LEADR/Victoria University Commercial Mediation in New Zealand Project Report (June 2015)

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Overview:

This report outlines the findings of a research project that was co-funded by LEADR&IAMA as part of Victoria University's 2014/15 Summer Scholarship programme. This particular research project examined the nature of private commercial mediation in New Zealand through conducting a survey of commercial mediators in New Zealand. Empirical data about the nature and use of commercial mediation in New Zealand is lacking, so the main aim of this project was to gather responses from people working in this field to move from anecdote to evidence. This report provides an analysis of the survey results alongside comments from targeted, qualitative, interviews with three respondents, and other relevant written sources. The survey was carried out from December 2014 to February 2015 and the interviews from March to May 2015.

1. Consent

#	Answer	Response	%
1.	I agree to take part in this research	34	100%
2.	I would like to receive publications resulting from this research when it is completed.	26	76%

2. Location of mediators

	Town/City/Region	Response	%
1.	Auckland	12	35%
2.	Wellington	12	35%
3.	Christchurch	3	9%
4.	Rotorua	1	3%
5.	Te Awamutu	1	3%
6.	Napier	1	3%
7.	Whangarei	1	3%
8.	Hamilton	1	3%
9.	Dunedin	1	3%
10	Tauranga	1	3%
	Total	**34**	**100%**

3. What is your gender?

#	Answer	Response	%
1.	Male	25	74%
2.	Female	9	26%
	Total	**34**	**100%**

Female mediators made up just over one quarter (26%) of survey respondents. In the United Kingdom, an audit of 295 commercial mediators also had 26% female respondents, which indicates that the gender imbalance in the New Zealand commercial mediation market mirrors that of other international jurisdictions.[1] One mediator described the commercial mediation market in New Zealand as a 'male dominated closed shop.'[2] 8 of the 9 women who responded to our survey mediate between 0 – 25 commercial disputes each year, with only one female commercial mediator conducting 25 – 50. Of the men who responded, 80% mediate between 0 – 25 commercial disputes each year.

4. What is your age?

#	Age range:	Response	%
1.	20 - 30	0	0%
2.	30 - 40	1	3%
3.	40- 50	1	3%
4.	50 - 60	18	53%
5.	60 - 70	9	26%
6.	70 +	5	15%
7.	Confidential	0	0%
	Total	**34**	**100%**

Most commercial mediators in New Zealand are aged between 50 to 70 years old (79%), with only 6% of respondents aged below 50 years old. This once again reflects the age of commercial mediators in the UK, which found the average female commercial mediator to be 50 years old and the average male commercial mediator to be 57 years old.[3]

[1] Centre for Effective Dispute Resolution [CEDR] *The Sixth Mediation Audit: A survey of commercial mediator attitudes and experience* (CEDR, London, 2014) at 4.
[2] Interview with a commercial mediator (Grant Morris, 27 March 2015), Wellington.
[3] CEDR, above n 1, at 4.

5. Approximately how many commercial disputes do you mediate each year?

#	Answer	Response	%
1.	0 - 10	17	50%
2.	10 - 25	11	32%
3.	25 - 50	3	9%
4.	50 - 75	0	0%
5.	75 - 100	2	6%
6.	100+	1	3%
	Total	**34**	**100%**

Half of the respondents (50%) perform less than 10 commercial mediations per year and 82% less than 25 mediations per year. One commercial mediator stated that doing 10 - 25 commercial mediations a year most definitely makes someone a part-time commercial mediator.[4] Feedback suggests that many mediators could be eager to take on more commercial work but cannot secure mediation opportunities to develop their skills. Another commercial mediator said they would like to do more commercial mediation but it is difficult to break into the market.[5] This attitude came through in the survey responses, as 'lack of work' and 'oversupply of mediators' were commonly identified as key challenges facing commercial mediators.[6] There is a lack of empirical data as to the exact number of commercial mediations in New Zealand, however it has been estimated that the current number is around 800 mediations per year.[7] It is anecdotally believed that around 10 – 12 individuals (carrying out between 50 – 100 mediations each year) dominate this market. An audit of commercial mediators in the United Kingdom alerted to a similar pattern, finding that "the market is still dominated by a select few, although the size of that group is steadily rising."[8] It is uncertain whether the size of that group in New Zealand is also rising but it seems unlikely.

