

# TO PROMOTE OR NOT TO PROMOTE? THE ROLE OF THE JUDICIARY IN THE NEW ZEALAND COMMERCIAL MEDIATION MARKET

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*Judicial promotion of mediation has been identified as an important way to encourage and increase the amount of commercial mediation in New Zealand. This latest contribution to the New Zealand Commercial Mediation Study (NZCMS) explores the views of District and High Court judges in relation to the use of mediation in their courts. Comparisons are made with earlier NZCMS studies, including the controversial issue of mandatory mediation. While the judiciary is well placed to increase the amount of commercial mediation in New Zealand, this paper concludes that it is unlikely that this potential will be realised under the current civil procedure settings. District and High Court judges possess a good understanding of mediation and its benefits but also prioritise party autonomy in choosing whether to undertake mediation or not.*

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## **I INTRODUCTION**

This analysis of judicial views of commercial mediation forms the fifth and final instalment of the New Zealand Commercial Mediation Study (NZCMS Part 5). The NZCMS began in early 2015 with an analysis of commercial mediators (NZCMS Part 1). In the following seven years, the study has also surveyed and interviewed legal practitioners (NZCMS Part 2), users of insurance mediation (NZCMS Part 3) and repeated the analysis of commercial mediators to provide a longitudinal perspective (NZCMS Part 4).<sup>1</sup>

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<sup>1</sup> See Grant Morris and Daniella Schroder "LEADR/Victoria University Commercial Mediation in New Zealand Project Report (June 2015)" (Research Paper, Victoria University of Wellington, 2015) [NZCMS Part 1]; Grant Morris and Amanda Lamb "Resolution Institute/Victoria University 'Lawyers as Gatekeepers to Commercial Mediation in New Zealand' Report (June 2016)" (Research Paper, Victoria University of Wellington, 2016) [NZCMS Part 2]; Grant Morris and Freya McKechnie "Resolution Institute/Victoria

Thus, the four main actors in the private commercial mediation world have provided their views on the current state of the market: mediators, lawyers, users and judges. In the case of mediators, this group has been asked twice, in 2015 and 2019, to gauge any changes in the market. Certain questions have been asked of all four groups to provide for triangulation and different perspectives. However, it is the mediators who are able to provide the most accurate information on market size and dynamics.

The history of commercial mediation in New Zealand is discussed in previous publications and it is sufficient to provide a few key summary statements for the present article. A recognisable commercial mediation market appeared in the mid-1990s when a few brave legal practitioners began to establish commercial mediation practices. The amount of commercial mediation grew exponentially in the late 1990s and early 2000s. This growth constituted an important element of New Zealand's mediation "boom" period. In more recent years, the amount of commercial mediation has plateaued. Exponential growth stopped at some point between the mid-2000s and 2015 (when the NZCMS began). The commercial mediation market is now approximately 25–30 years old and NZCMS has been in operation for the final quarter of this period.

The New Zealand mediation environment is dominated by state regimes. The three most prevalent areas for mediation are employment, family and commercial. Most employment mediation is carried out by the Ministry of Business, Innovation and Employment (which includes the former Department of Labour). The Ministry of Justice plays a key role in the parenting mediation occurring under the Care of Children Act 2004, including contracting dispute resolution providers. This leaves commercial mediation carrying the torch for private market provision.

New Zealand does not have mandatory court-connected mediation for commercial disputes in its traditional court structure (District and High Courts). The previous NZCMS studies have focussed on how mediators, lawyers and their peak organisations can grow the mediation market. This leaves one vital group involved in the decision whether to mediate or not, namely, the judiciary. By surveying and interviewing the judiciary, this final project aims to explore the nature of the judiciary's involvement in commercial mediation. This issue has become even more pressing due to the Covid-19 pandemic. At the beginning of the pandemic, a leading commercial mediator called for the New Zealand courts to quickly adopt a United Kingdom-style costs sanctions approach to avoid a massive case backlog.<sup>2</sup>

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University of Wellington Users of Commercial Mediation in New Zealand – Insurance Industry Report" (April 2017) (Research Paper, Victoria University of Wellington, 2017) [NZCMS Part 3]; and Grant Morris and Sapphire Petrie-McVean "Resolution Institute/Victoria University of Wellington "Commercial Mediation in New Zealand: The Mediators" Project Report (August 2019)" (Research Paper, Victoria University of Wellington, 2019) [NZCMS Part 4].

