

JUDICIAL SPECIALISATION IN A GENERALIST JURISDICTION: IS COMMERCIAL SPECIALISATION WITHIN THE HIGH COURT JUSTIFIED?

*William Steel**

In November 2013, after a series of Law Commission reports and years of academic, professional and judicial discussion, the Government introduced legislation to Parliament to replace the existing High Court commercial list with a specialist commercial panel. Whilst this panel would bring New Zealand into line with many comparable common law jurisdictions, this article argues that the case for specialisation has not been established. In particular, it notes that there is no publically available evidence to support the claim that the High Court is losing its commercial jurisdiction, or that commercial parties are choosing to resolve their disputes offshore or through alternative dispute resolution. Accordingly, this article argues that future research by the Law Commission, or other research agency, is required before specialisation can be justified. In reaching this conclusion, it also examines the issues that may arise if the Government decides to continue with its proposed reform under cl 18 of the Judicature Modernisation Bill 2013, suggesting changes along the way.

I INTRODUCTION

Judicial specialisation is a vexed, complicated and highly contentious issue. On the one hand, several experienced practitioners have strongly advocated moving towards increased High Court specialisation. On the other hand, many of the senior courts judges have rallied against this proposal, vigorously defending their right to exercise all of the High Court's jurisdiction regardless of their pre-bench experience. Unfortunately, much of the debate has centred on perception and intuition, rather than empirical analysis. The purpose of this article is to place the dispute in context, providing a thorough discussion of the contentious issues involved.

Beginning with an analysis of the perceived problem, this article notes that practitioners' concerns with the current system are multifaceted, ranging from the judiciary's ability to develop New Zealand's

* Submitted as part of the LLB(Hons) programme at Victoria University of Wellington.

commercial law to the rising use of alternative dispute resolution (ADR). Whilst these concerns are frequently cited, practitioners fail to provide concrete evidence to support their contentions. Nor, as this article reveals, does this evidence exist. As a result, this article suggests the future steps which law reform bodies such as the Law Commission or the Ministry of Justice should take.

Assuming that further research confirms practitioners' concerns with the current system, this article considers other countries' use of specialist courts and judges, observing that commercial specialisation is present in both large and small jurisdictions. This article then briefly considers the potential effects specialisation may have within New Zealand, before addressing the numerous concerns with the Government's current proposals for reform in the Judicature Modernisation Bill 2013.

II THE PERCEIVED PROBLEM

For New Zealand's civil justice system to flourish, it must enjoy the commercial community's confidence and respect. Decisions need to accord with business common sense, and the standard of judicial reasoning must be high.¹ If not, parties will seek to resolve their disputes elsewhere, depriving High Court judges of the opportunity to shape and develop New Zealand's commercial law.

Unfortunately, if one is to believe the writings of several critics, New Zealand's lack of High Court specialisation represents an "acute problem",² posing a significant threat to the commercial community's "access to justice".³ Their views, and the alleged consequences of this lack of specialisation, are outlined below.

A The Underlying Issues

Underpinning several practitioners' (and some judges') concerns with the current system is the belief that generalist judges may be unable to grasp the factual and legal nuances of many commercial disputes, leading to inadequate decisions and unwanted appeals.

1 Alan Galbraith "Facilitating and Regulating Commerce – The Court Process" (2002) 33 VUWLR 419 at 422; Ivor Richardson "What Can Commercial Lawyers Expect of a Legal System?" (1998) 4 NZBLQ 128 at 133; and John Katz "Access to Justice from the Perspective of the Commercial Community: Judicial Specialisation" (2012) 18 Auckland U L Rev 37 at 38. See also Robert Goff "Commercial Contracts and the Commercial Court" [1984] LMCLQ 382 at 382 where his Lordship famously stated that Judges "are there to help businessmen, not to hinder them: we are there to give effect to their transactions, not frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."

2 Tony Molloy and Toby Graham "Trust Jurisdictions: the Path from Incipience to Refulgence" (2010) 16 Trusts & Trustees 116 at 120.

3 Katz, above n 1, at 41.

1 *Failure to identify the correct facts*

Under New Zealand's common law system, appellate courts almost always defer to the High Court judge's impression of witnesses and decisions based on the evidence placed before him or her.⁴ Accordingly, litigants must be confident of the generalist judge's ability to draw the correct inferences from the evidence placed before the court, otherwise they will begin to look elsewhere.⁵

This is particularly important in highly technical fact-based areas of the law.⁶ Take, for example, a complex multilateral finance or intellectual property dispute.⁷ In many situations, these cases will be won or lost depending on whether the judge understands the evidence in dispute.⁸ Yet, what an expert considers to be "everyday bread and butter ... may well be a minefield" for a non-specialist judge.⁹

The result, according to critics, is that generalist judges may feel the need to take "crash" courses at university, or request additional background information from counsel or expert witnesses.¹⁰ But

4 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 198. See also Viscount Haldane LC's statement in *Nocton v Lord Ashburton* [1914] AC 932 (HL) at 957: "It is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness." (emphasis added).

5 Katz, above n 1, at 41.

6 See for example Michael R Baye and Joshua D Wright "Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals" (2011) 54 *Journal of Law and Economics* 1 at 4; and Richard A Posner "The Law and Economics of the Economic Expert Witness" (1999) 13 *Journal of Economic Perspectives* 91 at 96: "[E]conometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be able to understand all the criticisms of an econometric study, no matter how skilful the econometrician is in explaining a study to a lay audience".

7 For a detailed discussion of these disputes in the New Zealand context see Susan Glazebrook "A Specialist Patent or Intellectual Property Court for New Zealand" (2005) 33 *JWIP* 524; David Baragwanath "How Should We Resolve Disputes in Complex International Financing Transactions?" (2012) 7 *CMLJ* 204; and Jonathan Ross "The case for P.R.I.M.E. Finance: P.R.I.M.E. Finance cases" (2012) 7 *CMLJ* 221.

8 See Intellectual Property Research Institute of Australia "Submission to the Advisory Council on Intellectual Property in response to its Issues Paper Post-Grant Patent Enforcement Strategies" (May 2007) <www.ipria.org>, cited with approval by Glazebrook, above n 7, at 540.

9 Katz, above n 1, at 41. This is not a new phenomenon. For example, in 1911, Learned Hand J stated: "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these ... How long shall we continue to blunder along?" See *Parke-Davis & Co v H K Mulford & Co* 189 F 95, 115 (SDNY, 1911).

10 See for example the House of Lords decision to attend a two-day chemistry seminar at Oxford University in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667 (HL) at [135].

in both situations, trials are likely to become more drawn out, and hence, more expensive.¹¹ This is neither fair on the judges, "who may have no aptitude or interest in the topic",¹² nor the parties, who bear the expense of educating the judge.¹³ More worryingly, as Baragwanath J argued extrajudicially, it is a breach of "natural justice" if judges fail to understand the case pre-trial, leaving them incapable of posing "questions to witnesses and counsel during the hearing".¹⁴

This is not an idle concern for many practitioners. Whereas appellate courts will readily overturn a trial court judge's incorrect application of the law, they "will not reverse a factual finding unless compelling grounds are shown for doing so".¹⁵ The option to appeal, therefore, may be of cold comfort to those litigants whose issue is with the judge's findings of fact, rather than his or her application of the law.

2 *Incorrect application of the law*

Nevertheless, the generalist judge's (in)ability to make correct findings of fact forms only part of the problem according to critics of the current system. If the resulting judgment fails to accord with business common sense, or lacks detailed reasons for its conclusion, commercial parties are unlikely to view the domestic courts with confidence.¹⁶

Unfortunately, critics routinely identify generalist decisions that are said to fail this basic standard.¹⁷ For example, in 2011, a dispute regarding the interpretation of a bond, entered into between the parties pursuant to a ship-building contract, was appealed from the English Commercial Court to the Court of Appeal. At stake was a claim worth US\$46,620,000 plus interest.¹⁸ With Patten LJ and Sir Simon Tuckey coming to different conclusions, Lord Justice Thorpe had the casting vote.

11 For example Baragwanath, above n 7, at 210; Glazebrook, above n 7, at 537; and Richard Southwell "A Specialist Commercial Court in Singapore" (1990) 2 Sac LJ 274 at 275. See also Katz, above n 1, at 39.

12 Baragwanath, above n 7, at 210.

13 For example at 210.

14 At 211.

15 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*, above n 4, at 198 per Tipping J.

16 See generally Galbraith, above n 1.

17 For example Galbraith, above n 1, at 427 trenchantly criticised the Court of Appeal's decision in *Benjamin Developments v Jones* [1994] 3 NZLR 189 (CA) stating that "[the] case illustrates that the judges that made up that particular Court of Appeal were not prepared to subsume their view to that of market participants. In my opinion, they were wrong. Whatever expertise the members of that court had in commercial law is not the same as the expertise or experience that the market participants had in the actual marketplace". See also Tony Molloy "New Zealand: Cuckoos in the nest in an otherwise promising trust and investment jurisdiction" (2009) 201 *Offshore Investment* 19 at 21 who comments on a series of "silly decisions" in New Zealand trust law.

18 *Rainy Sky v Kookmin Bank* [2009] EWHC 2624 (Comm), [2010] 1 All ER (Comm) 823 at [1].

In a one paragraph opinion, Thorpe LJ (a former Family Court judge) commenced his reasoning as follows:¹⁹

I find myself in the invidious position of expressing a decisive opinion in a field that is completely foreign. With considerable trepidation I support the judgment of Patten LJ.

Clearly, this statement is unlikely to engender confidence in the judiciary.²⁰ Indeed, the case's subsequent progression to the United Kingdom's Supreme Court further reinforced many practitioners' perception of non-specialist judges being unsuitable for deciding commercial disputes. Delivering the Court's unanimous judgment, Lord Clarke dramatically overturned the Court of Appeal's decision, stating that it led to a "surprising and uncommercial result"²¹ and "defies commercial common sense."²²

Admittedly, this example involves an appellate, rather than a trial, court decision from a different jurisdiction. Nevertheless, it provides a stark example of a judge who is out of his depth. And it is this risk which causes significant concern amongst senior practitioners.²³

Significantly, this unease is not unique to barristers and their clients. Indeed, it is a view often shared by judges.²⁴ In 2009, New Zealand's Attorney-General, Chris Finlayson QC, recounted Sir Hugh Laddie's experience as an English High Court judge as persuading him that increased judicial specialisation was required.²⁵ In 2005, Sir Hugh Laddie took the almost unprecedented step of resigning his judicial commission. His reasons for doing so were illuminating. Amongst other

19 *Rainy Sky v Kookmin Bank* at [2010] EWCA Civ 582, [2011] 1 All ER (Comm) 18 at [53].

20 For example, Mark Humphries, former head of advocacy at Linklaters in London, noted in "Choosing the Right Judges" (7 July 2011) Law Society Gazette <www.lawgazette.co.uk>, "can it be right that an appeal from a Commercial Court judgment is ultimately decided by a judge whose expertise is largely confined to family law? ... At the very least, the public is entitled to expect that the law will be administered by those who have sufficient expertise."

21 *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [17].

22 At [41] and [45].

23 See for example Baragwanath, above n 7, at 210; Katz, above n 1, at 41; Molloy, above n 17, at 21; and Humphries, above n 20.

24 See, for instance, Warren Burger's statements in "Using Arbitration to Achieve Justice" (1985) 50 Arb J 3 at 6. See also David Williams QC, former High Court Judge, who observed that "the commercial community [in New Zealand] is bailing out of civil litigation [because of] ... 'continuing long run unhappiness' with the [apparent] refusal to let judges specialise in either commercial or criminal matters", cited by Molloy, above n 17, at 22.

25 Chris 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).

"gripes",²⁶ he expressed serious concern at the prospect of hearing cases outside his experience, stating that "it was challenging – like high wire walking – but I didn't think it was fair for clients to be learning at their expense".²⁷ As Finlayson noted:²⁸

... this made me think that if someone like Sir Hugh [whom he had previously described as being "one of the most impressive lawyers I have ever met"] could be lost to the bench due to his fear he lacked experience in some areas, then we have to ask ourselves "what about others"?

Finally, there is a widespread view that specialisation at the bar should result in specialisation at the bench.²⁹ If, as critics emphasise, commercial parties do not expect lawyers to be generalists, how can they expect judges to become experts in the multitude of cases that come before them?³⁰

B How is This a Problem?

A lack of judicial specialisation does not pose a direct threat to New Zealand's judicial system. Taken as a whole, the number of wayward decisions by generalist judges is likely to be a relatively small percentage of the overall number of High Court decisions. Instead, the damage, according to critics, comes from the loss of litigation as commercial parties choose to use ADR and other offshore dispute resolution bodies, threatening the development of New Zealand's commercial law.³¹

26 In particular, "[h]e blamed a lack of stimulation [and] the isolation of the job". See "Professor Sir Hugh Laddie" *The Telegraph* (online ed, London, 3 December 2008).

27 "Professor Sir Hugh Laddie", above n 26.

28 Finlayson, above n 25.

29 For example Katz, above n 1, at 39; and Galbraith, above n 1, at 423.

30 For example Katz, above n 1, at 39; and Galbraith, above n 1, at 423. See also the New Zealand Bar Association's submission to the Law Commission, which observed that "[s]pecialisation in one form or another is a reality in the modern practice of law and has been for some time now. It is an issue of relevance, not just for legal practitioners and their clients, but also the judiciary." Cited in Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) [Law Commission 2012 *Issues Paper*]. For a contrasting view, see Susy Frankel "Commentary on the Conference Session 'Regulating and Facilitating Commerce'" (2002) 33 VUWLR 813 at 816.

31 Indeed, the New Zealand Law Society recently expressed concern "about the prospect of the law not being developed and articulated as fully as it might be because of a decline in judgments in commercial cases. This is an issue that is important to the commercial community." See Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) [Law Commission 2012 *Review of the Judicature Act 1908*] at [10.38]. See also Helen Winkelmann, Chief High Court Judge of New Zealand "ADR and the Civil Justice System" (speech to the Arbitrators' and Mediators' Institute of New Zealand, Auckland, 6 August 2011) at 2.

1 *Increasing use of ADR*

Defined broadly, ADR refers to all methods of resolving a dispute other than by recourse to litigation. Whilst this includes processes such as negotiation, conciliation and mini-trials,³² practitioners have emphasised the (perceived) link between a lack of judicial specialisation, and the rise of arbitration and mediation.

Although arbitration offers many potential advantages over litigation, "often the factor which tips the choice towards arbitration", according to Alan Galbraith QC, "is the ability of the parties to select the arbitrator".³³ Given the choice between an experienced arbitrator, and the possibility of a judge who finds himself "in the invidious position of expressing a decisive opinion in a field that is completely foreign",³⁴ it is easy to see why commercial parties (allegedly) opt for arbitration.³⁵

There is also, according to many critics, a clear link between the use of mediation and the High Court's lack of commercial specialisation. As Sir Ivor Richardson wrote, "[j]ustice may be priceless, but it is not costless".³⁶ The *risk* to parties (however misguided) from potential future costs in terms of time, expense and appeals resulting from inadequate judicial reasoning forms the backdrop to mediation.³⁷ As a result, it is suggested that parties face an added impetus to settle upon terms of their choosing, with the help of a specialist mediator, rather than risk the (albeit low) potential vagaries of a generalist judge.³⁸

This (perceived) loss of commercial litigation has serious consequences for New Zealand's economy and justice system. If ADR's popularity continues to grow, courts are likely to be faced with

32 David Spencer *Principles of Dispute Resolution* (Thomson Reuters, Sydney, 2011) at 2.

33 Galbraith, above n 1, at 421.

34 *Rainy Sky v Kookmin Bank*, above n 19, at [53].