This survey mainly generated responses from part-time, less experienced mediators, which could be a reflection of the market. A similar response was generated by a 2014 survey of international commercial mediators by the University of Missouri, with 63% of respondents having a very limited involvement with international commercial mediation, and only 9% having involvement in over 20 international commercial mediations.[9] Although this research had an international rather than domestic focus, it shows that dominance by a handful of mediators with a great deal of experience is also apparent in the international market. Researchers from the University of Missouri noted that responses from less experienced mediators can still provide important insight into their own and others' perception of the market.[10] The same is true for

[4] Interview with a commercial mediator (Grant Morris, 18 March 2015) Wellington
[5] Interview, above n 2.
[6] See question 24.
[7] This is a calculated estimation based on the surveys, interviews and written documents.
[8] CEDR, above n 1, at 3.
[9] S.I Strong "Use and Perception of International Commercial Mediation and Conciliation: A preliminary report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation" (Legal Studies Research Paper No. 2014-28, University of Missouri, 2014) at 14 -16.
[10] Ibid, at 14.

this survey, as the insights can identify areas of the New Zealand commercial mediation market that could be developed to ensure greater quality and involvement.

6. In what cities and towns (regions) do these mediations primarily take place?

#	Answer	Response	% of respondents
1.	Auckland	15	44%
2.	Wellington	14	41%
3.	Bay of Plenty/Waikato	6	18%
4.	Christchurch	6	18%
5.	Dunedin	4	13%
6.	Hawkes Bay/Gisborne	3	9%
7.	Palmerston North	3	9%
8.	Northland	2	6%
9.	Taranaki	2	6%

Included only one city in response	24	71%
Included more than one city in response	10	29%

Most commercial mediation takes place in the Auckland and Wellington, which is not surprising considering that Auckland is the most commercially active city in New Zealand and Wellington is where the government is located. While majority of mediators conduct mediations in one city, 10 respondents conduct mediations in more than one city, which shows the flexibility of mediation. Mediation is not restricted to one particular city, but can be carried out in a variety of contexts and locations. Based on this data, significantly more mediations occur in the North Island than in the South Island, which reflects the population distribution in New Zealand.

7. In your commercial mediations, what are the most common legal subject areas (for example, contractual disputes, banking, insurance etc.)?

#	Answer	Response	% of respondents
1.	Contracts (general)	25	74%
2.	Property (leases)	7	23%
3.	Building/Construction	7	23%
4.	Employment/workplace	5	15%
5.	Family (incl. relationship property)	4	12%
6.	Insurance	4	12%
7.	Trusts, Estates and/or Wills	5	15%
8.	Business/Commercial	4	12%
9.	Tort	3	9%
10.	Other	2	6%

This question was a text-entry question, so the categories above have been compiled based on the general responses given in the survey. Some respondents used a broad definition of ‘commercial’ while others used

a more narrow definition. Contractual disputes were significantly more common than any other legal subject areas (74%.) The inclusion of 'family' as a commercial legal dispute most likely refers to disputes to do with commercial aspects of family law, such as relationship property. 23% of respondents said 'construction' was a common type of mediated dispute. This most likely means disputes between parties that have activated a clause requiring mediation outlined in a standard construction contract. It could possibly include disputes relating to leaky homes. Most leaky homes mediations are conducted through the Weathertight Homes Resolution Services Act 2007 so are less likely to come under the definition of private commercial disputes, although some are mediated privately. Therefore while 'construction' disputes were identified as fairly common (23%), exactly what respondents meant by 'construction' could go beyond what the subject area traditionally includes.

8. Please indicate how often parties are represented by counsel in a commercial mediation.

#	Answer	Response	%
1.	Always	11	32%
2.	Often	10	29%
3.	Sometimes	6	18%
4.	Occasionally	3	9%
5.	Never	4	12%
	Total	**34**	**100%**

61% of respondents indicated that parties are always or often represented by counsel in a commercial mediation. This response is supported by the findings of question eleven, in which 47% of respondents identified lawyers or law firms as the most common source of referral. If lawyers are referring their parties to mediation, it could be they are then representing their party as counsel in mediation. Commercial mediation is legally complex, which is another reason why parties frequently have counsel representation to help them navigate through the process.

