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**THE PRICE WE PAY FOR A SPECIALISED SOCIETY:  
DO TAX DISPUTES REQUIRE GREATER JUDICIAL  
SPECIALISATION IN NEW ZEALAND?**

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## *Abstract*

In recent years, a review of the Judicature Act and the introduction of the Judicature Modernisation Bill have enlivened the debate over the structure and character of the New Zealand court system. A key issue that the recent review and reforms have brought to the fore is whether greater judicial specialisation is advantageous at the High Court level. This paper considers whether tax cases, in particular, warrant greater judicial specialisation. The paper draws from experiences of specialised tax adjudication in foreign jurisdictions and evaluates the efficacy of existing specialisation in the New Zealand system, as well as considering whether the nature of tax law lends itself to specialisation. The conclusion is that greater judicial specialisation in respect of tax cases is undesirable. Admittedly, specialisation has been effective in many foreign jurisdictions and many characteristics of tax law favour specialisation. Yet, specialisation would come at a price in terms of the independence of tax judges and the development of idiosyncratic law. Moreover, New Zealand's size would decimate the benefits that it could gain from further specialisation, particularly when the disputes process and the Taxation Review Authority already incorporate an effective level of specialisation to the resolution of tax disputes in New Zealand.

## *Key Words*

Judiciary – Judicial Specialisation

Court – Specialist Court – Specialist Tax Court – Specialist Tax Panel

Tax Disputes – Taxation Review Authority

## Introduction

Modern society is incredibly specialised. This reaches across most professions; doctors may specialise in a microscopic facet of anatomy, engineers and manufacturers may exclusively produce tiny parts of machinery, and lawyers may solely practise in obscure areas of law. Within these professions, the advances and expertise that specialists achieve often means that the benefits of specialisation are axiomatic and undoubted. Yet, since its inception as a generalist bench, the New Zealand judiciary has remained remarkably resistant to this trend towards specialisation. It may be that this signals a failing of the judiciary to adapt to more complex divisions of labour, or perhaps judging simply remains an area in which the price of specialisation is more pronounced. It is often said that “taxes are the price we pay for a civilised society”,<sup>1</sup> but this paper asks: what is the price that we pay for an increasingly *specialised* society, as regards judicial specialisation for New Zealand tax law cases?

Across the New Zealand legal system, dissatisfaction with the ordinary courts has led to an influx in demand for specialist courts and judges. A survey by the New Zealand Bar Association indicated that 84 per cent of members supported judicial specialisation.<sup>2</sup> Prominent members of the legal community have spoken out in favour of judicial specialisation,<sup>3</sup> including Tony Molloy QC,<sup>4</sup> James Farmer QC,<sup>5</sup> and Attorney-General Chris Finlayson.<sup>6</sup> In response to the growing pressure for specialisation, the past few decades have seen an ad-hoc and reactionary proliferation of tribunals and specialised adjudicators,<sup>7</sup> reflecting a perception that decision-making must be increasingly specialised to serve the interests of justice. Nonetheless, judicial specialisation has attracted opposition from a large number of judges,<sup>8</sup> including Chief Justice Sian Elias.<sup>9</sup> The Law Commission’s

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<sup>1</sup> This quote is most often attributed to Justice Oliver Wendell Holmes, Jr. as originating from his dissenting judgment in *Compañia General de Tabacos de Filipinas v. Collector of Internal Revenue* 275 US 87 (1927) at 100.

<sup>2</sup> The New Zealand Bar Association “Submission to the Law Commission on the Review of the Judicature Act 1908” as cited in Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 104.

<sup>3</sup> Phil Taylor “Justice in the Firing Line” *The New Zealand Herald* (online ed, Auckland, 5 May 2012).

<sup>4</sup> Tony Molloy “New Zealand: Cuckoos in the Nest in an Otherwise Promising Trust and Investment Jurisdiction” *Offshore Investment* (New Zealand, November 2009).

<sup>5</sup> James Farmer “The High Court in Review” (8 October 2012) JAMES FARMER Q.C. <[www.jamesfarmerqc.co.nz](http://www.jamesfarmerqc.co.nz)>.

<sup>6</sup> Christopher Finlayson, Attorney-General of New Zealand “Access to Justice, Legal Representation and the Rule of Law” (speech to the Legal Research Foundation, 23 October 2009).

<sup>7</sup> Law Commission *Striking the Balance* (NZLCPP51, 2002) at 78-90; Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) at appendix 1.

<sup>8</sup> Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 103.

<sup>9</sup> Rod Vaughan “Twitchy lawyers put heat under Chief Justice” *The National Business Review* (online ed, New Zealand, 23 August 2012); Cabinet Social Policy Committee Paper

comprehensive review of the Judicature Act 1908<sup>10</sup> and the introduction of the Judicature Modernisation Bill,<sup>11</sup> which implements the Commission's recommendations, have reinvigorated the ongoing debate over judicial specialisation in the High Court.

5 Tax law is frequently singled out as a prime candidate for greater specialisation<sup>12</sup> and judicial tax specialisation has developed in many foreign jurisdictions, raising the question of whether New Zealand ought to follow in this development. New Zealand invests a great deal into the management of its income tax system and the far-reaching effects of taxation affect all  
10 citizens.<sup>13</sup> When tax disputes arise, a functioning system for the adjudication of tax law disputes is essential to the operation of New Zealand's economy.<sup>14</sup> The introduction of specialist judges, courts, or panels stands to have a significant effect on the process and results of the court system. Accordingly, it is necessary to consider the merits of specialisation in a principled manner,  
15 particularly when the benefits of specialisation tend to be more readily apparent than its consequences.

This paper will address whether increased adjudicative tax specialisation is desirable in New Zealand, considering the "price" we pay for judicial specialisation, as well as its benefits. The paper is divided into four  
20 parts. Part I will consider judicial specialisation generally and observe the often-unprincipled trend towards specialisation in New Zealand. Part II will evaluate the level of judicial specialisation in New Zealand in respect of tax law, with particular reference to the position of the Taxation Review Authority, concluding that problems with tax specialisation in New Zealand  
25 are best addressed by reform to existing means of specialisation rather than overlaying additional judicial specialisation. Part III will survey a selection of specialised overseas jurisdictions to gain insights into the realities of judicial specialisation and to establish whether New Zealand should follow the example that they have set. Lastly, Part IV will apply a set of normative  
30 criteria to determine whether the nature of tax law is suitable for greater judicial specialisation.

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'Government response to the Law Commission's report "Review of the Judicature Act 1908: Towards a New Courts Act"' (April 2013) at [16].

<sup>10</sup> Law Commission, above n 8.

<sup>11</sup> Judicature Modernisation Bill 2013.

<sup>12</sup> The Law Commission has recommended the establishment of specialist panels in taxation, intellectual property, competition, and admiralty law: Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 267.

<sup>13</sup> In the 2012-2013 financial year, the Inland Revenue Department collected some \$53.8 billion in tax revenue and had an operating budget of \$684.9 million: *Annual Report 2013* (Inland Revenue, Annual Report B-23, October 2013).

<sup>14</sup> Ivor Richardson "Directions for Tax Administration: Two Recent Reports" (1994) 22 FL Rev 461 at 461.

## *I. Surveying Specialisation in New Zealand*

### *i. A “General” History of Specialisation*

Historically, New Zealand’s court system has been characterised by a preference for generalist judges. More recently, there has been a growing trend towards specialisation, which is particularly evident in the growth of tribunals.

New Zealand established its first court, the Supreme Court, in 1841 as a general court. The New Zealand court system indicated an early inclination towards judicial generalism; the Supreme Court streamlined the common law and equity jurisdictions, simplified the procedural rules of its English model,<sup>15</sup> and specified that its jurisdiction incorporated testamentary, lunacy, vice-admiralty and criminal jurisdiction.<sup>16</sup> These generalist origins are attributable to the small size of the judiciary at the time, which necessitated that the few judges covered a vast range of cases.<sup>17</sup> The introduction of the lower courts in 1841 brought greater speciality to the court system, with courts such as the Court of Requests and the Court of Petty Sessions.<sup>18</sup> In 1858, the first District Courts replaced these two specialised courts,<sup>19</sup> returning to New Zealand’s leaning towards courts of a wide jurisdiction.

The advent of specialist courts happened gradually with the establishment of the predecessors to the modern Maori Land Court and Maori Appellate Court in 1865,<sup>20</sup> the Employment Court in 1894,<sup>21</sup> and the Environment Court in 1953.<sup>22</sup> The scattered introduction of these specialised courts indicates the absence of an underlying rationale or cohesive vision for the New Zealand court system.

In 1968, New Zealand took a considerable leap towards judicial specialisation with the introduction of the Administrative Division of the High Court. The short-lived Division was abolished in 1991, following Law

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<sup>15</sup> Supreme Court Ordinance 1841; see also Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at 110.

<sup>16</sup> Supreme Court Ordinance 1841, Ordinance 1, Session 2; Peter Spiller, Jeremy Finn, and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers Ltd, Wellington, 2001) at 203.

<sup>17</sup> G A Wood “Construction and Reform: The establishment of the New Zealand Supreme Court” (1968) 5 VUWLR 1 at 3.

<sup>18</sup> The Court of Requests dealt with the recovery of small debts and the Court of Petty Sessions allowed justices of the peace to resolve certain criminal law cases: Philip A Joseph and Thomas Joseph. “Judicial system - History of the courts” (3 July 2012 Te Ara - the Encyclopedia of New Zealand) <www.TeAra.govt.nz>.

<sup>19</sup> Peter Spiller, Jeremy Finn, and Richard Boast, above n 16, at 204.

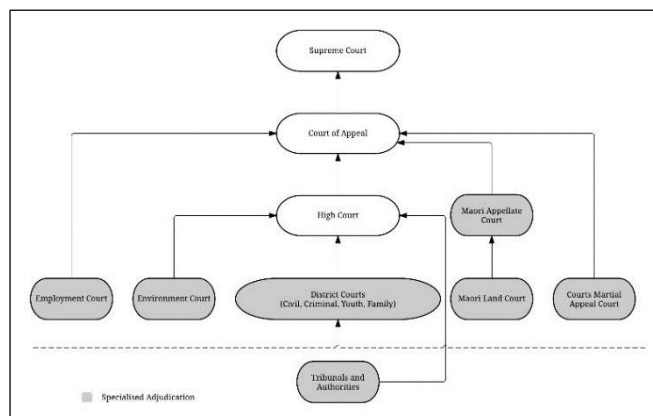
<sup>20</sup> First established in 1865 under Native Lands Act 1865, s 5 as the Native land Court. Now established in the Te Ture Whenua Maori Act 1993 (Maori Land Act 1993), s 6; Te Ture Whenua Maori Act 1993 (Maori Land Act 1993), s 50.

<sup>21</sup> The Court can be traced to the Court of Arbitration established under the Industrial Conciliation and Arbitration Act 1894. It is now under the Employment Relations Act 2000, s187.

<sup>22</sup> The Court first existed as an Appeal Board under the Town and Country Planning Act 1953, then became a Planning Tribunal under the Town and Country Planning Act 1977. The Resource Management Amendment Act 1996, s 6 introduced the modern Environment Court.

Commission recommendations.<sup>23</sup> Amongst the reasons for the division's demise was a caseload that "lacked the critical mass needed for successful specialty"<sup>24</sup> and a growing interest and expertise of High Court judges in public law as it became more common, dissolving the need for specialist judges.

Fig. 1: Specialisation in the New Zealand Court Hierarchy<sup>25</sup>



More recently, there has been a proliferation of tribunals dealing with specialist matters.<sup>26</sup> Once introduced, these tribunals have proved resistant to "overhaul and rationalisation".<sup>27</sup> Despite repeated attempts by the Law Commission to streamline the tribunal system, New Zealand still has well over 100 disparate tribunals.<sup>28</sup> The Commission has remarked that the tribunals "have grown in ad hoc and random fashion. They have been set up to meet specific needs, but not according to any rational pattern".<sup>29</sup>

Specialist courts, too, have developed in an ad hoc manner, and it is not always clear why specialisation was considered necessary for particular areas of law over others.<sup>30</sup> The creators of specialist courts often acted with little forethought as to the courts' operation as part of the general court structure.<sup>31</sup> Instead, the establishment of new specialist courts was motivated by a response to an immediate, pragmatic, and identified need,<sup>32</sup> or by an

<sup>23</sup> Law Commission *The Structure of the Courts* (NZLC R7, 1989).

<sup>24</sup> Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, 2002) at 157.

<sup>25</sup> This diagram is reproduced from: "Diagram of the Courts Structure" Courts of New Zealand <[www.courtsfnz.govt.nz](http://www.courtsfnz.govt.nz)>.

<sup>26</sup> Law Commission *Striking the Balance*, above n 7, at 78-90; Law Commission *Tribunals in New Zealand*, above n 7, at appendix 1; See also W John Hopkins "Order from Chaos? Tribunal Law Reform in New Zealand" (2009) 1 JIA Law TA 47.

<sup>27</sup> Law Commission *Tribunals in New Zealand*, above n 7, at 6.

<sup>28</sup> Trevor Daya-Winterbottom "Specialist Courts and Tribunals" (2004) 12 Waikato L Rev 21 at 22.

<sup>29</sup> Law Commission *Tribunals in New Zealand*, above n 7, at 6.

<sup>30</sup> Law Commission *Striking the Balance*, above n 7, at 50; See also the comments of Roger Kerr, who states that "I believe there are good arguments for abolishing most of them [existing specialist courts]": Roger Kerr "Judging the Judiciary" (paper presented to Wellington District Law Society Conference, Ruapehu, June 1998) at 8.

<sup>31</sup> The same cannot be said for the introduction of the Administrative Division, which followed the "PALRC Report": *Appeals from Administrative Tribunals* (Public and Administrative Law Reform Committee of New Zealand, First Report, 1968).

<sup>32</sup> Daya-Winterbottom, above n 28, at 24.



attempt to privilege a particular area or influence the decisions within that area. For instance, the Native Land Court was introduced to expeditiously further the native land policies of the time. The Act's preamble asserted that the Court's purpose of achieving the policy of converting title, without  
5 consideration of the principles behind specialisation or its consequences on the wider court system.<sup>33</sup> Similarly, the first Arbitration Court (now the Employment Court) was established by William Reeves, who described the Industrial Conciliation and Arbitration Act as his "pet measure".<sup>34</sup> Reeves was a socialist and sought to have disputes settled outside of the general legal  
10 system that were connected to what he described as "the natural warfare between classes".<sup>35</sup> The Employment Court's history again seems to be borne out of a specific desire to introduce a specialisation, without regard for the implications on the cohesion of the court system. Baum observes that:<sup>36</sup>

15 Most often, proposals for specialized courts have been adopted because advocates and decision makers sought to shape the substance of judicial policy... The perceived virtues of specialization as such have played only a limited part in the adoption of particular proposals.

Robertson agrees, concluding:<sup>37</sup>

20 Specialist Courts are created when some interest group does not believe that equal application of the laws by judges applying the traditional canons of statutory interpretation and the traditional values of the common law will result in decisions that favour its own ideology and interests.

25 Going forward, proposals for judicial specialisation must be carefully considered to prevent deference to interest groups with an interest in influencing judicial policies and decisions, which has plagued the history of specialist courts in New Zealand.

## *ii. Means of Specialisation*

30 Specialisation may be internal, through the creation of divisions within the general court system, such as for the Youth Court and the Family Court, or it may be external, such as for the creation of the separate Environment Court.<sup>38</sup> This distinction is not always conclusive as to the degree of judicial separation of the particular court; Environment Court judges are also District Court judges even though the court is separate, whereas Employment Court and

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<sup>33</sup> The Native Lands Act 1865, preamble.

<sup>34</sup> Keith Sinclair *William Pember Reeves: New Zealand Fabian* (Clarendon Press, 1965) at 151.

<sup>35</sup> Keith Sinclair "William Pember Reeves" in *Dictionary of New Zealand Biography: Volume Two, 1870-1900* (Bridget Williams Books: Department of Internal Affairs, Wellington, 1993) at 413.

<sup>36</sup> Lawrence Baum *Specializing the Courts* (University of Chicago Press, Chicago, 2011) at 214.

<sup>37</sup> Bernard Robertson "The Status and Jurisdiction of the New Zealand Employment Court" (paper presented to the New Zealand Business Roundtable, Wellington, August 1996).

<sup>38</sup> Susan Glazebrook "A Specialist Patent or Intellectual Property Court for New Zealand?" (2009) 12 JWIP 524 at 525.

Maori Land Court judges sit separately.<sup>39</sup> Panel systems and specialist lists may also act as an inroad to the judiciary's general nature. For instance, the commercial list in the High Court adds a greater degree of specialisation.<sup>40</sup> Different means of specialisation strike a different balance between generalisation and specialisation.

Specialisation can take place at any level of the judicial system. It is most likely to have the greatest impact at the High Court level,<sup>41</sup> leaving appellate judges to benefit from the expertise of the judge who first pieced together the facts of the case in the lower court, when this expertise is often touted as the primary justification for specialisation.

This paper will consider two main methods of specialisation; a tax court or a tax panel. A specialist tax court would sit at High Court level and have exclusive jurisdiction to hear tax cases. A panel would be composed of a list of High Court judges who have particular tax expertise. Tax cases would be allocated to judges on the panel and panel judges would continue to hear other High Court cases.