34 Ivor Richardson "Law and Economics" (1998) 4 NZBLQ 64 at 64.

35 This view was reinforced by Warren Burger, former Chief Justice of the United States of America Supreme Court, when he stated: "My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases ... I emphasize this because to find precisely the judge whose talents and experience fit a particular case of great complexity is a fortuitous circumstance. This can be made more likely if two intelligent litigants agree to pick their own triers of the issues." See Burger, above n 24, at 6.

36 Richardson, above n 34, at 64.

37 See Susan Corbett "Mediation of Intellectual Property Disputes: A Critical Analysis" (2011) 17 NZBLQ 51 at 62.

38 As the Law Commission recently noted, "how things present themselves to the business sector is an important intangible element. And there can be little doubt, given the worldwide acceptance of its importance in many jurisdictions, that the actual 'availability' – regardless of the numerical impact – of a commercial court or panel is perceived to be of some moment. *It is a confidence factor in a particular jurisdiction that is not easily quantified.*" Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.60] (emphasis added).

fewer civil suits, and less ability to shape future law.³⁹ Indeed, the New Zealand Law Society recently expressed concern "about the prospect of the law not being developed and articulated as fully as it might be because of a decline in judgments in commercial cases".⁴⁰

2 *Offshore litigation*

Unfortunately, practitioners have emphasised that ADR is not the only threat to New Zealand's commercial litigation. In an increasingly globalised world, New Zealand businesses will often contract with offshore entities, leading to negotiations on a choice of forum clause. The problem, in this regard, as Sir Ivor Richardson observed, is that "[t]he legal procedures of the jurisdiction, including the quality of lawyers and judges will influence forum selection *as much as the substantive law*".⁴¹

Whilst New Zealand undoubtedly has a solid legal system, it is clear that some of our most substantial disputes are now being resolved offshore, under different jurisdictions.⁴² Part of the reason appears to be a lack of judicial specialisation.

In 2010, a leading international journal – *Trusts & Trustees* – commissioned an issue on emerging trust jurisdictions, including China, Cyprus, Malta, Russia and, pertinently, New Zealand.⁴³ The accompanying editorial does not make for pleasant reading. In the editors' view:⁴⁴

[T]he acute problem besetting [New Zealand] is a lack of judicial specialization, combined with a high proportion of judges ... whose judicial utterances display a serious ineptitude for equity and trust matters.

Admittedly, this particular editorial was jointly written by Tony Molloy QC, an outspoken critic of New Zealand's generalist system.⁴⁵ Nonetheless, statements such as these represent a significant

39 This is not an idle concern. In relation to a dwindling number of construction cases, Canada's Chief Justice noted: "The construction law tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are being neglected." Beverly McLachlin "Judging the 'Vanishing Trial' in the Construction Industry" (2010) 5 CL Int 9 at 10. For a New Zealand perspective see Winkelmann, above n 33.

40 Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.39].

41 Richardson, above n 1, at 132 (emphasis added).

42 For two examples of large commercial disputes that were resolved outside New Zealand's courts see *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* [2014] NZHC 1681; and *Ironsands Investments Ltd v Toward Industries Ltd* [2012] NZHC 1277.

43 Molloy and Graham, above n 2. *Trusts and Trustees'* editorial board includes figures such as Lord Millett, Sir Gavin Lightman and Dr Donovan Waters QC.

44 Molloy and Graham, above n 2, at 120.

45 Notwithstanding Tony Molloy QC's obvious bias, this editorial was vigorously defended by Anthony Grant who argued: "I [do not] think that those who read this article should say that criticism from *Trusts and Trustees* is merely a criticism from Tony Molloy. It is not. The Editorial comments are jointly authored and are from

threat to New Zealand's legal system. If such criticisms become well known, then offshore parties may become more insistent when negotiating choice of forum clauses.⁴⁶ To the extent this occurs, New Zealand stands to lose some of its most significant litigation, with a consequent inability to shape and develop our existing commercial law.

C Summary

According to its detractors, litigation has truly become an option of last resort.⁴⁷ Commercial parties' and their lawyers' lack of confidence in the ability of generalist judges to grasp the factual and/or legal nuances of many commercial disputes has led to a significant loss of commercial litigation in New Zealand. Where parties have the choice, disputes are primarily resolved through ADR or in offshore courts, threatening the development of New Zealand's commercial law and undermining its economic growth. The only solution, for many senior practitioners, is an increase in High Court specialisation.⁴⁸

III DOES PERCEPTION MATCH REALITY?

However, whilst criticisms of the current system abound, an almost universal feature of these articles and comments is a lack of empirical data to support their claims. Forceful statements are often justified on the basis of personal experience, or discussions with other lawyers or judges.⁴⁹ Numerous unnamed "clients" are referred to as supporting a move to specialisation.⁵⁰ Yet none of this information is public or available to scrutiny. This is not satisfactory. As the Law Commission

a legal journal of international repute with an Editorial Board of impeccable quality. That is how readers will interpret them." See Anthony Grant "How Others See Us: A Need for Judicial Specialisation" (14 May 2010) <www.anthonygrant.com>.

46 For example, Grant, above n 45. See also Galbraith, above n 1, at 421 who argues: "It is important that the New Zealand court system maintains the integrity and confidence of the commercial community in its processes and outcomes, so that New Zealand businesses can argue with confidence that New Zealand is an appropriate legal forum for determining disputes arising out of the international commerce they engage in."

47 For example Katz, above n 1, at 38.

48 See for example Anthony Grant "Is the High Court's Civil Jurisdiction in a Death Spiral (part 3)?" (2010) 153 NZ Lawyer Magazine 9; Galbraith, above n 1; and Molloy and Graham, above n 2, at 120.

49 See, for instance Galbraith, above n 1, at 422 who justified his comments on the basis of "thirty plus years in litigation, and innumerable conversations with other litigators and with commercial clients."

50 For example, Anthony Grant stated: "I am aware of at least one enterprise that is so mistrustful of our senior courts it will not do business in New Zealand unless the parties it contracts with agree that all disputes will be litigated off-shore. I am also aware of other enterprises that are not willing to do any business in New Zealand because of their lack of confidence in our senior courts": Anthony Grant "Is the High Court's Civil Jurisdiction in a Death Spiral? (Part 1)" (17 September 2010) <www.anthonygrant.com>.

recently observed: "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."⁵¹

The purpose of this part is to examine the available evidence to assess whether the above concerns represent reality, or mere perception. In this regard, there are two main issues. First, what is meant by "commercial cases"? Secondly, has there been a drop-off in commercial litigation, or a substantial increase in the use of ADR?

A What is a "Commercial Case"?

As a matter of principle, one cannot propose a solution (in this case, increased judicial specialisation) without first identifying a problem. Unfortunately, a distinctive feature of the judicial specialisation debate has been the failure of practitioners and others to define what is, and is not, a "commercial case".⁵²

Although a murder case undoubtedly involves criminal law and a contract performance dispute involves commercial law, the distinction is not always clear-cut. Can tax, competition and now breach of directors' duties cases, which will often involve some form of criminal element, be considered commercial if all of the evidence before the court concerns the nature of the market or the reasons for entering into a particular transaction? Moreover, how does one classify cases such as *Prest v Petrodel Resources Ltd*,⁵³ which, while nominally a family law dispute, involved complex issues about piercing the corporate veil?

New Zealand's case and statute law provides only limited guidance. In 1986, the Government attempted to define the scope of "commercial proceedings" eligible for entry onto the newly established commercial list. The result was a detailed list of proceedings, as set out in s 24B of the Judicature Act 1908.⁵⁴ Unfortunately, subsequent judicial interpretation has substantially limited the list's effectiveness as an all-purpose definition, with the High Court holding that s 24B simply refers to disputes of a sufficiently "commercial flavour".⁵⁵ The problem with this interpretation is that it immediately becomes a subjective exercise, providing little guidance on what is, and is not, considered commercial.⁵⁶

51 Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.41].

52 See Frankel, above n 30, at 816.

53 *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415.

54 Judicature Act 1908, s 24B.

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

56 One needs to look no further than Wylie J's statement in *Sullivan v Villages of NZ (Pakuranga) Ltd* (1990) 3 PRNZ 718 (HC) at 721: "It may be difficult to define the line [between commercial and non-commercial cases] but it should not be difficult to recognise on which side of the line a particular case should fall."

Nor is there an internationally accepted definition.⁵⁷ Nevertheless, following the Law Commission's recent approach,⁵⁸ it is sufficient, at this stage, to adopt the English Commercial Court's approach, which defines a commercial case as any claim relating to:⁵⁹

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

B Has There Been A Decline in Commercial Litigation?

Having roughly defined what is, and is not, "commercial", it becomes possible to assess whether there has been a substantial drop-off in the level of commercial litigation, or a large increase in the use of ADR, as one would expect if concerns about judicial specialisation are valid.

1 High Court proceedings

Unfortunately, as the Law Commission recently discovered, it is almost impossible to determine whether the High Court has experienced a decline in the number of commercial proceedings.⁶⁰

One reason for this is that neither the High Court,⁶¹ nor the Ministry of Justice,⁶² provides detailed breakdowns of the types of claims filed, or the numbers that are disposed of through trial. In general,

57 Compare, for example, the definition of commercial proceedings under r 45.1 of the Uniform Civil Procedure Rules 2005 (NSW) and the definition of commercial under art 1(1) of the United Nations Commission on International Trade Model Law on International Commercial Arbitration GA Res 61/33, A/61/17 (1985).

58 Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.12].

59 Civil Procedure Rules (UK), r 58.1(2).

60 Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.42].

61 See generally Courts of New Zealand "Annual Statistics" <www.courtsofnz.govt.nz>.

62 See generally the Ministry of Justice *Annual Report 1 July 2011 – 30 June 2012* (Wellington, 2012); and Ministry of Justice *Annual Report 1 July 2010 – 30 June 2011* (Wellington, 2011).

reports distinguish between criminal trials, criminal appeals, civil proceedings⁶³ and civil appeals.⁶⁴ Furthermore, even though reports occasionally provide additional breakdowns, distinguishing insolvency claims and judicial review applications from other cases, this provides little to no information as to the underlying nature of the remaining "general proceedings".⁶⁵ As a result, it is almost impossible to identify the number of *commercial* (rather than civil) claims going before the court, let alone identify the nature of these claims.

This is not the only problem one faces when attempting to assess the High Court's commercial workload. Reports often use different time periods, and have conflicting figures. Take, for example, the data presented in the 2012 and 2013 High Court Annual Reports.

2012 High Court Annual Report⁶⁶

Summary of new business and disposals for the year ended 30 November 2012				
	Jury trials	Civil proceedings	Criminal appeals	Civil appeals
New business				
2012	212	2,889	1,158	341
2011	162	3,005	1,194	353
Disposals				
2012	206	3,072	1,206	328
2011	184	3,164	1,213	314

63 Defined by s 2 of the Judicature Act 1908 as "any proceedings in the court, other than criminal proceedings".

64 See for example Helen Winkelmann "Report from the High Court 2011 – The Year in Review" (23 February 2012) Courts of New Zealand <www.courtsofnz.govt.nz>; Helen Winkelmann "Report from the High Court 2012 – The Year in Review" Courts of New Zealand <www.courtsofnz.govt.nz>; and Helen Winkelmann "Report from the High Court 2013 – The Year in Review" (9 April 2014) Courts of New Zealand <www.courtsofnz.govt.nz>.

65 For instance Courts of New Zealand "Annual Statistics for the High Court December 2012" <www.courtsofnz.govt.nz>.

66 Table sourced from Winkelmann "2012 High Court Annual Report", above n 64, at 4.

Disposals by trial adjudication				
2012	113	158		
2011	123	136		
Disposals by non-trial adjudication				
2012		494		
2011		587		

2013 High Court Annual Report⁶⁷

Summary of new business and disposals for the year ended 31 December 2013				
	Criminal trials	Civil proceedings	Criminal appeals	Civil appeals
New business				
2013	215	2,669	1,043	317
2012	232	2,827	1,179	338
Disposals				
2013	222	2,598	1,048	317
2012	212	3,047	1,213	320
Disposals by trial adjudication				
2013		365		
2012		386		
Disposals by non-trial adjudication				
2013		789		
2012		1,020		

⁶⁷ Table sourced from Winkelmann "2013 High Court Annual Report", above n 64, at 9.

As will be immediately apparent, the reports are conflicting and impossible to reconcile. Whereas the 2013 report clearly covers the 12 months from 1 January 2013 to 31 December 2013, the 2012 report fails to clarify whether the period covered is the 11 months from January 2012 to November 2012, or the full 12 months from December 2011 to November 2012. Already, therefore, one faces significant difficulties when trying to compare the two reports.

However, of greater concern are the reports' conflicting statistics. According to the 2013 report, the High Court resolved 386 civil proceedings by trial in 2012, dramatically overstating the 2012 report's version of events, which recorded only 158 civil cases as being determined by trial to the year ended 30 November. Thus, unless the High Court released 228 judgments in December 2012 (the one month for which there is no data), the two reports are irreconcilable, preventing any meaningful comparison.

Faced with contradictory official reports, the Law Commission examined a small sample of the civil cases that were "disposed of" in the Auckland and Wellington High Court registries between 2008 and 2010.⁶⁸ Whilst they successfully broke the claims down into 41 categories, such as negligence, contract and insurance cases, their work provided little insight for three reasons. First, because the categorisation was done by court staff, it "is not necessarily as accurate as if it had been done by legally trained people".⁶⁹ Secondly, because the claims were broken down into so many categories, "it is difficult to get a broad sense of the overall classes of case[s]" determined by the High Court.⁷⁰ Finally, because the sample only considered claims that progressed to trial, it failed to provide any information on the roughly 91–93 per cent of proceedings that settle pre-trial.⁷¹

There is, therefore, no publically available information to support or refute practitioners' claims that a significant amount of commercial litigation is being diverted from the High Court to alternative dispute fora.

2 *District Court proceedings*

Nor is there any conclusive evidence to suggest that the District Court has lost its commercial jurisdiction. Although this article focuses on the High Court, the vast majority of New Zealand's civil disputes, up to a value of \$200,000,⁷² are resolved by generalist judges in the District Court. Accordingly, if, as practitioners claim, commercial parties have lost confidence in generalist judges'

68 Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.48] (emphasis added).

69 At [10.50].

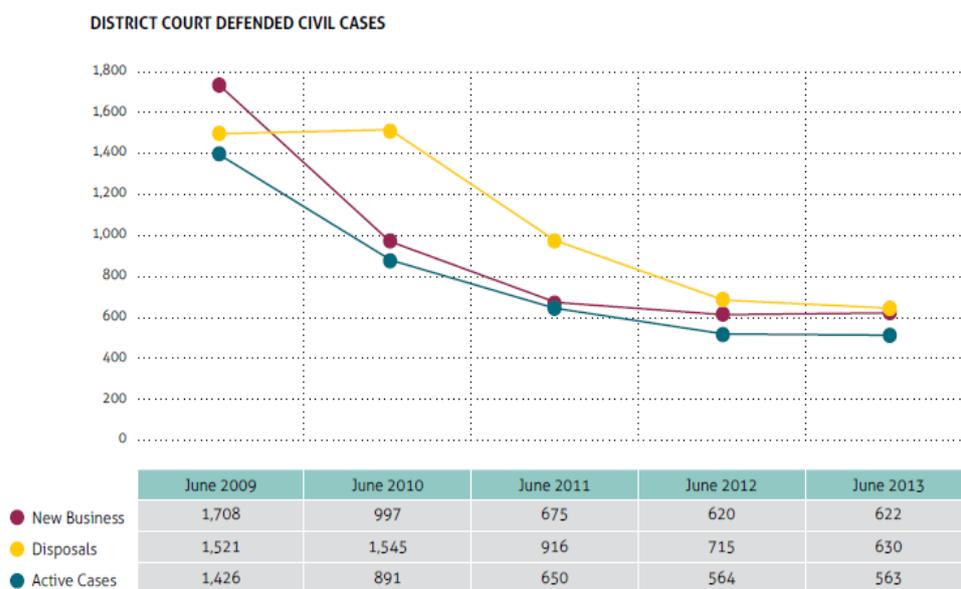
70 At [10.50].