9. What is your approximate settlement rate in commercial mediation?

#	Answer	Response	%
1.	90-100%	19	56%
2.	80-90%	11	32%
3.	70-80%	4	12%
4.	60-70%	0	0%
5.	Less than 60%	0	0%
6.	Confidential	0	0%
	Total	**34**	**100%**

Over half of the respondents reported a 90 – 100% settlement rate, and none reported a settlement rate of less than 70%. The focus on achieving settlement in mediation is clear, ranking as the second style of

mediation most used by practitioners.[11] A 'settlement' style means that the main focus of the mediation is reaching an outcome, whether through evaluation or facilitation. This is further discussed in question 16.

10. What would be your approximate fee (excl GST) for a one-day mediation?

#	Answer	Response	%
1.	Below $2,500	6	19%
2.	$2,500- $5,000	15	47%
3.	$5,000 - $7,500	8	25%
4.	$7,500 - $10,000	1	3%
5.	Above $10,000	1	3%
6.	Confidential	1	3%
	Total	**32**	**100%**

97% of respondents were willing to include their approximate mediation fee. Almost half of the respondents (47%) charge between $2,500 and $5,000 for a one-day mediation. It would be interesting to find out how any extra time is remunerated. Whether travel costs are additional or absorbed into the mediation price would also be an interesting consideration when assessing the actual cost of mediation.

The 2 respondents who charge over $7,500 for a one-day mediation conduct more than 25 mediations a year. One mediator commented that it is difficult to compare what mediators charge for mediation across the board, as it depends on the technicality and nature of the commercial dispute.[12]

11. Please note the ways in which commercial mediation work is referred to you and rank them in order of frequency (i.e. 1= most frequent, 5 = less frequent):

#	Answer	Response
1.	Law firm/Lawyer	1.91
2.	Directly through the parties to the mediation (not as a result of a dispute resolution clause in a contract)	1.96
3.	Directly through the parties to the mediation (as a result of a dispute resolution clause in a contract)	2.77
4.	District Court	4.60
5.	High Court	4.61

Work is most frequently referred to mediators through law firms or lawyers, even though 15% of respondents noted 'reluctance from gatekeepers (mainly lawyers) to refer parties to mediation' as one of the most pressing challenges they are currently facing.[13] New Zealand does not have an overarching professional provider of commercial mediators. Just recently, Fairway Resolution rolled out a commercial mediation service that aims to bridge this gap through helping parties find a mediator suitable to their

[11] See question 16.
[12] Interview with a commercial mediator (Grant Morris, 28 May 2015), Auckland.
[13] See question 24.

commercial dispute.[14] Referral from the courts was ranked lowest, despite specific court rules allowing the referral of cases to mediation.[15] During this research project, two Official Information Requests were made seeking the extent to which the High Court utilizes these rules. The response to these requests stated that High Court referral to mediation must be at the consent of the parties.[16] Requesting such referrals does not require a formal application. This means the Ministry of Justice does not keep a record of the number of referrals to mediation, and could therefore not provide information as to the number of commercial disputes that are referred to mediation by the courts.[17] If the information does exist, it is within the individual case files which makes it near impossible to obtain.

In July 2014, the New York Supreme Court Commercial Division launched an 18-month pilot mediation scheme mandating the diversion of every fifth commercial case to mediation.[18] The aim is to achieve more efficiency in commercial dispute resolution. This scheme is still underway, but it shows that other jurisdictions are realising the role the courts can play to streamline the handling of commercial disputes. It seems our courts could be used more effectively to increase the use of commercial mediation in New Zealand.

In 2009, Justice Minister Simon Power and Courts Minister Georgina Te Heuheu launched a similar High Court Mediation Pilot scheme.[19] The aim was for an appointed panel of 12 – 15 private mediators to undertake voluntary meditation in some civil disputes, deemed to be appropriate by the Chief High Court judge. The intention was to establish if increasing the use of private mediators would increase throughput and/or reduced waiting times.[20] A review of this scheme was either not completed or not made publically available, so it is uncertain how the pilot worked. We will seek more information from the relevant department on this matter. The implementation of the pilot shows that the Ministry of Justice identified commercial disputes as a potentially appropriate context for mediation.