2 Geoff Sharp "How Mediation Will Help Flatten the Curve in New Zealand's Civil Courts" (23 April 2020) Courts of New Zealand <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

The New Zealand judiciary is not limited to the judges of the District and High Courts. Family and Employment Court judges have been intricately involved in supporting, and arguably promoting, mediation since the Family Proceedings Act 1980 and the Employment Contracts Act 1991. Previous NZCMS studies have indicated that District and High Court judges could do more to foster the growth of commercial mediation. The reasons for their relatively passive approach have been unclear. This article will reveal some of those reasons and critique the validity of reasons in the context of New Zealand's wider legal system.

## ***II METHODOLOGY***

The methodological approach for our study of the judiciary was the most straightforward of all the NZCMS studies. At the time of the survey, there were 189 District Court judges and 48 High Court judges. The broad High Court grouping includes eight Associate Judges and the Chief High Court Judge. All 48 judges were invited to take part in this study. In the New Zealand court system, District Court judges are divided into five main jurisdictions: General, Civil, Jury, Family and Youth. Some judges operate in more than one jurisdiction. Given the commercial nature of this study, the 46 District Court judges operating in the Civil and General jurisdictions were invited to take part in this study. The vast majority of District Court jury trials are for criminal matters and Family and Youth hearings do not involve commercial matters as defined for the NZCMS.

The definition of commercial mediation has remained consistent throughout the NZCMS. Public mediation is that carried out by the government or directly controlled by the government through funding and/or specific legislation. Mediation beyond this is considered private and most of this mediation is commercial. The most common sub-areas of commercial mediation are general contractual disputes and matters relating to insurance, construction and commercial property.

Our survey was distributed on 2 February 2021 and closed on 19 February 2021. The response rate was 16 per cent (15 responses from 94 judges). While lower than hoped given the clear cohort, the response rate was similar to the other NZCMS studies, which ranged from 15 per cent to 24 per cent.<sup>3</sup> The respondents included nine High Court judges (response rate of 19 per cent) and six District Court judges (response rate of 13 per cent). The High Court dominates commercial adjudication so it was interesting to observe the similar response rates. We had expected a significant difference.

All research with New Zealand judges must be approved by the Judicial Research Committee. Judges are inundated with requests to complete surveys, take part in interviews and otherwise engage in research. The survey timing and distribution process was based on lessons learned from the previous four NZCMS studies to maximise responses. However, the reality is that it is very difficult to get responses from busy judges, especially when competing with multiple other research requests.

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3 NZCMS Part 2 (15 per cent), NZCMS Part 3 (24 per cent), NZCMS Part 4 (22 per cent).

The survey consisted of 27 questions including Likert-type scales and open text questions. These questions have inspired the sub-headings throughout this article. Where possible, this article engages with the previous four NZCMS studies to show similarities and differences. The aim is to provide a comprehensive picture of the private commercial mediation market in New Zealand.

### **III THE RELATIONSHIP BETWEEN THE TRADITIONAL COURTS AND COMMERCIAL MEDIATION**

Judicial attitudes to commercial mediation is an under-researched area. We are not aware of any equivalent empirical studies from overseas jurisdictions. However, a healthy number of resources are available discussing the related topic of mandatory/compulsory mediation. For example, in June 2021, the United Kingdom's Civil Justice Council published its research report entitled *Compulsory ADR*.<sup>4</sup> This is an up-to-date analysis of the pros and cons of mandatory ADR, and mediation in particular, and engages with judicial attitudes on this issue. This engagement is mainly in the form of decisions, speeches and articles authored by United Kingdom judges. Thus, it is more anecdotal than empirical. Five of our survey questions directly addressed mandatory mediation. Connections with the United Kingdom research will be made later in this article.

As part of this NZCMS study, we conducted an international review of mandatory court-connected mediation in overseas jurisdictions. This review has a particular focus on the fellow common law, Commonwealth jurisdictions of Australia (both federal and state), the United Kingdom and Canada. References to these jurisdictions will be made throughout the article, where relevant.

