Institute and the United States Patent Trademark Office “Study on Specialised Intellectual Property Courts” (25 January 2012).

Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R 85, 2004).

Law Commission *Evidence: reform of the law* (1999, LCR 55, Wellington).

Law Commission *Insolvency Law Reform: Promoting Trust and Confidence* (2001, SP11, Wellington).

Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012).

Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012).

Law Commission *Structure of the Courts* (NZLC R7, 1989).

Law Commission *Tribunal Reform* (NZLC SP20, 2008).

Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008).

Letter to the President of the Law Commission from the Chief Justice, Federal Court of Australia, August 2003.

New Zealand Bar Association “Review of the Judicature Act 1908 – Towards a Consolidated Courts Act” (February 2012) Submission to the Law Commission.

New Zealand Law Society “Review of the Judicature Act 1908 – Towards a consolidated Courts Act” (4 May 2012) submission to the New Zealand Law Commission.

OECD “White Paper on Corporate Governance in Asia” (10 June 2003).

Public and Administrative Law Reform Committee “Appeals from administrative tribunals” (1968).

Royal Commission on Courts *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978).

Senior Courts “Submission of the Supreme Court, Court of Appeal and High Court on the Judicature Modernisation Bill” (12 March 2014).

D Texts

Adam Smith “An Inquiry into the Nature and Causes of the Wealth of Nations” (1776).

Cane, P “Administrative Tribunals and Adjudication” (Oxford, United Kingdom, 2009).

Finch, I “James & Wells Intellectual Property Law in New Zealand” (2007, Brookers, Wellington) at 2.4.8-2.4.16.

Michael Taggart “Judicial Review of Administrative Action in the 1980s: Problems and prospects” (Oxford University Press, Auckland, 2002).

Philip A Joseph “Constitutional and Administrative Law in New Zealand (4th ed, Thompson Reuters, 2014).

Sir Robin Cooke “The Struggle for Simplicity in Administrative Law” (seminar presented 20 February 1986 at Victoria University of Wellington) as published in Michael Taggart “Judicial Review of Administrative Action in the 1980s: Problems and prospects” (2002, Oxford University Press, Auckland).

Spiller, P “The Disputes Tribunals of New Zealand” (2nd ed, Brookers, 2003).

Stephen Legomsky “Specialized Justice : Courts, Administrative Tribunals, and Cross-National Theory of Specialization” (1990, Clarendon Press, Oxford).

E Journal articles

Andrew Maples “Tax Complexity and the Capital-Revenue Distinction: Lessons to be Learnt from Two Recent New Zealand Cases” (University of Christchurch, submission for the LLM).

Annette Marfording “Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany” (2010) (University of New South Wales research paper, July 15).

Anthony Downs “Inside Bureaucracy” (Chicago, Real Estate Research Corporation, 1964).

Craig Elliffe and Jess Cameron “The Test for Tax Avoidance in New Zealand: A Judicial Sea Change” (2010) 16 NZBLQ 440.

Christopher Enright “Federal Administrative Law” (2004, The Federation Press).

David Friedman “The Regulator in Robes: Examining the SEC and Delaware’s Court of Chancery Parallel Disclosure Regimes” (2014) 113 Columbia Law Review 1543.

Diane P. Wood “Generalist Judges in a Specialized World” (1997) 50 SMU Law Review 1755.

Dr. W. John Hopkins “Order from Chaos? Tribunal Reform in New Zealand” (2007, Paper, University of Canterbury).

Dreyfuss, Zimmerman and First “Expanding the boundaries of intellectual property” (Oxford University Press, 2001).

Ellen R. Jordan “Specialized Courts: A Choice?” (1981) 76 Nw. U.L. Rev. 745.

Jeffrey W. Stempel “Two cheers for specialization” [1995] 68 Brooklyn Law Review 67.

John Prebble “Tax Avoidance, International Tax Arbitrage, and New Zealand as a Haven for Foreign Capital and Income” (2010) 16 Revue Juridique Polynésienne 169.

Jordan ER “Specialist Courts: A Choice?” (1981) Northwestern University Law Review 748.

Laurence Baum “Judicial Specialization and the Adjudication of Immigration Cases” (2010) 59 DLJ 8.