71 Winkelmann "2012 High Court Annual Report", above n 64, at 6; and Winkelmann "2013 High Court Annual Report", above n 64, at 11.

72 District Courts Act 1947, s 29. This jurisdiction is set to increase to \$350,000 under cl 256 of the Judicature Modernisation Bill 2013 (178-2).

abilities to grasp the factual and/or legal nuances of their disputes, one would expect to see a decline in the level of District Court commercial litigation.

Prima facie, this is exactly what has happened.⁷³ As the graph on the following page reveals, the number of defended cases filed and disposed of at trial by the District Court fell by almost two-thirds between June 2009 and June 2013, suggesting strong litigant dissatisfaction with the generalist court system.



However, this decline in litigation provides little support for practitioners' claims for two reasons.

First, the District Court has always used generalist judges to resolve civil disputes. Accordingly, it would be unlikely that litigants suddenly lost confidence in the Court's judges between 2009 and 2010. Instead, as the Court's annual reports reveal, a more likely explanation for the rapid decline was the introduction of new District Court Rules in November 2009,⁷⁴ which strongly encouraged pre-trial settlement.⁷⁵

73 Graph sourced from District Courts of New Zealand *Annual Report 2013* (Wellington) at 39. Importantly, the graph and accompanying figures only relate to those cases which proceeded to trial. There are no publically available statistics on the number of civil claims filed.

74 District Court Rules 2009, r 1.2.

75 Courts of New Zealand "Annual Statistics for the District Courts – December 2011" <www.courtsofnz.govt.nz>

Unfortunately, there is no publically available data on the number of civil claims filed, however, the increased focus on pre-trial settlements from November 2009 explains the rapid decline in the number of "*defended* civil cases", as plotted on the graph above. Indeed, this explanation is further supported by the stabilisation in civil litigation numbers between 2012 and 2013, after all of the changes "washed through".

Secondly, even if it were possible to "strip-out" the new court rules' impact, the District Court's statistics only refer to "civil litigation", providing no information as to the underlying state of "commercial litigation".

Consequently, as with the High Court, there is no publically available information to support practitioners' claims that commercial parties have lost confidence in generalist judges' ability to resolve their disputes.

C Has There Been an Upsurge in ADR's Popularity?

Nevertheless, if, as many practitioners claim, the High Court is in danger of losing its commercial litigation practice,⁷⁶ then one would expect to see, first, a significant increase in the use of ADR and, secondly, evidence linking this rise in ADR to the High Court's generalist structure, rather than factors such as time, cost and flexibility. Once again, however, there is a distinct lack of empirical evidence.

Whereas the Ministry of Justice compiles data on the number of claims filed and resolved in New Zealand's courts, there is no central dispute resolution body to collate or produce any meaningful ADR statistics.⁷⁷ Moreover, because disputes are resolved confidentially, and in many different fora, it becomes almost impossible for researchers even to begin to estimate the numbers of disputes resolved outside the court system.

Fortunately, there is one very limited exception. In 2004, the Ministry of Justice released a report on the use of ADR in "general civil cases".⁷⁸ Based upon surveys with lawyers, ADR professionals, litigants and judges, the research attempted to answer many of the "unanswered questions", such as whether ADR's use was growing, and the reasons for that growth, if any.⁷⁹

76 For example Galbraith, above n 1, at 421 who stated that "in Auckland, the majority of substantial commercial disputes, other than debt collecting, are now determined by alternative dispute fora – arbitrators and mediators".

77 Whilst there are two ADR professional organisations in New Zealand – LEADR (Lawyers Engaged in Alternative Dispute Resolution) and AMINZ (Arbitrators' and Mediators' Institute of New Zealand), neither compile statistics on the use of ADR in New Zealand.

78 K Saville-Smith and R Fraser *Alternative Dispute Resolution: General Civil Cases* (Ministry of Justice, Wellington, 2004).

79 At 2.

In terms of ADR's overall use, the report's findings were underwhelming. Perhaps reflecting the nature of a survey, the report simply found that:⁸⁰

With the exception of [litigants], all the stakeholder groups expressed a view that the use of ADR is increasing. Among ADR practitioners, however ... there is a view that the increase in ADR take-up, especially mediation, has not been as pronounced or as extensive as predicted in the 1980s and 1990s.

Nevertheless, other aspects of the report are illuminating. Lawyers who primarily worked in the High Court reported that of the 1,923 general civil cases they handled in 2002,⁸¹ 1,193 were filed in the High Court and 730 were not.⁸² In other words, only 61 per cent of claims, eligible to be heard in the High Court, were actually filed.⁸³ Furthermore, of the 730 unfiled claims, lawyers reported that 494 were settled through ADR during the survey's time period.⁸⁴

In many respects, this lends significant weight to practitioners' claims that the High Court is at risk of losing its civil jurisdiction. If the above figures are correct, then the High Court may hear less than 5.5 per cent of all civil claims in New Zealand.⁸⁵ Furthermore, with 88.5 per cent of lawyers surveyed reporting that commercial contract disputes were suitable for ADR,⁸⁶ the risk is that the proportion of *commercial* (rather than civil) cases being diverted from courts to ADR is considerably higher.

However, this does not provide sufficient evidence to support practitioners' claims that litigants are being driven into ADR due to a lack of High Court specialisation for two reasons. First, the survey was conducted in 2003, with the questions relating to 2002. In the intervening decade, lawyer and client perceptions of ADR and the High Court may have changed significantly, with the survey's results becoming outdated by 2015.

80 At 16.

81 The survey covered the period 1 January 2002 to 31 December 2002.

82 Saville-Smith and Fraser, above n 78, at 40.

83 At 40.

84 This was done primarily through lawyer-lawyer negotiation and mediation. See Saville-Smith and Fraser, above n 78, at 40.

85 If one accepts that the High Court resolves between seven and nine per cent of all civil claims filed, as suggested by the High Court annual reports, and only 61 per cent of civil claims are filed in the High Court, then on the basis of these figures, the High Court would determine only 5.49 per cent of all reported civil disputes.

86 Saville-Smith and Fraser, above n 78, at 14.

Secondly, and more importantly, the survey fails to identify the extent to which the High Court's generalist structure is fuelling ADR's use.⁸⁷ ADR offers many advantages over litigation independent of the level of judicial specialisation, such as reduced cost and time relative to court proceedings,⁸⁸ and increased confidentiality⁸⁹ and flexibility.⁹⁰ Thus, while the survey may be useful as a historical benchmark for any future research, it fails to shed much light on the link between a lack of judicial specialisation and ADR's use.

IV WHERE TO FROM HERE?

How, then, can one assess whether specialist High Court commercial panels are required or desirable?

87 The report provided the following table. Saville-Smith and Fraser, above n 78, at 27.

Lawyers' Perceptions of Disputants' Reasons for ADR Take-Up (multiple responses allowed)

Perceived Disputant Reason	Responses	% of Lawyers (n = 196)
Want to reduce costs	183	93.4
Want speedy resolution	159	81.1
Uncertainty of court outcome	142	72.4
Preservation of ongoing relationship	86	43.9
Desire for compromise solution	82	41.8
Desire for more control over process and outcome	80	40.8
Privacy and confidentiality	74	37.8
Directed by contract, statute or existing agreement	61	31.1
Desire for creative solution	48	24.5
Concerns about court procedures	39	19.9

Importantly, one cannot use the uncertainty of court outcome as a proxy for judicial specialisation given the number of other explanations for such a response.

88 See for example Saville-Smith and Fraser, above n 78, at 26–29; Susan Blake, Julie Browne and Stuart Sime *A Practical Approach to Alternative Dispute Resolution* (2nd ed, Oxford University Press, Oxford, 2012) at [14.14]; and Roger Pitchforth "Arbitration" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, Sydney, 2007) at 130.

89 For example, David L Kreider, head of Vodafone New Zealand's legal team who stated: "Above all else, a 'household name' business and consumer services company like Vodafone, when faced with a dispute, will wish to protect its brand and reputation. *In any dispute situation, this is my overarching objective*" (emphasis added). He continued, "[f]or this reason, the privacy, and where available, the confidentiality, offered by arbitration is a very attractive feature to in-house counsels." David L Kreider "A Corporate General Counsel's Perspective on Arbitration" (speech to the Arbitrators' and Mediators' Institute of New Zealand Conference, Auckland, 4–6 August 2011). See also Virginia Goldblatt "Confidentiality in Mediation" [2000] NZ Law Review 392 at 392.

90 Whereas litigation is governed by strict rules of procedure set out in the District Court Rules 2009 and the High Court Rules, ADR is far more flexible. For example, in both arbitration and mediation, parties have free reign over the location, dates, timetabling, and choice of New Zealand or foreign law.

A Seek and They Shall Come

One suggestion, recently adopted by both the Law Commission and the Government, has been to take a "seek and they shall come" approach.⁹¹ The idea "is that expertise is like a magnet. The more there is of it, the more people will be drawn to it."⁹² By introducing judicial specialisation, commercial parties who were previously unwilling to use the court system will come out of the woodwork, leading to increased use of the High Court and an increased ability to shape New Zealand's commercial law.⁹³

The problem is that reform commenced on this basis threatens to affect the provision of justice in New Zealand profoundly, with little to no guarantee of success. Even if this approach could be justified in other areas, changes that fundamentally affect the nature of the judiciary should not be introduced based solely on a perception voiced by senior members of the legal profession.

B A More Principled Approach

Instead, fundamental reform of the judiciary should only occur if empirical evidence or comprehensive survey results clearly demonstrate a link between commercial disputes, ADR and a lack of High Court specialisation.⁹⁴ In particular, it is suggested that judicial specialisation will only be justified if it can be shown that:

- (1) relative to historical trends and comparable jurisdictions, the High Court has "lost" a significant proportion of its commercial jurisdiction (both in terms of numbers of cases filed, and types of cases heard and decided);
- (2) the "lost" commercial cases are being resolved through ADR or in offshore fora; and
- (3) the primary reason for litigants' movement away from the formal civil justice system is a lack of judicial specialisation.

The reasons for adopting these criteria, and the means by which research into these may be carried out, are summarised below.

91 Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.60]; and (5 December 2013) 695 NZPD 15305 per Raymond Huo MP. See also James Allsop "International Commercial Law, Maritime Law and Dispute Resolution: The Place of Australia, New Zealand and the Asia Pacific Region in the Coming Years" (2007) 21 ANZ Mar LJ 1 at 15.

92 Grant, above n 45.

93 See for instance Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.60] (emphasis added).

94 Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.41].

1 *Loss of the High Court's commercial jurisdiction*

Notwithstanding practitioners' claims that specialist judges deliver higher quality judgments in a shorter time and at a lower cost than generalist judges,⁹⁵ there can be no mandate to introduce judicial specialisation until research reveals that the High Court has lost a significant portion of its commercial jurisdiction.

The core difference between a loss of litigation due to a lack of specialisation, and the speed, quality and cost of judgments in a generalist system, is that the latter can be fixed through moderate changes within the current system, whereas the former cannot. Issues of speed and cost can be reduced through more intensive case management procedures,⁹⁶ whilst inadequate judicial reasoning is remedied through the exercise of parties' rights of appeal. In contrast, a loss of litigation due to a lack of judicial specialisation cannot be remedied by tinkering with the current system. Proceedings are either filed in the High Court, or not.

Accordingly, any introduction of judicial specialisation must be predicated on a finding that the High Court lacks exposure to a significant portion of New Zealand's commercial jurisdiction. This may be established through, *inter alia*, a combination of historical research and comparisons with similar common law jurisdictions.

Specifically, the Law Commission (or other research agency) should attempt to map out: (a) the number of civil cases filed; (b) the number of defended trials; and (c) the percentage of defended trials per filing across the High Court and other specialist New Zealand courts⁹⁷ over the last 30–40 years.⁹⁸ This data can then be used in several ways.

First, reflecting population growth, one would expect to see a significant increase in both the numbers of filings and defended High Court trials over the time period. If this is not the case, then this indicates that litigants are increasingly looking towards ADR to resolve their disputes, suggesting a loss of High Court litigation.

95 For example, Molloy, above n 17, at 20; and Katz, above n 1, at 39. See also Glazebrook, above n 7, at 537; and Letter from Michael Black (Chief Justice of the Federal Court of Australia) to Bruce Robertson (President of the Law Commission) regarding judicial specialisation (August 2003), cited in Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) [Law Commission *Delivering Justice for All*] at 266.

96 See generally Helen Winkelmann and others *The New High Court Case Management Regime* (New Zealand Law Society, Wellington, 2013). For a contrary view see Jim Farmer "Civil Litigation in Crisis" in New Zealand Bar Association *Civil Litigation in Crisis – What Crisis* (February 2008).

97 Such as the Employment, Environment and Family Courts.

98 For an example of historical data trend analysis, see Marc Galanter "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 *Journal of Empirical Legal Studies* 459.

Secondly, the Law Commission should compare the percentage of defended hearings per filings across the High Court and specialist New Zealand courts to determine whether a disproportionate proportion of High Court cases are settled pre-trial relative to other courts. Although far from conclusive, data showing higher settlement rates in the High Court, relative to specialist courts, may indicate that litigants are reluctant to allow their disputes to be resolved by generalist judges.⁹⁹ Where data is available, these settlement rates could be compared to the settlement rates in other common law jurisdictions.

Thirdly, by taking a geographically representative sample of cases filed in the High Court registries¹⁰⁰ over the past 40 years,¹⁰¹ historical data trend analysis can reveal changes in the *nature* of the High Court's work over time. This is particularly useful in determining whether the Court is "losing" some of its commercial jurisdiction. For example, if contract disputes formed 25 per cent of all civil filings in 1970, but only five per cent in 2014, then this would strongly suggest that parties engaged in contract disputes are bypassing the High Court in favour of other dispute resolution fora. If possible, this data should then be compared to data in other common law jurisdictions to determine whether these trends are specific to New Zealand or have been experienced throughout the rest of the world.

2 *The "lost" cases are being resolved offshore or in ADR*

Even if historical or comparative research reveals that the number of commercial cases filed and determined in the High Court has declined, or failed to rise in line with population growth, this is only part of the picture. The next step is to show that the "missing" cases are being resolved either offshore or through ADR.

Unfortunately, because there is no historical data on ADR's use in commercial disputes this will have to be estimated through surveys designed to reveal the current position. The Law Commission

99 When comparing the High Court's settlement rates with other specialist courts, the Law Commission (or other research body) will have to be mindful of statutory regimes that require a dispute to be litigated. Where this is the case, settlement rates are likely to be artificially low. Accordingly, an allowance may need to be made when conducting this exercise.

100 A geographically representative sample is required because the majority of commercial disputes occur in Auckland. For example, in 2013, 74 per cent of all civil proceedings were filed in the area covered by the Auckland circuit; 81 per cent in 2012; and 67 per cent in 2011. See Winkelmann "2011 High Court Annual Report", above n 64; Winkelmann "2012 High Court Annual Report", above n 64; and Winkelmann "2013 High Court Annual Report", above n 64.