The extent of New Zealand High Court judges' jurisdiction in relation to mediation appears in the High Court Rules 2016:<sup>5</sup>

A Judge may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution (to be specified in the order) agreed to by the parties.

While a judge's action is termed an "order", it can only be made with parties' consent, making it more of a recommendation. Most importantly, the use of the term "may" gives a judge total discretion as to whether these recommendations are even made.

No similar rule exists in the District Court Rules 2014. Litigants are asked about mediation in the standard court case management document but this is only one of 24 matters for parties to consider at a case management conference. The wording in Schedule 5(8)(i) of that document is passive: "if the proceeding is ready to go for a hearing or a trial, is alternative dispute resolution suitable to try to

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4 Sarah Asplin and others *Compulsory ADR* (Civil Justice Council, June 2021).

5 High Court Rules 2016, r 7.79(5).

facilitate settlement prior to trial?". In the most recent NZCMS mediator survey, the most common sources of mediation referrals were lawyers and the parties themselves, with the District Court a distant third, followed closely by the High Court in last place. This is very similar to the 2015 results.<sup>6</sup> The longitudinal nature of the mediator survey allows us to observe that in the four years between the surveys (2015–2019), little appears to have changed in how judges recommended mediation.

This article will analyse the reasons given by our respondents both for and against mediation. However, it is helpful to begin by summarising the common reasons which motivate parties, especially in relation to the alternative of litigation.<sup>7</sup> Mediation is usually cheaper and quicker than litigation. The NZCMS has found that the "one day" mediation model continues to dominate the private commercial market. This will not be the case where mediation is unsuccessful and parties then proceed to trial. However, commercial mediation settlement rates are approximately 90 per cent. Mediation prioritises the preservation of relationships by providing a collaborative, rather than adversarial, environment. It also provides autonomy and control to parties; in particular, it leaves the decision of how and whether to settle to the parties. Confidentiality is also seen as an advantage compared to the public nature of litigation.

Mediation's weaknesses include the lack of a guaranteed binding decision. Parties may choose not to agree to a settlement. In litigation and arbitration, an outcome is guaranteed. As noted above, this increases party autonomy but provides uncertainty about whether there will be a resolution. Mediation also lacks the procedural safeguards of the courtroom. While parties to mediation are usually not concerned about the development of New Zealand precedents, litigation can create precedents while the confidential mediation process does not. This potentially affects the development of case law in the New Zealand legal system.

#### ***IV THE NATURE OF THE COHORT***

New Zealand judges are usually appointed from the senior levels of the legal profession. While a lawyer must have practiced for at least seven years before appointment, the reality is that most judges join the bench after many years in practice. Judges are usually appointed in their late 40s or early 50s, with a compulsory retirement age of 70. That suggests a career of approximately 20 years.<sup>8</sup> The cohort for this study was relatively balanced in terms of experience, with 40 per cent in the early stages of their career (1–5 years), 27 per cent mid-career (6–15 years) and 33 per cent nearing retirement (16

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6 NZCMS Part 1, above n 1, at 6–7.

7 These reasons are discussed comprehensively in Grant Morris and Annabel Shaw *Mediation in New Zealand* (Thomson Reuters, Wellington, 2018).

8 The average age of a District Court judge is 60 and the average length of service is 10 years: Geoff Adlam "New Zealand's judiciary at 14 March 2019" (2019) 927 LawTalk 24.

years and above). A few of the most experienced judges will have been appointed to the bench during the beginnings of commercial mediation in New Zealand. This could potentially result in a different perspective on the relationship between mediation and the courts compared to those who had only adjudicated in the context of a well-established commercial mediation market.

As noted above, our cohort consists of 60 per cent High Court judges and 40 per cent District Court judges. The gender breakdown is 73 per cent male and 27 per cent female. As at October 2020, 39 per cent of District Court judges were female and 43 per cent of High Court judges.<sup>9</sup> Our cohort has a low percentage of female respondents, lower than the actual profession. This low percentage reflects the overall lack of female judges in the courts while the discrepancy with the profession is partly related to the small sample size of the cohort. Adding only two more female respondents would have given results in line with the profession.