## *II. Judicial Specialisation in Respect of Tax Law*

### *i. What is Tax Law?*

It is necessary to demarcate what tax law is before considering whether it demands greater judicial specialisation because an inability to define a discrete area of law can stand as an initial obstacle to specialisation. For instance, Frankel has questioned whether commercial specialisation is appropriate, noting the overlap where "commercial law may involve contractual matters of either a generalist or a specialist nature (such as construction contracts), insolvency matters, tax issues, property matters, intellectual property matters...".<sup>42</sup> Tax law is less burdened by this problem than many other legal disciplines.<sup>43</sup> Tax cases are easily identified through the presence of the Commissioner of Inland Revenue Department (IRD) as a party. Tax cases typically deal with assessments of tax decisions or determinations of the Commissioner that are authorised by the various Income Taxation Acts. The simple identification of tax law means that it is

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<sup>39</sup> Law Commission, above n 12, at 16.

<sup>40</sup> The Commercial list was established in 1987. The list provides a pre-trial procedure for certain commercial cases, but returns cases to the High Court to be allocated to any High Court judge. Although the list was initially successful, nowadays only a small fraction of commercial cases is commenced by the commercial list: See generally Law Commission, above n 12, at 267-269.

<sup>41</sup> See S H Legomsky *Specialized Justice - Courts, Administrative Tribunals and a Cross-National Theory of Specialization* (Oxford University Press, Oxford, 1990) at 9.

<sup>42</sup> Susy Frankel "Facilitating and Regulating Commerce: Commentary on the Conference Session 'Regulating and Facilitating Commerce'" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 391 at 394.

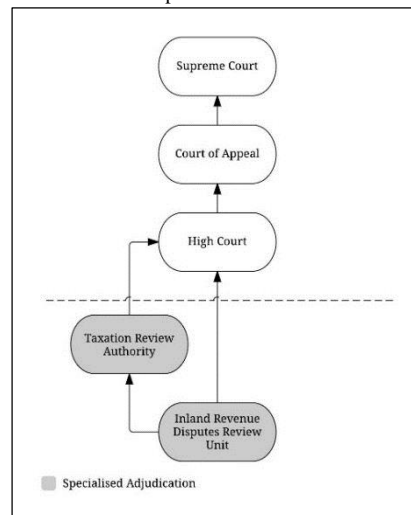
<sup>43</sup> But see the discussion of the "Degree of Isolation" of tax law in part IV.

less likely to be affected by jurisdictional conflicts, which can introduce second order litigation over which court ought to hear a particular case.

ii. *Current New Zealand Tax Judicial Specialisation*

Presently, there is no formal mechanism that provides for tax disputes to be dealt with by specialist judges in the general New Zealand court hierarchy. However, the disputes process and the Taxation Review Authority (TRA) give tax cases exposure to specialist practitioners and judges. An analysis of these forums reveals that the New Zealand tax system already incorporates a significant degree of specialisation in the valuable early stages of a tax dispute. While the process has some shortcomings, reforms to elements of the existing process are more likely to be effective than superimposing an extra layer of specialisation to the court system.

Fig. 1: New Zealand Tax Disputes Structure



iii. *Taxation Review Authority*

a. *Overview of the TRA*

Taxation was possibly the first area of British law to develop a recognisable tribunal, with the establishment of a board of three commissioners under the 1799 Income Tax Act.<sup>44</sup> New Zealand followed this model, establishing a Board of Review in 1891,<sup>45</sup> although New Zealand has adopted several different adjudicative bodies for tax disputes since then.<sup>46</sup> The TRA provides an important initial opportunity for prospective litigants to have their cases heard by a specialist judge. Following the disputes process, litigants may file proceedings with the Authority. The Taxation Review Authorities Act 1994 provides for the establishment of 1 or more Taxation Review Authorities.<sup>47</sup> Technically, the Authority need not be a judge. Section 5(3) provides that an

<sup>44</sup> The Duties upon Income Act 1799. See also Law Commission *Tribunals in New Zealand*, above n 7, at 13.

<sup>45</sup> Land and Income Assessment Act 1891, s 20.

<sup>46</sup> See generally, Law Commission *Tribunals in New Zealand*, above n 7, at 16.

<sup>47</sup> Taxation Review Authorities Act 1994, s 5.

experienced lawyer of not less than seven years' practice may also act as the Authority. In practice, this has not occurred. Since 2012, a single District Court Judge has acted as the Authority, Judge AA Sinclair.<sup>48</sup>

5 The Governor-General appoints judges to the Authority on the  
recommendation of the Minister of Justice.<sup>49</sup> The tenure of an appointment is  
for a term not exceeding seven years.<sup>50</sup> Authorities may be reappointed,  
which has occurred frequently, with Judge Barber serving for some 31 years  
in 1981-2012.<sup>51</sup> The TRA's appointment process is different to the usual  
10 appointment of judges in New Zealand,<sup>52</sup> whereby the Governor-General  
appoints judges on the Attorney-General's advice.<sup>53</sup> The divergence in  
appointment practice is troubling, because the ministerial involvement  
introduces a political dimension to judicial appointments. In view of the  
Government's substantial interest in the funding it receives from taxation, it  
seems inappropriate to give the Minister power over the appointment of a  
15 specialist Authority. The Law Commission has recommended the  
introduction of consistent appointment guidelines for tribunals, but suggested  
that the Minister of Justice, as a supposedly "disinterested party", be  
responsible for tribunal appointments.<sup>54</sup> The government did not implement  
the recommendation, but a 2014 cabinet paper proposes that the Ministry of  
20 Justice publish the tribunal appointment and reappointment process where it  
is common across tribunals.<sup>55</sup> This proposal may boost the transparency of  
TRA appointments.

The limited tenure of a judge is another inroad into judicial  
independence and gives a member of the executive the power to appoint new  
25 judges after an arbitrary period if the Authority reaches decisions that conflict  
with governmental interests. Although the need for judicial independence is  
intensified in respect of tax law, granting lifetime tenure to Authorities is not  
without problems too. If a single judge was granted lifetime tenure and  
developed a track record favouring the Commissioner, many taxpayers would  
30 be left without recourse. The Courts and Tribunals Enhancements cabinet  
paper proposes to amend the appointment term of an Authority to a term not

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<sup>48</sup> "Appointment of a Taxation Review Authority" (7 June 2012) 66 *New Zealand Gazette* 1820 at 1820.

<sup>49</sup> Taxation Review Authorities Act 1994, s 5(4).

<sup>50</sup> Taxation Review Authorities Act 1994, s 6(1). The Governor-General has the power to suspend or remove an Authority for engaging in an outside occupation, being unable to perform the functions of the office, becoming bankrupt, neglecting their duty, or for misconduct; Taxation Review Authorities Act 1994, s 6(3).

<sup>51</sup> See Appendix 2 for a table of previous Authorities.

<sup>52</sup> However, this position is not unique for a tribunal such as the Taxation Review Authority. Unlike the courts, many tribunals have different advising ministers.

<sup>53</sup> See generally Phillip A. Joseph "Appointment, Discipline and Removal of Judges in New Zealand" in H. P. Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011).

<sup>54</sup> Law Commission *Tribunal Reform* (NZLC SP20, 2008) at 13.

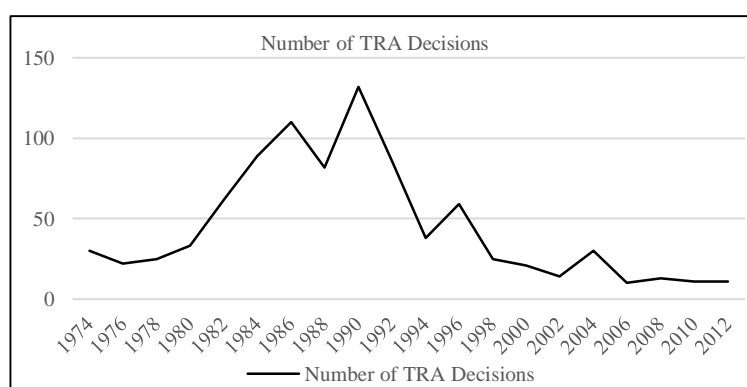
<sup>55</sup> See Cabinet Social Policy Committee Paper "Courts and Tribunals Enhancements" (24 June 2014) at 5-6.

exceeding five years.<sup>56</sup> Apart from Judge Sinclair’s five-year appointment in 2012, a seven-year term has been standard for Authorities. This reduction may jeopardise the TRA’s independence, which is particularly crucial in light of the relationship between the state and the taxpayer, or it may prevent long-term appropriation and wrecked credibility of the Authority.

The Authority is technically an administrative tribunal, but in practice, it acts like any court of first instance. Indeed, some foreign commentators have classified the Authority as a specialist tax court.<sup>57</sup> Under s 138P(1) of the Tax Administration Act 1994, the Authority is empowered to review assessments, including the power to confirm, cancel or vary an assessment, or to reduce the amount of an assessment. Taxpayers can generally file proceedings with the TRA or the High Court<sup>58</sup> and there are powers to have the case transferred from the TRA to the High Court.<sup>59</sup> Litigants usually have appeal rights to the High Court if the amount of tax involved exceeds \$2000 or the net loss exceeds \$4000.<sup>60</sup> Appeal may be granted to the Court of Appeal in some circumstances.<sup>61</sup> A specialist tax court at High Court level would remove any potential strategic advantage that taxpayers have in choosing between the TRA and the High Court, which presents an initial argument for specialisation.<sup>62</sup>

#### b. Declining Cases: A Failure of Judicial Specialisation?

Fig. 2: Number of TRA Decisions by Year<sup>63</sup>



<sup>56</sup> Cabinet Social Policy Committee Paper, above n 55, at 5.

<sup>57</sup> Suzette Chapple “Income Tax Dispute Resolution: Can We Learn From Other Jurisdictions” (1999) 2(5) JAT 312 at 322. President North described the former Board of Review as a “judicial body” in *Reckitt & Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 at 1037. The Court of Appeal held that the Authority was a “court of inferior jurisdiction” for the purposes of s 67 of the Judicature Act in *Jacobs v Commissioner of Inland Revenue* [2012] NZCA 30.

<sup>58</sup> Carin Holmes and Kevin Holmes “Judicial System of New Zealand: Legal Remedies in the New Zealand Tax System” (2010) 16 Asia-Pacific Tax Bulletin 63 at 65.

<sup>59</sup> Tax Administration Act 1994, s 138N.

<sup>60</sup> Taxation Review Authorities Act 1994, s 26.

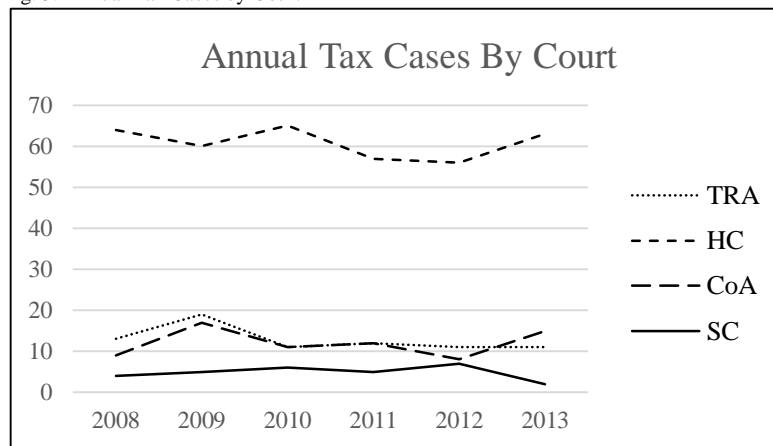
<sup>61</sup> Taxation Review Authorities Act 1994, ss 24 (4), 26, 28.

<sup>62</sup> The Treasury identified this “tactical opportunity for taxpayers” as an issue in its discussion of a specialist tax court but did not find it persuasive: *Tax Review 2001* (Treasury, Issues Paper, 2001) at 24.

<sup>63</sup> The number of tax cases is no longer collected by the Inland Revenue Department. These statistics are based on the number of cases reported in the New Zealand Tax Cases (NZTC). For a full table of the figures, see appendix 1.

The Authority has experienced a great decline in cases. A joint submission of the Law Society and the National Tax Committee of the New Zealand Institute of Chartered Accountants compares the 64 cases taken to the Authority in 1996 to the 13 cases that it had dwindled to in 2006.<sup>64</sup> A single judge, for whom the Authority's cases only take up approximately a quarter of her time, now deals with the work performed by four judges for whom Authority work occupied 80 per cent of their time in 1996.<sup>65</sup> The small claims jurisdiction of the Authority was removed in 2011,<sup>66</sup> after having been used less than 10 times since it was introduced.<sup>67</sup> A decrease in sitting days also lends some empirical support to the deteriorating role of the Authority.<sup>68</sup> As figure 3 demonstrates, the High Court still deals with the bulk of tax cases. The falling-off in cases to the Authority risks weakening the benefits of specialisation; without a steady stream of cases for judges to build expertise, the benefits of specialisation may wane. More critically, it may be that this decline signals a taxpayer preference to have cases heard before generalist judges.

Fig. 3: Annual Tax Cases by Court<sup>69</sup>



<sup>64</sup> The New Zealand Law Society and the New Zealand Institute of Chartered Accountants “Joint Submission to the Finance and Expenditure Committee on the Taxation (Tax Administration and Remedial Matters) Bill” at 7-10 as cited in Andrew Maples “Resolving Small Tax Disputes in New Zealand – Is There A Better Way?” (2011) 6(1) JIA Law TA 96 at 98.

<sup>65</sup> However, Judge Barber notes there were really only two active Taxation Review Judges, even when more district court judges held warrants for the Authority. Judge Barber commented that tax cases took up around 80 per cent of his time in 1988, with the other 20 per cent dedicated to other criminal and civil court work: Ann Riley and others “International Conference Courts with Income Tax Jurisdiction: Conference Transcript” (1988) 8 Va Tax Rev 443 at 445.

<sup>66</sup> The small claims jurisdiction was removed by the Tax Administration and Remedial Matters Act 2011.

<sup>67</sup> *New Zealand Master Tax Guide* (2013 edition, CCH New Zealand Limited, New Zealand, 2013) at 209.

<sup>68</sup> However, the small period for which sitting days were published and the significant effect that a handful of complex cases can have in skewing this data means that its usefulness is reduced: See appendix 3.

<sup>69</sup> The Inland Revenue Department no longer collects the number of tax cases. These statistics are based on the number of Authority decisions reported in the New Zealand Tax Cases (NZTC), and High Court cases on the Ministry of Justice’s searchable database of Judicial

However, it is not entirely fair to evaluate the TRA's effectiveness through a case volume comparison with the High Court. The High Court holds powers that the Authority does not, such being vested with the sole power to hear  
5 judicial reviews and more extensive powers to award costs to the successful party (although this may be advantageous to some litigants).<sup>70</sup> Another key difference is that TRA hearings are conducted privately and published anonymously.<sup>71</sup> The High Court may also be the sensible route for taxpayers who expect to appeal their case further. The Treasury's 2001 Tax Review  
10 was reluctant to force commencement at the Authority because it would increase legal costs and lengthen queues, when "many cases currently being initiated at the High Court are likely to be appealed from the Authority if initiated there".<sup>72</sup> Furthermore, institutional features of the courts such as the time and cost of hearings, which are not necessarily a direct reflection of  
15 success of specialisation, are suggested as being the dividing factors between the High Court and the Authority.<sup>73</sup>

Compared to the large amounts of money at stake, the difference in the fees at the High Court and the TRA is insignificant,<sup>74</sup> although the TRA may waive the filing fee where the disputant cannot pay the fee or the proceeding  
20 concerns a matter of genuine public interest that the taxpayer would not commence without the waiver.<sup>75</sup> If the Authority cannot offer significantly less costly dispute resolution, then it is unlikely that High Court level specialisation would deliver this.

Alternatively, the High Court may be preferred as a more expeditious  
25 avenue of dispute resolution. TRA decisions seem to take an excessive amount of time. The average age of cases from Ministry receipt to TRA decision is 828 days,<sup>76</sup> excluding 16 adjourned cases that obscure the true average age. The cabinet paper outlining these figures makes special mention of the fact that the "tribunal considers very complex and litigious cases, often relating to  
30 large companies".<sup>77</sup> However, information provided in August 2014 by the office of Hon Chester Borrows, Minister for Courts, indicates that work is

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Decisions Online. For a full table of the figures and explanation of the sources, see Appendix 5.

<sup>70</sup> Compare section 51G of the Judicature Act 1908 and part 14 of the High Court Rules with sections 22 and 22B of the Taxation Review Authorities Act 1994.

<sup>71</sup> Taxation Review Authorities Act 1994, s 16(4); Taxation Review Authorities Regulations 1998, reg 36(2).

<sup>72</sup> *Tax Review 2001* (Treasury, Final Report, October 2001) at 2.21.

<sup>73</sup> For instance, see The New Zealand Law Society and the New Zealand Institute of Chartered Accountants "Joint Submission to the Finance and Expenditure Committee on the Taxation (Tax Administration and Remedial Matters) Bill" at 7-10.

<sup>74</sup> The application fee to have a case heard by the Taxation Review Authority is \$410: Taxation Review Authorities Regulations 1998, reg 10(1). The application fee to have a case heard by the High Court is \$1,350 and there are further hearing fees, depending on how many court days the matter takes: High Court Fees Regulations 2013, schedule 1.

<sup>75</sup> Taxation Review Authorities Regulations 1998, reg 10A.

<sup>76</sup> Cabinet Social Policy Committee Paper, above n 55, appendix 1.