[14] Fairway Resolutions "Commercial, private dispute resolution" (2015) < www.fairwayresolution.com>.
[15] High Court Rules 2008, cl 7.79(5); District Court Rules 2009, cl 1.7. (District Court Rules 2014 appear to have removed this clause.)
[16] Further Request for Information (15 April 2015) (Obtained under Official Information Act 1982 Request to the Higher Courts Correspondence).
[17] Ibid.
[18] Commercial Division – New York Supreme Court "ADR Overview" (2014) New York State Unified Court System <www.nycourts.gov>.
[19] Simon Power and Georgina Te Heuheu "Court-Ordered Settlement Conferences" (press release, 2 July 2009).
[20] Ibid.

12. Do you use co-mediation in commercial disputes?

#	Answer	Response	%
1.	Yes	1	3%
2.	No	25	73%
3.	Sometimes	8	24%
	Total	**34**	**100%**

This data shows that most mediators in New Zealand do not use co-mediation, or only use it some of the time. It seems co-mediation is not commonplace in the New Zealand mediation market.

13. Which of the following forms of dispute resolution are you commonly involved in as a professional?

#	Answer	Response	% of respondents
1.	Litigation	10	30%
2.	Arbitration	16	48%
3.	Negotiation	25	76%

It is not surprising that 97% of respondents are involved with other forms of dispute resolution, because the majority operate as part-time commercial mediators and therefore have to do something else in order to work as a full-time dispute resolution practitioner. 68% of respondents have a law degree, which could be another explanation for the high involvement with other forms of dispute resolution, particularly negotiation (76%).

14. In your successful commercial mediations, what is the most common form of final agreement (e.g. written contract)?

#	Answer	Response	%
1.	"Written contract"	15	44%
2.	"Written agreement"	12	35%
3.	"Settlement"	7	21%
	Total	**34**	**100%**

As this was an open-text question, the table above has grouped the responses based on the terms most commonly used by respondents. The ambiguity of the responses make it difficult to know exactly what parties meant by the different answers. All parties indicated that an agreement in writing is created following mediation, which shows that a certain level of conclusion is reached and deemed substantial enough to be recorded and taken away from the mediation. 44% of respondents said they come to a 'contract' and 21% included the word 'settlement' in their response. If these respondents mean they come to binding agreements in the mediation room, this indicates that most parties are probably not pursuing further ADR or court action after mediation.

15. In your professional experience, how long does a commercial mediation usually take?

#	Answer	Response	%
1.	Half a day or less	5	15%
2.	One day	27	79%
3.	2-3 days	1	3%
4.	A week	1	3%
5.	More than a week	0	0%
	Total	**34**	**100%**

79% of respondents said their commercial mediations take one day. One commercial mediator we interviewed thought it might be more accurately described as "one day with some after care," explaining that there is "less settling on the day and more being settled in the week afterwards."[21] While respondents indicated that their mediations take one day, in reality the finishing up of the settlement is likely to go beyond that time. As raised in question 10, it would be interesting to know whether this extra time is remunerated.

16. Please note the mediation styles that you use in commercial disputes and rank them in order of frequency of use (i.e. 1= most frequent, 4 = less frequent):

#	Style of mediation	Response
1.	Facilitative	1.45
2.	Settlement	2.20
3.	Evaluative	2.73
4.	Transformative	3.38

Facilitative mediation was ranked as the most frequently used style. However, the accuracy of these responses is uncertain, as they are based on respondents' personal perception of what 'facilitative' mediation looks like. Mediators are often trained to be facilitative, but one mediator was doubtful as to whether facilitation is actually translating into practice as much as this survey indicates.[22] It was suggested that the 72% of respondents who do 0 – 25 mediations a year are less likely to be comfortable with facilitation and might 'revert to type.' By type, the mediator means an evaluative mediation style. 68% of respondents have a legal background, so reaching an outcome based on their own advice and evaluation would be familiar to them.

Robert Fisher QC used the mediation rules of the Institute of Arbitrators and Mediators Australia (IAMA) to suggest that practitioners who provide "opinions as to what would be reasonable, or make suggestions for settlement" are more technically defined as 'conciliators' than as mediators.[23] Fisher discussed an American Bar Association (AMA) survey that indicated overwhelming party support for mediators to provide

[21] Interview, above n 4.
[22] Ibid.
[23] Robert Fisher "When mediators should bite their tongue" *NZ Lawyer Magazine* (New Zealand, 26 November 2010) at 18.