The cohort is geographically balanced with 53 per cent in the main population centre and commercial hub of Auckland and 13 per cent in both of our "second" cities, Wellington and Christchurch. Hamilton, Tauranga and Palmerston North each had one response. Of New Zealand's eight largest urban areas, the only ones missing are Dunedin and Napier/Hastings. Auckland has been a dominant presence throughout the NZCMS studies. However, the location of judges is more a reflection of population distribution rather than commercial dominance. Thus, Wellington's dominant role in previous surveys is lessened in this instance. In fact the gap between Auckland and Wellington in this survey closely reflects the number of civil cases filed in these cities, with 577 cases filed in the High Court's Auckland civil registry in the year ending 30 June 2020 compared with 150 for Wellington.<sup>10</sup>

Judges were asked approximately how many cases they hear each year. Nearly all High Court judges who answered this question (83 per cent) were hearing 51–100 cases per year. This is a predictable level given the length and complexity of High Court cases and also the number of active cases before the High Court.<sup>11</sup> The responses from District Court judges were more difficult to interpret, with two stating "hundreds" and three stating "thousands". Of these District Court cases, only a small amount were civil cases (83 per cent of respondents noted approximately 10 per cent of their caseload was civil). The fact that these are judges with specific civil jurisdiction reflects the dominance of criminal trials in the District Court. Conversely, all the High Court judges had at least a 50 per cent civil jurisdiction caseload, with over half (56 per cent) having at least 75 per cent. There

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9 Mike White "Diversity badly lacking among New Zealand's judges" *Stuff* (online ed, New Zealand, 4 October 2020).

10 Courts of New Zealand "Annual statistics for the High Court 30 June 2020" <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

11 For the year ending 30 June 2020, the High Court had a total of 3,628 active cases, or 75 per judge. Courts of New Zealand "High Court – cases and volumes – for the 12 months ending 30 June 2020" <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

is potential for greater promotion of mediation in both the District and High Courts, but changes to the High Court's civil procedure will have a bigger impact.

#### ***V WHAT IS THE LEVEL OF MEDIATION AWARENESS AND SUPPORT AMONGST THE JUDICIARY?***

Members of the New Zealand judiciary are, by definition, learned in the law. The journey to becoming a judge starts in law school, continues through a career in practice (usually at the Bar) and culminates in appointment to the Bench. There is continuing education through every stage. The Institute of Judicial Studies is specifically set up to provide training and seminars for judges. Our expectation was that judges would have a high level of mediation awareness. This was indeed the case, with 80 per cent of respondents describing their knowledge as extensive (7–10 on a scale of 1–10, with 10 being extensive knowledge). Three judges (20 per cent) rated their knowledge as 10 out of 10, ie expert-level. While three judges rated their knowledge as less than seven out of 10, the trend was clearly towards a high level of expertise.

As with all surveys, this may indicate some survey bias, with those interested in mediation choosing to complete a mediation survey. Another disclaimer relates to perception. Just because a judge states that they have extensive knowledge does not objectively make it true. It is part of human nature to overestimate, or underestimate, one's knowledge and abilities. In the NZCMS Part 2 study, 65 per cent of commercial lawyers claimed an extensive knowledge of mediation, which seemed rather high given the niche nature of commercial mediation.<sup>12</sup> However, given the expertise and analytical skills of judges, we should have a high level of faith in their ability to accurately answer this question.

Respondents were asked where they gained mediation knowledge. This was one of the open text questions. Most judges noted more than one source. All respondents acquired some mediation knowledge as lawyers, prior to being appointed as a judge. Four judges noted that they also gained mediation knowledge as a judge. Four judges cited mediation training. All the judges had personally experienced mediation in an advocate role, and it appears that a few had also taken the role of mediator.

As with the previous four NZCMS surveys, we asked the judges how they would describe the judiciary's awareness of mediation. This is a question of perception. No one judge will be in a position to know the mediation knowledge of all of their peers. However, the answers provide important information about how sections of the profession view themselves as a cohort. Awareness of mediation does not necessarily equate with awareness of the *value* of mediation, but hopefully it

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12 NZCMS Part 2, above n 1, at 6.

involves some appreciation of strengths and weaknesses. Unlike commercial lawyers,<sup>13</sup> the judicial respondents rated their own personal awareness of mediation higher than their overall professional peers. This resulted in 67 per cent of judges perceiving an extensive knowledge of mediation amongst their peers (with a mean of 6.5 versus 7.5 for personal awareness). While most of our respondents were very confident in their own knowledge of mediation, they were more doubtful about their peers.