<sup>77</sup> Cabinet Social Policy Committee Paper, above n 55, at 19, n 1.

underway to deliver prompter resolution of tax disputes. The office aims to halve the time taken to deal with matters across the court and tribunal system by 2017, including those matters at the TRA.<sup>78</sup> The Ministry is delivering this goal on policy and operational levels. The Minister is preparing the Courts and Tribunals Enhanced Services (CATES) Bill, which is expected to be released toward the end of 2014.<sup>79</sup> Operationally, the TRA is “focusing in particular on older cases, ensuring the smarter management of tribunals support and judicial resources, and working alongside judicial officers to pro-actively manage cases towards a resolution and reduce the time it takes to release reserved judgments”.<sup>80</sup> This has produced encouraging results. Between 30 April 2013 and 24 August 2014, the average (mean) age of active cases at the Authority has decreased by 19.7 per cent, from taking 1756 days to 1410 days.<sup>81</sup> Additionally, the number of cases in hand has decreased by 66.8 per cent, from 157 cases to 52.<sup>82</sup> If the unpopularity of the judicially specialised Authority is due to excessive delays, then this progress signals that legislative and operational changes at the level of the Authority are effective solutions, without the need to specialise the general court system. It also suggests that the Authority’s supposed failings are not as a result of its specialist nature or the problems associated with that, but more general operational issues.

Indeed, beyond a quantitative assessment of the TRA, it is difficult to draw firm conclusions as to the qualitative success of tax specialisation in New Zealand based on the Authority’s record of accomplishment. Sir Ivor Richardson concludes:<sup>83</sup>

I have read hundreds of Taxation Review Authority judgments and numerous High Court judgments too. I hesitate to generalise or to attempt any kind of ranking. Certainly I have found numerous judgements in both jurisdictions to be very helpful in the depth of the analysis and reasoning.

While some judges have performed commendably,<sup>84</sup> the performance of others is open to criticism. Some commentators have observed that Authority decisions are rarely appealed or reversed,<sup>85</sup> although in some cases this may be symptomatic of unduly brief judgments that do not provide scope to appeal. There have been some issues of inconsistency both within the

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<sup>78</sup> Email from Oliver Searle (Office of Chester Borrows, Minister for Courts) to Sarah Miles regarding Taxation Review Authority Enhancements (29 August 2014).

<sup>79</sup> New Zealand Government “Further Improvements To Tribunals Announced” (press release, 24 June 2014).

<sup>80</sup> Email from Oliver Searle, above n 78.

<sup>81</sup> Email from Oliver Searle, above n 78.

<sup>82</sup> Email from Oliver Searle, above n 78.

<sup>83</sup> Ivor Richardson “Observations from the Bench” (address to the NZ Society of Accountants 1994 Tax Conference, November 1994).

<sup>84</sup> Hansard records praise in the House for the performance of the Authorities: “...the role of the Taxation Review Authority... has been discharged manfully by officials and members of the authority for a number of years”: (9 November 2004) 621 NZPD 16775.

<sup>85</sup> Paul Stephan “Courts with Income Tax Jurisdiction: An International Comparison” (1988) 8 Va Tax Rev 233 at 242; see also Riley and others, above n 65, at 477.



Authority, and between the Authority and the High Court.<sup>86</sup> This could highlight the risk of leaving adjudication to a small pool of experts: poor decision-making is more concentrated and the quality and outcome of decisions is more patchy and inconsistent, both intra-tribunally and inter-tribunally.

Figure 2 demonstrates that the sharpest decline in cases before the Authority occurs after 1990, with cases peaking in 1984-1990. One explanation for this may be the appointment of less preferred judges to the Authority; with only one judge sitting as the Authority, it may seem probable that the Authority's caseload decline can be ascribed to litigants avoiding a particular judge. However, the decline in workload is unlikely to be attributable to the appointment of certain judges. The caseload decline in the early 1990s does not correspond with a personnel change; Judges Barber, Bathgate, and Keane were authorities throughout both the peak and declining periods of the Authority.<sup>87</sup> The drop also corresponds to an overall drop in tax cases across all the courts.<sup>88</sup> More likely, the drop in cases corresponds with certain events in the history of taxation. For instance, the introduction of goods and services tax in 1986 introduced extra litigation, while a major reform of the disputes process and enactment of the self-assessment regime in 1994 and the settlements policy in 1995 reduced the number of cases proceeding to the Authority.<sup>89</sup> Because changes in the volume of tax cases before the authority are more often brought about by changes to the law or reforms to the adjudication process, then in the dynamic subject of tax law, the need for a flexible and adaptable court system is underscored. Greater High Court level specialisation risks damaging this flexibility by rigidly fixing the number of High Court judges able to hear cases.

#### *iv. Disputes*

Before a tax dispute arrives before a judge, it will have already passed through the disputes resolution process, which gives cases early exposure to a range of tax specialists to ensure that issues are identified and that factual disputes

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<sup>86</sup> See Susan Glazebrook "Revenue Law" (1993) 4 NZ Recent Law Review 180; see also David Dunbar's criticism of Judge Barber's decisions in certain income-splitting cases (even though it is acknowledged that Judge Barber "... is an extremely experienced Taxation Review Authority with over 20 years' judicial experience": David Dunbar "Judicial Techniques for Controlling the New Zealand General Anti-Avoidance Rule: The Scheme and Purpose Approach, from *Challenge Corporation to Peterson*" (2006) 12 NZJTL 324 at 340.

<sup>87</sup> See Appendix 2 for a table of appointments to the Authority.

<sup>88</sup> Justice William Young tracks a similar decline in tax cases to the High Court in "Tax Disputes in New Zealand" (2009) 4(1) JATTA 1 at 8.

<sup>89</sup> Former Taxation Review Authority, Judge Barber, similarly observed how fluctuations in the nature of cases driven by legislative and policy changes can affect overall case volumes, commenting that "I rather think that the claims by employees under the Fourth Schedule to the Income Tax Act 1976 have fallen off a little, as have farming loss cases, but as I mention below, the rental loss situation is a new problem area and there appears to be a greater proportion of investigation hearings than previously": Paul Barber "Tax and the Courts" (paper presented to the 1984 Residential Taxation Seminar, Wellington, November 1984) at 2.

are addressed early in the challenge process.<sup>90</sup> The Review Unit is an “independent”<sup>91</sup> branch within the IRD, staffed by qualified accountants and lawyers.<sup>92</sup> At the end of the process, the Disputes Review Unit will deliver an adjudication report based on the papers, which can be helpful for prospective litigants in determining their litigation risks according to specialist opinions. Key reviews and amendments to the disputes process in 2003 and 2010 have helped to achieve its objectives.<sup>93</sup> However, the disputes resolution process is not a complete substitute for litigation. Justice Glazebrook emphasises the important societal benefits that the disputes process lacks, observing: “Court judgments have precedential value and the court process itself can act as a check on executive power, something which is essential to the rule of law”.<sup>94</sup>

In Brown’s survey of tax cases between 1 September 2011 and 31 August 2012, he found that the number of substantive cases heard by either the authority or the courts was only 15, with 86.7% of those cases resulting in outright wins for the Commissioner.<sup>95</sup> Brown suggests that the disputes process may be too expensive and time-consuming for many taxpayers, pressuring them to concede cases that might otherwise be upheld at court, or that commercial settlements may pull potentially successful cases from the court system.<sup>96</sup> Again, direct reforms to the disputes process best address this concern, rather than overlaying judicial specialisation. Regardless of the speed at which specialist courts or panels can dispose of tax cases, this efficiency will not remedy delays before the case reaches court. Indeed,

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<sup>90</sup> Holmes and Holmes, above n 58, at 64. The Review Unit also significantly limits the number of cases reaching the courts, with approximately one third of reviews in favour of the taxpayer: Zoë Prebble and John Prebble “New Zealand” in Karen Brown (ed) *A Comparative Look at Regulation of Corporate Tax Avoidance* (Springer, Netherlands, 2012) 243 at 248.

<sup>91</sup> Justice Glazebrook notes that “While the Unit is a separate unit within the Office of the Chief Tax Counsel, it is still an internal administrative mechanism without the independence of the courts and without the public scrutiny of its decisions in terms of the open justice principle, which again is so fundamental to our system of justice (and indeed of parliamentary democracy generally)”: Susan Glazebrook “Taxation Disputes in New Zealand” (paper presented to Australasian Tax Teachers Association (ATTA) Conference, Auckland, January 2013) at 17.

<sup>92</sup> *New Zealand Master Tax Guide* (2013 edition, CCH New Zealand Limited, New Zealand, 2013) at 222; “Office of the Chief Tax Counsel (OCTC): Disputes Review Unit” (9 July 2013) Inland Revenue Department <[www.ird.govt.nz](http://www.ird.govt.nz)>.

<sup>93</sup> A review of the process described the objectives of the process as being “to improve the quality and timeliness of assessments and to reduce the likelihood and grounds for subsequent litigation”: *Disputes: A Review – An Officials’ Issues Paper* (Inland Revenue Department and the Treasury, July 2010) at 1.4.; *Resolving tax disputes: a Legislative Review* (Inland Revenue Department, July 2003). Similarly, Commentary to the Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions Bill) 2004 identifies that “The main objective of the disputes process is to have legislation and administrative practices which encourage disputes to be dealt with fairly, efficiently, and quickly before they get to court”: as cited in James Coleman and Eugen Trombitas “Disputes with the IRD” (New Zealand Law Society Seminar, March 2009).

<sup>94</sup> Glazebrook, above n 91, at 17.

<sup>95</sup> Brendan Brown “New Zealand Case Law Developments” (paper presented to the New Zealand Institute of Chartered Accountants 2012 Tax Conference, October 2012).

<sup>96</sup> See also Mark Keating “New Zealand’s Tax Dispute Procedure — Time for a Change” (2008) 14(4) NZJTL 425; Glazebrook, above n 91, at 11.

disputes process reforms are already underway. In 2011, the IRD made several changes to the disputes process aimed at improving its timeliness. The changes include an assurance of more focused notices of proposed adjustments and clarification of the taxpayer's limited opportunity to opt out of the disputes process.<sup>97</sup> IRD also set tighter internal deadlines and processes for monitoring deadlines.<sup>98</sup> This goes some way to correcting the former position, which imposed numerous deadlines on the taxpayer throughout the process, without reciprocal obligations on the Department.<sup>99</sup> A taxpayer who failed to meet the stipulated timeframes would be deemed to accept the IRD's position,<sup>100</sup> allowing the Department to drag out disputes before they even reached court while the taxpayer was required to meet strict deadlines.

v. *Settlements*

Settlement policies also explain the decline in cases to the Authority and High Court. Section 6A of the Tax Administration Act was introduced in 1995, allowing the commissioner to settle for less than "the highest net revenue that is practicable within the law" in some circumstances.<sup>101</sup> Subsequent cases affirmed the Commissioner's power to settle disputes on a commercial basis.<sup>102</sup> It is arguable that the case decline does not signal a failed application of judicial specialisation, but reflects changes to disputes and settlements practices. The shortcomings of these specialised stages of the process are best addressed, and are currently being addressed, by targeted reforms aimed at the particular delay or problem. High Court specialisation cannot be contemplated without reference to existing, specialised, stages of the tax disputes process.

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<sup>97</sup> *Disputes Resolution Process Commenced by the Commissioner of Inland Revenue* (Inland Revenue Department, SPS 11/05, November 2011) at [65]-[92] and [172] to [195]; *Disputes Resolution Process Commenced by a Taxpayer* (Inland Revenue Department, SPS 11/06, November 2011) at [34]-[141] and [203]-[230].

<sup>98</sup> *Disputes Resolution Process Commenced by the Commissioner of Inland Revenue* (Inland Revenue Department, SPS 11/05, November 2011) at [93]-[97]; *Disputes Resolution Process Commenced by a Taxpayer* (Inland Revenue Department, SPS 11/06, November 2011) at [138]-[141].

<sup>99</sup> Brown and McKay accept that the indicative timeframes are not unreasonable, even though they are more generous than the taxpayer timeframes, but they still find it problematic that "the timeframes are subject to extension and there are no consequences for the Commissioner in failing to adhere to them": Brendan Brown and Mathew McKay "Managing Tax Audits, Investigations and Disputes" (paper presented to New Zealand Law Society Tax Conference 2010, September 2010) at 149.

<sup>100</sup> For instance, s 89H of the Tax Administration Act 1994 deems the taxpayer to accept the Commissioner's position if the taxpayer does not reject an adjustment contained in the notice of proposed adjustment within the given response period, unless certain exceptional circumstances can be made out according to section 89K.

<sup>101</sup> See generally Mark Keating "Settlement of Tax Disputes: A Step Backwards" (paper presented to New Zealand Law Society Tax Conference 2011, September 2011) at 32-37.

<sup>102</sup> *Auckland Gas Co. Ltd v CIR* [1999] 2 NZLR 409 at 417; *Attorney-General v Steelfort Engineering Co. Ltd* (1999) 1 NZCC 61,030 at 61,036. See also "Care and Management of the Taxes Covered by the Inland Revenue Acts" – Section 6A(2) and (3) of the Tax Administration Act 1994 (Inland Revenue Department, IS 10/07, 22 October 2010).

Overall, the TRA and Disputes/Settlements Processes offer taxpayers an effective level of specialisation in New Zealand that would not be enhanced by the introduction of a specialist court or judges. Problems identified with the independence, cost, and timeliness of these specialisations are not usually related to their specialisation per se, and are being addressed by a range of reforms led by the Minister for Courts, and internally at the IRD.

vi. *De Facto Specialisation and Appointments*

As well as specialisation at the IRD and the TRA, there is arguably a de facto practice of specialisation on the New Zealand bench. Certainly, a small handful of judges have been instrumental in the development of New Zealand's tax law. McLeod claims, "It is generally accepted that Sir Ivor is a tax expert who has had more influence on tax law and practice than any other New Zealand Judge".<sup>103</sup> Butler has observed an allocation pattern in tax cases between 1999 and 2001, noting, "Sir Ivor Richardson, Justice Blanchard, Justice Gault, and the High Court judges Justices McGechan, Robertson, and Salmon heard more tax law cases than their colleagues".<sup>104</sup> There are dangers in relying on de facto specialisation; it does not perform as effectively as a transparent system for specialisation, without the benefits of organised professional development and absent of any safeguards in place to minimise the perception of bias, isolation, and idiosyncratic development of the law.

More broadly, many newly appointed judges have backgrounds in commercial law, contrary to the perception that High Court judges disproportionately come from criminal law backgrounds.<sup>105</sup> Of 20 appointments from 1 July 2010, 14 were judges with experience in commercial law firms.<sup>106</sup> Brown suggests that the appointment of Justice Glazebrook to the Supreme Court, who has considerable experience as a tax practitioner, is of "particular interest to tax practitioners".<sup>107</sup> The appointment of more judges with a broad commercial background is a valuable way of equipping the judiciary to deal with tax cases, without many of the consequences associated with full models of specialisation. Although there is no legislative requirement that the Attorney-General consider the diversity of

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<sup>103</sup> Rob McLeod "Collecting Taxes" [2002] VUWLR 33 at 33; See also Geoff Harley "Reflections on Sir Ivor Richardson's Career in Tax Cases" (2002) 8(2) NZJTL 141.

<sup>104</sup> Petra Butler "The Assignment of Cases to Judges" (2003) 1 NZJPIL 83 at 91.

<sup>105</sup> For instance, Roger Kerr comments that judges come from a narrow range of backgrounds, commenting that "There is a... potential source of judicial talent that is under-used because the system is clearly loaded against this group. A procedure of consulting senior judges inevitably favours the litigators who appear before them. Left largely out of account are the transactional or commercial lawyers who arguably undertake the real development of our law by devising original solutions to new problems": Roger Kerr "Judging the Judiciary" (paper presented to Wellington District Law Society Conference, Ruapehu, June 1998) at 5.

<sup>106</sup> Brown, above n 95, at 10.

<sup>107</sup> Brown, above n 95, at 10.

experience and backgrounds of candidates,<sup>108</sup> this factor influences both the appointments process protocol<sup>109</sup> and practice.<sup>110</sup> A specialist tax court or panel might make it simpler and more transparent to appoint judges based on tax-specific experience, but in light of the High Court's existing commercial strength, this benefit of specialisation is marginal.

vii. *Implications of a Commercial Panel*

The Judicature Modernisation Bill 2013 may have significant implications for the level of tax judicial specialisation in New Zealand. Clause 18 of the Bill establishes a commercial panel in the High Court, to replace the commercial list. Although the Bill does not set out the types of cases that the commercial panel will deal with, it is unlikely to deal with tax cases. The Bill abolishes the existing commercial list,<sup>111</sup> suggesting that the cases that the commercial panel will determine are likely to remain the same as those dealt with by the commercial list. The commercial list does not incorporate the management of tax cases.

Clause 18(2) of the Bill empowers the Chief High Court Judge, in consultation with the Attorney-General and the Chief Justice, to establish other panels of High Court Judges. There has been no suggestion that a High Court tax panel is imminent and the Law Commission was not satisfied that any other panels were justified.<sup>112</sup> However, the existence of this significant power to create panels is a further reason that a considered debate regarding tax specialisation is crucial. In light of the ad-hoc history of judicial specialisation in New Zealand and the divergent judicial views on specialisation, entrusting this power to a sole person may risk a proliferation of specialist panels at the High Court, fragmenting the general court system.

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<sup>108</sup> But see s 94 of the Judicature Modernisation Bill 2003, which requires the Attorney-General to publish information concerning judicial appointment processes.

<sup>109</sup> The Attorney-General has recognised that “legal ability”, which includes a “sound knowledge of the law and experience of its application”, is a criterion for High Court Appointment. The appointment protocol recognises a broad range of legal experience and does not suggest any requirement for the Attorney-General to consider what a candidate would bring to the overall diversity of experience of the bench. However, the Attorney-General does request a curriculum vitae with a full work history, including a list of significant cases the applicant has appeared as counsel in, as well as general career highlights: Christopher Finlayson “High Court Judges Appointment Protocol” (April 2013) Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>110</sup> Former Attorney-General, Margaret Wilson, stated from her experience that it was important, at least for the Supreme Court, to “reflect a diversity of legal experience”: Margaret Wilson “Appointing Judges the New Zealand Way” (2013) 21 Wai L Rev 41 at 47. The Law Commission has also recognised the need to maintain a “horses for courses” approach to appointments when it formulated a set of general principles for the Attorney-General to consider in making appointments: Law Commission, above n 15, at 27.