101 Specialisation has been an issue since at least 1968. See Public and Administrative Law Reform Committee *Appeals from Administrative Tribunals - First Report* (1968) and Beattie and others *Report of the Royal Commission on the Courts* (1978) [*Report of the Royal Commission on the Courts*] at 93–96. Accordingly, research should attempt to cover this period so that the effects of specialisation on the High Court's workload can be isolated and examined.

should survey a geographically representative sample of lawyers, accredited ADR professionals¹⁰² and, if possible, commercial parties to determine: (a) the number of disputes they are involved in; (b) the legal issues involved in the dispute; (c) whether those disputes were filed in the High Court; and (d) how those disputes were resolved.¹⁰³

The purpose of this research is to determine both the size of the ADR market and the nature of cases resolved through ADR. This information can then be compared to the High Court data in a further attempt to determine whether the cases resolved in the High Court are representative of New Zealand's commercial disputes.

3 *Link between ADR and judicial specialisation*

Finally, the Law Commission (or other research body) must determine the extent of the connection between the generalist High Court and litigants' choice to pursue ADR. This is the most important piece of the puzzle. Without a direct link, no amount of evidence showing a loss of High Court commercial litigation can provide any justification for introducing judicial specialisation.¹⁰⁴

This could be done by surveying a representative sample of lawyers¹⁰⁵ and clients, and asking them to rate the importance of factors such as time, cost, flexibility, confidentiality and the lack of judicial specialisation, on their decision to pursue ADR rather than litigation.

4 *Summary*

Unless solid evidence conclusively links the High Court's lack of specialisation to a loss of commercial litigation, fundamental reform of the judiciary cannot be justified. By following the steps outlined above, it is suggested that the Law Commission would be capable of determining this issue, providing a sound foundation for the introduction of High Court specialisation if such a need is identified.

102 The two bodies who provide some form of accreditation in New Zealand are LEADR and AMINZ.

103 It will also be necessary to determine the size of the dispute to ensure that it is within the High Court's jurisdiction rather than the District Courts.

104 This statement assumes that a failure to identify any link between the lack of judicial specialisation and the parties' decision to use ADR implies that parties chose to pursue ADR for reasons such as cost, time, confidentiality and flexibility.

105 Lawyers' responses will be of particular importance following the implementation of r 14.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which obliges lawyers to "keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute".

V SPECIALISATION OVERSEAS

Calls for increased judicial specialisation are not limited to New Zealand, with countries around the world facing demands from practitioners and others to provide specialist commercial courts or judges.¹⁰⁶ By analysing the court systems in England, Australia, Singapore and the Cayman Islands, conclusions can be drawn, and lessons learnt, if New Zealand chooses to go down the judicial specialisation path.

A *England*¹⁰⁷

Established in 1895 as part of a judicial initiative to halt the increasing use of arbitration by London's merchants,¹⁰⁸ the English Commercial Court is perhaps the most well-known, and successful, specialist court in the common law world.¹⁰⁹ Located in a purpose-built building with its own support staff, the Court operates under the auspices of the Queen's Bench Division of the England and Wales High Court,¹¹⁰ where it has jurisdiction over "any claim arising out of the transactions of trade and commerce".¹¹¹

Parties from around the world, who often have no connection to the United Kingdom, are increasingly entering into contracts to resolve their disputes in the Commercial Court, providing a significant boost to England's jurisprudence, economy and legal sector.¹¹² Legal services now account

106 For examples of other jurisdictions that have faced pressure to increase judicial specialisation, see the Chief Justice's Working Party on Civil Justice Reform *Civil Justice Reform* (2004) Hong Kong Judiciary <www.judiciary.gov.hk>; and the Scottish Civil Courts Review *Report of the Scottish Civil Courts Review* (September 2009).

107 The author acknowledges that England and Wales share the same legal system. Thus, all references to England should be read as meaning England and Wales.

108 See for example the comments of one anonymous High Court judge who stated: "The bulk of the disputes of the commercial world seldom, in these modern days, finds its way into the Courts. Merchants are shy of litigation. ... They prefer even the hazardous and mysterious chances of arbitration ...": published in *The Times* on 10 August 1892, cited in Anthony Colman, Victor Lyon and Philippa Hopkins *The Practice and Procedure of the Commercial Court* (6th ed, Informa Law, London, 2008) at 4. It was not until the passage of the Administration of Justice Act 1970 (UK) that the Court achieved statutory recognition.

109 See for example Richardson, above n 1, at 132. See also Galbraith, above n 1, at 421; and Southwell, above n 11, at 275.

110 Senior Courts Act 1981 (UK), s 6.

111 Civil Procedure Rules (UK), r 58.2(2).

112 Richard Aikens "With a View to Despatch" in Mads Andenas and Duncan Fairgrieve (ed) *Tom Bingham and the Transformation of the Law; A Liber Amicorum* (Oxford University Press, London, 2009) at 587 noted in 2009: "The Commercial Court statistics have consistently shown for about ten years that in 80 per cent of its cases, at least one of the parties is a non-UK entity. In 50 per cent of its cases all the parties are non-UK entities". This appears to have grown over time, with a 2013 study showing that "over 75 per cent of litigants using the Commercial Court are foreign, with the highest regional representation from Europe and Eurasia":

for 1.8 per cent of the United Kingdom's gross domestic product, with exports from the provision of legal services to foreigners tripling over a 10-year period to £3.2 billion in 2009.¹¹³ Building directly off the Commercial Court's reputation, London has also become the world's most popular seat of arbitration, providing significant income to the English legal profession.¹¹⁴

A large part of this success has been attributed to the Court's judges.¹¹⁵ Appointed on the basis of their pre-bench commercial experience by the Lord Chief Justice, after consulting with the Lord Chancellor,¹¹⁶ all Commercial Court judges are judges of the High Court. This is important, because, as *puisne* judges, they are still required to preside over criminal cases. Thus, in 2004, of the 14 judges appointed to sit in the Court, only 8–9 sat in the Commercial Court fulltime due to other commitments.¹¹⁷ If England, a country with almost 15 times the population of New Zealand cannot sustain a fully specialist commercial court, then this strongly suggests that High Court specialisation in New Zealand would only require judges in a part-time capacity.¹¹⁸

However, as the Commercial Court's history reveals, specialist judges only form part of the picture. In 1960, the Court risked oblivion.¹¹⁹ Filings had plummeted to just 27 in 1958,¹²⁰ and judges such as Devlin J openly questioned whether "the time may come when it will have to be considered whether there is any longer any value in the Commercial Court".¹²¹ Since then, the Court has embarked on a series of reforms to ensure its continued viability, providing several lessons for New Zealand if it chooses to pursue judicial specialisation.

Portland Communications "The World's Legal Capital? Who Uses the Commercial Court" <www.portland-communications.com>.

113 Ministry of Justice and UK Trade & Investment "Plan for Growth: Promoting the UK's Legal Services Sector" (30 March 2012) <www.justice.gov.uk> at 1.

114 See generally Aikens, above n 112, at 576–577.

115 See for example the *Report of the Singapore International Commercial Court Committee* (November 2013) <www.mlaw.gov.sg> at 11, which states: "The success of the UK legal sector is founded on the global dominance of English law for contracts, the prestige and standing of its judicial system, *in particular the Commercial Court, and the acknowledged quality of its commercial judges and barristers*" (emphasis added).

116 Senior Courts Act 1981, s 6(2).

117 See generally *Report and Recommendations of the Commercial Court Long Trials Working Party* (December 2007) at [163]–[176], which strongly defended the use of Commercial Court judges in criminal trials.

118 Indeed, the Law Commission appears to have accepted this. See Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.69].

119 Aikens, above n 112, at 571; and Colman, Lyon and Hopkins, above n 108, at 8.

120 Colman, Lyon and Hopkins, above n 108, at 8.

121 *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* [1957] 1 WLR 273 at 280.

At the heart of this reform has been a high level of practitioner and client involvement in the Court's development and administration through the Commercial Court Users Committee. Established in 1960, and formalised in 1977, the Committee is chaired by the judge in charge of the Commercial Court, and contains representatives from the bar, solicitors, arbitrators, banks, government agencies, and a variety of domestic and foreign commercial litigants.¹²² It meets at least four times a year, and is heavily involved in the Court's administration and procedure, helping to ensure that the Court remains competitive and retains a steady stream of litigation.¹²³

For example, a direct product of the Committee's reports has been the adoption of several procedures designed to reduce trial lengths, and encourage efficiency. Thus, statements of claim are limited to 25 pages,¹²⁴ and witnesses are required to provide written statements¹²⁵ to be used in place of an oral examination in chief.¹²⁶ Pre-trial settlement is also encouraged through the parties' ability to request, subject to the judge in charge of the Commercial Court's approval, "a without-prejudice, non-binding early neutral evaluation (ENE) of a dispute or of particular issues" by a Commercial Court judge.¹²⁷

Interestingly, even with the ability to seek an ENE, only 70 per cent of Commercial Court cases settle before trial, compared with 91 per cent in New Zealand's High Court¹²⁸ – possibly reflecting a higher degree of litigant confidence in the specialist Commercial Court judges.

Finally, recent statutory reforms have ensured that the Commercial Court is not faced with an impossibly high workload. Since the 1990s, straightforward commercial disputes of a lower value¹²⁹ have been diverted to Mercantile Courts based in London and other major cities.¹³⁰ Like the Commercial Court, these courts remain part of the Queen's Bench Division of the High Court, and are

122 Colman, Lyon and Hopkins, above n 108, at 27.

123 At 27–32.

124 Her Majesty's Courts & Tribunals Service *The Admiralty and Commercial Courts Guide* (9th ed, March 2013) at [C1.1]. This limit will only be extended in exceptional cases "where a party shows good reasons for doing so".

125 At [C1.1]. These statements are limited to 30 pages in length unless the court directs otherwise.

126 At [H1.6].

127 At [G.2]. If the parties choose to continue their litigation, the judge who performed the ENE will take no further part in the case, "unless the parties agree otherwise": see at [G.2.5].

128 Aikens, above n 112, at 578.

129 There is no upper limit on the Mercantile Court's jurisdiction, but it is safe to assume that disputes of less than US\$500,000 will end up in the Mercantile Court. See Colman, Lyon and Hopkins, above n 108, at 47.

130 Mercantile Courts are based in the district registries of the High Court in Birmingham, Bristol, Cardiff, Chester, Leeds, Liverpool, Manchester, Mold and Newcastle upon Tyne and London: Civil Procedure Rules 1998 (UK) Practice Direction 59 – Mercantile Courts at [1.2].

staffed with specialist commercial judges. This has ensured that litigants throughout England and Wales have access to specialist judges, whilst allowing the Commercial Court to concentrate on higher value and more complicated commercial claims.

In summary, whilst the provision of specialist judges helped to establish the Court in the early 20th century, it has achieved its current position as the "curia franca of international commerce"¹³¹ through its continuous efforts to adapt its structure and procedures to meet the business community's, and its lawyer's, needs.

B Australia

As New Zealand's closest neighbour, our second largest trading partner and a fellow common law jurisdiction, Australia, and its level of specialisation is of particular relevance to New Zealand. Accordingly, this article briefly considers the specialist structures within the Federal Court of Australia (FCA), and the Supreme Court of New South Wales.

1 Federal Court of Australia

Established in 1976,¹³² the FCA provides an interesting comparison due to its use of specialist panels and individual docket system.

Unlike the other courts surveyed, the level of judicial specialisation differs across the FCA's registries. In some parts of Australia, for example, South Australia and the Australian Capital Territory, judges are generalists, and there is no specialisation. In contrast, the FCA's larger registries,¹³³ have established specialist panels in areas such as intellectual property, tax, competition, corporations and workplace relations.¹³⁴ In this regard, the FCA can be seen as a quasi-specialist court. Depending upon the nature of the dispute and the registry in which it is filed, cases may be allocated to either a specialist or generalist judge.

Of greater importance, however, is the means by which panel judges are appointed. Whilst the FCA Chief Justice nominally controls the appointments process, by convention, judges are assigned

131 *Amin Rasheed Shipping Company Corp v Kuwait Insurance Co* [1983] 1 WLR 228 (CA) at 240 per Sir John Donaldson MR.

132 Federal Court of Australia Act 1976 (Cth), s 19. See generally Bernard Cairns *Australian Civil Procedure* (10th ed, Thomson Reuters, Sydney, 2014) at 7. There are currently more than 150 Acts granting the FCA jurisdiction to hear a wide variety of issues. For a full list see Federal Court of Australia "Acts which Confer Jurisdiction" (31 January 2014) <www.fedcourt.gov.au>.

133 Specialist panels exist in the New South Wales, Victoria and Queensland registries. For a full list, see Federal Court of Australia "Panels for the Docket System" (May 2014) <www.fedcourt.gov.au>.

134 Federal Court of Australia, above n 133.

to panels for a three-year term,¹³⁵ *upon their request*.¹³⁶ This is important for two reasons. First, by providing judges with a guaranteed three-year tenure, panel judges face less pressure to appease the Chief Justice in order to remain on the panel. As will be explained in the context of the New Zealand Government's proposed reforms, this helps to safeguard individual judicial independence. Secondly, the ability of FCA judges to request appointment provides a strong bulwark against judicial manipulation by removing the Chief Justice's ability to "stack" panels with judges that conform to his or her views.

Although this voluntary appointments process may lead to concerns about non-specialist judges ending up on specialist panels,¹³⁷ this is managed by requiring judges to "accept a responsibility to become familiar with the area ... [and] take an active part in regular judicial education programmes".¹³⁸ Not only are judges likely to take their judicial obligations seriously, but the requirement to conduct lectures is likely to deter non-specialist judges from requesting appointment to areas where they will be unable to perform their duties adequately.¹³⁹

The FCA's second "distinctive" feature is its use of an individual docket system.¹⁴⁰ Introduced in 1997, cases are assigned, upon filing, by the registrar to a judge using a strictly rotational system, who

135 Law Commission *Delivering Justice for All*, above n 95, at 265.

136 Michael Black "The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries" (2007) 31 MULR 1017 at 1042. See also Law Commission *Delivering Justice for All*, above n 95, at 265.

137 This was reflected in some of the concerns raised by practitioners in Caroline Sage, Ted Wright and Carolyn Morris *Case Management Reform: A Study of the Federal Court's Individual Docket System* (Law and Justice Foundation of New South Wales, 2002) at 63.

138 See Law Commission *Delivering Justice for All*, above n 95, at 265; and Black, above n 136, at 1042.

139 In 2003, "the Chief Justice describe[d] the advantages of the panel system as follows:

- (a) it widens the specialist base of the court: the allocation of specialist cases within a panel substantially increases the chance of individual judges hearing a reasonable number of such cases, where if they were distributed randomly among the Melbourne and Sydney judges (of whom there are almost 30) the level of experience in specialist areas would drop;
- (b) the system promotes expertise;
- (c) it gives judges the opportunity to do work they like, and others the opportunity to avoid work they do not like."

Letter from Michael Black (Chief Justice of the Federal Court of Australia) to Bruce Robertson (President of the Law Commission) regarding judicial specialisation (August 2003), cited in Law Commission *Delivering Justice for All*, above n 95, at 265.

140 Sage, Wright and Morris, above n 137, at 169. See also Steven Rares "The Significance of the Commercial Jurisdiction of the Federal Court of Australia" (2008) 22 CLQ 25 at [37].

is then given responsibility to manage the case from its commencement to disposal at trial.¹⁴¹ The aim of the system is to "promote more active and effective judicial case management ... streamline processing, encourage early settlement and, overall, to dispose of cases more efficiently".¹⁴² Importantly, this system continues to apply to panel cases. Thus, where cases fall within the jurisdiction of a particular panel, the registrar simply assigns cases to panel judges on the same strictly rotational basis.¹⁴³

Although concerns have been raised about whether the use of a strictly rotational system has resulted in an equitable distribution of work,¹⁴⁴ and whether it may be possible to "game" the system by filing cases in a way which gets particular judges assigned,¹⁴⁵ the overall view of the system is incredibly positive.¹⁴⁶

2 *New South Wales*

Since 1903, with the introduction of the Commercial Causes Act, the Supreme Court of New South Wales has been defined by its longstanding history of commercial specialisation.¹⁴⁷ Although "[t]he organisational structure for commercial litigation has [developed] from single judges administering an informal list, to a formal commercial list to a separate Commercial Division",¹⁴⁸ commercial specialisation is now provided through the commercial list in the Equity Division of the Supreme Court.¹⁴⁹

Like the English Commercial Court, the scope of New South Wales' commercial list is extremely broad. Under the Uniform Civil Procedure Rules, the commercial list has jurisdiction over all

141 Sage, Wright and Morris, above n 137, from 57; Law Commission *Delivering Justice for All*, above n 95, at 265; and Rares, above n 140, at [37].