Interestingly, the respondents ranked judicial *support* for mediation higher than awareness, with 86 per cent of respondents believing there is extensive support amongst their peers. A high level of support was also found in the 2016 survey of lawyers.<sup>14</sup> However, both surveys raise the question whether this is comprehensive support or support "on their own terms". In this context, "on their own terms" refers to support that is conditional on mediation suiting the interests of the judiciary (both individually and as a group). In possibly the most famous New Zealand speech on mediation, then Chief High Court Judge Helen Winkelmann (now Chief Justice) questioned the assertive promotion of mediation, especially if this included criticism of adjudication in the courts.<sup>15</sup> This highlights the importance of discovering the nature of judicial recommendations of mediation.

## ***VI IN WHAT CIRCUMSTANCES DOES THE JUDICIARY RECOMMEND MEDIATION TO PARTIES?***

At the heart of this particular NZCMS study is the analysis of when, how and why judges recommend mediation to parties. The possible approaches can be viewed as a spectrum. Under the existing civil procedural rules, judges could choose to take an assertive approach with strong recommendations to mediate. Alternatively, judges could take a more passive approach and mention the possibility of mediation where appropriate and not pursue the matter any further. In between these options is a more balanced approach. The extremes do not really exist in a New Zealand context. There is no mandatory mediation, so judges cannot direct parties to mediation. While one District Court judge did state that they never specifically recommend parties to mediation, no respondents stated that they never recommend parties to ADR. So, while a few judges may not specifically mention mediation, they will at least canvass the possibility of dispute resolution options beyond litigation.

The most common form of ADR recommended by our judges is mediation (79 per cent of participants recommended mediation more than negotiation and arbitration). The remaining 21 per cent recommended negotiation more than mediation and no judge recommended arbitration more than

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13 NZCMS Part 2, above n 1, at 6 and 25. The personal question uses "knowledge" while the overall profession question uses "awareness" in the surveys for both NZCMS Part 2 and NZCMS Part 5.

14 At 26. Sixty-five per cent believed support was "extensive".

15 Helen Winkelmann "ADR and the Civil Justice System" (speech to the Arbitrators' and Mediators' Institute of New Zealand Conference, Auckland, 6 August 2011).

mediation and negotiation. There was no discernible difference between High and District Courts. As noted by two participants in open comments, judges assume negotiation has occurred at some point before proceeding to court, so mediation is the obvious form of ADR to recommend. Negotiation is by far the most common form of ADR used in our legal system.<sup>16</sup>

The most important question in this survey asked: "In civil cases, how often do you specifically recommend parties to mediation?". A third of respondents (33 per cent) said "always" or "often", with two of these being High Court and three being District Court judges. Commercial mediation is more likely to occur in the High Court, so the 33 per cent figure is not necessarily as promising as it may seem for the future growth of mediation. Nearly half (44 per cent) of the High Court judges actually stated that they only "occasionally" recommend mediation, with the remainder noting "sometimes". This small sample suggests that High Court judges, as a cohort, are taking an ad hoc and relatively passive approach to recommending mediation. The District Court judges were spread out across the spectrum from "always" to "never", making it difficult to draw any conclusions (apart from the ad hoc nature of recommendations).

During the first NZCMS study in 2015, requests under the Official Information Act 1982 were sent to the High Court asking how many cases are referred to mediation by judges. The reply was that these records are not kept and could only be ascertained by going through every case file. The case files are not accessible to the public. We do not know how many recommendations are being made, but our responses from mediators, lawyers and judges suggest that it is not very high. It is definitely not high enough to provide a significant boost to the number of commercial mediations in New Zealand.

Previous NZCMS studies indicate that only a small amount of commercial mediation work is flowing from District and High Court recommendations. Mediators in NZCMS Part 1 and NZCMS Part 5 reported a very low amount of mediation coming from court recommendations.<sup>17</sup> This was also apparent from surveying lawyers. Only 49 per cent had at some stage in their career represented clients in mediation following a direct High Court recommendation. The figure was 28 per cent for the District Court.<sup>18</sup> Our NZCMS Part 3 users study had more positive results. While insurance mediation users enter mediation mainly through external legal advice (ie, an in-house decision or the other side initiating ADR), 69 per cent reported that mediation is "sometimes" or "occasionally" a result of court or tribunal recommendations (most likely High Court, given the nature of insurance litigation).<sup>19</sup>

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16 This is the reality of legal practice but is also supported by all previous NZCMS studies. See NZCMS Part 1, above n 1, at 7; NZCMS Part 2, above n 1, at 8; and NZCMS Part 3, above n 1, at 5.