<sup>111</sup> The Bill does not carry forward s 24A of the Judicature Act 1908, which establishes the commercial list.

<sup>112</sup> Law Commission, above n 8, at 12.

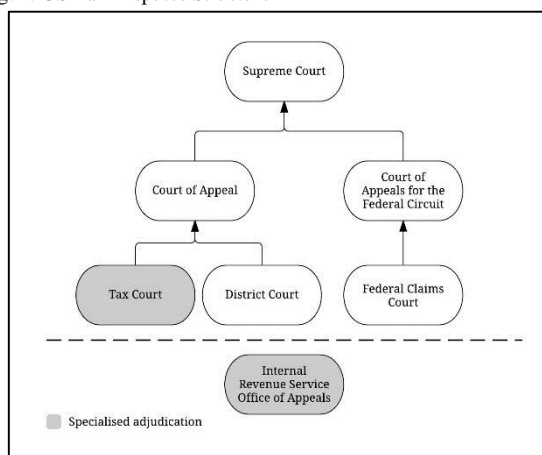
### III. The Overseas Experience of Specialisation

This part will compare the approach of several foreign jurisdictions towards specialisation of the judiciary in respect of tax. Many of the jurisdictions compared in this section have dissimilar tax systems to New Zealand, and far larger federal court systems. Bearing in mind these limitations, America, Canada, and Australia have been chosen because they share a broad common law heritage and they provide different models of specialisation that New Zealand might learn from.

Most countries of a comparable size to New Zealand do not have judicial specialisation for tax matters in the general courts, although many have tax tribunals.<sup>113</sup> This international consistency with similarly sized countries suggests that New Zealand's court system is striking the appropriate balance for tax judicial specialisation. Of the countries sampled that do incorporate specialisation into the general courts, such as Lebanon, Finland, and Slovakia, most do not have dedicated tax specialisation, but administrative courts or divisions. Although New Zealand's now defunct Administrative Division only had a limited jurisdiction to hear certain sales tax cases,<sup>114</sup> the division's collapse indicates that a return to this system would be ill judged.

#### i. United States of America

Fig. 4: US Tax Disputes Structure



In 1924, the United States congress created the Board of Tax Appeals, which evolved to what is now the Tax Court, with a change to that name in 1942.<sup>115</sup>

The Tax Court has national jurisdiction to hear tax cases.<sup>116</sup> The United States court system also features several specialised state courts that hear tax disputes in connection with state tax laws.<sup>117</sup> The Office of Appeals is an

<sup>113</sup> See Appendix 4.

<sup>114</sup> Legomsky, above n 41, at 56.

<sup>115</sup> The name was again changed to the United States Tax Court by the Tax Reform Act 1969 Pub L No 90-172 83 Stat 730 (1969). See generally Erwin Surrency *History of the Federal Courts* (Oceana Publications, New York, 1987) at 319-320.

<sup>116</sup> "About the Court" (25 May 2011) United States Tax Court < [www.ustaxcourt.gov](http://www.ustaxcourt.gov) >.

<sup>117</sup> For example: Oregon Tax Court, Hawaii Tax Appeal Court, Indiana Tax Court, Massachusetts Appellate Tax Board, Minnesota Tax Court, New Jersey Tax Court.

independent body that taxpayers may have their case reviewed by before progressing to the Court.<sup>118</sup> Appeals from the Tax Court go to the general United States Court of Appeals in the circuit where the taxpayer resides. The taxpayer has the choice of having the case heard in the Tax Court, the District Court, or the Claims Court. The Tax Court is comprised of 19 presidentially appointed judges,<sup>119</sup> alongside several senior judges and special trial judges.<sup>120</sup>

An obvious strength of the Tax Court is the high degree of expertise of its judges. Baum notes that it is “regular practice” for judges to be chosen to serve on the Tax Court because of their pre-existing expertise from specialising in tax law as a practitioner.<sup>121</sup> The biographies of Tax Court judges certainly support this claim.<sup>122</sup> Baum argues that this expertise is likely to produce better decisions and he points to studies that observe a higher rate of Court of Appeal reversals coming from the District Court than the Tax Court.<sup>123</sup> However, it seems that the strength of the United States’ tax judiciary is largely a function of the size of the United States, rather than its approach to specialisation. The United States population and tax system is exponentially larger than New Zealand’s. In 2013, the United States Tax Court alone had 335 full-time employees and total budgetary resources of \$48 million.<sup>124</sup> Judge Barber notes that the key difference between the United States Tax Court and the TRA is size, stating, “We are a very small operation by comparison”.<sup>125</sup> The United States’ population of some 315 million people compared to New Zealand’s 4.5 million, suggests that the introduction of a specialist court or panel would probably have a marginal effect on the pool of judicial candidates, which will inevitably lack tax specialists in a small legal community.

Despite the strength of the tax bench, the Tax Court has been criticised for its insularity and its lack of independence and transparency,<sup>126</sup> suggesting that this criticism of specialist courts is almost unavoidable, regardless of how well executed or on what scale the specialisation is. Specialisation, by nature, tends to be tarnished by these problems of appropriation and insularity, even though extent of benefits from specialisation tends to vary proportionately to the scale of specialisation.

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<sup>118</sup> “Appeals... Resolving Tax Disputes” (16 June 2014) Internal Revenue Service <[www.irs.gov](http://www.irs.gov)>.

<sup>119</sup> Presidential nomination is subject to Senate confirmation.

<sup>120</sup> “About the Court” (25 May 2011) United States Tax Court <[www.ustaxcourt.gov](http://www.ustaxcourt.gov)>.

<sup>121</sup> Lawrence Baum “Probing the Effects of Judicial Specialization” (2009) 58 Duke LJ 1667 at 1676.

<sup>122</sup> See “Judges” (11 April 2014) United States Tax Court <[www.ustaxcourt.gov](http://www.ustaxcourt.gov)>.

<sup>123</sup> Baum, above n 36, at 153.

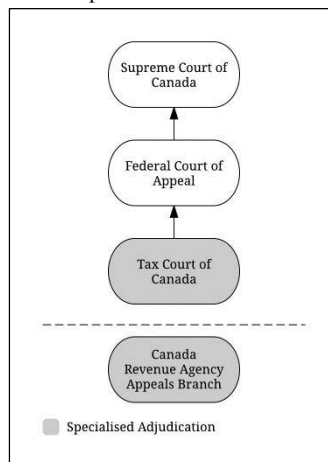
<sup>124</sup> Office of Management and Budget (US) (eds) *Fiscal Year 2015 Appendix, Budget of the United States Government* (Government Printing Office, United States, 2014) at 40.

<sup>125</sup> Riley and others, above n 65, at 474.

<sup>126</sup> Leandra Lederman “Tax Appeal: A Proposal to Make the United States Tax Court More Judicial” (2008) 85(6) Wash U L Rev 1195.

ii. Canada

Fig. 5: Canadian Tax Disputes Structure



Canada's introduction of a specialist tax court is more recent. The Tax Court of Canada was established in 1983 as a superior federal court of record,<sup>127</sup> replacing the Tax Review Board.<sup>128</sup> The court has exclusive original jurisdiction to hear appeals or matters arising under certain statutes such as the Excise Tax Act and the Income Tax Act.<sup>129</sup> The Governor in Council appoints judges.<sup>130</sup> The Court currently consists of a Chief Justice, an Associate Chief Justice and 23 other judges.<sup>131</sup>

The Court was established to fulfil the recommendations of a report by the Carter Commission, which criticised the independence and prestige of the former Tax Review Board.<sup>132</sup> A specialist court was recommended to remove suggestions of political interference and to attract more skilled judges, who had begun to view the Tax Board as an inferior tribunal. The Tax Court's mission statement reflects a balancing between the dangers and advantages of judicial specialisation, affirming a commitment to "providing the public with an accessible and efficient appeal process and working together to maintain a fair and independent Court".<sup>133</sup> By most accounts, the Tax Court is balancing these competing aims effectively. The Court's success is evident in the rejection of a 1997 proposal to consolidate the Federal Court and the Tax Court, with many stakeholders unprepared to surrender the efficiency that the specialised Court was providing.<sup>134</sup> Overall, the Court receives glowing reports from most commentators, with

<sup>127</sup> Tax Court of Canada Act RSC 1985 c T-2, s 3.

<sup>128</sup> See Alban Garon and others "Tax Court of Canada: 20th Anniversary Symposium" (2005) 53(1) Can TJ 135 at 137.

<sup>129</sup> Tax Court of Canada Act RSC 1985 c T-2, s 12.

<sup>130</sup> Tax Court of Canada Act RSC 1985 c T-2, s 4(2).

<sup>131</sup> "Judges" (10 June 2014) Tax Court of Canada <www.tcc-cci.gc.ca>.

<sup>132</sup> *Report of the Royal Commission on Taxation* (Queen's Printer, 1967).

<sup>133</sup> *Tax Court of Canada, 1999-2000 Estimates, Report on Plans and Priorities* (Tax Court of Canada, 1999) at 6.

<sup>134</sup> Ian MacGregor and others "The Development of the Tax Court of Canada: Status, Jurisdiction, and Stature" (2010) 58 Can TJ 87 at 97.

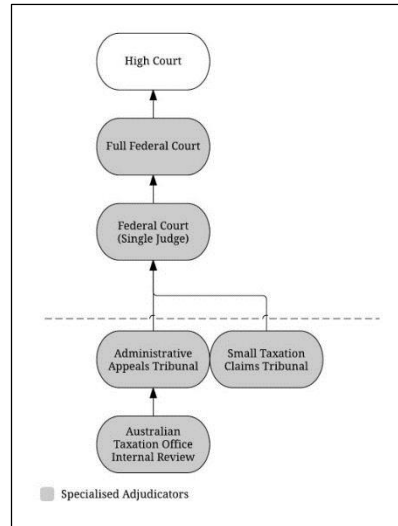


MacGregor and others commenting that “The Court has garnered respect from both the general public and the tax community”.<sup>135</sup>

### iii. Australia

- 5 Australia has no specialist tax court, but incorporates specialisation at the Administrative Appeals Tribunal (AAT) and in a list and panel system at the Federal Court.

Fig. 6: Australian Tax Disputes Structure



- 10 The taxpayer can take a dispute to the AAT or the Small Taxation Claims Tribunal (STCT) within the AAT if the claim is for less than \$5,000.<sup>136</sup> Taxpayers may then appeal to the Federal Court to be heard by a single judge, with a further right of appeal to have the full Federal Court hear the case. The final opportunity for appeal is by special leave to the High Court. Interestingly, Australia does not have a sophisticated disputes process before the AAT as New Zealand has before the TRA. Commentators have questioned this gap and suggested that Australia ought to follow New Zealand’s practice in this area.<sup>137</sup>
- 15

- 20 The AAT was established in 1976, replacing the former Board of Review, which was a board with three members: a person from the tax office, an accountant, and a lawyer. The Tribunal has been criticised for perpetuating a pro-administration leaning that developed from the Tax Office’s influence in appointments to the Board of Review.<sup>138</sup> Australia’s experience reinforces

<sup>135</sup> MacGregor and others, above n 134, at 98.

<sup>136</sup> Administrative Appeals Tribunal Act 1975 (Cth), s 24AC.

<sup>137</sup> Chapple, above n 57, at 322.

<sup>138</sup> Hugh Ault and Brian Arnold *Comparative Income Taxation: A Structural Analysis* (Kluwer Law International, 1997) at 19. See also Wayne Gumley “The Taxation Appeals System: An Administrative Law Perspective” in Chis Evans and Abe Greenbaum (eds) *Tax Administration: Facing the Challenges of the Future* (Prospect Media, St Leonards (NSW), 1998) 299 at 307-308: “The basis for this change was a perception by tax practitioners that the presence of former ATO employees as chairpersons undermined the independence of the Boards. A related argument was that the relatively small number of Board members (some of whom were also former ATO officers) created a risk that they would become attuned favourably to arguments regularly presented by ATO advocates before the Board”.

that the development of a perception of bias to a specialist body is not a fanciful prospect and that it can have devastating consequences for the reputation of the court or tribunal. This lends support to an argument for transferring the TRA appointment powers of the Minister of Justice (as  
5 advising minister) to an apolitical office, such as the Attorney-General. Notwithstanding these suggestions of political influence, Justice Downes has praised the Taxation Appeals division for its strong membership, asserting, “The Tribunal... began its taxation jurisdiction with a distinguished group of  
10 taxation specialists. That position has continued throughout its 25 year history”.<sup>139</sup> However, if a much larger country such as Australia struggles to appoint judges whose experience in private firms or government departments does not give rise to perceptions of bias, then New Zealand is sure to struggle to improve on this experience.

The Governor-General appoints members of the AAT as a President,  
15 Deputy President, Senior Member, or Non-presidential member. The necessary qualifications for appointment are dependent on the role.<sup>140</sup> Currently, only 16 of the 84 tribunal members are judges.<sup>141</sup> Extensive guidelines set out how the President of the Tribunal determines which  
20 members hear a particular case.<sup>142</sup> The care taken in developing these guidelines hints at the sensitivity of panel appointments. If New Zealand were to develop a tax panel at the High Court, it ought to look to Australia’s guidelines as a way of lessening the risk of “panel packing”,<sup>143</sup> which the  
25 Judicature Modernisation Bill leaves as a very real opportunity. The Bill gives the Chief High Court Judge power to decide the basis on which cases are to be distributed to panel judges,<sup>144</sup> as well as the power to assign a judge  
30 directly to a case.<sup>145</sup> The result is that the Chief Judge could manipulate the allocation of judges to ensure that judges with certain policy leanings or predispositions could hear particular cases, in an attempt to influence the case’s decision. The guidelines provide general and special rules for  
35 constituting the tribunal and a list of matters to be taken into account generally, which reduces the arbitrariness of a single judge’s choice in allocating a judge to a panel.

Australia also incorporates a list and panel system for tax cases into the Federal Court. The tax list is geared towards facilitating case  
35 management. A tax list co-ordinating judge completes a pro forma questionnaire, leads a scheduling conference, and examines tax cases to

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<sup>139</sup> Garry Downes, President of the Administrative Appeals Tribunal “Twenty Five Years of Tax Cases in the AAT; Eleven years of the “practical business tax” (Corporate Tax Association 2011 GST Corporate Intensive, The Grace Hotel, Sydney, 17 October 2011).

<sup>140</sup> Administrative Appeals Tribunal Act 1975, s 7.

<sup>141</sup> “Who We Are” (9 September 2014) Administrative Appeals Tribunal <[www.aat.gov.au](http://www.aat.gov.au)>.

<sup>142</sup> Administrative Appeals Tribunal Guidelines “Guidelines for Constituting the Tribunal” (14 November 2011).

<sup>143</sup> See generally Butler, above n 104, at 85.

<sup>144</sup> Judicature Modernisation Bill 2013, cl 18(5).

<sup>145</sup> Judicature Modernisation Bill 2013, cl 18(6).

- ensure that like cases and issues are heard together.<sup>146</sup> The practice note for the tax list provides that the co-ordinating judge will refer cases to the registry to be allocated to a docket judge. The individual docket system then provides for “Cases in some areas of law requiring particular expertise (including patents, taxation and admiralty)” to be randomly allocated to members of a specialist panel.<sup>147</sup> Justice Spender claims that the Federal Court’s appellate decisions have “a certain authority” even though it is not a separate appeal court, because panels are “formed with specialist judges who tend to have an interest and expertise in one particular area of another”.<sup>148</sup> Typically, the Chief Justice assigns two tax experts and one non-expert to an appeal panel, to balance the expertise against a broad perspective.<sup>149</sup> Overall, the AAT and the Federal panels have been successful. Schabe and Blissenden praise the STCT as “a significant and worthwhile development in tax dispute resolution for which the Federal Government should be commended”,<sup>150</sup> and the panel system has attracted praise in both Australia and New Zealand, but has also been criticised as an elitist system that favours certain judges according to their area of interest and geographical location.<sup>151</sup> Former Chief Justice Michael Black argues that the combination of the docket system and panels is optimal, asserting that:<sup>152</sup>
- In this way, the Federal Court maximises the efficient use of its judicial expertise at trial and on appeal. At the appellate level, the system provides a facility for constituting appellate benches for specialist cases that permanent courts of appeal are unlikely to be able to match consistently.
- Overall, foreign specialist tax courts and panels have successfully developed an experienced and knowledgeable bench and an efficient system for tax dispute resolution. Yet, a recurrent criticism of these adjudicative and curial bodies questions their independence, and disapproves of their insularity. On the scale that these countries operate on, it may be that the price of specialisation is justifiable. But, for New Zealand, it is likely that concerns over insularity and perceived partiality would accompany specialisation, without the full benefits that these large, well-resourced, specialised tax dispute systems enjoy.

<sup>146</sup> *Fast Track* (Federal Courts of Australia, Practice Note CM 8, August 2011).

<sup>147</sup> “Individual Docket System” Federal Court of Australia <[www.fedcourt.gov.au](http://www.fedcourt.gov.au)>.

<sup>148</sup> Jeffrey Ernest John Spender “Interview with J.E.J. Spender: An Overview of the Australian Federal Court System” (1990) 16 *Brook J Int’l L* 453 at 458.

<sup>149</sup> Spender, above n 148, at 458.