'analytical input,' or evaluative mediation. He suggested feedback would be similar in New Zealand if such a survey were to be conducted, particularly from parties to commercial disputes. Fisher's view is that provision of more substantial mediator assistance could be suitable in certain types of disputes in New Zealand. One mediator suggested that mediators are becoming more specialized in the areas that they mediate, so it seems a more evaluative approach could be an overflow of this.[24] If a mediator's expertise in a certain type of dispute is the reason for their selection, it is likely the parties are keen for the mediator to take a more substantive role in the process.

17. What formal mediation training do you have, if any?

	Answer	Response	% of respondents
1.	LEADR (general)	21	62%
2.	Mention of AMINZ (overall)	17	50%
a)	AMINZ and Massey University Diploma in Business Studies (Dispute Resolution)	10	29%
b)	AMINZ (without Massey Diploma)	7	20%
3.	Massey University Diploma in Business Studies (Dispute Resolution) and no mention of AMINZ	3	9%
4.	CDR associates, United States	5	15%
5.	Bond University (Australia)	4	12%
6.	US Universities: Harvard/Pepperdine	3	9%
7.	NZ Law Society	2	6%
8.	Ministry of Justice Restorative Justice Training	1	3%
9.	Institute of Judicial Studies	1	3%

62% of respondents referenced LEADR as part of their formal training in this question, whereas 50% said they belong to LEADR in question 19.[25] This indicates that most respondents have at some time been trained by LEADR, but less are currently members of LEADR.

17 respondents (50%) made some mention of AMINZ in their answer. Of those 17 respondents, 10 (58%) had completed the Massey University Diploma in Business Studies (Dispute Resolution). 3 respondents (9%) mentioned the Massey University Diploma without mentioning AMINZ. AMINZ outlines on their website that a practitioner can become an AMINZ Associate member through completing the Massey diploma. [26] Similarly, Massey University's website says "students can become eligible for graded membership of [AMINZ] after completing four specific papers in the programme."[27]

This could suggest that alignment with AMINZ is a result of completing the Massey Diploma, as opposed to attaining the Massey Diploma being a result of AMINZ membership.

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[24] Interview, above n 4.

[25] See question 19.

[26] Arbitrators' and Mediators' Institute of New Zealand Inc. "Associate" <www.aminz.org.nz>.

[27] Massey University "Graduate Diploma In Business Studies (Dispute Resolution) (GradDipBusStuds(DisRes))" < www.massey.ac.nz >.

Some respondents have been internationally trained, for example, 15% being trained by CDR associates in the United States.

18. Do you have a law degree?

#	Answer	Response	%
1.	Yes	23	68%
	If so, what law school? — **Response** — **%**		
	University of Auckland, Auckland — 6 — 26%		
	University of Canterbury, Christchurch — 5 — 22%		
	Victoria University of Wellington — 8 — 35%		
	Cambridge University, UK — 2 — 7%		
	University of Otago, Dunedin — 2 — 7%		
	Total — **23** — **100%**		
2.	No	11	32%
	Total	**34**	**100%**

68% of our respondents have a law degree. Comparatively in the UK, 52% of the CEDR survey respondents were legally qualified.[28]

The CEDR survey asked the respondents about their professional backgrounds, comparing the responses of lawyer mediators with the responses from non-lawyer mediators. Of the lawyer mediator responses, 62% said their background was relevant in practice, 65% said it was influential in getting them work, and 43% used their background for self-promotion. Of the non-lawyer mediators, only 43% of non-lawyer mediators said their professional background was of relevance, 55% said it helped to obtain work and 64% used it in self-promotion.[29] The CEDR report therefore shows that while non-lawyer mediators promote themselves as having a 'professional background' more than lawyer mediators, lawyer mediators obtain more work as a result of their background.

In our survey, all of the 18% of respondents who conduct more than 25 mediations a year have law degrees. However, of the 82% that conduct less than 25 mediations per year, 60% also have a law degree. So while those who conduct more mediations have a legal background, so too do majority of those who only conduct a few mediations. Whether a law degree greatly influences a mediator's ability to obtain mediation work is therefore uncertain.

One commercial mediator who does not have a legal background conducts 10 – 25 commercial mediations a year.[30] This mediator commented that it is better for mediators with legal experience to mediate large,

[28] CEDR, above n 1, at 4.
[29] Ibid.
[30] Interview, above n 12.

technical commercial disputes. This mediator also commented that having counsel present at the mediation is preferred when disputes are of a commercial nature. This mediator always refrains from providing legal advice or substantive evaluation to the parties, and directs the parties to a lawyer, if necessary.