Lawrence Baum “Probing the effects of judicial specialisation” (2009) 58 DLJ 1673.

Laing, Righarts and Henaghan *A Preliminary Study on Civil Case Progression Times in New Zealand* (University of Otago Issues Centre, 15 April 2011).

Lewis S. Black, Jnr “Why Corporations Choose Delaware” (2007) Delaware Department of State Division of Corporations.

Matthew Grooves “Modern Administrative Law in Australia: Concepts and Context” (2014, Cambridge University Press, Australia).

Markus B. Zimmer “Overview of Specialist Courts” (2009) 10 IJFCA 1.

N. March Hunnings “Current Legal Developments: Administrative Law” (1970) 19 Int’l & Comp. L.Q. 508.

Petra Butler “The Assignment of Cases to Judges” (2003) 1 NZJPIL 83.

Richard Posner “Will the Federal Courts of Appeals survive until 1984? An essay on delegation and specialisation of the judicial function” (1983) 56 Cal. L. Rev. 761.

Rifkind S, “A special court for Patent Litigation? The danger of a specialized judiciary”, (1951) American Bar Association Journal.

Rochelle C.Dreyfuss “Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes” [1995] 61 Brooklyn Law Review 1.

Roger P.Alford “The Proliferation of International Courts and Tribunals: International Adjudication in Ascendancy” (2000, Scholarly Works, Notre Dame Law School).

Royal Commission on Courts *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978).

Sarah Miles “The price we pay for specialised society: do tax disputes require greater judicial specialisation in New Zealand?” (Masters dissertation, Victoria University of Wellington Faculty of Law, 2014).

Shinohara “Outline of the Intellectual Property High Court of Japan” (2005) AIPPI 30(3) 131.

Sir Ian Barker QC, “Is Australia and New Zealand’s IP litigation product internationally competitive?” (1997) NZIPJ 259.

Stephen Legomsky “Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization” (1990, Clarendon Press, Oxford).

Suzan Glazebrook J “A Specialist Patent or Intellectual Property Court for New Zealand?” (2009) 12 Journal of World Intellectual Property 524.

William Steel “Judicial Specialisation in a generalist jurisdiction: Is commercial specialisation within the high court justified?” (2014, dissertation for the LLB (hons) degree, Victoria University of Wellington).

F Speeches

R McClelland, Attorney General “Address to the Law Council of Australia” 36th Australian Legal Convention 18 September 2012.

Sir Rabinder Singh “The Unity of Law – Or the Dangers of Over-Specialisation (2013, Society of Legal Scholars Centenary Lecture, University of Birmingham).

G Newspaper Articles

Brendan Manning “Judicial review hearing for Hager” (2014, New Zealand Herald, 18 December).

The Economist “Delaware’s Corporate Courts” (November 23 2013, New York).

Stuff News “Bain seeks judicial review” (2013, 30 January) at <<http://www.stuff.co.nz/national/8242038/Bain-seeks-judicial-review>>.

H Websites

Anthony Grant “Courts – Is the High Court’s Civil Jurisdiction in a “Death Spiral”?” (2014) <www.anthonygrant.com/trusts>.

Courts of England and Wales “Administrative Court” at <<http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court>> .

Courts of New Zealand “Commercial List” <www.courtsofnz.govt.nz>.

Gill Nieuwland “Gill Nieuwland’s guide to property tribunal survival” (1 January 2014) <<http://www.leaseholdknowledge.com/an-lvt-survival-guide-for-lay-applicants>>.

High Court National Workload Statistics 2014 sourced from <<http://www.courtsofnz.govt.nz/from/statistics/annual-statistics/latest-june-2014/high-court/high-court-executive-summary-workload-for-the-12-months-ending-30-june-2014>> .

Inland Revenue Department “About Us” <<http://taxpolicy.ird.govt.nz/about-us>>.

Ministry of Justice Judicial Specialisation in the High Court (Regulatory Impact Analysis, August 2014) at <www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement>.

Ministry of Justice “Courts of New Zealand”
<<http://www.justice.govt.nz/tribunals/alcohol-regulatory-and-licensing-authority>> .

Ministry of Justice “Tribunals” <<http://www.justice.govt.nz/tribunals>> .

“United States Courts” (2014) <<http://www.uscourts.gov/Home.aspx>> .