<sup>150</sup> David Schabe and Michael Blissenden “The Small Taxation Claims Tribunal: The Experience Thus Far” in Chis Evans and Abe Greenbaum (eds) *Tax Administration: Facing the Challenges of the Future* (Prospect Media, St Leonards (NSW), 1998) 283 at 283.

<sup>151</sup> In New Zealand, the Law Commission cited a submission of the Bar Association that referred to concerns over the perception of the tribunal as elitist, but stated, “The concerns that have been raised however do not detract from what is generally seen as the overall success of the regime”: Law Commission, above n 8, at 105.

<sup>152</sup> Michael E J Black “The Federal Court of Australia: The First 30 Years — A Survey On the Occasion of Two Anniversaries” (2007) 31 *Melb U L Rev* 1017 at 1043.

#### IV. *New Zealand and Specialisation: Applying Legomsky's Criteria*

This part will apply Legomsky's criteria to evaluate whether a class of cases should be determined by specialist judges.<sup>153</sup> The criteria provide a more  
5 principled way to consider specialisation than the responsive, ad-hoc process that has characterised the history of judicial specialisation in New Zealand.

##### i. *Mix of Law, Fact, and Discretion*

##### a. Discretion and the GAAR

The first criterion suggests that discretionary and factual decisions favour  
10 specialisation. Discretionary decisions lend themselves to specialisation because the wider the scope of a judge's choice, the more likely it is that the decision will best employ certain qualities possessed by specialist judges. These qualities include an understanding of the particular policy objectives, a reduced likelihood of oversights, a commitment to the pursuit of coherence,  
15 and reduced dependence on the views and adversarial skills of counsel.<sup>154</sup>

Certainly, many areas of tax law are highly discretionary. Particularly, the application of general anti-avoidance provisions exercises a wide judicial discretion. Since the 1960's,<sup>155</sup> litigation in respect of the GAAR has been increased so that it now represents a significant component of tax challenges  
20 and litigation.<sup>156</sup> Justice Glazebrook notes that many of the "most important" tax cases reaching the Supreme Court involve tax avoidance or evasion.<sup>157</sup> GAAR cases also exert a significant economic impact. The "bank conduit" cases involved some of the largest sums in the history of New Zealand litigation, with an estimated \$2.4 billion in tax and interest claimed by the  
25 IRD.<sup>158</sup>

The GAAR provides that "A tax avoidance arrangement is void as against the Commissioner for income tax purposes".<sup>159</sup> Section YA 1 defines a tax avoidance arrangement imprecisely and circularly, essentially declaring

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<sup>153</sup> Legomsky, above n 41, at 20-32.

<sup>154</sup> Legomsky, above n 41, at 22-23.

<sup>155</sup> *Ben Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue* [2009] NZSC 40, [2009] 2 NZLR 358 at [11].

<sup>156</sup> Mark Keating "Tax Avoidance in New Zealand: The Camel's Back that Refuses to Break!" (2011) Vol 17(1) NZJTL 115; Timothy McLeod "'Reconstruction' or 'Destruction'?: The Approach of the Commissioner and the Courts to Section GA 1" (2012) 18(3) NZJTL 256 at 256-257.

<sup>157</sup> Glazebrook, above n 91, at 3.

<sup>158</sup> As Prebble puts into perspective, "NZ\$2.4 billion is approximately the total of the annual fees of the New Zealand legal profession and rather more than the \$US1.4 billion (about \$NZ1.9 billion) at issue in the celebrated United States KPMG tax shelter cases of the late 1990s": 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; see also Michael Littlewood "Tax Avoidance, the Rule of Law and the New Zealand Supreme Court" (2011) 1 NZLR 35.

<sup>159</sup> Income Tax Act 2007, s BG1.

that a tax avoidance arrangement is an arrangement that avoids tax.<sup>160</sup> New Zealand courts have recognised the inescapable uncertainty of the provision, with the Supreme Court in *Glenharrow* holding that “it is simply not possible to meet the objectives of a general anti-avoidance provision by the use, for example, of precise definitions”.<sup>161</sup> Inland Revenue’s interpretation statement similarly acknowledged that the courts are left with the task of identifying avoidance.<sup>162</sup> The Supreme Court in *Ben Nevis* has formulated the most authoritative test: the parliamentary contemplation test.<sup>163</sup> However, the test has been criticised for incorporating a “sniff test”, allowing judges wide discretion to point to indicia of avoidance such as artificiality, contrivance, and mismatches between the form of the arrangement and its economic and commercial realities, which “contribute to the overall foul smell of a transaction”.<sup>164</sup> When tasked with navigating the incredibly wide discretion of GAAR cases, perhaps specialist judges with a keen ‘sense of smell’ are needed to fully appreciate the underlying policy. There is also a danger that generalist judges will be more inclined to write overly formalistic judgments when faced with this discretion.<sup>165</sup> With avoidance cases comprising a significant percentage of tax cases, and those cases having such profound consequences for the development of the law and the New Zealand economy, the level of discretion afforded to judges in this area is a strong factor in support of specialisation.

Although the highly discretionary nature of tax law arguably makes the most of the advantages of specialisation, it can also exacerbate its dangers. A specialist court or panel concentrates the power to make substantial policy decisions, affecting thousands of taxpayers, into the hands of a very small group of judges. Specialist judges are also more likely to harbour dogmatic

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<sup>160</sup> The tautology of the definition is reminiscent of Lord MacNaghten’s remark that “Income tax, if I may be pardoned for saying so, is a tax on income” in *Attorney General v London County Council* [1901] AC 26 at 35. The very concept of income tax is to be understood according to ordinary concepts, as identified by judges. The statement illustrates that broad tax concepts are often resistant to capture by precise definitions and that judicial discretion is often necessary and advantageous.

<sup>161</sup> *Glenharrow Holdings Ltd v CIR* [2007] NZSC 116, at [48].

<sup>162</sup> The interpretation statement states that “The statutory definition of ‘tax avoidance’ is not an exhaustive one. Parliament has left it to the courts to identify tax avoidance, and the function of the statutory definition is to confirm that certain defined circumstances, such as future tax liabilities, are not excluded from the scope of tax avoidance”: *Tax Avoidance and the Interpretation of Sections BG 1 and GA 1 of the Income Tax Act 2007* (Inland Revenue Department, IS 13/01, June 2013) at [14].

<sup>163</sup> The parliamentary contemplation test first considers whether the use made of a specific provision was within its intended scope, and then whether the use of the provision, viewed in the light of the arrangement as a whole, was nevertheless used in a way that was outside of Parliament’s contemplation when enacting the provision.

<sup>164</sup> Mike Lennard “Two Tribes and an Elephant Called Ben Nevis” (2009) 22 *Taxation Today* 1; Craig Elliffe and Jess Cameron “The Test for Tax Avoidance in New Zealand: A Judicial Sea Change” (2010) 16 *NZBLQ* 440.

<sup>165</sup> Vermeule suggests that the tendency to write overly formalistic judgments appears across most substantive topics dealt with by generalist judges: Adrian Vermeule “Judging Under Uncertainty: An Institutional Theory of Legal Interpretation” (Harvard University Press, 2006) at 37.

policy biases, which may have more severe consequences in highly discretionary areas of law. Constant exposure to similar cases can solidify a judge's views on a legal issue, lessening their ability to bring a fresh mind to new cases. Where any policy biases are favourable to the Commissioner, there is a greater risk that taxpayers could perceive a bias in highly discretionary decisions. Compared to a panel system, an external court would worsen these concerns regarding bias and idiosyncratic development of the law because judges on an external court would not decide other non-tax related cases and would lack a wider exposure to other legal issues.

10      b.      Factual Issues and Expert Evidence

Avoidance cases (as well as many other types of tax cases) involve difficult factual questions that demand specialisation, with President North declaring that the presence of avoidance is "... ultimately a question of fact".<sup>166</sup> To decide whether an arrangement is economically and commercially realistic, judges must be able to analyse factually complex financial arrangements.

Although specialist judges may cope best with the factual complexity of tax cases, they are particularly at risk of developing a narrow judicial perspective and pigeonholing certain fact situations that they are frequently exposed to. For instance, Sir Ivor Richardson has observed that:

20                    ... on the factual side, if you listen to a diet of asset accretion cases, I suspect it is easy to become cynical of standard explanations of discrepancies between expenditures on living and capital assets and reported incomes...

Yet, in highly factual decisions, it is particularly important that a judge bring a fresh mind to the particular case.

The extent to which expert evidence may alleviate factual difficulties is relevant. Judges have been somewhat hostile, perhaps justifiably,<sup>167</sup> to the inclusion of expert evidence in tax cases. In *Penny v Commissioner of Inland Revenue*,<sup>168</sup> the Commissioner disputed evidence on the basis that it related to questions of law, but for many tax issues, the relationship between law and fact is nebulous. In the recent Court of Appeal avoidance case, *Alesco*,<sup>169</sup> the Court acknowledged that expert evidence may assist the Court's understanding of factual context "... where the impugned arrangement falls within a novel or sophisticated economic environment".<sup>170</sup> Yet, the Court rapidly denied that expert evidence was necessary, stating that events at trial reflected "an increasing but unacceptable trend of resorting to experts to add

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<sup>166</sup> *Elmiger v Commissioner of Inland Revenue* [1967] NZLR 161 (CA) at 178.

<sup>167</sup> See generally Ivor Richardson's discussion of the practical problems associated with expert economic evidence in "Economics and Law: The Courtroom Reality" (paper presented to New Zealand Law Society Seminar Economics and the Law: The Application of Economics in Legal Practice, Wellington, December 1990).

<sup>168</sup> *Penny v Commissioner of Inland Revenue* [2009] 3 NZLR 523 at [53].

<sup>169</sup> *Alesco New Zealand v Commissioner of Inland Revenue* [2013] NZCA 40, [2013] 2 NZLR 175.

<sup>170</sup> At [96].

to the armoury of advocacy”.<sup>171</sup> Overall, the factual problems associated with tax cases are exacerbated by a tendency of the judiciary to regard expert evidence as adversarial or simply “not particularly relevant”.<sup>172</sup>

*ii. Technical Complexity and Cohesiveness*

- 5 Legomsky’s second criteria convincingly favours specialisation; tax is extremely technically complex. Specialists are better equipped to deal with this complexity and to produce more sound judgments because of their dedicated familiarity with tax laws. Identified specialist judges are also able to receive more targeted professional development and tend to hold a greater  
10 commitment to educating themselves in the specialised area. Legomsky outlines four factors suggesting technical complexity: size of the relevant legislation, organisational complexity, existence of a specialised terminology, and fact-finding that requires extra-legal knowledge.<sup>173</sup>

*a. Size of the Legislation*

- 15 The sheer volume of statutes,<sup>174</sup> regulations, cases, rulings, interpretations, and rules is massive, and increasing in volume and effect each year. The Income Tax Act 2007 alone is some 3,852 pages and is New Zealand’s largest piece of legislation. This does not indicate drafting failures; the Rewrite Advisory Panel had remarkable success in redrafting the Income Tax Act to  
20 enhance simplicity and readability.<sup>175</sup> Lengthy legislation is not unique to New Zealand. The inherent features of tax law mean that other countries have all needed to develop myriad laws and regulations to define and capture taxes. As Prebble observes, the complexities of tax law often arise because of features innate to any tax system: unavoidably arbitrary geographical  
25 distinctions, artificialities in income years, and an unprincipled capital/revenue distinction are all intractable problems.<sup>176</sup> Accordingly, the voluminous complexity of tax law is unlikely to decrease over time, and this is not only necessary, but also usually desirable when other values of a tax system, such as fairness and certainty, are incompatible with simplicity.<sup>177</sup>

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<sup>171</sup> At [97].

<sup>172</sup> Andrew McSmith “Expert Accounting Evidence and New Zealand Tax Litigation: A Research Note” (2007) 13(4) NZJTL 565 at 582.

<sup>173</sup> Legomsky, above n 41, at 24-26.

<sup>174</sup> Legomsky, above n 41, at 24: “One view might be that technical complexity can arise from the sheer size of the pertinent legislation”.

<sup>175</sup> Ivor Richardson “Simplicity in Legislative Drafting and Rewriting Tax Legislation” (2012) 43 VUWLR 517 at 525-527; Maryann Richardson and Adrian Sawyer “Complexity in the Expression of New Zealand’s Tax Laws: An Empirical Analysis” (1997) 14 Austl Tax F 325 at 352-354.

<sup>176</sup> John Prebble “Why is tax law incomprehensible?” (1994) British Tax Review 380-393; John Prebble “Can Income Tax Law be Simplified?” (1996) 2 NZJTL 187; John Prebble “Income Taxation: A Structure Built on Sand” (2002) 24(3) SLR 301.

<sup>177</sup> For instance, the United Kingdom Tax Law Rewrite Project Team has defended the complexity of tax legislation by pointing out that the complexity furthers the interests of fairness and is necessary to keep pace with economic developments: “The fact that we in the UK have some 6,000 pages of primary tax legislation is not a reflection of the prolixity of successive Parliamentary drafters, rather it reflects the choices the UK has made over more

b. Organisational Complexity

Tax law involves a high degree of organisational complexity. The Income Tax Act is the only legislation not drafted by the Parliamentary Counsel Office, perhaps in recognition of its technical complexity.<sup>178</sup> Because of this unusual drafting process, the legislation takes on a unique organisational structure, with alphanumeric numbering and functional organisation. Rapid and technical developments often take place outside of legislation in tax information bulletins, determinations, interpretation guidelines and statements, operational statements, product and public rulings, and standard practice statements.

Furthermore, in an increasingly global economy, the organisational complexity rises because of the addition of double tax treaties or provisions geared towards cross-border arrangements. It is likely that even more major conceptual developments are to come in the next few decades because the complexity of tax law is inextricably linked to the rapidly changing international economy.

c. Specialised Terminology and Extra-Legal Knowledge

Specialised terminology does not contribute to tax's complexity because most technical terms are obvious to a non-expert or can be explained by counsel. However, the fact-finding endeavour of tax law will often require extra-legal knowledge from the fields of accounting or economics. Legislation will often refer to accounting standards or practices and an understanding of so-called "economic realities" is central to the application of the GAAR. More fundamentally, the lack of a basic definition of "income" has necessitated the incorporation of accounting and economic principles.<sup>179</sup>

d. Drawbacks to Technical Expertise

However, a mastery of the technical complexity of tax law may have drawbacks. Baum has warned that the risk of judicial activism is greater with specialist judges because specialists with expertise through constant work in one field tend to feel greater confidence in their judgment than their generalist counterparts.<sup>180</sup> This confidence means that judges are more inclined to making sweeping policy decisions, when they may not be best placed to

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than 150 years to try to ensure the burden of taxation falls equitably in an increasingly complex and diverse world": Steve Matheson, Geoffrey Sellers, and Neil Munro "The Audience for Tax Legislation — Is It Different From That for Other Legislation and Should It Be Considered To Be the Same for All Sections or Parts?" (1997) 3 NZJTL 178 at 181.

<sup>178</sup> But see Prebble and Prebble, who suggest that the drafting position simply arose "as a result of historical accident" because the IRD were undertaking redrafting at a time when the PCO was under-resourced: Prebble and Prebble, above n 90, at 244.

<sup>179</sup> Ivor Richardson "The Impact and Influence of Accounting and Economic Principles on Taxation Law" (1998) 4 NZJTL 18; Kevin Holmes "Should Accountants Determine How Much Tax We Pay?: International Accounting Standards vs. Taxable Income and Capital Gains" (Professorial Inaugural Lecture, Victoria University of Wellington, Wellington, 25 September 2007).

<sup>180</sup> Baum, above n 36, at 35.



anticipate the fiscal (or other) consequences without access to full parliamentary resources.

e. A Crisis of Confidence?

5 Although the complexity of tax law is relatively undoubted, the extent to which the New Zealand judiciary is capable of dealing with this complexity is contested. In a controversial article, Tony Molloy QC criticised the judiciary's institutional competence in dealing with complex cases, stating that:<sup>181</sup>

10 the courts produce a plethora of judgments from which it is clear that counsel, or the judge—and frequently both counsel and the judge—have been trying to grapple with areas of the law beyond the level of their skill or experience.

Molloy's comments in this article, along with a tirade of statements to the National Business Review, were widely criticised.<sup>182</sup> Attorney-General Chris  
15 Finlayson condemned the comments as "a vulgar, crude and intemperate attack on our judicial system"<sup>183</sup> and the National Standards Committee of the Law Society ordered Molloy to pay \$1000.<sup>184</sup> Yet, it seems that Molloy's sentiments are not entirely isolated and the debate over the judiciary's competence has been heated. High profile barrister Anthony Grant employed  
20 similarly strong language in bluntly claiming, "The age of the generalist has passed... Litigants know this and are reluctant to submit a dispute in a specialised area of law to a Judge who has no known competency in that area of law".<sup>185</sup>

25 Statements such as these have contributed to what the Law Commission described as the "awkward question of whether there is a want of confidence in some High Court judges, particularly in the commercial law area".<sup>186</sup> Criticisms of the judiciary's technical competence and the decline in tax cases support the idea that there is a crisis of confidence. However, the Law Commission has pointed to several objective measures of the quality of  
30 generalist High Court decisions. The Commission looked at how other jurisdictions receive New Zealand judgments and found plenty of examples of overseas cases citing New Zealand judgments approvingly.<sup>187</sup> The Commission also considered whether overseas institutions were using New

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<sup>181</sup> Molloy, above n 4, at 20.

<sup>182</sup> Molloy's comments included that "The public of New Zealand is being shafted by the manner in which the judiciary is being deployed", suggestions that judges were "flouting their oath", and that the justice system was "fraudulent" because of the lack of specialisation: Rod Vaughan "New Zealanders shafted by fraudulent justice system, says top QC" *The National Business Review* (online ed, New Zealand, 29 August 2012).