17 NZCMS Part 1, above n 1, at 6; and NZCMS Part 4, above n 1, at 18.

18 NZCMS Part 2, above n 1, at 21.

19 NZCMS Part 3, above n 1, at 15.

As noted elsewhere in this article, our respondents were generally not aware of the results of court-recommended mediation. This is understandable as the private commercial mediation market exists outside the court's jurisdiction. However, it is important to know how litigants react to judicial recommendations. The judge is in an obvious position of power and even recommendations should be influential. We asked respondents what they did when parties declined recommendations to mediate. Most judges (79 per cent) said that they just moved onto the next step. Two judges were interested in the reasons for declining and one noted they would encourage litigants to reconsider. This is the limit of judicial power in this situation. If New Zealand continues to reject mandatory mediation then one way to potentially increase mediation is to engage more with litigants about their reservations.<sup>20</sup> It may make little difference if parties have entrenched views, but given our respondents' sound knowledge of mediation, it could be helpful to have a wise authority figure talk more about the positives and negatives of different dispute resolution options.

This approach has recently been criticised in other jurisdictions.<sup>21</sup> Strong judicial mediation recommendations may put the party under pressure to agree, especially if they feel it is necessary to maintain judicial support. Other commentators have argued that some pressure during pre-trial discussions can be distinguished from pressure within mediation.<sup>22</sup> Regardless of one's view on this issue, our study suggests that there is little danger of this occurring in New Zealand at present.

Another pivotal question in this study relates to the "why" of mediation, ie the main reasons why judges recommend parties to mediation. This question has been asked in all NZCMS surveys. As an open text question, there was a variety of answers, some overlapping. The main reason for recommendations was cost. This is one of the key findings of the NZCMS<sup>23</sup> and reflects similar surveys in other jurisdictions.<sup>24</sup> Ten of the 15 respondents noted "cost" as a main reason.

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20 In the Central London County Court's Automatic Referral to Mediation Pilot Scheme, one or both parties objected to mediation in approximately 80 per cent of cases. See Paul Randolph "Compulsory mediation?" (2010) 160 NLJ 499.

21 Scottish Government *An International Evidence Review of Mediation in Civil Justice* (June 2019) at 43; and Laurence Boulle and Rachael Field *Mediation in Australia* (LexisNexis, Sydney, 2018) at 56.

22 The general debate is covered in Timothy Heeden "Coercion and Self-Determination in Court-Connected Mediation" (2005) 26 JustSysJ 273 at 277.

23 NZCMS Part 1, above n 1, at 16; and NZCMS Part 2, above n 1, at 12.

24 Centre for Effective Dispute Resolution *The Ninth Mediation Audit: A survey of commercial mediator attitudes and experience in the United Kingdom* (2021); Thomas J Stipanowich and J Ryan Lamare "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations" (2014) 19 Harv Negot L Rev 1; International Mediation Institute *Global Pound Conference Series 2016–17: Cumulated Data Results March 2016–September 2017* (2017) at Session 3,

The next most popular reasons were only mentioned by three respondents. The other common advantages of mediation were mentioned as follows: preserving relationships (three responses), parties having control over the outcome (three responses), and saving time (three responses). "Time" has been a more dominant reason in previous NZCMS surveys and is inextricably linked to "cost".<sup>25</sup> By the time a judge is considering recommending mediation, the potential for saving time is much less than earlier in a dispute.

A number of vague reasons were provided indicating the subjectivity and discretion that judges have, including: "dispute seems resolvable through mediation", "attitudes of parties", "type of issue", and "unrealistic prospects of legal outcomes". Interestingly, confidentiality was only cited as a reason by one judge. Confidentiality has traditionally been considered an essential element of mediation. More recently the centrality, and even feasibility, of confidentiality has been questioned.<sup>26</sup> While "cost" may seem a less philosophically inspiring reason for mediation than party autonomy, flexible outcomes and confidentiality, it is clearly the main reason High and District Court judges recommend mediation.

