

Commercial
mediation in New
Zealand: An
empirical study of
the current market
and suggestions for
future development

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Purpose of this research

- ▶ To collect empirical data about the commercial mediation market in New Zealand
- ▶ To move from anecdote to evidence

Research method

- ▶ Background analysis of relevant written sources
- ▶ Created survey about the nature of commercial mediation in New Zealand
- ▶ Distributed the online questionnaire to commercial mediators
- ▶ Interviewed targeted survey respondents
- ▶ Used the survey responses, interviews and written sources to compile a report outlining the current nature of commercial mediation in NZ.

Gender

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

Age range

#	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%

Commercial mediation workload

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%

Location of commercial mediations

#	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%

Types of commercial disputes

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%

Use of legal counsel

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%

Settlement rate

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%

Commercial mediation fee

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%

Referral to commercial mediation

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

Involvement with other forms of ADR

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%

Length of commercial mediation

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%

Mediation styles

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

Formal mediation training

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%

Legal background of commercial mediators

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%

Influential jurisdictions

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%

Mandatory commercial mediation

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%

Perception of the commercial mediation market in NZ

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%

Key challenges to commercial mediators in NZ

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%

Why do parties choose 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%

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Suggestions for future development

Increase gatekeeper support for referral to commercial mediation

- ▶ Understand and address the main reasons for gatekeeper reluctance
- ▶ Produce information aimed at increasing confidence in the suitability of commercial mediation
- ▶ Gatekeeper survey: attitudes and perceptions of commercial mediation

Develop better pathways

- ▶ Facilitate partnerships between existing commercial mediators and potential commercial mediators
- ▶ Develop commercial mediation schemes/programmes
 - ▶ eg Fairway/NZDRC
- ▶ Aim to assist trained mediators as they transition into practice

Encourage court-connected mediation

- ▶ The courts play a role in shifting perceptions about the suitability of mediation for commercial disputes
- ▶ Encourage better use of court rules by judges
- ▶ Follow the example of international jurisdictions
 - ▶ eg Judicially imposed consequences for parties that do not attempt to resolve their dispute outside of the courts

Final conclusion

- ▶ 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.