<sup>183</sup> Jock Anderson "Outraged Finlayson says judge-critic Tony Molloy should quit QC rank" *The National Business Review* (online ed, New Zealand, 31 August 2012).

<sup>184</sup> *Notice of Determination by the National Standards Committee (NSC)* (Determination 6446, December 2013).

<sup>185</sup> Anthony Grant "Courts- Is the High Court's Civil Jurisdiction in 'a Death Spiral' (Part 3)" Anthony Grant: Barrister <[www.anthonygrant.com](http://www.anthonygrant.com)>.

<sup>186</sup> Law Commission, above n 8, at 113.

<sup>187</sup> Law Commission, above n 8, at 113.

Zealand as a jurisdiction for their business affairs, and they highlighted evidence that there have been 7,500 foreign trust registrations in New Zealand in October 2006-November 2012,<sup>188</sup> which does not support the notion that confidence in the New Zealand jurisdiction is lacking. The Report  
5 also cited the collective submission of New Zealand judges, which remarks that “there does not seem to be any evidence that appeals from generalist judges are more likely to be overturned on appeal”.<sup>189</sup> It seems that the perception, particularly as expressed by many lawyers, on the competence of the judiciary in technically complex cases is not entirely supportable in  
10 view of this evidence.

Interestingly, although the views expressed by actors in the tax system vary widely, there is a perceptible division between judges and lawyers in the specialisation debate.<sup>190</sup> It may be that tax lawyers, who often focus solely on tax law, are more inclined to rally for what they perceive to  
15 be improvements to the tax system that they exclusively deal with. Those who work wholly in tax law would presumably want to privilege the resolution of tax disputes over other cases, and have a particular interest in disputes being settled at court, rather resolved by the disputes system. On the other hand, judges may be better positioned to holistically gauge the  
20 consequences of specialisation for the justice system overall. It is improper to dismiss the legitimacy of the insights that lawyers offer as being purely myopic or self-interested, but the interests of different stakeholders in the wider court system must be considered when referring to the specialisation debate.

25 f. Cohesion

Legomsky suggests that a cohesive area of law containing substantial interrelationship can benefit from specialisation because specialist judges have a greater appreciation for the overall scheme of the law and can decide cases without creating unintended consequences for other cases within that  
30 branch of law. The complexity of tax law prevents its classification as ‘cohesive’, which counts against specialisation. Specialisation may also impinge on the overall cohesion and accessibility of the court framework. Damage to the organisation of the court framework may create difficulties for litigants to determine where a particular claim lies and a panel within the  
35 High Court could internally fragment the Court. As a by-product of this fragmentation, the valuable collegiality amongst High Court judges may be eroded, particularly if divisions are seen as elitist or insular.<sup>191</sup>

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<sup>188</sup> Law Commission, above n 8, at 114.

<sup>189</sup> Law Commission, above n 8, at 103.

<sup>190</sup> See also Law Commission, above n 8, at 103-106.

<sup>191</sup> The New Zealand Bar Association, above n 2, at 105.

iii. *Dynamism*

The dynamism of tax law favours specialisation because specialist judges' commitment to following developments best enables them to keep pace of dynamic movements.

5           Although tax law is subject to rapid changes, its existence as a primary area of law is long-standing. Unlike the administrative law division of the High Court, which became less necessary as other High Court judges became more aware of and conversant in public law matters, tax law is unlikely to become more mainstreamed in the judicial conscious.

10           Tax law is dynamic for several reasons. First, it is an area that is aggressively tested by taxpayers, with Harley suggesting that "as taxpayers find new ways of acting just outside the boundary of what is taxable, so the government changes the definition of what is taxable to account for the new challenge. This is why there are so many Income Tax Amendment Acts each year and why tax law becomes so complicated".<sup>192</sup> Taxpayers match each move by the Commissioner with an increasingly sophisticated arrangement, precipitating more laws.<sup>193</sup>

20           Tax law is also exceptionally dynamic because of its political exposure. The 1993 New Zealand Law Conference discussed how "Tax is the classic area in which the law and politics interact on a daily basis".<sup>194</sup> Most political parties campaign on tax reform proposals and the tax system is often subject to frequent reforms in service of political agendas.<sup>195</sup> For instance, the notion of a capital gains tax is gaining political traction and it presents an example of tax reform that would undoubtedly add layers of complexity to the tax system that specialist judges may be best equipped to navigate.<sup>196</sup>

25           Sir Ivor Richardson attributed the dynamism of tax law to the economic and social objectives that it serves, concluding that "... there is no other area of our law which is so subject to constant review and change".<sup>197</sup> As well as substantive changes to the law, attitudes towards taxation and compliance can shift and alter the volume of cases. The former President of

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<sup>192</sup> Geoff Harley "Tax and Law" [2002] NZLJ 305 at 305.

<sup>193</sup> See also James R Hines Jr "On the Timeliness of Tax Reform" (2004) 88 Journal of Public Economics 1043.

<sup>194</sup> Ivor Richardson and others "Tax Law: How Can the System Generate the Cash Needs of Government, and Still be Fair to the Ordinary Taxpayer?" (panel discussion at the 1993 New Zealand Law Conference, Wellington, March 1993) at 200.

<sup>195</sup> Sawyer claims that "Tax policy and politics go hand in hand" and observes that the influence of consultation in the generic tax policy process pales in comparison to the will of politicians in tax policy formulation: Adrian Sawyer "Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of 'Law and Politics'" (2013) 28(2) ATF 401 at 402. See also Paul Goldsmith *We Won, You Lost, Eat That!: A Political History of Tax in New Zealand Since 1840* (David Ling Publishing Limited, 2008).

<sup>196</sup> See generally Andrew Maples' discussion of the politicisation of a capital gains tax: Andrew Maples "A Comprehensive Capital Gains Tax in New Zealand – No Longer Political Hari-Kari?: A Consideration of the Labour Party Proposal of 2011" (2014) 20(2) NZJTL 144.

<sup>197</sup> Ivor Richardson "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 ATF 3 at 3.

the Australian Administrative Appeals Tribunal noted that “fashions in tax avoidance” could cause significant fluctuations in the volume of cases coming before the courts.<sup>198</sup>

5 Any specialisation would need to be flexible enough to withstand a changing caseload, according to political, policy, and compliance changes. In this respect, a tax panel is preferable to an independent court, because it can cope better with fluctuating caseloads by having judges sit on other cases when there is reduced demand for tax litigation. Ultimately, generalist courts would allow for the greatest flexibility.

10 *iv. Degree of Isolation*

The degree of isolation of an area of law is a double-edged sword, at times favouring specialisation and at others favouring generalism. Legomsky identifies discreteness and uniqueness as the properties of isolation.

15 Tax law is discrete, even though cases often involve issues that are equally classifiable as, inter alia; company law, property law, or criminal law. The discreteness of tax can be narrowing to the perspectives of specialist judges. Justice French has spoken out against specialist courts stating that:<sup>199</sup>

20 One of the great strengths of the law is the facility it offers to cross-fertilise concepts and approaches from one area to another. Specialisation leads to intellectual inbreeding and risks the development of excessively comfortable relationships between judges and members of the relevant specialist bar.

25 Perhaps the scarce evidence of the cross-fertilisation of other legal concepts into tax law signals that it is already isolated and parochial, when this should not necessarily be the case. It may be that the lack of connections with other areas of law is not due to the nature of tax law, but because of an already blinkered perspective of tax practitioners or judges. Caron suggests that the misperception that tax law is a self-contained body of law has “impaired the development of tax law by ignoring insights from other areas of law that should inform the tax debate”.<sup>200</sup> In the Australian context, Justice Gordon has remarked, “Another effect of specialisation and myopia in the tax profession is the inability, failure or refusal to embrace the particular facts of a problem”.<sup>201</sup> Justice Gordon pointed to *Aid/Watch Incorporated v Commissioner of Taxation*,<sup>202</sup> as an example of a case with a pronounced need to think “outside of the tax sphere”<sup>203</sup> and look to the general law of charities

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<sup>198</sup> Downes, above n 139.

<sup>199</sup> Jeremy Curthoys “In Conversation with Justice Robert French” (2002) 50 IPF 6 at 8.

<sup>200</sup> Paul Caron “Tax Myopia, Or Mamas Don’t Let Your Babies Grow Up To Be Tax Lawyers” (1994) 13 Va Tax Rev 517 at 518.

<sup>201</sup> Michelle Gordon “Tax Is More Than Numbers – But It Is Also More Than Tax: The Interrelationship between Tax Law and Other Areas Of Law, and The Consequences On Teaching, Drafting and Interpreting Tax Laws” (speech to the 23<sup>rd</sup> Australasian Tax Teachers Association Conference, Melbourne, January 2011) at 2.

<sup>202</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

<sup>203</sup> Gordon, above n 201, at 2.

to determine whether the political activities of a taxpayer institution defeated its charitable characterisation, despite the case's classification as a tax case.<sup>204</sup>

The way in which the New Zealand Supreme Court did not characterise the materially similar case of *Re Greenpeace of New Zealand Incorporated*<sup>205</sup> as

5 a tax case<sup>206</sup> demonstrates the artificiality of dividing off an area of law and shows how tax provisions often operate in broader contexts and involve overlapping areas of a law. Judge Barber commented that in cases before the TRA, "all sorts of legal problems only indirectly related to the tax situation arise," such as commercial, trust, or criminal issues.<sup>207</sup> In the many cases that  
10 are not strictly tax-specific, a specialist tax judge is no better equipped than a generalist is.

Tax law may be described as unique because analogies are unlikely to be drawn between the resolution or reasoning of cases in other fields. Although the Income Tax Act is not a code, tax law is primarily statute based,  
15 and tax law has developed unique processes of statutory interpretation,<sup>208</sup> such as the parliamentary contemplation test, where orthodox, traditional methods of interpretation have been inappropriate.<sup>209</sup> However, unique approaches to statutory interpretation have been criticised by the likes of Justice Kirby, who stated that "It is hubris... to consider that 'their Act' is  
20 special and distinct from general movements in statutory construction which have been such a marked feature of our legal system...".<sup>210</sup> Again, it may be that tax law itself is not isolated, but practitioners of tax law further isolate the law.

Whatever the causes of the isolation, it gives rise to an insensitivity of  
25 generalist judges to tax implications of their judgments, whereby a judge's decision in an ostensibly unrelated case can have a ripple effect on tax law. Isolating tax law further by removing it from the general court system or from other generalist judges, heightens this risk. Prebble has commented on a series of problematic decisions in Europe by the generalist European Court of  
30 Justice (ECJ), which have posed a threat to the domestic tax base of some

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<sup>204</sup> The case was brought against the Commissioner and classified as a tax case, even though "the dispute [was] occasioned not by the terms of the revenue legislation ... but by the content of the general law respecting charitable purposes": *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at [27].

<sup>205</sup> *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105.

<sup>206</sup> In New Zealand, the case was not referred to by the Supreme Court as a tax case, even though the Court acknowledged that the principal advantage of charitable registration is tax relief: at [1].

<sup>207</sup> Barber, above n 89, at 2.

<sup>208</sup> See generally Eugen Trombitas "Statutory Interpretation and Tax Avoidance" [2010] NZLJ 428.

<sup>209</sup> For instance, because the Income Tax Act's purposes expressly include the purpose of imposing tax, a purely purposive approach may often be inappropriately stacked in favour of the Commissioner because the interpretation that prevails would be the interpretation that imposes the most tax. See: Income Tax Act 2007, s AA1(a); *Commissioner of Inland Revenue v International Importing Ltd* [1972] NZLR 1095.

<sup>210</sup> *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at [84]; See also Michael Kirby "Hubris Contained: Why a Separate Australian Tax Court Should Be Rejected" (speech to the 23<sup>rd</sup> Challis Taxation Discussion Group, Sydney, 3 August 2007).

European Countries.<sup>211</sup> For instance, several decisions of the ECJ struck down Germany's controlled foreign company regime or the United Kingdom's group relief rules on the basis that they were unjustified restrictions on the freedom of establishment. These decisions are sensible in terms of general company and European law principles, but they can have unfortunate consequences on these countries' ability to protect their domestic tax base. Prebble comments that the ECJ's approach:<sup>212</sup>

10                   ...causes difficulties for the governments of EU Member States which want to collect tax. Their efforts to counter tax avoidance and prevent taxpayers from moving income to what are effectively tax havens can be readily undone by the ECJ.

On one hand, it is arguable that greater judicial specialisation within the ECJ might have avoided these problems, but it illustrates the problems for general courts that arise when generalist judges are distanced from specialised areas.

15       *v.       Repetition*

Areas of law involving a high degree of repetition are more likely to warrant specialisation because they can maximise efficiency. Rather than requiring many judges to become familiar with a repetitive case model, specialisation targets the initial education at a smaller pool of judges. Repetitive cases intensify the need for consistency within an area of law, and consistency is best served by judicial specialisation because specialisation brings familiarity and exposes a case to fewer conflicting adjudicators.<sup>213</sup>

20                   The presence of repetitive cases may pose problems for judicial recruitment, when the position attracts many judges because of the diversity it offers. It is difficult to predict whether tax judicial specialisation would improve or impair recruitment. The wide range of work of generalist judges may be attractive to potential judges.<sup>214</sup> Perhaps it would even come as a relief to many candidates to know they would not hear tax cases.<sup>215</sup> On the other hand, an opportunity to delve further into specialisation is appealing to judges with a strong interest in that area.

30                   However, although avoidance cases dominate substantive tax litigation, the remaining cases often sprawl a range of technical or procedural issues,<sup>216</sup> undermining the characterisation of tax law as an overly repetitive

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<sup>211</sup> John Prebble and others "Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law" (2008) BFIT 151.

<sup>212</sup> Prebble and others, above n 211, at 170.

<sup>213</sup> Legomsky, above n 41, at 27At 27.

<sup>214</sup> Law Commission, above n 8, at 103.

<sup>215</sup> Former Taxation Review Authority, Paul Barber, attributed the backlog of tax cases in the High Court in the mid-1980s to the fact that "... if you speak to any of the High Court Judges, they will tell you that they don't much like handling tax cases": Riley and others, above n 65, at 475.

<sup>216</sup> Judge Barber has commented on the broad range of cases that came before the Taxation Review Authority, stating, "Even from the general description of cases noted in the memorandum, it can be seen that the type-coverage is quite extensive and all sorts of legal problems only indirectly related to the tax situation arise": Barber, above n 89, at 2.

branch of law. Even within avoidance cases, there is minimal repetition and different arrangements require separate factual examination.

vi. *Clannishness*

5 The clannishness of lawyers, government officials, and experts within the tax field also favours generalism. Most law firms will have a dedicated tax team and lawyers rarely move in and out of a tax specialisation because of the significant time taken to build up expertise. This clannishness can increase the chances of perceptions of bias because of the familiarity of adjudicators and other actors in the system.

10 The tax community's clannishness may also give rise to a greater risk of complacency and a reduction in innovative jurisprudence because of the minimal exposure to outside judicial thinking. A fresh perspective is necessary to question assumptions or settled modes of judicial thinking. New Zealand's comparatively small legal population makes clannishness more  
15 troubling. From the outset, a handful of law professors will teach most New Zealand tax lawyers, who then progress through the insular tax community, attending tax-specific conferences, professional development and networking. Caron observes that there is a self-selection bias before law students even begin their education, stating that "Tax courses are perceived  
20 to be reserved for what in my day used to be called 'tax geeks' – accountant-types who carry calculators and plastic pocket-protectors for their multi-color array of pens".<sup>217</sup> Any specialist judges are likely to come from this small, closed tax community and may consequently develop a narrow judicial perspective.

25 Another consequence of this clannishness is its exposure to manipulation. Justice Glazebrook suggests, "A major risk of specialization is that judicial objectivity may be lost due to actors in the sphere becoming too familiar, and judges thus becoming vulnerable to interest group manipulation".<sup>218</sup> Interest groups will no longer have to spread their efforts  
30 across a general bench in the hopes of influencing decision making, leaving few tax judges more susceptible to capture or pressure by interested parties.

Greater tax judiciary specialisation may also damage the representativeness of the bench because the profession often lacks diversity.<sup>219</sup> Worldwide, there is a concentration of men in the tax  
35 profession,<sup>220</sup> which risks exacerbating the unsatisfactory gender diversity of the judiciary.<sup>221</sup> New Zealand is unexceptional; lawyers who spend over 50%

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<sup>217</sup> Caron, above n 200, at 519.

<sup>218</sup> Glazebrook, above n 38, at 538.

<sup>219</sup> The record of appointments to the Taxation Review Authority reinforces the existence of this problem, with only one female tax judge in the history of the Authority.

<sup>220</sup> Ulrike Shultz and Gisela Shaw *Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession* (Hart Publishing, Oregon, 2003) at 346.

<sup>221</sup> Law Commission, above n 15, at 27; see also Susan Glazebrook "Looking Through the Glass: Gender Inequality at the Senior Levels of New Zealand's Legal Profession" (speech to the annual 'Chapman Tripp – Women in Law event', Wellington, 16 September 2010).

of their time on tax law fall in a 39:61 female to male ratio.<sup>222</sup> Indeed, there is a question of whether the small tax community would provide an adequate (let alone diverse) pool of judicial candidates. Judging is, in itself, a legal specialisation,<sup>223</sup> with only a select number of lawyers possessing the necessary qualifications and attributes. Limiting the potential pool to a single area of law may prove difficult in terms of recruitment.