Juxtaposed with the "why" is the "why not". The two main reasons judges did not recommend mediation related to resistance from parties (six responses) and the existence of an important question of law (five responses). Party resistance/attitude was also cited as the main reason for lawyers not recommending mediation to their clients in earlier NZCMS studies.<sup>27</sup> The precedent issue is a more complex one and was raised by Winkelmann J in her seminal 2011 lecture.<sup>28</sup> However, relatively few cases contain points of law so important that mediation should not even be attempted. The United

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Question 1; and SI Strong "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 Wash & Lee L Rev 1973.

25 NZCMS Part 1, above n 1, at 16; and NZCMS Part 2, above n 1, at 12.

26 In particular, confidentiality can be viewed differently in non-Western contexts. The challenges to confidentiality as a central concept have come at a similar time to challenges to another central concept of the modern mediation movement, namely, impartiality. In Australia, the problems with impartiality have been comprehensively analysed in Rachael Field and Jonathan Crowe "The Empty Idea of Mediator Impartiality" (2019) 29 ADRJ 273; and Rachael Field and Jonathan Crowe *Mediation Ethics: From Theory to Practice* (Edward Elgar, Cheltenham, 2020). An early seminal example in the United States is Kenneth Cloke *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass, San Francisco, 2001) and a very recent addition is Bernard Mayer and Jacqueline Font-Guzman *The Neutrality Trap: Disrupting and Connecting for Social Change* (Wiley, Hoboken, 2022).

27 NZCMS Part 2, above n 1, at 13; NZCMS Part 3, above n 1, at 10.

28 Winkelmann, above n 15.

Kingdom courts' position is that nearly all cases are suitable for mediation, but where there is a vital legal issue needing clarification then mediation is generally inappropriate.<sup>29</sup>

A similar question sheds light on the relative importance of these two reasons. When asked "Which are relevant factors that you consider when referring a party to mediation?", 100 per cent of respondents said that a positive attitude from parties is important, while only 13 per cent said the development of precedent was key in inspiring recommendations. Respondents also said that mediation can be helpful when parties have long-standing relationships<sup>30</sup> and when there is the prospect of a successful resolution.<sup>31</sup>

## **VII WHAT IS THE SUBJECT MATTER OF THESE MEDIATIONS?**

Throughout the NZCMS we have attempted to ascertain the commercial areas where mediation is most commonly used. This question was quite straightforward in the first four studies, but for the judiciary it consisted of providing participants with a list of areas and asking, "In the following commercial areas, how likely would you be to recommend parties to mediation?". While the amorphous area of "contractual disputes" has been a very common response in previous surveys, it was less common with the judiciary and only 29 per cent of respondents noted that they "always" or "often" recommend mediation here. The other most popular areas in the NZCMS are construction, commercial property and insurance.<sup>32</sup> Many disputes in this area relate to contracts, creating an overlap. Construction and property disputes were the most likely areas recommended for mediation (43 per cent of respondents), followed by insurance (36 per cent). Three judges "always" recommended mediation for construction disputes, which is the most assertive use of judicial persuasion found in this study.

The popularity of banking and finance mediation has fluctuated throughout the NZCMS and only two judges "always" or "often" recommend mediation in this area. No other commercial area received more than one mention in the open "other" category.<sup>33</sup> The United Kingdom's *Civil Court Mediation Service Manual* suggests that nearly all areas of commerce are suitable for mediation, but specifically

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29 Her Majesty's Courts Service *Civil Court Mediation Service Manual* (February 2009) at 6.

30 At 9.

31 This was one of the factors raised in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002.

32 NZCMS Part 2, above n 1, at 11.

33 "Family disputes" were recommended "often" by one respondent and "trusts and estates" "sometimes" by another. "Māori issues", "relationship issues" and "intellectual property" all appeared once in the "occasionally" category.

highlights contractual disputes, commercial property, insurance and construction/building.<sup>34</sup> These four areas happen to make up the bulk of New Zealand's commercial mediation market.