19. Which professional dispute resolution organisations do you belong to?

#	Answer	Response	% of respondents
1.	LEADR	17	50%
2.	AMINZ	27	79%
3.	NZ Law Society	18	53%

The purpose of this question was to see the current memberships that respondents hold. This question allowed respondents to select all three organisations, if applicable. 26% respondents selected all three organisations, 18% selected just LEADR, 24% selected just AMINZ, 24% selected AMINZ and NZLS, 3% selected LEADR and NZLS and 6% selected LEADR and AMINZ.

18 respondents belong to the NZ Law Society, while 23 respondents have law degrees.[31] This shows that 5 of the respondents who are legally qualified are not practicing lawyers. 50% of the respondents are current members of LEADR.

79% are current members of AMINZ. This could be because AMINZ is arguably the main organisation in New Zealand that supports arbitration, which 48% of respondents are regularly involved in alongside mediation.[32] If almost half of our respondents are also arbitrators, this could explain the high number of AMINZ memberships. The recent merger between LEADR and the Institute of Mediators and Arbitrators Australia (IAMA) could see a change to arbitrator memberships in New Zealand.

[31] See question 18.

[32] See question 13.

20. Which mediation textbooks/journals have you found particularly useful in your practice?

#	Answer	Response	% of respondents
1.	"Getting to Yes" by Fisher and Ury	9	29%
2.	"Mediation: Principles, Process, Practice" by Boulle, Green and Goldblatt	8	24%
3.	"The Mediator's Handbook" by Charlton and Dewdney	5	16%
4.	"Getting past No" by Ury	4	13%
5.	"Making Money Talk" by Little	4	13%
6.	"The Promise of Mediation" by Bush and Folger	3	10%
7.	"Williams & Kawharu on Arbitration" by Williams and Kawharu	2	6%
8.	"Difficult Conversations: How to Discuss What Matters Most" by Stone	2	6%
9.	"The crossroads of conflict" by Cloke	2	6%
10	"Bringing peace into the room" by Bowling and Hoffman	2	6%

84% of respondents provided at least one textbook, journal or resource that they have found useful in their mediation practice. 29% indicated that Fisher and Ury's "Getting to Yes" was particularly useful. 24% found "Mediation: Principles, Process, Practice" useful, which is co-written by New Zealand mediators Phillip Green and Virginia Goldblatt and is therefore directly relevant to the New Zealand mediation market. The other textbooks mentioned were fairly unsurprising, with many being written by mediators who have visited New Zealand. One mediator suggested that developing a more academic approach among practitioners could lead to a wider appreciation and use of mediation scholarship.[33]

21. In terms of scholarship, which jurisdictions have been the most influential for your practice? (Not including NZ.)

#	Answer	Response	% of respondents
1.	Australia	14	47%
2.	UK	7	23%
3.	USA	15	50%
4.	Canada	3	10%
5.	Other	1	3%

The most commonly included useful textbook in question 20 was 'Getting to Yes" which is a textbook that came from the work of Harvard University's Negotiation Project. This could explain why 50% of respondents selected the US as being influential on their scholarship. Nearly half (47%) said that Australia was

[33] Interview, above n 4.

influential, which is logical seeing as Australia is New Zealand's neighbouring jurisdiction and has a flourishing ADR profession.

The only 'other' jurisdiction included was Singapore. Mediation in Singapore has become largely institutionalized, both publicly and privately, over the past few years.[34]

22. Do you think commercial mediation should be mandatory in NZ?

#	Answer	Response	%
1.	Yes	3	9%
2.	No	12	35%
3.	In certain contexts	19	56%
	Total	**34**	**100%**

Over half of the respondents thought that commercial mediation should be mandatory in New Zealand in certain contexts. This data is somewhat vague, as respondents were not invited to elaborate on what they think those contexts are or should be. Gathering mediators' thoughts on this could be helpful, particularly when trying to form a more cohesive picture of the role the courts should be playing in directing parties to mediation.