Despite the clannishness of tax law, there have been few applications for recusal for judges of the Taxation Review Authority, perhaps suggesting that arguments relying on perceptions of bias are overstated, since the existence of a single tax adjudicator has not translated to a significant number of recusal applications. Mr John Russell made the only recusal application to an Authority, Judge Barber, who refused.<sup>224</sup> Mr Russell alleged that Judge Barber was biased because he had consistently held against Mr Russell in 65 cases in 1989-2005,<sup>225</sup> which involved the “Russell Template”, a tax template that Mr Russell designed. Mr Russell argued that Judge Barber had “formed very firm views concerning the template”<sup>226</sup> and he highlighted the fact that Judge Barber had described him as a “person who is in business substantially as a tax avoidance specialist” and that his “obsession with saving tax means that he has a mental block over schemes which have gone beyond tax planning into the realm of tax avoidance”.<sup>227</sup> It was unnecessary to decide at the High Court or Court of Appeal whether there was apparent bias because Justice Wylie reheard the substantive case at the High Court and there was no suggestion that he was biased. Although this case represents an isolated event of recusal application, it demonstrates how the risk of apparent bias can flow from a single specialised judge forming fixed views as a result of hearing the same types of cases.

### vii. *Peculiar Importance of Consistency*

Legomsky argues that specialisation helps ensure the law’s internal consistency. This is important in relation to tax law because fairness is an essential aim of the income tax system;<sup>228</sup> taxpayers who are similarly placed should be taxed at a consistent rate. Compliance is often dependent on

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<sup>222</sup> *New Zealand Law Society/Momentum Legal Salary Survey 2011* (2011) at 16. The only areas of law where men featured more dominantly than in Tax were Lending Activities, Arbitration, Banking and Finance, Company/Commercial, Civil Litigation, Immigration, and Property.

<sup>223</sup> Law Commission, above n 8, at 103.

<sup>224</sup> *Russell v Commissioner of Inland Revenue* TRA 003/03 Decision No 10/2005, 27 July 2005.

<sup>225</sup> The Taxation Review Authority heard 82 cases related to Mr Russell since 1989. 65 of those cases were heard by Judge Barber: *Russell v Taxation Review Authority* (2009) 24 NZTC 23, 284 (HC) at [1].

<sup>226</sup> *Russell v Commissioner of Inland Revenue*, above n 224, at [9].

<sup>227</sup> *Russell v Commissioner of Inland Revenue*, above n 224, at [10].

<sup>228</sup> Victoria University of Wellington Tax Working Group *A Tax System for New Zealand’s Future* (Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, January 2010) at 9-10.



perceptions of fairness<sup>229</sup> and the fair resolution of disputes is essential to overall perceptions of fairness.

5 Recently, tax avoidance has begun to attract the wider public's attention, with increased political and media coverage. The IRD's report on the taxation of multinational companies noted "Media comment around the world has focused on the unfairness of the low levels of tax paid by some multinationals", <sup>230</sup> which suggests that the adjudication of tax disputes may already be perceived to favour large multinational parties.

10 Taxpayers are also often indirectly in competition, heightening the need for consistent decision-making to avoid unfair tax advantages for some taxpayers over their competitors. Where competing taxpayers structure their affairs identically, decisions must be consistent between taxpayers to avoid economic inefficiencies.

15 In a small country like New Zealand, the difference between specialist and generalist adjudicators may be minimal. In commenting on the decisions coming from the TRA, Harley suggested that there is "bound to be inconsistency" with five Authorities deciding cases with similar issues, but that the inconsistency is no greater than for some 24 to 26 High Court judges at the Court of Appeal.<sup>231</sup> If a mere five authorities is enough to create  
20 inconsistency in the law, then a tax panel is unlikely to remedy this problem.

#### *viii. Degree of Controversy*

Legomsky argues that controversial subject matter favours generalism because controversy heightens the problems associated with concentrated judicial power and the risk of apparent bias. The controversy of tax judgments  
25 arises for several reasons.

First, the large amount of money involved and the far-reaching consequences of tax law mean that decisions are of considerable public interest. Sir Ivor Richardson affirms the significance of tax law, asserting, "There is no other legislation which is so far reaching and pervasive and  
30 which touches human activities at so many points".<sup>232</sup>

Highly discretionary decisions, such as those in anti-avoidance cases, tend to be the most controversial because the risk of policy-making or judicial activism tends to be the most clearly exhibited in this context. On the topic of tax avoidance, Keating asks:<sup>233</sup>

35 What is it about tax avoidance that causes so much controversy? No other single provision of the Income Tax Act is so commonly litigated.

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<sup>229</sup> Natrah Saad "Fairness Perceptions and Compliance Behaviour: The New Zealand Evidence" (2011) 17(1) NZJTL 33.

<sup>230</sup> *Taxation of Multinational Companies* (Inland Revenue Department, Tax Policy Report, T2012/3250; PAD2012/268, December 2012) at 10.

<sup>231</sup> Geoff Harley "Tax Law: How Can the System Generate the Cash Needs of Government, and Still be Fair to the Ordinary Taxpayer?" (panel discussion at the 1993 New Zealand Law Conference, Wellington, March 1993) at 200 at 209.

<sup>232</sup> Richardson, above n 197, at 3.

<sup>233</sup> Keating, above n 156, at 115.

No other aspect of tax generates as much heated debate in both tax practice and academic circles. All leading cases are reviewed and analysed endlessly, and every new decision is seized upon.

5 Tax cases also create a high degree of controversy because litigation is effectively between the individual and the government,<sup>234</sup> with the result that the resolution of tax cases is of significant public importance. McKay suggests that taxation is a fundamental element of the relationship between the state and the citizen, arguing:<sup>235</sup>

10 Such is the impact of taxation, so vital is it to the character, the quality, of both our day-to-day lives as individuals, and the overall social face of our society, that it seems to me to be a matter of constitutional significance...

The government's interest in taxation is immense, with over \$53.8 billion collected in the 2012/2013 tax year.<sup>236</sup> The Commissioner also arguably  
15 benefits from a power imbalance in litigation,<sup>237</sup> with the full resources of the state behind her. This intensifies the need for public justice in tax cases and suggests that an ordinary court of record ought to hear cases because it is more likely to be open, accessible, and transparent to most citizens. Constitutionally, the judiciary is one of the few, limited checks on  
20 Parliament's otherwise unrestrained power to impose tax. Sir Ivor Richardson has noted that, more recently, the judiciary has adopted a less protective role in respect of individual taxpayers against the Executive.<sup>238</sup> This shift may mean that the court system affords the taxpayer even less protection from the state's whims, intensifying the controversy of decisions.  
25 In many other civil disputes, litigants have a wider range of dispute resolution available to them outside the court system, such as arbitration or mediation. Because tax litigants do not have the same choice of forum and degree of voluntariness towards litigation, the need for the court process to limit controversy and, in turn, be respected as an independent and reputable  
30 forum, is greater.

Tax could also be described as a subject matter with "high emotional content" because of the confiscation of property that it involves.<sup>239</sup> Certainly, some regard taxation as an extraction of private wealth and a deeply intrusive power of the state. Judge Barber also observes that the "harrowing" process  
35 prior to a case reaching court can add to the emotional content of tax cases,

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<sup>234</sup> The Solicitor-General, in his capacity as Chief Executive of the Crown Law Office, is ultimately responsible for the representation of the Commissioner of Inland Revenue in litigation: see generally "Protocols Between the Solicitor-General And Commissioner of Inland Revenue" (29 July 2009) Inland Revenue < [www.ird.govt.nz](http://www.ird.govt.nz) >.

<sup>235</sup> Lindsay McKay "Taxation and the Constitution" (1985) 15 VUWLR 53 at 58.

<sup>236</sup> *Annual Report 2013*, above n 13, at 17.

<sup>237</sup> It has been argued in the Australian context that individual taxpayers in particular can suffer from an unfavourable imbalance in power: Binh Tran-Nam and Michael Walpole "Independent Tax Dispute Resolution and Social Justice in Australia" (2012) 35(2) UNSW Law Journal 470 at 475.

<sup>238</sup> Ivor Richardson "Attitudes to Income Tax Avoidance" (inaugural address delivered before the Victoria University of Wellington, Wellington, 18 April 1967) at 16.

<sup>239</sup> Legomsky, above n 41, at 27.

resulting in an “air of great tension and ill feeling between the parties” that strengthens the need for an undoubtedly independent adjudicator.<sup>240</sup> Indeed, he recounts instances of taxpayers weeping inconsolably upon the realisation that they were finally “actually in an independent judicial forum”.<sup>241</sup> Most of the countries surveyed in part III have additional measures in place for the protection of taxpayers, such as a dedicated tax ombudsman in Australia or a “taxpayer bill of rights” in America.<sup>242</sup> There is a risk that, absent these checks, a small tax court with a greater susceptibility to bias or corruption may corner a taxpayer, leaving him with limited recourse.<sup>243</sup> Of course, even where appeal is an option, the appellate court would remain bound by the tax court’s findings of facts, which may be of little consolation in frequently factual tax decisions.

Tax avoidance scholarship has frequently engaged with questions of the morality of tax avoidance. With this degree of emotional content, a judge’s particular persuasion on an issue is even more likely to enter into that judge’s decision-making, and may lead to the development of a bias. The exposure of many taxpayer companies to a great deal of moral and ethical scrutiny<sup>244</sup> also means that the decisions are more likely to be highly emotional and controversial, heightening the need for public justice in the ordinary courts.

However, it seems that the controversy of tax cases persists, even when the general courts decide them. Many commentators have labelled recent decisions, particularly in avoidance cases, as “controversial” and been critical of the Commissioner’s success rate.<sup>245</sup> Coleman notes that the successful streak of appeals by taxpayers in the 1990s has now ended and has been replaced by a string of successes for the Commissioner, emboldening her to take “...a more and more aggressive stand in litigation”.<sup>246</sup> In a series of interviews with tax lawyers, accountants, academics, and former IRD investigators, there was some evidence of a feeling that the generalist judiciary was increasingly likely to side with the Commissioner’s position, with the results suggesting, “The participants felt that there had been a shift in judicial attitude when interpreting the general anti-avoidance provision. Further, this shift has swung the pendulum the way of the Commissioner.”<sup>247</sup>

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<sup>240</sup> Riley and others, above n 65, at 475.

<sup>241</sup> Riley and others, above n 65, at 475.

<sup>242</sup> See generally Adrian Sawyer “A Comparison of New Zealand Taxpayers’ Rights with Selected Civil Law and Common Law Countries – Have New Zealand Taxpayers Been ‘Short-Changed’?” (1999) 32 *Vanderbilt J Transnatl L* 1345.

<sup>243</sup> The government is looking to establish a conduct complaints process, which may help to boost the accountability of judicial officers in the Taxation Review Authority: Cabinet Social Policy Committee Paper, above n 55, at 6.

<sup>244</sup> Keating observes that allegations of tax avoidance carry a “significant reputational dimension”: Keating, above n 156, at 133.

<sup>245</sup> Hamish Fletcher “Tax Ruling Alarming - Expert” *The New Zealand Herald* (online ed, Auckland, 6 March 2013).

<sup>246</sup> James Coleman “Tax Update” [2014] *NZLJ* 43 at 43.

<sup>247</sup> Richard Bracefield and others “Perspectives and Implications of the Supreme Court ruling in *Penny*: Evidence of an Expectations Gap? (2013) 19 *NZJTL* 51 at 56.

Greater judicial specialisation may send a symbolic message to taxpayers that the judiciary takes these controversial matters seriously. Commentators have made similar arguments in the context of sexual offence courts, claiming that a court of special status or esteem can be appropriate in some circumstances to signal to the community the importance and gravity of sexual offending to the justice system and to “send a message to victims of sexual offending which may encourage reporting of offences.”<sup>248</sup> Greater judicial specialisation could have an important symbolic value in respect of tax law, by establishing that the resolution of tax disputes has a special status in New Zealand. This may encourage greater investment in New Zealand as a business jurisdiction,<sup>249</sup> as well as greater compliance. The opposite possibility exists; taking tax outside the mainstream court system might simply create a perception of tax matters’ lesser importance and confine taxpayers to a court of lower standing, depending on the specialist court’s strength and resourcing.

Additionally, a differing perception of the status of a court may also influence the court’s ability to recruit judges,<sup>250</sup> as occurred in relation to Canada’s former Board of Review. The Law Commission observed that a judicial career often involves surrendering the possibility of a career with real standing; recruitment may become even more difficult if candidates perceive specialist courts to be less prestigious.<sup>251</sup>

ix. *Logistics: Volume, Time, and Geographic Distribution*

Even though many of these criteria point towards specialisation, logistics produce the greatest and most fatal objection. In a review of the Judicature Act, the Law Commission acknowledged that “It would not be sensible for any jurisdiction to introduce change into a quality generalist jurisdiction unless the need to do so can be properly demonstrated”. This need is not yet demonstrated. Much of the efficiency gain from a specialised judicial system relies on a steady stream of cases, which the small jurisdiction of New Zealand would fail to supply.<sup>252</sup> Additionally, specialisation renders the court system less responsive to fluctuations in the volume of cases in particular areas. Justice Glazebrook dismissed the possibility of an independent tax court on logistical grounds:<sup>253</sup>

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<sup>248</sup> Jeremy Finn “Decision-Making and Decision Makers in Sexual Offence Trials: Options For Specialist Sexual Offence Courts, Tribunals of Fact and the Giving of Reasons” (2011) 17 Canterbury L Rev 96 at 102.

<sup>249</sup> The Law Commission acknowledged that “... how things present themselves to the business sector is an important intangible element”: Law Commission, above n 8, at 114.

<sup>250</sup> Markus Zimmer “Overview of Specialized Courts” (2009) 2:1 International Journal for Court Administration 46 at 47.

<sup>251</sup> Law Commission, above n 8, at 103.

<sup>252</sup> This was the conclusion of the Law Commission in *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, above n 12, at 263: “Given the size of the New Zealand jurisdiction and the number of judges in the High Court, we do not believe that the system can have specialist judges to the exclusion of work in the broad general jurisdiction”.

<sup>253</sup> Glazebrook, above n 91, at 21.

5 In a jurisdiction as small as New Zealand... the creation of a separate court dealing with all tax cases is not really an option, particularly with the decline in tax cases being brought before the courts. Even in its heyday, the Taxation Review Authority could not support more than two judges....

10 There are few empirical studies of the volume of tax litigation, but many commentators echo Justice Glazebrook's view that the number of tax cases is decreasing steadily. The Ministry of Justice's review of Wellington and Auckland High Court registries in 2010 put tax law at just 3.8 per cent of the total sample of cases.<sup>254</sup> The IRD has suggested that this trend is evidence that the disputes process was functioning effectively and reducing the need for litigation.<sup>255</sup> However, in the Bar association's submissions they noted, "Many of the countries that are actually embracing specialisation are relatively small, and that on the international experience size alone is not a significant inhibiting factor".<sup>256</sup> This claim is not borne out by surveys of similarly sized countries; the few specialist tax courts or panels in countries of comparable size to New Zealand is compelling evidence of the unfeasibility of further specialisation.<sup>257</sup>

20 As well as the number of tax disputes, the type of disputes is relevant to any proposals for specialisation. On this point, Justice Glazebrook observed an increasing trend towards procedural disputes between 1996 and 2008 because of "teething difficulties" caused by challenge proceedings procedures introduced in 1996.<sup>258</sup> Substantive decisions heighten the benefits of specialisation because they are more likely to engage the judge's specialist skill set and knowledge. The difference that judicial specialisation makes to the determination of procedural issues, judicial review decisions, or enforcement decisions, is minimal. However, Glazebrook J suggests that the rise in procedural issues has settled, observing that in the 2008-2013 period the number of procedural cases in the High Court had dropped to some five cases per year, compared to 14 procedural cases in the 2003-2008 period.<sup>259</sup> The "most important tax cases" before the Supreme Court between its introduction in 2003 and 2013 have featured a more balanced ratio between procedural and substantive issues; of the 12 tax cases before the Supreme Court, five involved procedural issues and the remainder involved tax avoidance or evasion and goods and services tax.<sup>260</sup> Brown suggests that a reduction of procedural cases is not so obvious, arguing that "relatively few

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<sup>254</sup> Law Commission, above n 8, at 108-112.

<sup>255</sup> Inland Revenue *Resolving Tax Disputes: A Legislative Review* (Policy Advice Division of the Inland Revenue Department, Government Discussion Document, July 2003) at 2.

<sup>256</sup> The New Zealand Bar Association, above n 2, at 105.

<sup>257</sup> See Appendix 4.

<sup>258</sup> See also Young, above n 88, at 7-12.

<sup>259</sup> Glazebrook, above n 91, at 3.

<sup>260</sup> Susan Glazebrook "Taxation Disputes in New Zealand" (paper presented to Australasian Tax Teachers Association (ATTA) Conference, Auckland, January 2013) at 3.

of the cases involving Inland Revenue relate to substantive tax disputes (ie, disputes concerning the application of substantive taxing provisions)".<sup>261</sup>

Most commentators seem to agree that, at least of the substantive cases, tax avoidance is a dominant issue. Keating looks broadly at IRD's attitude towards general anti-avoidance provisions, finding that between 2004 and 2010 the department's investigators sought approval to invoke the GAAR or the anti-avoidance rule of s 76 of the Goods and Services Tax Act 1985 804 times, with approval granted in 724 instances. Keating concludes that tax avoidance is a "major feature of the New Zealand tax landscape" that consumes a "disproportionate amount of the resources of Inland Revenue, taxpayers, the courts and practitioners".<sup>262</sup> This has implication for the merits of specialisation. The controversy and discretion that are strongly associated with general anti-avoidance rules are heightened in these cases, militating against specialisation.