142 Sage, Wright and Morris, above n 137, at 169. See also Rares, above n 140, at [37].

143 Sage, Wright and Morris, above n 137, from 57, Law Commission *Delivering Justice for All*, above n 95, at 265; and Rares, above n 140, at [37].

144 Sage, Wright and Morris, above n 137, at 60.

145 At 59.

146 Sage, Wright and Morris, above n 137, at 55 concluded that "the aims and goals of the Individual Docket System were being achieved". They continued, "judges said that the greatest benefit ... was increased control over their workload and time [whilst] practitioners generally considered that the new system had a positive impact on how they approached litigation".

147 Commercial Causes Act 1903 (NSW) long title. See JJ Spigelman, Chief Justice of New South Wales, "Commercial Causes Centenary" (speech to the dinner held to celebrate 100 years since the commencement of the Commercial Causes Act 1903, Sydney, 6 November 2003) at 3.

148 See Spigelman, above n 147, at 4.

149 Uniform Civil Procedure Rules 2005 (NSW), r 45.1. See also the Supreme Court Act 1970 (NSW), s 38.

"proceedings arising out of commercial transactions" and "proceedings in which there is an issue that has importance in trade or commerce".¹⁵⁰

However, reflecting the list's structure, New South Wales judges are, at best, quasi-specialist. Not only are judges appointed to multiple lists, but "the first claim on [their time] is the criminal business of the court".¹⁵¹ Given that New South Wales has a population of more than 7 million, this indicates that specialisation within the New Zealand High Court would have to be done on a similar basis.

One concern with the New South Wales list system is the means by which judges are appointed and dismissed. The Chief Justice of New South Wales has an untrammelled power to appoint judges to a list,¹⁵² but more importantly, "may at any time ... revoke a Judge's designation as a List Judge".¹⁵³ As will be discussed later, in the context of the proposed reforms to New Zealand's High Court, the risk, from placing the power of appointment and dismissal in the hands of one person, is that the Chief Justice may "panel pack" the list, in an attempt to manipulate the result of a case, or development of the law.¹⁵⁴ In this regard, it potentially poses a substantial threat to the principle of individual judicial independence.¹⁵⁵

Nevertheless, the commercial list appears to be reasonably successful. Whilst the number of filings dropped between 2008 and 2012,¹⁵⁶ this is consistent with a trend observed in other courts,¹⁵⁷ as the world moves from recession to recovery. Instead, a more representative indication of the list's success is the high number of cases awaiting trial,¹⁵⁸ indicating a strong demand for specialist dispute settlement. A further reason for this success may be the existence of the commercial list users committee which, like the English Commercial Court Users Committee, ensures a steady stream of dialogue between the court and practitioners.

150 Uniform Civil Procedure Rules 2005 (NSW), r 45.6(1).

151 Law Commission *2012 Issues Paper*, above n 30, at [7.48].

152 Supreme Court Act 1970 (NSW), s 28(1).

153 Section 28(5).

154 See generally Petra Butler "The Assignment of Cases to Judges" (2003) 1 NZJPIL 83.

155 See generally Simon Shetreet "Judicial independence and accountability: core values in liberal democracies" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 3.

156 Supreme Court of New South Wales "2012 Annual Review" <www.supremecourt.lawlink.nsw.gov.au> at 57.

157 See for example Courts of New Zealand "Annual Statistics for the High Court December 2013" <www.courtsofnz.govt.nz>.

158 See Supreme Court of New South Wales, above n 156, at 57. Between 2008 and 2012, the number of cases awaiting trial in the commercial list has remained above 280 – a large number when one considers that the court only disposed of 178 cases in 2012.

C Singapore

As a common law jurisdiction with a population of 5.5 million, Singapore provides a particularly interesting comparison from a New Zealand perspective.

Until recently, Singapore, like New Zealand, was a generalist jurisdiction. With the limited exception of its Admiralty and Intellectual Property Courts, all commercial disputes with a value exceeding S\$250,000 fell within the jurisdiction of the Singapore High Court, where they were resolved by generalist judges.¹⁵⁹ However, this changed significantly on January 5 2015, with the establishment of the Singapore International Commercial Court (SICC).¹⁶⁰

Enacted by the Singaporean Government following a detailed report from a group of commercial lawyers and judges,¹⁶¹ the SICC has been designed to become "the premium forum for court-based commercial dispute resolution both within and beyond Asia".¹⁶² Several features have been implemented to achieve this goal. First, like the English Commercial Court,¹⁶³ parties will not need to show any link to Singapore before falling within the SICC's jurisdiction.¹⁶⁴ Instead, they simply need to establish that their dispute is of an international and commercial nature,¹⁶⁵ and provide the Court with a consensual agreement to resolve their case at the SICC, either before or after the dispute arose.¹⁶⁶

Secondly, there is no obligation to litigate disputes under Singapore law.¹⁶⁷ Cases can be determined under the parties' choice of law and, unlike other courts, there is no requirement to plead, and prove, foreign law as fact.¹⁶⁸ Instead, SICC judges will simply "take judicial notice of foreign

¹⁵⁹ State Courts Act (Singapore, cap 321, 2007 rev ed), s 2(b). See also Supreme Court of Singapore "Our Courts" (3 July 2014) <app.supremecourt.gov.sg>.

¹⁶⁰ See ss 18A–18M of the Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev ed); and Order 110 of the Rules of Court (Singapore, cap 322, 2014 rev ed). For more general information see *Singapore International Commercial Court User Guides* (January 2015) <www.sicc.gov.sg>; and *Singapore International Commercial Court Practice Directions* (December 2015) <www.sicc.gov.sg>.

¹⁶¹ See *Report of the Singapore International Commercial Court Committee* (November 2013) <www.mlaw.gov.sg>.

¹⁶² At 11.

¹⁶³ See Colman, Lyon and Hopkins, above n 108, at 27–28.

¹⁶⁴ Rules of Court (Singapore, cap 322, 2014 rev ed), Order 110, rr 7 and 8(2).

¹⁶⁵ Rule 7(1)(a). For definitions of "international" and "commercial" see r 1(2)(a) and (b).

¹⁶⁶ Rule 7(1)(b).

¹⁶⁷ Rule 23.

¹⁶⁸ Rules 25 and 26. See also *Report of the Singapore International Commercial Court Committee*, above n 161, at 17.

law with the assistance of oral and written legal submissions, supported by relevant authorities".¹⁶⁹ Additionally, where disputes have no substantial connection to Singapore,¹⁷⁰ parties may be represented by foreign counsel, so long as they are registered with the SICC.¹⁷¹

Thirdly, whilst proceedings will ordinarily "take place in open court",¹⁷² the Rules of Court are designed to make it easier for offshore parties to request that their dispute be resolved in confidence, thereby countering one of arbitration's major advantages over litigation.

Nonetheless, it is the Court's use of international judges and a specialist Court of Appeal that sets it apart from its competitors. Although the SICC is a division of the High Court, cases are assigned by the Chief Justice to specialist commercial judges appointed to the SICC panel.¹⁷³ Significantly, SICC judges are not required to be Singaporean, with international judges being appointed to the SICC panel by the President, acting on the Prime Minister's and Chief Justice's advice, "for a fixed period, and then assigned cases on an *ad hoc* basis".¹⁷⁴ Unlike their Singaporean counterparts, international judges do not have security of tenure, and will be paid according to "an agreed rate based on the number of days required for the specific case".¹⁷⁵ Nonetheless, their availability is likely to be a key drawcard for foreign commercial litigants.

The Court's second defining feature is the right of appeal to a specialist Court of Appeal made up of three, or if the parties agree, five,¹⁷⁶ judges from the SICC panel.¹⁷⁷ This continuation of

169 *Report of the Singapore International Commercial Court Committee*, above n 161, at 17.

170 A case has no substantial connection to Singapore when either: (i) Singapore law is not the governing law; or (ii) when the parties' choice of Singapore law is the only connection to Singapore. See Rules of Court (Singapore, cap 322, 2014 rev ed), Order 110, r 1(2)(f). For examples of what does, and does not, constitute a substantial connection to Singapore see the *Singapore International Commercial Court Practice Directions*, above n 160, at [29].

171 Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev ed), s 18M. For the registration requirements see s 36P of the Legal Profession Act (Singapore, cap 161, 2009 rev ed).

172 Rules of Court (Singapore, cap 322, 2014 rev ed), Order 110, r 30. See also *Singapore International Commercial Court User Guides*, above n 161, at 6. Interestingly this provision does not go as far as the Committee on the Singapore International Commercial Court recommended. See *Report of the Singapore International Commercial Court Committee*, above n 161, at 17.

173 Constitution of the Republic of Singapore, art 95(9); and Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev ed), s 9(4). This was based upon a recommendation by the *Report of the Singapore International Commercial Court Committee*, above n 161, at 13.

174 *Report of the Singapore International Commercial Court Committee*, above n 161, at 13.

175 At 13.

176 Rules of Court (Singapore, cap 322, 2014 rev ed), Order 110, r 53(2).

177 Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev ed), s 29(1). See also the *Report of the Singapore International Commercial Court Committee*, above n 161, at 18.

specialisation to the Court of Appeal (the highest court in the Singaporean hierarchy) represents a selling point unmatched by the English Commercial Court or the Commercial Division of the New York Supreme Court.¹⁷⁸

Finally, unlike other courts, parties have a wide-ranging discretion over the number of judges presiding over their initial trial and appeal. Subject to the Chief Justice directing otherwise, the parties may choose whether their trial is held before one or three judges from the SICC panel, and may choose whether their appeal is to be heard by three or five SICC judges.¹⁷⁹

Whilst the appointment of international judges on an ad hoc basis raises legitimate questions around a lack of judicial independence,¹⁸⁰ this is less worrying than it would be in most municipal courts because the SICC does not have a monopoly over its "clients". Where foreign litigants believe, or at least perceive, that their case will not be resolved fairly, then they are highly unlikely to agree to the SICC's jurisdiction. In other words, market forces are likely to ensure an independent and impartial judiciary. Moreover, because the international judges are likely to be well known and respected, this should help to assuage any further concerns of partiality and corruption.¹⁸¹

Remarkably, even though the Court has yet to release a substantive judgment, it appears highly likely to succeed. In a briefing to its clients, one of the world's leading law firms, Clifford Chance, described "the proposed SICC [a]s a masterstroke. The idea is at once bold, visionary and entrepreneurial."¹⁸² It continued:¹⁸³

178 See The Chief Judge's Task Force on Commercial Litigation in the 21st Century *Report and Recommendations to the Chief Judge of the State of New York* (June 2012) at 21 which stated: "The Appellate Divisions and Court of Appeals are vital to the development of commercial law in New York State. The liberal availability of interlocutory appeals from Commercial Division rulings is rare among competitor courts and is generally considered by practitioners to be beneficial. But even as a number of former Commercial Division Justices have been added to the Appellate Divisions in recent years, the increasingly complex nature of some commercial litigation appeals may warrant reforms to the appellate process."

179 Rules of Court (Singapore, cap 322, 2014 rev ed), Order 110, r 53.

180 For a discussion of the concerns raised by ad hoc appointments in the New Zealand context see Law Commission *2012 Issues Paper*, above n 30, at [3.55]–[3.83].

181 The SICC recently appointed a series of international judges from both civil and common law countries. Appointed judges include Heydon J, a former High Court of Australia judge, Justice Hascher, a judge of the Supreme Judicial Court in France, and Sir Bernard Rix, a former Lord Justice of Appeal and judge in charge of the English Commercial Court. For a full list of SICC judges see <www.sicc.gov.sg>.

182 Clifford Chance "Briefing Note: The Singapore International Commercial Court – A Masterstroke" (17 December 2013) <www.cliffordchance.com> at 1. See also Herbert Smith Freehills "Singapore launched International Commercial Court to hear cross-border commercial disputes: What you need to know" (7 January 2015) <www.herbertsmithfreehills.com>.

183 Clifford Chance, above n 182, at 1.

The rationale behind the proposal is compelling ... Singapore, with its well-developed legal system, world class infrastructure and "trusted hub status", is ideally positioned to become Asia's premier dispute resolution hub to handle the expected growth in complex, high value, multi-jurisdictional commercial and investment disputes.

Indeed, to the extent that the SICC develops a strong reputation, New Zealand businesses may choose to resolve their disputes in Singapore, posing an additional threat to the development of New Zealand's commercial law.

D Cayman Islands

With a population of less than 55,000, and a GDP of just US\$3.1 billion, the Cayman Islands is, perhaps, an unlikely candidate for judicial specialisation. Nonetheless, since its inception on 2 November 2009, the Financial Services Division (FSD) of the Grand Court (equivalent to New Zealand's High Court) has become increasingly important, dealing with hundreds of cases every year.¹⁸⁴

Although the FSD has a more limited focus than the SICC and the English Commercial Court, the definition of "financial services proceedings" is relatively broad, and includes any proceedings against a mutual fund, its directors, trustees, and managers; insurance claims; trust and partnership claims; professional negligence actions; and arbitral appeals.¹⁸⁵ In this regard, it cannot properly be considered a commercial court. Nevertheless, given the Cayman Islands' status as a "thriving offshore financial centre",¹⁸⁶ the FSD has become the Islands' de facto commercial court, dealing with the majority of commercial disputes on the islands.¹⁸⁷

Like the FCA, the FSD uses an individual docket system. Cases are assigned, upon filing, by the FSD's registrar, in consultation with the Chief Justice,¹⁸⁸ to an FSD judge, who will "adjudicate the trial of the matter and every interlocutory application arising before or after the trial".¹⁸⁹ This procedure accomplishes two goals. First, it reduces the risk of judicial manipulation¹⁹⁰ by ensuring that an independent registrar allocates cases amongst the commercial judges, whilst guaranteeing

184 Cayman Islands Judicial Administration "Judicial and Court Statistics 2004–2013" (20 January 2014) Cayman Islands Judicial and Legal Information Website <www.judicial.ky>.

185 Cayman Islands Grand Court Rules 1995 (Revised Edition 1 July 2013) O.72, r. 1(2).

186 Central Intelligence Agency "The World Factbook – Cayman Islands" (20 June 2014) <www.cia.gov>.

187 Jeremy Walton "Guide to the Legal System in the Cayman Islands" (September 2013) Appleby Global <www.applebyglobal.com> at 4. For this reason, judges in the FSD are officially called "commercial judges". See Cayman Islands Grand Court Rules 1995 (Revised Edition 1 July 2013) O.5, r. 1(7).