As discussed in question 11, the US rolled out a mandatory commercial mediation pilot in New York in 2014 to trial the effectiveness of directing certain commercial cases to mediation. Parties are required to attend for the first 4 hours, but whether they settle in mediation is voluntary.[35] New Zealand's commercial mediation pilot in 2009 was not a mandatory scheme, as parties were asked to consent. In 2012, an article in *NZ Lawyer* suggested that one solution to the problem of allocation of scarce judicial resources could be for the courts to increasingly abandon resolving commercial disputes to the private sector.[36]

35% of respondents did not see any need to mandate mediation, which indicates that many mediators are happy with the way it currently operates. In 2013, multinational law firm Linklaters released a review of the availability and process of commercial mediation in 21 jurisdictions.[37] According to this review, most international jurisdictions did not have court-mandated mediation.[38] A middle ground approach has been taken by many jurisdictions, whereby judges may impose sanctions on parties who do not attempt to resolve their disputes prior to commencing court action but cannot direct parties to mediation without their consent.

[34] Linklaters *Commercial Mediation – A Comparative Review* (2nd ed, Linklaters LLP, London, 2013) at 38.
[35] Commercial Division – New York Supreme Court, above n 18.
[36] Anthony Willy "Commercial dispute resolution: public or private" (2012) *NZLawyer* (New Zealand, 20 December 2012)
[37] Linklaters, above n 34, at 1.
[38] Ibid.

23. How many commercial mediators do you think are currently operating in NZ on a full-time or near to full-time basis?

#	Answer	Response	%
1.	0-15	17	50%
2.	15-30	8	24%
3.	30-45	5	15%
4.	45-60	2	6%
5.	60+	2	6%
	Total	**34**	**100%**

This question provides insight into perceptions of the mediation market. Half of the respondents were aware that the commercial mediation market in New Zealand is limited to a small number of fulltime mediators. A few respondents perceived the commercial market to be much larger, with 2 respondents thinking over 60 mediators operated on a full-time basis. While the sample size of this survey is relatively small, it is a fair indicator of the reality of the mediation market. This result is similar to the findings in the UK, as documented in the CEDR report. They concluded that "the combination of an insufficient level of demand for mediation services and an over-supply of aspiring mediators seeking to break into a marketplace that remains dominated by a limited number of established players" is a potential obstacle to mediators in the UK.[39]

24. In your opinion, what are the key challenges facing commercial mediators in NZ at the present time?

#	Answer	Response	% of respondents
1.	Poor public and professional awareness of the mediation process	9	27%
2.	Lack of mediation skill/training/quality/experience	7	21%
3.	Oversupply of mediators, not enough mediation work	8	24%
4.	Reluctance from gatekeepers to refer to mediation (mainly lawyers and accountants)	5	15%
5.	Weak pathways for new mediators to enter into the market	2	6%
6.	No unified, professional organisation or regulatory body	2	6%
7.	Focus on settlement	2	6%

This table is a compilation of the most common responses. Poor awareness of the mediation process, not enough mediation work, and lack of mediation skills and training were identified as the key challenges facing mediators. These challenges could be addressed by greater promotion of mediation, potentially by professional groups and/or by the courts. Taken holistically, it seems the most common issue is related to the market rather than the process of mediation in New Zealand. The responses highlight the struggle to obtain work in a tight-knit market either because gatekeepers are reluctant to refer to them or because there is nothing in place to assist mediators to transition into practice. The oversupply issue was also

[39] CEDR, above n 1, at 11.

identified by mediators we interviewed, and is reflected in the number of full-time mediators versus part-time mediators outlined in question 5.

After sending out the survey to New Zealand's mediators, we received a large number of email replies from lawyers who had 'commercial mediation' on their websites but had no practical experience as a mediator. The website information referred to representing clients in mediation and therefore these lawyers did not fill out the survey (which is for mediators with experience). However, a number of these lawyers were accredited mediators and expressed interest in gaining practical mediation experience. This indicates that there is a healthy supply of potential commercial mediators which is not currently being utilized.