Additionally, the "price" of administering a specialist court or panel is not simply figurative. A separate court "does not come cheap",<sup>263</sup> and although a panel would better utilise existing facilities and court systems, it would still involve additional administrative and managerial costs that are unlikely to be offset by any efficiency gains. New Zealand's geographic dispersal would further complicate the logistics of specialisation. Legomsky notes, "A small pie is inconvenient enough, but having to carve it into even smaller segments exacerbates the problem".<sup>264</sup> Adjudicating a small number of tax cases across New Zealand's major populations, presumably with a circuit system,<sup>265</sup> is costly to administer and can lead to certain cities with backlogs of cases and others with an idle jurisdiction.

Ultimately, the tax caseload is insufficient to justify further specialisation, and of the cases that do reach court, the procedural nature of many cases would not reap the full benefits of specialisation. Although these problems fall under a single criterion, the logistical problems associated with an inadequate caseload are fatal to the implementation of tax specialisation.

#### x. *Unique Procedural Needs*

Tax law does not feature particularly unique procedural needs. Already, the TRA has relaxed rules of evidence that allow it to receive any documents or information that assist with the effective dealing of the inquiry.<sup>266</sup> Judge Barber described the TRA as a "slightly relaxed forum" that is "supposed to be trying to put the taxpayer a little bit at ease".<sup>267</sup> The procedural rules are

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<sup>261</sup> Brown, above n 95, at 4.

<sup>262</sup> Keating, above n 156, at 115-116.

<sup>263</sup> Law Commission, above n 15, at 70.

<sup>264</sup> Legomsky, above n 41, at 31.

<sup>265</sup> This would follow the practice of the Taxation Review Authority, which is based in Wellington, but travels in circuit around New Zealand: Prebble and Prebble, above n 90, at 248.

<sup>266</sup> Taxation Review Authorities Act 1994, s 17(1).

<sup>267</sup> Riley and others, above n 65, at 475.

also relaxed for cases that fall under Pt 8 of the Tax Administration Act 1994 that the High Court hears.<sup>268</sup> An advantage of the Authority's status as a tribunal is the room it has to develop fast-tracking or informal procedures in the future (as in Australia and Canada), which is a possibility that the more ossified High Court rules may limit.<sup>269</sup>

Typically, taxpayers who take tax cases to court tend to be large companies represented by skilled and experienced advocates who are comfortable with formal court procedures. The high quality of advocacy in tax cases suggests that judges do not need to take a specialised and more active role in the exposition of a case.<sup>270</sup>

*xi. Special Need for Prompt Resolution*

A need for prompt resolution suggests that specialisation is desirable. Specialists are able to deal with cases more rapidly because less preparation and research around basic principles is necessary. Judges with technical knowledge of an area are also better able to quickly identify the issues in a case, and have less need for expert witnesses.<sup>271</sup> The expediency of case progression corresponds to the financial burden of running the courts, which is transferred to litigants, who must invest privately raised capital, and to taxpayers, who fund the court system. Molloy argues that a further cost of an inefficient allocation of judicial time is that the system needs more judges, meaning additional judges must be appointed from a "lower strata" of candidates, in turn producing greater inefficiency and lower quality judgments.<sup>272</sup>

There are many stages to a tax dispute, and most of them are unduly time-consuming, whether specialists adjudicate them or not. Tax law does not involve a peculiar need for prompt resolution; usually the taxpayer has the ability to defer disputed payments, which alleviates the hardship of a long

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<sup>268</sup> Tax Administration Act 1994, s 136(16).

<sup>269</sup> In Australia, the Federal Court has a fast-track system that aims to deliver judgments within 6 weeks of the trial. The fast-track system incorporates measures such as replacing full proceedings with a case summary, dealing with most interlocutory applications on the papers, holding scheduling conferences, reducing discovery, holding pre-trial conferences, and conducting "chess-clock" style trials: "Fast Track System" Federal Court of Australia <[www.fedcourt.gov.au](http://www.fedcourt.gov.au)>. In Canada, taxpayers can opt to proceed cases where the tax is less than \$25,000 via the informal process. The informal process encompasses more relaxed and flexible rules of evidence and representation and it guarantees that the court fixes a hearing date within 180 days of the filing deadline for the reply and delivers judgments within 90 days of the hearing: MacGregor and others, above n 134, at 95-97.

<sup>270</sup> Even supposing that tax judges need to adopt a different role to cater to unique procedural needs, there is little to suggest that those who are experts in taxation will be any more capable of performing this role.

<sup>271</sup> Katz observes that as well as the lesser need for expert witnesses to understand the complexities of the case, there is also likely to be less reliance on expert witness' conclusions, stating, "again it should not be overlooked that the skill of the specialist advocate can extend to the embellishment of a submission that might muster some credence before a generalist judge, but would readily be seen for what it is by a specialist judge: John Katz "Access to Justice from the Perspective of the Commercial Community: Judicial Specialisation" (2012) 18 AULR 37 at 39.

<sup>272</sup> Molloy, above n 4, at 20-21.

wait for a decision.<sup>273</sup> However, the time per case of tax disputes is still unsatisfactory. Sir Ivor Richardson expressed an overall concern that “resolving tax disputes can take an unacceptably long time” and referred to the many years that pass before cases reached the Court of Appeal.<sup>274</sup> The disputes process has also been criticised for being time-consuming.<sup>275</sup>

Again, the best way to address these delays is by reforming the process’ existing form rather than adding a specialist court or panel system to the High Court. The High Court will benefit from insights into the facts provided by the TRA and the disputes process will help to narrow the range of issues even coming before the court. A specialist court may replace the Authority but it would be unlikely to deal with cases more efficiently than the already specialised tribunal and neither option would address the wait before a case even reaches court, which is a significant contributor to the delays in resolving tax cases.

## *V. The Benchmark for Specialisation*

Although the focus thus far has been on tax law, tax law cannot, and should not, operate in isolation to the rest of the court system. Nor should any proposals for specialisation be considered without a view to the overall integrity of the court structure. The Law Commission’s call for a “coherent and principled framework for the court system” identifies the need to consider specialisation holistically, with a view to creating a system that will be robust and responsive to a changing legal environment in the future.<sup>276</sup> Compared to existing specialist courts in New Zealand, there is arguably a more principled basis for the specialisation of tax cases than there has been for many existing specialist courts in New Zealand. However, the benchmark for greater specialisation cannot be measured against current specialist courts, especially when many of these courts lack a firm and consistent rationale. There is a risk that accepting the existing specialist courts as a mandate for further specialisation in the court system would open the floodgates to a proliferation of specialist courts or divisions fragmenting the High Court, as have occurred in the case of tribunals. This risk will become even more immediate should the Judicature Modernisation Bill be passed, empowering the Chief High Court judge to create new High Court panels.

Finding the appropriate benchmark for specialisation is also not as simple as tallying Legomsky’s criteria to establish whether there are more numeric benefits or disadvantages to specialisation. The criteria are not of equal weighting and some factors more persuasively point towards or away

<sup>273</sup> Tax Administration Act 1994, s 128(2).

<sup>274</sup> Richardson, above n 83.

<sup>275</sup> Andrew Maples “Resolving Small Tax Disputes in New Zealand – Is There A Better Way?” (2011) 6(1) JATTA 96; James Peck and Andrew J Maples “The Tax Disputes Process in New Zealand: What about the Little Fellas?” (2010) 16 NZJTL 348; Keating, above n 96; Glazebrook, above n 91, at 15.

<sup>276</sup> Law Commission, above n 12, at 104.



from greater specialisation than others. Finally, although it is helpful to consider the overseas experiences of specialisation, which can highlight certain frequent problems or benefits of specialisation, it is also inappropriate to rely heavily on the approaches taken in further jurisdictions as an indication of the correct level of specialisation. Specialisation is deeply contextual and the size and structure of New Zealand's court system does not provide a meaningful comparison to entirely base the appropriate level of specialisation in New Zealand on.

Instead, the conclusion must be based on a balancing of all of these factors, including the existing level and success of tax specialisation in New Zealand, the impact of specialisation on the court system as a whole, the successes and shortfalls of specialisation overseas, and nuanced evaluation of Legomsky's criteria.

## VI. Conclusion

On the surface, these factors may appear to point towards specialisation. The nature of tax law establishes it as an obviously complex and dynamic area of law that stands to benefit from specialisation. Many commentators have pointed to issues with the Taxation Review Authority and the general court system, questioning the institutional proficiency of these organisations in dealing with the tax law in an effective and efficient manner. The introduction of greater judicial specialisation seems like an obvious answer to these problems, and it has been a broadly successful answer in countries such as America, Canada, and Australia. Judicial specialisation at the High Court level, through an independent court or internal panel, appears to hold plain and logical benefits; from greater judicial expertise flows higher quality decisions and increased efficiency. In light of this, it is tempting to suggest that a specialist tax court or panel is warranted in New Zealand.

However, a closer inspection reveals that greater specialisation is not without a price, although this price is often more pernicious. Greater specialisation risks the development of idiosyncrasies in the development of the law, the fragmentation of the court system, and heightened controversy or perceptions of bias or appropriation by interest groups. This is not an abstract concern; criticisms of a lack of independence or appropriation are frequent across the overseas experience of specialisation and the history of judicial specialisation in New Zealand indicates a risk of specialist courts being used as a tool for policy intervention. Although the benefits of specialisation often vary in extent, the disadvantages associated with specialisation tend to be consistent and potentially devastating to a court's perception across different applications of judicial specialisation.

Not only does specialisation come at a "price", but also the supposed payoff of specialisation is unlikely to be realised in New Zealand. As well as heightening the problems of a clannish and insular grouping of professionals, the logistical realities of a small country like New Zealand

prohibits the replication of successful specialist courts and panels in foreign jurisdictions and outweighs any arguments for the greater efficiency of specialist courts. New Zealand lacks the critical tax case volume that would enable judges to develop a specialisation, and numerous procedural cases coming before the courts often do not benefit from the enhanced expertise, efficiency, and internal consistency of specialisation. New Zealand simply does not have the size (both the size of the judiciary and the wider legal system) or resources to support tax judicial specialisation.

Additionally, New Zealand is further separated from other judiciaries with tax specialisation by the existence of effective extra-judicial means of tax specialisation, such as the comprehensive disputes process, which continues to evolve and develop to become more efficient and respected. The Taxation Review Authority also continues to occupy an important position in New Zealand's court system, even though it has been affected by fluctuations in workload due to systemic and policy reforms of the tax system. Many of the issues faced by the tribunal and the disputes process tend to revolve around how expensive and time-consuming these forums are. However, these issues are unlikely to be directly caused by problems associated with specialisation, but are more closely tied to the resourcing and management of these forums, which have been subject to a series of ongoing, promising reforms and enhancements since their fairly recent introduction. These reforms will also ensure that the critical perception of independence of the TRA is maintained.

There are countless arguments that could be made for the advantages and disadvantages of judicial specialisation. Yet, overseas experience, an appreciation for the New Zealand context of specialisation, and an evaluation of the normative debate suggests that many of the theoretical benefits of specialisation would not translate to a small New Zealand context, while the inefficiencies, appropriation or bias risk, clannishness, and isolated development of the law would mean that the price that New Zealand would pay for a specialised judicial society in respect of tax law, would far outweigh the benefits that specialisation purports to offer.



## Appendices

### Appendix 1. Number of Tax Review Authority Cases by Year.\*

Year	# of Cases
1974	30
1975	24
1976	22
1977	11
1978	25
1979	24
1980	33
1981	40
1982	62
1983	71
1984	89
1985	87
1986	110
1987	100
1988	82
1989	108
1990	132
1991	71
1992	86
1993	59
1994	38
1995	45
1996	59
1997	41
1998	25
1999	28
2000	21
2001	9
2002	14
2003	29
2004	30
2005	16
2006	10
2007	13
2008	13
2009	19
2010	11
2011	12
2012	11
2013	11

\* Courts of New Zealand does not publish statistics relating to the case volumes of specific tribunals, such as the Taxation Review Authority, but only publishes general workload statistics for a collection of 24 select tribunals, including the Taxation Review Authority. These statistics are instead compiled from the cases reported in the *New Zealand Tax Cases* journal.

*Appendix 2. Taxation Review Authority Appointments.\**

Year	Name	Term	Tenure (Years)	Appointment or Re- Appointment	Gazette Notice (Gazette Year/ Page Reference)
1981	Paul Barber	1981-1988	7	Appointment	1981/2371
1982	John Bathgate	1982-1989	7	Appointment	1982/1383
1984	David Sheppard	1984-1991	7	Appointment	1985/129
1987	Patrick Keane	1987-1994	7	Appointment	1987/1233
1988	Paul Barber	1988-1995	7	Re-Appointment	1988/3646
1989	John Bathgate	1989-1996	7	Re-Appointment	1989/865
1991	Antony Willy	1991-1998	7	Appointment	1991/3223
1994	Patrick Keane	1994-2001	7	Re-Appointment	1994/1400
2003	Paul Barber	2003-2006	3	Re-Appointment	2003/843
2012	Allison Sinclair	2012-2017	5	Appointment	2012/66

\*Between 2006-2012, Paul Barber continued to act as an authority, but there does not appear to be a record of this re-appointment in the Gazette. Additionally, Board of Review judge A.J. Lloyd Martin continued to act as an Authority once the Board became the Taxation Review Authority.

*Appendix 3. Sitting Days of the Taxation Review Authority\**

Year	Sitting Days
1997	72
1998	73
1999	103
2000	50
2001	21
2002	26
2003	96

\* These figures are taken from the Annual Reports of the Department of Courts in 2003 and 1999: *Annual Report* (Department for Courts, Annual Report, 1999) at 99; *Annual Report* (Department for Courts, Annual Report, 2003) at 105. Following the merger of the Department of Courts and the Ministry of Justice in 2003, these statistics were no longer collected and published.

The figures do not always accurately reflect the demand for the Authority because complex cases can skew the total sitting days. For instance, in 1995, a single case occupied an entire 43 sitting days: *Case R 25* (1994) 16 NZTC 6,120.

*Appendix 4: Specialisation in Countries of Similar Size.*

Country	Population (million)*	Specialisation (Court Level)?	Tax Specialisation (Tribunal Level)?	Other Notes
New Zealand	4.51	No	Yes	New Zealand's specialist tribunal is the Taxation Review Authority. <sup>1</sup>
Ireland	4.63	No	Yes	A specialist, independent Appeal Commissioner hears appeals by taxpayers. <sup>2</sup>
Lebanon	4.82	Yes	Yes	Although not solely a tax specialisation, Lebanon has administrative courts and tribunals that hear tax matters. <sup>3</sup>
Norway	5.04	No	No	There is no tax judicial specialisation in Norway, either curial or adjudicative. <sup>4</sup>
Singapore	5.41	No	Yes	Singapore has three Boards of Review for tax matters; the Goods & Services Tax Board of Review, the Income Tax Board of Review, and the Valuation Review Board. <sup>5</sup>
Finland	5.43	Yes	Yes	Finland has a Board of Adjustment as the first appeal authority and then further appeals may go to the Administrative Court. <sup>6</sup>
Slovakia	5.45	Yes	No	Slovakia has an administrative law section within its regional courts that usually act as the court of first instance in administrative matters. <sup>7</sup>
Denmark	5.62	No	Yes	The Danish National Tax Tribunal hears tax matters. The taxpayer may also request an expert opinion at several stages of the dispute, including at the City Court/High Court stage. <sup>8</sup>

\* Population Statistics are taken from the projections for 2013 in: United Nations Department of Economic and Social Affairs/Population Division World Population Prospects: The 2012 Revision, Volume I: Comprehensive Tables (New York, 2013) at 57.

<sup>1</sup> Taxation Review Authorities Act 1994.

<sup>2</sup> Taxes Consolidation Act 1997 (Ireland), s 850; "Office of the Appeal Commissioners (for the purposes of the Income Tax Acts)" (1999) Office of the Appeal Commissioners <www.appealcommissioners.ie>.

<sup>3</sup> OECD Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Review Report Phase 1: Legal and Regulatory Framework: Lebanon (OECD Publishing, 2012) at 11-12.

<sup>4</sup> Bård Tønder "The Control of the Legislative and the Executive Power by Norwegian Courts" (24 June 2014) The Supreme Court of Norway <www.domstol.no>.

<sup>5</sup> Singapore Income Tax Act (c 134) 2014, s 78; Income Tax (Board of Review) (Appeals Procedure) Regulations 1990; Goods and Services Tax Act (c 117a, s 50(10)) Goods and Services Tax (Board of Review) Regulations 1993; Property Tax Act (c 254, s 68) Valuation Review Board (Appeals Procedure) Regulations 1990.

<sup>6</sup> "Tax Administration and Appeals" Vero: Finnish Tax Administration <www.Vero.fi>.

<sup>7</sup> OECD Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Review Report Phase 1: Legal and Regulatory Framework: Slovakia (OECD Publishing, 2012) at 14.

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*Appendix 5: Cases in the TRA, High Court, Court of Appeal, and Supreme Court.\**

Year	TRA	High Court	Court of Appeal	Supreme Court
2008	13	64	9	4
2009	19	60	17	5
2010	11	65	11	6
2011	12	57	12	5
2012	11	56	8	7
2013	11	63	15	2

\* Courts of New Zealand, the Ministry of Justice, and the Inland Revenue Department do not collect/publish statistics for the volume of tax cases before the Courts or the Taxation Review Authority. Data relating to the Taxation Review Authority is compiled from the cases reported in the *New Zealand Tax Cases* journal. Data relating to the general courts is compiled from the Ministry of Justice's *Judicial Decisions Online* Database where cases have the Commissioner as a party. As a result, these statistics may also include cases that relate to ACC, liquidations, or child support, for instance.



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B. *United States of America*

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C. *Canada*

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D. *Australia*

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