188 Cayman Islands Grand Court Rules 1995 (Revised Edition 1 July 2013) O.5, r 1(7).

189 Rule 2(2).

190 For a more detailed discussion see Butler, above n 154.

some judicial involvement through the need to consult with the Chief Justice. Secondly, the docket system allows the judge to become intimately involved in the case, forcing the parties to concentrate on key issues and facts, and allowing for an expedited interlocutory and trial process.¹⁹¹

At present, there are seven FSD judges, with appointments made by the Cayman Islands Governor, on the advice of the Judicial and Legal Services Commission.¹⁹² Like the SICC, there is no requirement for FSD judges to be from the Cayman Islands. Instead, applications can be made from lawyers throughout the Commonwealth, provided that they have been qualified for over ten years.¹⁹³

The result is a highly successful commercial court, in a very small common law jurisdiction.¹⁹⁴ Although it costs CI\$15,000 (approximately NZ\$21,000) to lodge a case in the FSD,¹⁹⁵ more than 150 cases have been filed every year since its inception – a substantial number given that only 480 civil cases were filed in 2008, the year before the FSD was established.¹⁹⁶

E Summary

As can be seen from this brief review of just four jurisdictions and five courts, the manner and degree of specialisation is varied. At one extreme, Singapore's SICC involves a specialist court comprised of a mixture of domestic and foreign judges, with appeals going to a specialist Court of Appeal. At the other end sits the New South Wales Supreme Court's specialist lists, staffed by quasi-specialist judges who are still expected to hear a variety of cases outside their specialist areas. Nonetheless, from this variety, several conclusions can be drawn.

First, the extent of any court's specialist jurisdiction is a policy decision that must be made on a country-by-country basis according to both the needs of the commercial community, and the available judicial resources. It would be inappropriate, therefore, for the Government to simply adopt another court's specialist model in the hope that it will work in the New Zealand context.

Secondly, apart from the SICC, all judges are expected to work outside their specialist area. If England's specialist judges are not required to work fulltime in the Commercial Court, then one can

191 Marit Hudson "The Cayman Grand Court's Financial Services Division: A Progress Report" (April 2011) Appleby Global <www.appleby.com> at 1.

192 The Constitution of the Cayman Islands, art 106(1). See also Ian Hendry and Susan Dickson *British Overseas Territories Law* (Hart Publishing, Oxford, 2011) from 98.

193 Cayman Islands Government "Job Description – Grand Court Judge, Financial Services Division" Judicial and Legal Services Commission <www.judicialandlegalservicescommission.ky> at 3.

194 See Hudson, above n 193, at 1; and Peter Hayden "Holding Court" (2010) 160 NLJ 182.

195 Cayman Islands Court Fees Rules 2009, sch 1, pt B.

196 Grand Court of the Cayman Islands "Judicial and Court Statistics 2004–2013" (20 January 2014) Cayman Islands Judicial and Legal Information Website <www.judicial.ky>.

hardly expect that New Zealand will have sufficient cases to justify a separate court staffed by wholly specialist judges. Specialisation, therefore, must occur within the existing High Court structure.

In saying this, it is clear that there must be scope for specialist divisions or panels to adopt their own procedures, independently of the existing High Court Rules. As the English Commercial Court's experience in the 1960s reveals, the existence of specialist judges is only a minor part of the picture. Specialisation only succeeds if the court procedures underpinning it reflect the commercial community's requirements.

Finally, specialisation must be seen as a dynamic process. As the continuous reforms of the New South Wales commercial list and English Commercial Court reveal, the business community's needs change over time. At the very least, New Zealand should establish a court user committee, to ensure a steady stream of dialogue between judges and court participants.

VI THE POTENTIAL EFFECTS OF SPECIALISATION IN NEW ZEALAND

Although specialisation has been successful in other countries, this provides only a limited guarantee as to its success in New Zealand. Accordingly, this part briefly considers the costs and benefits of specialisation, before highlighting some additional features that must be considered if specialisation is to be introduced to the Zealand High Court.

A General Advantages and Disadvantages of Specialisation

1 Advantages offered by specialisation

As Adam Smith observed in 1776, increased familiarity breeds increased efficiency.¹⁹⁷ Whereas generalist judges require time and effort to bring themselves "up to speed", specialist judges will already have a solid background knowledge of either the law or facts, driving several efficiency gains.¹⁹⁸ As Michael Black, a former FCA Chief Justice, argued:¹⁹⁹

No doubt we can all work out the right result if we have time, but where a decision in a technical area has to be made on the spot ... it is best to have a judge who can give the case the immediate, almost instinctive, attention that it requires.

Where the judge already has an intimate knowledge of the law and issues involved, trials will become shorter, and judgments released more quickly. This benefits both litigants and the state, as

¹⁹⁷ See generally Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

¹⁹⁸ For example Galbraith, above n 1, at 537; and Edward K Cheng "The Myth of the Generalist Judge" (2008) 61 *Stan L Rev* 519 at 549.

¹⁹⁹ Letter from Michael Black (Chief Justice of the Federal Court of Australia) to Bruce Robertson (President of the Law Commission) regarding judicial specialisation (August 2003), cited in Law Commission *Delivering Justice for All*, above n 95, at 266.

specialist judges can handle larger caseloads, shortening the time taken to get a case before court, and reducing the need to appoint more judges.²⁰⁰

Specialists are also said to write better quality judgments, containing fewer "accidental errors".²⁰¹ Instead of seeking background explanations, a specialist's ability to ask both counsel and expert witnesses questions that go right to the heart of an issue is likely to result in quality judgments that accurately balance policy considerations, and accord with the parties' expectations.²⁰²

Furthermore, specialist judgments often benefit from increased legitimacy, compared to their generalist counterparts. As one commentator observed:²⁰³

To the extent that the opinion makes difficult trade-offs, affected parties may defer more to an expert's judgment under the assumption that the judge "understands" the stakes and the complexities of the field or industry.

As a result, judgments are less likely to be appealed, further reducing parties' litigation costs.²⁰⁴

Finally, specialisation is likely to foster consistency as fewer judges have a greater influence on the law and its development.²⁰⁵ In turn, this consistency facilitates commerce by reducing commercial parties' transaction costs (both in developing a framework to avoid legal liability, and also helping parties to come to an agreement if a dispute arises).²⁰⁶ This may be reinforced through the development of a specialist bar, which has the potential to create further efficiencies.²⁰⁷

2 *Disadvantages of specialisation*

On the other hand, whilst specialist courts and judges may create a uniform and consistent body of case law, this is accompanied by a strong risk of stagnation. As the Chief Justice of Australia, Robert French, stated "one of [law's greatest] strengths ... is the facility it offers to cross-fertilise

200 Cheng, above n 198, at 549.

201 David Currie and Frank Goodman "Judicial Review of Federal Administrative Action: Quest for the Optimum Forum" (1975) 75 Colum L Rev 1 at 67.

202 Glazebrook, above n 7, at 537. See also Galbraith, above n 1, at 422.

203 Cheng, above n 198, at 549.

204 Galbraith, above n 1, at 422.

205 Glazebrook, above n 7, at 537. See also Currie and Goodman, above n 201, at 63.

206 Richardson, above n 1, at 129 and 133; and Galbraith, above n 1, at 420. For further discussion of this issue see Roger Kerr "Commerce, Certainty and the Courts" [1997] NZLJ 361.

207 Glazebrook, above n 7, at 537. See also Grant, above n 50, where he argues that "[s]pecialist Courts attract specialist advocates and there is greater confidence for people to make use of such Courts".

concepts and approaches from one area to another".²⁰⁸ The fear is that specialist judges risk losing sight of legal developments outside their particular field, resulting in arcane rulings and decisions which fail to reflect societal developments.²⁰⁹

This concern is amplified due to the:²¹⁰

... danger that a specialised panel which is too small and specialised may create a "club" culture, promote a matching mythology of expertise among the profession, encourage monopolies and constrain jurisprudence.

Faced with a small, and often deferential, specialist bar, specialist judges may become even more insular in their thinking, failing to consider the effects of their ruling on other areas of the law.²¹¹

This has further consequences if specialist judges become emboldened, assertive or actively contemptuous. To the extent that specialist judges believe that the generalist Court of Appeal or Supreme Court is less knowledgeable than themselves, they may develop a "tendency to accord less authority" to the judicial hierarchy.²¹² Ironically, this may lead to uncertainty if specialist judges actively seek to avoid following appellate court decisions that they consider to be incorrectly decided.

Another frequently cited concern is the increased threat of interest group manipulation or special interest capture.²¹³ This manifests itself in two forms. First, because specialisation may lead to "the development of excessively comfortable relationships between judges and members of the relevant specialist bar",²¹⁴ there is a risk of judicial capture, with a small group of lawyers wielding substantial

208 Jeremy Curthoys "In Conversation with Justice Robert French" (2002) 50 IPF 6 at 8. See also Cheng, above n 198, at 553; Rochelle Cooper Dreyfuss "Specialized Adjudication" [1990] BYU L Rev 377 at 379; and Currie and Goodman, above n 201, at 68. For a contrary view see Jeffrey W Stempel "Two Cheers for Specialization" (1995) 61 Brook L Rev 67 at 96.

209 See Cheng, above n 198, at 552; and Lawrence Baum "Probing the Effects of Judicial Specialization" (2009) 58 Duke LJ 1667 at 1678.

210 Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000) at [7.24].

211 See for example Baum, above n 209, at 1679; and Ellen Jordan "Specialized Courts: A Choice?" (1981) 76 Nw U L Rev 745 at 747–748.

212 Baum, above n 209, at 1678.

213 Baum, above n 209, at 1677; Jordan, above n 211, at 747–748; Glazebrook, above n 7, at 538; Cheng, above n 198, at 551–552; and Dreyfuss, above n 208, at 379.

214 Curthoys, above n 208, at 8. See also Baum, above n 209, at 1679.

influence. Secondly, if a small category of litigants will often appear before the court, they have a strong incentive to lobby for the appointment of judges favourable to their cause.²¹⁵

Finally, specialisation comes with increased financial costs. Litigants may engage in jurisdictional conflicts in an attempt to get their case in or out of a specialist court, whilst the courts themselves need to be staffed and well resourced.²¹⁶ Given New Zealand's relatively small economy, these costs may outweigh any efficiency benefits specialisation provides.

B Further considerations

The difficulty, however, that one faces when examining these considerations is that "[t]he existing scholarship provides only a fragmentary understanding of the extent to which the potential effects of judicial specialisation – positive, negative, or mixed – actually occur".²¹⁷ Moreover, the extent and relevance of many of these factors is enormously dependent upon the form of specialisation introduced. Thus, even if certain effects can be shown in relation to one court, there is little guarantee that these will eventuate in another situation.

Nevertheless, there are two key considerations that are of particular importance to the current commercial specialisation debate. First, New Zealand is not a large country. It has a limited pool of judicial resources, and only so many commercial disputes. Accordingly, any attempt to introduce a commercial court or specialist panel must define the scope of its jurisdiction in a way which, first, protects it against sudden fluctuations²¹⁸ and, secondly, is sufficiently narrow so as to enable the efficiency gains from specialisation to be realised.

This is of added importance if the specialisation occurs at High Court level for several reasons. First, High Court judges are not cheap. In a figure that has undoubtedly risen since its 2006 calculation, it was estimated that each High Court judge costs in excess of \$630,000 per annum.²¹⁹ Moreover, due to their guaranteed security of tenure,²²⁰ they cannot be removed even if there is insufficient work to justify their appointment. Accordingly, if judges were appointed on the basis of their commercial

215 Cheng, above n 198, at 551; and Sarang Vijay Damle "Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court" (2005) 91 Va L Rev 1267 at 1283.

216 Glazebrook, above n 7, at 539. See also Law Commission 2012 *Issues Paper*, above n 30, at [7.45]–[7.46]; and Trevor Daya-Winterbottom "Specialist Courts and Tribunals" (2004) 12 Wai L Rev 21 at 45.

217 Baum, above n 209, at 1680.

218 Cheng, above n 198, at 555. See also Katz, above n 1, at 44.

219 See John Hansen, Judge of the High Court of New Zealand "Courts Administration, the Judiciary and the Efficient Delivery of Justice" (FW Guest Memorial Lecture, Otago University, Dunedin, 28 September 2006) at 1: "It is estimated that each High Court Judge, with necessary support staff, premises, library etc., costs the taxpayer in excess of \$630,000 per year, but this ignores the superannuation contribution and the capital setup costs on appointment."

220 Constitution Act 1986, s 23.

experience to a court or panel that subsequently failed to attract cases, the Government would be required to bear the expense of an unwanted, and expensive, judicial asset. On the other hand, if the introduction of a specialist court leads to a substantial influx of commercial cases, this may place pressure on the current statutory limit of 55 judges,²²¹ potentially resulting in delays to non-commercial cases if insufficient judges are assigned to sit on regular civil and criminal trials.

Secondly, the judicial specialisation debate needs to be seen in context. Since the Supreme Court's establishment in 1841, New Zealand's judiciary has been characterised by its generalist nature. The High Court has never sat in divisions²²² and its judges have successfully withstood numerous calls for increased judicial specialisation throughout its history.²²³ The danger is that once New Zealand goes down the path of specialisation, it will be very difficult to return to a generalist structure.

Take, for example, the Māori Land Court. With a heritage dating back to 1862,²²⁴ the Court was established "to ensure ownership, use and disposal of Māori land".²²⁵ Although its function shifted from facilitating European purchase of Māori land during the 19th century, to resolving disputes between Māori with collective ownership of land, by 1980 a Royal Commission considered that "its life [was] running out".²²⁶ In a view shared by "most, if not all of those with the greatest knowledge and experience of the Court", the Commission reported that: "It is hard to see that a separate court will be needed to do the remaining judicial work which could then perhaps be handled *within the central court structure*".²²⁷

Nevertheless, more than 30 years on, the Māori Land Court remains in existence, providing a vivid example of just how difficult it can be to remove a specialist panel or court.

221 Judicature Act 1908, s 4(1)(b). This limit is set to be reaffirmed by cl 6A(1) of the Judicature Modernisation Bill 2013 (178-2).

222 I accept that the High Court's Administrative Division operated between 1968 and 1991, however, this is more akin to a specialist panel, rather than a division. This can be contrasted with the formal separation between the Chancery, Queen's Bench and Family divisions in the England and Wales High Court, and the Common Law and Equity divisions in the New South Wales Supreme Court.

223 See for example *Report of the Royal Commission on the Courts*, above n 101, at 90–97; and Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.3]–[10.16].

224 Te Kooti Whenua Māori "Māori Land Court" <www.justice.govt.nz>.

225 Thaddeus McCarthy and others *Report of the Royal Commission of Inquiry on the Maori Land Court* (1980) at 3.

226 At 6.

227 At 74 (emphasis added).

This concern is two-fold. First, any move to introduce a specialist commercial panel, division or court is likely to result in lobbying for further specialisation in other legal areas.²²⁸ Taken to an extreme, this may result in the division of the Court's jurisdiction into a series of panels, as has happened with the FCA. Secondly, even if the specialist commercial panel, division or court failed to live up to expectations it may, as the Māori Land Court shows, prove very difficult to remove.

Unfortunately, as the following parts reveal, neither the Government nor the Law Commission considered these factors in any detail when designing the proposed reform under cl 18 of the Judicature Modernisation Bill.

VII THE JUDICATURE MODERNISATION BILL

A Law Commission Report

In its 2012 report *Review of the Judicature Act 1908*, the Law Commission strongly supported the introduction of a specialist High Court commercial panel. Unfortunately, as this article reveals, the Commission's reasons for change are unable to withstand scrutiny, whilst its lack of detailed recommendations on the proposed panel's operation has led to many of the problems created by cl 18 of the Judicature Modernisation Bill.

1 The rationale for change

Two factors underpinned the Commission's decision to recommend greater High Court specialisation: the failure of the commercial list and a perceived loss of commercial litigation. Neither provides a solid basis for the Commission's recommendations.