25. What factors do you think influence people to use commercial mediation?

#	Answer	Response	% of respondents
1.	Keen to avoid the costs of litigation; it is cheaper to mediate	21	62%
2.	Speed and efficiency	17	50%
3.	Confidentiality	9	26%
4.	Preservation of relationships and reputation	7	21%
5.	Desire to settle	6	18%
6.	Parties have some control over the outcome	6	18%
7.	Advised to mediate by lawyers	6	18%
8.	Required to mediate by contract	4	13%
9.	Involvement from both parties in the process	3	9%
10	Mediation has a good reputation and success rate	3	9%
11	Provides more certainty	3	9%
12	Mediation provides more options	2	6%
13	Accessibility	2	6%

Most respondents included multiple factors in their answers for this question. The responses are not surprising, as they echo ideas that come through in most textbooks or publications that discuss the benefits of mediation. The majority of the responses for this question were compared with litigation. 62% saw the price of mediation as a major draw card, as it is significantly cheaper than litigation. Mediation's speed and efficiency, compared with the often-lengthy litigation process, was the second most common response. Confidentiality provides an element of privacy that litigation does not, and was identified as the third most common influence on parties when choosing to mediate. It is possible respondents are echoing the reasons they have been given firsthand from their parties, and that cost is the biggest reason that parties pursue mediation. It is clear that parties undertaking mediation are mainly driven by a desire to avoid the price, time and publicity that comes with undertaking court action.

Whether these factors result in parties choosing mediation over litigation is not certain, but court statistics offer some insights. The 2014 District Court Annual Report shows a 25% decrease in the number of new

cases in the District Court since June 2013.[40] The report states "the majority of cases in the civil jurisdiction are resolved without proceeding to trial." [41]

The 2014 High Court statistics show that while resolution by trial increased to 14% of civil disposals, the total number of cases filed with the High Court decreased by 5% compared to 2013.[42] The High Court also reports that the majority of civil cases are settled by the parties without a trial.[43]

These statistics confirm that parties pursue alternatives to litigation an overwhelming amount of the time. The statistics could indicate that the factors listed in question 25 are swaying parties, either before or during the commencement of court action, to settle and resolve their disputes elsewhere.

Summary: Where to from here?

Mediation offers cost and time efficiency, confidentiality, relationship preservation and party participation in the dispute resolution process. It is therefore an effective and appropriate method for commercial parties seeking to resolve a dispute. Awareness and use of the commercial mediation market in New Zealand has been growing, but more can be done. Looking ahead, increased promotion and greater understanding of commercial mediation is essential to ensure its ongoing use, improvement and development in New Zealand.

This survey identified reluctance from gatekeepers to refer parties to mediation as a key challenge facing commercial mediators in New Zealand. Information and education specifically aimed at gatekeepers could be an effective way to increase their confidence in commercial mediation. It is important to understand the reservations and uncertainties that gatekeepers may have about referring parties to mediation in order to come up with focused ways to address and dispel these doubts. Carrying out a similar survey process targeting gatekeepers' attitudes and perceptions of the New Zealand commercial mediation market could be an effective way to gain insight into the best way to increase gatekeeper support for commercial mediation. Another key area that could be explored are the views of the actual parties to commercial mediation.

Establishing better pathways for keen mediators to enter the commercial mediation market should be another key goal of dispute resolution providers/organisations. This survey reveals a large number of accredited mediators who would be interested in conducting more commercial mediations, if the work was

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[40] District Courts of New Zealand *Annual Report* (2014) at 39.
[41] Ibid.
[42] High Court "Annual Statistics for the High Court" (December 2014) Courts of New Zealand <http://www.courtsofnz.govt.nz/from/statistics/annual-statistics/latest-december-2014/high-court.>.
[43] Ibid.

available and made known to them. Finding a way to connect more mediators with commercial parties would benefit those who are eager to mediate more disputes. This could be achieved through facilitating partnerships between existing commercial mediators and potential commercial mediators, or through setting up a more publically known referral scheme that parties seeking a commercial mediator could use. Fairway Resolution has recently implemented a scheme that seeks to provide this service for parties.

Better use of court rules that enable judges to actively encourage mediation for parties is another way commercial mediation could be better utilised in New Zealand. Court-connected mediation schemes internationally offer insight into how judicial encouragement of mediation can increase its use and credibility, particularly commercially. Research in this area could also focus more on the issue as to whether commercial mediation should be mandatory in some circumstances (and what those circumstances might be). Pursuing a greater connection between the courtroom and the mediation room in New Zealand could shift misconceptions about the effectiveness of mediation to resolve commercial disputes. Judges can play a role in changing ambivalent public and professional perceptions of mediation through encouraging parties to mediate.

It will be important to take a longitudinal approach and ideally repeat the survey in approximately 2017 to see what has changed and chart trends over time. Overall, the key focus should be on how to increase the commercial mediation market rather than on how to carve the existing market up into smaller slices.