(a) Commercial List's failure

Introduced by the Government in 1987, the commercial list provides for commercial judges, as appointed by the Chief Justice, to determine the parties' pre-trial applications with a view to identifying the main issues and reducing the scope of the substantive dispute.²²⁹ Although the list initially proved popular, its case load declined substantially over the past decade, leading the

²²⁸ This is not an idle concern. In February 2015, discussing the proposed Judicature Modernisation Bill, the Attorney-General, Chris Finlayson QC, remarked that "the key point to emphasise is that the panels are established in consultation with the Attorney-General. The legislation is not yet enacted and the consultation has not yet taken place. *But I have to say I am very attracted to the proposal which has been mooted that there be a specialist arbitration panel, as in other jurisdictions.*" See Chris Finlayson QC, Attorney-General for New Zealand, "Attorney-General's Remarks" (speech delivered to the International Chamber of Commerce and the Arbitrators' and Mediators' Institute of New Zealand, Auckland, 18 February 2015) at 2.

²²⁹ Law Commission 2012 *Review of the Judicature Act*, above n 31, at [7.4]. See also Andrew Beck "Do we need the Commercial List?" [2002] NZLJ 441.

Commission to conclude that it had "[lost] its purpose",²³⁰ and was "slowly falling into disuse".²³¹ Three factors were seen as contributing to the list's demise.

First, and most importantly, the commercial list suffered from a "fundamental weakness"²³² in that it only addresses pre-trial applications. Following the determination of pre-trial issues, cases returned to the general list, where there was no guarantee of a commercial judge determining the substantive dispute.²³³

Secondly, the introduction of general case management²³⁴ significantly reduced the list's *procedural* benefits, to the point whereby quintessentially commercial disputes were potentially refused entry onto the list due to "disadvantages [of] cost and convenience".²³⁵

Finally, because the list only operates in Auckland,²³⁶ this led to substantial and "unjustified" increases in cost and travel for litigants based elsewhere.²³⁷ This is "particularly [unsatisfactory] given that some of the significant commercial litigation is against Crown entities, which are usually based in Wellington".²³⁸

(b) Loss of litigation

The Commission also concluded that the commercial list's failure, coupled with ADR's rising popularity, had led to a "respectable 'bleeding off' of commercial litigation" in New Zealand.²³⁹ Acting as a catalyst for change, the Commission concluded that, without reform, "[it] is difficult to see that trend not continuing".²⁴⁰

230 Law Commission 2012 *Issues Paper*, above n 30, at [7.14].

231 At [7.34].

232 At [7.31]. See also Galbraith, above n 1, at 424.

233 Law Commission 2012 *Issues Paper*, above n 30, at [7.31]. Indeed, the Law Commission went further and stated "having got the case ready for hearing ... to then beat a retreat to the general list along with a myriad of other cases is inappropriate".

234 For further discussion see Winkelmann and others, above n 96.

235 Law Commission 2012 *Issues Paper*, above n 30, at [7.13]–[7.20]. For further discussion of this issue see *Commerce Commission v Cards NZ Ltd* HC Auckland CIV-2006-485-2535, 5 April 2007 at [12]–[15]; and Beck, above n 229, at 442.

236 This has recently changed with judges based in the Wellington High Court being appointed to the commercial list in 2011. See Winkelmann "2013 High Court Annual Report", above n 64, at 4.

237 Law Commission 2012 *Issues Paper*, above n 30, at [7.32].

238 At [7.32].

239 Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.54]

240 At [10.55].

(c) Criticism

Whilst it is undoubtedly true that the commercial list has "[lost] its purpose",²⁴¹ and is "slowly falling into disuse",²⁴² this does not mean that commercial litigation is not going to the High Court. Instead, all that one can say is that commercial parties no longer see any use for a procedure that assigns a specialist judge to manage a case's pre-trial applications, but returns it to the general list for the substantive hearing.

Secondly, there is no empirical evidence to support the Commission's conclusion that there has been a respectable 'bleeding off' of civil litigation".²⁴³ Nor is there any basis for the Commission's statement that, without reform, "[it] is difficult to see that trend not continuing".²⁴⁴ In effect, the Commission never even satisfied the first of the three criteria established earlier in this article, let alone showed that the "lost" litigation was being resolved offshore or in ADR, and the substantial reason for this was the High Court's lack of specialisation.

2 *Commercial panels*

Nevertheless, following its conclusion that change was required, the Commission examined four options for reform: (a) abolish the commercial list; (b) extend the commercial list to Wellington and Christchurch, and cover substantive hearings; (c) create a specialist commercial court in Auckland; or (d) introduce a High Court panel system.²⁴⁵

Whilst an expanded commercial list, and specialist commercial court were considered to offer some benefits,²⁴⁶ the Law Commission strongly favoured the introduction of a panel system for the following reasons.

First, the prospect of trial court specialisation garnered widespread enthusiasm amongst commercial parties and their lawyers. In particular, the New Zealand Law Society's strong support for a commercial panel²⁴⁷ was echoed by the results of a New Zealand Bar Association survey which found that 84 per cent of its members supported judicial specialisation of some form.²⁴⁸

241 Law Commission 2012 *Issues Paper*, above n 30, at [7.14].

242 At [7.34].

243 Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.54]

244 At [10.55].

245 Law Commission 2012 *Issues Paper*, above n 30, at [7.29].

246 At [7.36]–[7.46].

247 Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.39].

248 At [10.29].

Secondly, the Commission concluded that a panel system, which had received "general support"²⁴⁹ in Australia, represented a "pragmatic half-way house between an (unaffordable) commercial court and a wholly generalist jurisdiction".²⁵⁰

Finally, whilst the Commission accepted that there was no practical difference between a commercial panel, and extending the commercial list to cover substantive disputes, "it is the scope to develop further panels in the panel system that sets them apart, and makes us inclined to prefer it".²⁵¹ As noted earlier, this statement is particularly concerning when viewed in light of the High Court's longstanding history as a generalist court, and the difficulties one faces when attempting to remove specialist panels and courts.

3 *Lack of recommendations*

Unfortunately, having reached its conclusion, the Commission provided little guidance on the size, composition and scope of the proposed commercial panel, stating that this would "need to be settled".²⁵² Underpinning the Commission's reluctance to offer detailed recommendations was its (unexplained) belief that legislation should simply provide for the Attorney-General, in consultation with the Chief High Court Judge (CHCJ), to establish the commercial panel through subsequent Orders in Council.²⁵³ This is highly unsatisfactory for two reasons.

First, having discussed the current problems facing New Zealand's judiciary, the Commission effectively abdicated any responsibility for improving the situation. Take, for example, the two major features of any commercial panel: the scope of its jurisdiction and the membership of its judges.²⁵⁴ Both features are likely to be of paramount importance to any panel's success. If the panel's scope is too narrow, or the appointed judges lack the requisite expertise or experience, the panel is likely to fail. Yet the Commission never addressed the issue of judicial appointment/selection, and only briefly commented on the panel's scope by suggesting that the London Commercial Court's jurisdiction would be "a useful starting point for consideration".²⁵⁵

249 At [10.37].

250 New Zealand Law Society "Submission to the Law Commission on the *Review of the Judicature Act 1908*" quoted in Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.39]. Further supported by the Law Commission 2012 *Issues Paper*, above n 30, at [7.40]–[7.60].

251 Law Commission 2012 *Issues Paper*, above n 30, at [7.60]. See also Finlayson, above n 228, at 2.

252 Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.68].

253 At [10.67].

254 See for example Stephen Legomsky *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* (Oxford University Press, New York, 1990) at 33–38.

255 Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.68].

Like suggesting a cake but without providing the recipe, the result is a solution that is entirely lacking in substance. There is no guarantee of an improved civil litigation environment, or even an improvement upon the existing commercial list.²⁵⁶ In contrast, had the Commission attempted to define the commercial panel's jurisdiction, and set guidelines around its operation, commercial parties, lawyers and judges would have had an opportunity to comment and suggest improvements, dramatically increasing the likelihood of successful reform.

Secondly, the Commission's failure to provide distinct recommendations effectively forestalled detailed Parliamentary scrutiny of the panel's scope and operation. The problem is neatly encapsulated by Phil Goff during the Bill's first reading when he stated: "My experience of the Law Commission is that it does its homework ... and that *we can be confident that the basis of this legislation will be sound.*"²⁵⁷

Faced with a Bill over 1,000 pages long, in an area unlikely to draw much, if any, public attention, it would appear that MPs treated the Law Commission's report with deference, focusing instead upon areas where the Government differed from the Commission.²⁵⁸ This has resulted in a failure to consider the potentially serious issues, as detailed below, which may result from the Bill's current "bare bones" approach.

B The Judicature Modernisation Bill

Following its introduction on 27 November 2013, the Judicature Modernisation Bill has attracted wide cross-party support, passing its first and second readings unanimously, and "sailing" through the Select Committee with limited alterations. Barring any significant changes of heart, the Bill is likely to progress into law in the near future. Accordingly, the current formulation of cl 18,²⁵⁹ is of considerable importance.

256 See for example Ministry of Justice *Report of the Ministry of Justice to the Justice and Electoral Committee on the Judicature Modernisation Bill* (April 2014) at [61] which "recommend[s] that the panel approach set out in [cl 18] be retained. Even though submitters' support for a commercial panel was divided, this mechanism will assist the High Court to be most relevant to its users. *This aids the legitimacy of the Court, regardless of whether there is any real difference in decision-making.*" (emphasis added).

257 (5 December 2013) 695 NZPD 15311.

258 For example (5 December 2013) 695 NZPD 15312 per Phil Goff (Labour).

259 The only change made by the Select Committee to cl 18 was to rewrite cl 18(6) from its original: "The Chief High Court Judge may decide any other matters of practice or procedure relating to the commercial panel or other panels that are not prescribed or provided for by the High Court Rules." Compare the Judicature Modernisation Bill 2013 (178-1) with the Judicature Modernisation Bill 2013 (178-2).

18 Panels

- (1) The commercial panel of the High Court from which Judges may be selected to hear and determine commercial proceedings is established and may operate subject to this section.
- (2) The Governor-General may, by Order in Council made on the recommendation of the Attorney-General after consultation with the Chief Justice and the Chief High Court Judge,—
 - (a) specify a commencement date for the operation of the commercial panel:
 - (b) specify the types of proceedings that may be assigned to the commercial panel:
 - (c) if the Governor-General considers it necessary, provide for the commercial panel to cease its operations on or from a specified date.
- (3) The Chief High Court Judge, in consultation with the Attorney-General and the Chief Justice, may establish other panels of High Court Judges for the purposes of dealing with proceedings other than commercial proceedings.
- (4) The Chief High Court Judge may determine how many High Court Judges are to be on the commercial panel or any other panel and assign Judges to the panels.
- (5) The Chief High Court Judge may decide the basis on which cases are to be distributed as between Judges on the commercial panel or another panel and Judges who are not on any panel.
- (6) A party may nominate that the party's case be dealt with by a Judge on a panel and the Chief High Court Judge may assign to the case a Judge or Judges from a panel.

Several features are immediately noteworthy. First, the Bill provides little more than a rudimentary or "bare bones" framework. Whilst the commercial panel "is established", its commencement date, and more importantly its scope, will only be determined after the Bill is enacted and a subsequent Order in Council is issued.²⁶⁰ As previously noted, this is an unfortunate situation as it denies both the public, and MPs, the opportunity to scrutinise the panel's operation to ensure that: (a) constitutional safeguards remain; and (b) the panel will *actually* improve New Zealand's commercial litigation "problem".

Secondly, the Bill attempts to reduce executive influence by granting the CHCJ significant control over the panel's operation.²⁶¹ Thus, once the panel is established, the CHCJ has control over both the

²⁶⁰ Judicature Modernisation Bill (178-2), cls 18(1) and (2).

²⁶¹ See for example (5 December 2013) 695 NZPD 15299 where Hon Judith Collins MP stated: "Judicial independence will be maintained through judicial control of case allocation and judge assignment to the panel".

number, and appointment, of judges to the panel, and the subsequent assignment of panel (and non-panel) judges to panel cases.

Finally, cl 18(3) vests the CHCJ with the power to establish non-commercial panels, following consultation with the Attorney-General and Chief Justice, thereby allowing further specialisation within the High Court.

VIII ISSUES

Belying its simple construction, cl 18 has the *potential* to raise several constitutional issues. Whilst these concerns are (at present) hypothetical, this does not mean that they should be dismissed. Instead, cl 18 should be substantially rewritten to reduce the risk of panel packing, and its current threat to judicial independence.

A Judicial Independence

A fundamental principle of the rule of law,²⁶² and defining feature of a free society,²⁶³ judicial independence is necessary for judges to decide without "fear or favour, affection or ill will".²⁶⁴ Although statutes such as the Constitution Act 1986 have traditionally focused on the protection of judges from executive or legislative influence,²⁶⁵ judicial independence extends beyond separation of powers concerns.

As Simon Shetreet stated: "It must also encompass internal independence, namely, the independence of the judge from his or her judicial colleagues or superiors."²⁶⁶ Although this individual independence may be safeguarded in several ways,²⁶⁷ it receives its greatest support from the legislative principle that all High Court judges have power over all of the Court's jurisdiction.²⁶⁸

262 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 797. See also *Report of the Royal Commission on the Courts*, above n 101, at [642].

263 Geoffrey Palmer and Kim Hill *Constitutional Conversations* (Victoria University Press, Wellington, 2002) at 14.

264 Oaths and Declarations Act 1957, s 18. See also Joseph, above n 262, at [20.3].

265 Constitution Act 1986, ss 23 and 24.

266 Shetreet, above n 155, at 3. See also Judges of the Supreme Court, Court of Appeal and High Court "Submission to the Justice and Electoral Committee on the Judicature Modernisation Bill" at [6], where they argued that: "The independence of judges when judging means that they must also be free of interference by other judges. In the High Court, each judge has been appointed to exercise all the jurisdiction of the Court. We expressed our concern to the Law Commission that a panel system which deprives some judges of part of the jurisdiction is potentially an erosion of the protection of independence in judging."

267 For example, through random case allocation. See generally Butler, above n 154.

268 Judicature Act 1908, s 19. See also Judicature Modernisation Bill 2013 (178-2), cl 8; and Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.8].

In line with New Zealand's generalist tradition, this provision ensures equality amongst the judges, providing that none shall "rank" higher than another. Clause 18 threatens to undermine this principle in three respects.

1 *Judicial hierarchy*

First, the *practical* effect of establishing a commercial panel is a reduction in non-panel judges' jurisdiction. Whilst all High Court judges remain competent to adjudicate commercial matters,²⁶⁹ only commercial panel judges will experience commercial work. In contrast, under the existing commercial list, list judges preside over pre-trial disputes, but the case returns to the general list for its substantive hearing (where a non-list judge may be assigned). Assuming that judges enjoy working on commercial cases, cl 18 creates a judicial hierarchy whereby "all [judges] are equal, but [commercial panel judges] are more equal than others".²⁷⁰

It is not difficult to see how this increase in specialisation may, among other things, lead to problems surrounding judicial promotion. Faced with a choice between two otherwise identical High Court judges, one who has worked solely upon general list cases, and another who, in addition to sitting on a specialist commercial panel, has been exposed to a wide variety of general list work, the choice will often be clear. Taken to an extreme, one may question whether a judge who was not "trusted" to deal with High Court commercial cases, can be trusted to sit in the Court of Appeal or Supreme Court, where the consequences of an errant decision are far greater.

In many respects, this is of greater concern in New Zealand, than it is in any of the other jurisdictions surveyed above (apart from the Cayman Islands) for three reasons. First, whereas the New South Wales Supreme Court and England and Wales High Court have traditionally sat in divisions, New Zealand's High Court has always been a court of generalists. Thus, because promotions up the judicial hierarchy have always taken into consideration the judge's appointment to particular divisions, the existence of specialist lists and courts within these jurisdictions is of less concern than it is in a jurisdiction of generalists, such as New Zealand.

Secondly, because judges are assigned to multiple lists/panels in courts such as the New South Wales Supreme Court and the FCA, the risk of creating a judicial hierarchy is significantly reduced because the judges operate on a level playing field. Their specialities may be different, but none is exposed to all of the Court's work. In contrast, the effect of cl 18 is to reduce the non-panel judges' jurisdiction, whilst maintaining panel judges' ability to sit on all cases.

269 Judicature Act 1908, s 19. See also Judicature Modernisation Bill 2013 (178-2), cl 8.

270 A poor adaptation from George Orwell *Animal Farm: A Fairy Story* (Secker & Warburg, London, 1954). See also Glazebrook, above n 7, at 549–550.

Finally, unlike the FCA, where judges volunteer to be placed on panels, the fact that the CHCJ *appoints* panel judges under cl 18, could be seen as a promotion within the High Court, further undermining the principle that all judges are equal.

2 *Concentration of power*

This leads to the second, interrelated concern. In its attempt to remove any hint of executive influence over panel membership, the Government provided the CHCJ with an untrammelled power to appoint judges to the commercial panel.²⁷¹ Significantly, cl 18(4) contains no restrictions on the CHCJ's powers. Thus, unlike the existing commercial list provisions,²⁷² or many comparable jurisdictions,²⁷³ the CHCJ is under no obligation to consult with the Chief Justice, nor publish objective guidelines on the appointment process.

The risk of impropriety is clear. Where non-panel judges seek promotion to a panel, they face a *potential* incentive to "curry favour" with the CHCJ by ruling in a particular manner, or behaving in a particular fashion.²⁷⁴ To the extent that commercial parties and their lawyers recognise the existence of this threat, public confidence in the judiciary is likely to be severely undermined. This is exacerbated by the fact that the CHCJ is under no obligation to justify panel appointments, meaning that any judicial impropriety is unlikely to be discovered or brought to account.

Admittedly, it is highly unlikely that the CHCJ will exercise his or her power inappropriately. Nevertheless, this concern only arises because of the Government's decision to place the power of appointment solely in the CHCJ's hands. A more sensible approach (in line with the Senior Courts' Judges' submission)²⁷⁵ would be to require the Chief Justice's concurrence on any appointment.²⁷⁶ Doing so has the advantage of keeping appointments within the judiciary, thereby removing any hint of executive influence, whilst providing an additional degree of scrutiny and arms-length appointment. Alternatively, the Bill could provide for judges to apply to be placed on these panels,

271 See for example Judith Collins' statement during the Bill's first reading at (5 December 2013) 695 NZPD 15299; Ministry of Justice *Report of the Ministry of Justice to the Justice and Electoral Committee* (April 2014) at [63]; and Ministry of Justice *Judicature Modernisation Bill – Initial Briefing* (3 March 2014) at [18].

272 Judicature Act 1908, s 24C.

273 For instance, s 6(2) of the Senior Courts Act 1981 (UK) requires the Lord Chief Justice to consult with the Lord Chancellor before making appointments to the English Commercial Court, whilst appointments to the FSD of the Cayman Islands Grand Court are made by the independent Judicial and Legal Services Commission: see Cayman Islands Government, above n 193.

274 See for example Kathy Mack, Sharyn Roach Anleu, and Anne Wallace "Caseload Allocation and Special Judicial Skills: Finding the 'Right Judge'" (2012) 4(3) IJCA 68 at 75.

275 Judges of the Supreme Court, Court of Appeal and High Court, above n 266, at [6].

276 See also the provisions for appointment of commercial list judges under s 24C of the Judicature Act 1908.

coupled with a strong statement in Parliament that such applications should be accepted as a matter of course.

3 *Judicial tenure*

Finally, the Bill is silent on the *removal* of judges from the commercial panel. Nor is there any provision regarding the *term* of a judge's assignment. The obvious inference, therefore, is that the CHCJ's power to "assign" under cl 18(4), encompasses a further ability to reassign or remove judges from the panel.

Read in this light, cl 18 effectively provides for commercial panel judges to serve at the CHCJ's pleasure. This is a somewhat startling conclusion. As far back as 1700, the English Parliament rejected the King's ability to remove judges without reason.²⁷⁷ Yet that, in effect, is what cl 18 implies. When considered in light of the CHCJ's already substantial powers of appointment and case management, it becomes immediately apparent that too much power has been concentrated in the hands of one person.

An appropriate solution would be to adopt the FCA's approach,²⁷⁸ and appoint panel judges for a fixed term of, say, three years. Doing so has the advantage of reducing the CHCJ's control over panel judges, whilst also providing a degree of job security not currently present in cl 18.

B Panel Packing

In addition to the above concerns, the Bill poses a further threat of judicial manipulation or "panel packing". Defined as "the deliberate allocation of one or more judges to a judicial panel in order to achieve a particular outcome",²⁷⁹ panel packing compromises the parties' right to a free and impartial trial, breaches the rule of law and undermines public confidence in the judiciary.²⁸⁰ As such, it poses a significant threat to the judicial system, and ought to be actively guarded against. Unfortunately, the Bill does the opposite, facilitating judicial manipulation both within and outside the commercial panel.

1 *Panel packing within the panel*

Within the panel, threats of judicial manipulation are omnipresent due to the CHCJ's complete control over the allocation of panel cases. Not only does the CHCJ have the power to determine the

277 Act of Settlement 1700 (Eng) 12 & 13 Will III c 2. New Zealand adopted similar provisions in 1858 with the passage of the Supreme Court Judges Act 1858. For further discussion of this issue see Joseph, above n 262, at [21.3.2].

278 Law Commission 2012 *Issues Paper*, above n 30, at [7.60].

279 Butler, above n 154, at 85.

280 At 86–87. As Butler stated: "Precisely because the make-up of a court can determine the outcome of a case, it is vital for litigants to have confidence that they have not lost a case because of decisions made to appoint a particular judge or judges to the case in order to produce a particular result". See at 84.

"basis on which cases are to be distributed",²⁸¹ but cl 18(6) expressly provides the CHCJ with the authority to directly assign panel judges on a case-by-case basis. To the extent that the CHCJ wishes to influence a result, the potential for manipulation is clear.

Unfortunately, as New Zealand's only real attempt at specialisation reveals, this is not an idle concern. Between 1968 and 1991, the vast majority of public law cases (approximately 30 per annum) were sent to the High Court's Administrative Division, where they were resolved by judges appointed by the Chief Justice.²⁸² As with cl 18, the Chief Justice had an unfettered power to allocate judges to panel cases.²⁸³ As the following table reveals, the resulting distribution of cases leads to substantial concerns about the current drafting of cl 18.

Distribution of Administrative Division Cases (1968–1987)²⁸⁴

Judge	Total number of Admin Div cases decided	Years on the Administrative Division	Average number of cases per year
Davison CJ	125	10	12.5
Speight J	78	13	6
Wild CJ	75	10	7.5
White J	28	9	3.1
Jeffries J	26	6	4.3
Casey J	25	4	6.3
McMullin J	25	4	6.3
Cooke J	20	[less than 1]	[more than 20]
Roper J	20	4	5
Chilwell J	19	6	3.2
Wilson J	18	4	4.5
Grieg J	11	2	5.5
Holland J	10	3	3.3
Bisson J	8	6	1.3

281 Judicature Modernisation Bill 2013 (178-2), cl 18(5).

282 Legomsky, above n 254, at 51–54.

283 At the time the Administrative Division operated, the Chief Justice sat predominantly in the High Court. In this regard, they occupied a very similar role in relation to the Administrative Division as the CHCJ will under the proposed commercial panel.

284 Table sourced from Legomsky, above n 254, at 62.

Judge	Total number of Admin Div cases decided	Years on the Administrative Division	Average number of cases per year
Woodhouse J	7	6	1.2
Mahon J	5	2	2.5
Tompkins J	3	2	1.5
McGregor J	0	1	0
Doogue J	0	1	0
Other Judges	53	-	-
Totals	556	93	6

Of the 19 judges who were appointed to the Division between 1968 and 1987,²⁸⁵ three judges heard and decided "fully half" of the Division's cases.²⁸⁶ Clearly, judicial case allocation was not random, and the Chief Justices exerted significant control over the Court's business.²⁸⁷ Furthermore, the fact that both Chief Justices clearly favoured themselves when allocating cases shows the undesirability of placing the power of distribution in the hands of just one person.²⁸⁸

This is in stark contrast to the FCA's strictly random case allocation procedure, or the Cayman Islands' FSD provisions which require the registrar to appoint judges to cases randomly (with a requirement to consult the Chief Justice). Ironically, if commercial parties or their lawyers observe, suspect or perceive that panel packing is occurring within the commercial panel, threatening their ability to receive a fair and impartial trial, they may choose to resolve their dispute in offshore courts or through ADR. In this regard, cl 18's current formulation has the potential to reduce, rather than bolster, the number of New Zealand High Court commercial cases.

1 Manipulation outside the commercial panel

Clause 18 also threatens the provision of justice in non-commercial cases. Because panel judges will spend a disproportionately high proportion of their time presiding over commercial disputes, the rest of the High Court's work will be disproportionately spread amongst the non-panel judges.²⁸⁹ Where the CHCJ wished to influence a particular area of law, for example sentencing lengths, it would be relatively easy for him or her to "stack" the commercial panel with judges who favour tougher

285 Law Commission *The Structure of the Courts* (NZLC R7, 1989) at [468].

286 Legomsky, above n 254, at 60 – 66. See also Law Commission, above n 285, at [430].

287 Legomsky, above n 254, at 66.

288 At 81.

289 The Law Commission stated that they should only spend 50 per cent of their time on panel cases, but this was subject to the CHCJ's discretion: Law Commission *2012 Review of the Judicature Act*, above n 31, at [10.69].

sentences. The remaining, less penal judges, would then have a greater influence upon sentencing policy, helping achieve the CHCJ's aim of reducing sentencing lengths.

This risk is compounded by the CHCJ's ability to establish new panels under cl 18(3), after consulting with the Attorney-General and the Chief Justice. This devolution of power represents a puzzling step by Parliament. Whilst it is true that courts such as the FCA introduced their specialist lists through Court practice directions, it is remarkable that in a generalist system, Parliament would expressly provide the CHCJ with the power to create new panels. Indeed, it seems odd that Parliament granted the executive control over the commercial panel's commencement date, jurisdiction and termination,²⁹⁰ but is content to allow future panels develop with little to no statutory oversight.

Furthermore, the CHCJ's duty to consult provides only a limited bulwark on his or her powers. So long as the CHCJ actually consults with the Attorney-General and Chief Justice on his or her plans to create a new panel, there is no obligation to follow their advice.²⁹¹ Accordingly, as the clause currently stands, if the CHCJ wishes to influence another area of law, such as judicial review, there is almost nothing to prevent him or her from creating a panel to cover that topic, and appointing judges who share a similar view of the law in that area. Moreover, unlike the commercial panel, Parliament and the executive have no ability to terminate the newly established panel except through new legislation.²⁹²

Admittedly, the chances of a CHCJ deliberately assigning judges to the commercial panel to influence another area of law, or creating new panels to do just that, is very low. However, the consequences of panel packing are aggravated when judicial manipulation occurs in the High Court for two reasons. First, because many parties will be unwilling to file an appeal due to cost, time or other factors, judicially manipulated results will stand, compromising the judiciary's integrity. Secondly, even if an appeal is lodged, this may be of little comfort to affected litigants because appellate court judges will generally remain bound by the High Court's findings of fact.²⁹³ Accordingly, it is vital that steps are taken to prevent this non-random allocation of cases occurring.

3 Solution

To reduce the current risk of judicial manipulation under cl 18, three significant changes need to occur. First, judicial appointment to the panel should be done by the CHCJ, with the Chief Justice's

290 Judicature Modernisation Bill 2013 (178-2), cl 18(2).

291 See for example *R v Devon County Council, ex p Baker* [1995] 1 All ER 73 (CA) at p 85 per Dillon LJ; approved by the New Zealand Court of Appeal in *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [314].

292 Compare cl 18(2)(c) with cl 18(3) of the Judicature Modernisation Bill 2013 (178-2).

293 Butler, above n 154, at 86. See also Susan Willett Bird "The Assignment of Cases to Federal District Court Judges" (1975) 27 Stan L Rev 475 at 480.

concurrence. Alternatively, the Bill could provide for judges to apply for appointment, coupled with a strong statement in Parliament that such applications should be accepted as a matter of convention. Secondly, the legislation should require commercial panel cases to be assigned randomly to panel judges, *unless* the CHCJ provides written reasons for allocating a specific judge. Thirdly, the CHCJ's power to create new panels should be limited by the requirement to get both the Attorney-General's and Chief Justice's approval.

Ideally, however, cl 18 should be removed from the Bill, and made subject to a full Law Commission review.

IX CONCLUSION

This article does not advocate for, or against, judicial specialisation in New Zealand. Instead, it seeks to put the issue in context so that future reform is conducted in an appropriate fashion.

Although judicial specialisation (of different degrees) is prevalent in both large and small countries, each jurisdiction has different reasons for its introduction. While the FCA is concerned with judicial efficiency, economic justifications and the growth of the legal services industry are of primary importance for the SICC and English Commercial Court, with both Courts competing to attract litigants from around the world. The rationale behind the Cayman Islands' FSD, on the other hand, lies in between these two extremes – it is designed to encourage efficiency, whilst maintaining the Islands' position as a leading financial services destination.

In New Zealand, practitioners' calls for judicial specialisation have centred on commercial litigants' perceived loss of confidence in the generalist High Court. According to the Court's detractors, commercial parties have become wary of generalist High Court judges' abilities to understand the factual and legal nuances of their cases, and increasingly look towards offshore courts and ADR to resolve their disputes. The perceived result has been a substantial decline in commercial litigation, threatening the development of New Zealand's commercial law, and potentially endangering its economic development, as offshore parties become reluctant to invest, and domestic parties face higher transaction costs when negotiating agreements.

Critics argue that moving to a specialist structure will remedy these problems. As commercial parties become more willing to entrust their dispute to the courts, New Zealand's law will become more dynamic, enhancing its international legal reputation, and encouraging future economic development.

However, as the Law Commission correctly stated: "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."²⁹⁴ This standard simply has not been met. As this article highlights, there is no publically available evidence to support the claim that the High Court is losing its commercial

²⁹⁴ Law Commission 2012 *Review of the Judicature Act*, above n 31, at [10.41].

jurisdiction. Nor is there any empirical data to suggest that commercial litigation is being systematically resolved by ADR or in offshore dispute resolution fora. This is a highly unsatisfactory state of affairs. This article strongly argues that there can be no mandate to change a functioning and well-respected judiciary fundamentally until it can be shown that:

- (1) relative to historical trends and comparable jurisdictions, the High Court has "lost" a significant proportion of its commercial jurisdiction (both in terms of numbers of cases filed, and types of cases heard and decided);
- (2) the "lost" commercial cases are being resolved through ADR or in offshore fora; and
- (3) the primary reason for litigants' movement away from the formal civil justice system is a lack of judicial specialisation.

Unfortunately, the Government's proposal to introduce a panel system to the High Court under cl 18 of the Judicature Modernisation Bill represents a significant threat to New Zealand's legal system. As currently drafted, it endangers a litigant's right to a fair and impartial trial, places too much power in the CHCJ's hands and threatens to undermine the principle of individual judicial independence.

Whilst the ideal solution would be to remove cl 18 pending a full Law Commission review, if the Government continues to progress the Bill, supplementary order papers should be introduced immediately to: (a) limit the CHCJ's control over the panel by requiring the Chief Justice's concurrence on all panel appointments; (b) provide panel judges with a three-year tenure; (c) require all cases to be allocated randomly amongst panel judges; and (d) limit the CHCJ's ability to create new panels by requiring him or her to get the approval of both the Chief Justice and Attorney-General.