### ***VIII WHAT DOES THE JUDICIARY LOOK FOR IN A COMMERCIAL MEDIATOR?***

Judges have no formal role in recommending or appointing mediators. This is a wise approach given the necessary impartiality of the judiciary. However, parties may be looking for some guidance from the judge and an informal suggestion can be helpful. As a recommendation, parties are free to ignore it and should research any suggested mediator before appointment. Three judges noted that they have some involvement in recommending a mediator while 12 did not. An alternative to this ad hoc recommendation approach is to provide parties with a list of commercial mediators. While good in theory, this arguably creates a more uneven playing field than the ad hoc approach. Who will be on the list and who will be left off it, and who decides? Despite the NZCMS study, the commercial mediation market is still opaque to most potential users. Finding and appointing a commercial mediator is primarily through word of mouth and is usually organised by advocates rather than their clients.

Two judges provided information on the attributes they prioritise when recommending a mediator. This is therefore anecdotal and not necessarily representative of those in the judiciary who recommend specific mediators. As with previous NZCMS surveys, experience is the most important attribute, noted by both judges.<sup>35</sup> "Ability" and inspiring "respect from parties" were also mentioned. The impression gained from these two survey questions is that a minority of judges sometimes specifically recommend experienced commercial mediators to parties.

While judges who recommend mediators do so in the hope that mediation will settle the dispute, there appears to be no formal way of following up to confirm the result. Alternatively, if the result is known, most judges are unaware of the settlement rate for cases recommended to mediation. None of the High Court judges was aware of the settlement rates and only two District Court judges were willing to make a prediction. These predictions happen to match the information in previous NZCMS studies; commercial mediation settlement rates are in the 80s or low 90s (one judge predicted 80–90 per cent and another 90–100 per cent).<sup>36</sup>

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34 Her Majesty's Courts Service, above n 29, at 8.

35 In particular, lawyers prioritised experience as the number one attribute. See NZCMS Part 2, above n 1, at 15.

36 NZCMS Part 1, above n 1, at 5; NZCMS Part 2, above n 1, at 21; NZCMS Part 3, above n 1, at 16; and NZCMS Part 4, above n 1, at 15.

## ***IX ACCORDING TO THE JUDICIARY, SHOULD COMMERCIAL MEDIATION BE MANDATORY?***

The question of mandatory commercial mediation permeates this study. The term "mandatory" can mean many things in relation to mediation. For the purposes of the NZCMS, it means that parties must attempt mediation before being able to access a particular tribunal or court. This is most accurately a "de facto" mandatory approach as parties are not forced into mediation but rather denied the "Rolls Royce" option of adjudication until mediation has occurred. In other jurisdictions, this approach is described as "court-connected", "court-directed" and "court-ordered". "Court-connected" could arguably describe any process in which adjudicators discuss mediation with parties but does not imply an assertive approach from the court. "Court-directed" and "court-ordered" give a stronger impression of mandatory mediation.

There are also variations on the "de facto" mandatory approach. As discussed earlier, the United Kingdom courts use a "costs" regime to incentivise parties to mediate. If a successful litigant previously declined mediation, this can lead to a reduction in costs awarded by the court. Lawyers are thus ethically obligated to advise their clients of this litigation risk. The move to a "costs" regime contributed to the growth of the United Kingdom commercial mediation market. A cost-benefit analysis usually favours attempting mediation, even if it is not successful.

There is a solid amount of scholarship on the issue of mandatory mediation.<sup>37</sup> It obviously intersects with the wider debate on the merits of mediation. However, one can be a passionate advocate for mediation and strongly against mandatory mediation. In fact, it could be argued that a mediation purist should be against any compulsion as it undermines the philosophy of party autonomy at the heart of the modern mediation movement.<sup>38</sup> There are strong arguments on both sides and the debate has been particularly lively recently in jurisdictions which do not yet have formal mandatory

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37 The following contributions have been made in the last decade: Dorcas Quek "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) 11 CJCR 479; Hazel Genn *Judging Civil Justice* (CUP, New York, 2010); Nancy Walsh "Mandatory Mediation and its Variations" (2011) 1 Texas A&M University School of Law 108; Jacqueline Nolan-Haley "Is Europe Headed down the Primrose Path with Mandatory Mediation" (2011) 37 NCJ Int'l L& ComReg 982; Melissa Hanks "Perspectives on mandatory mediation" (2012) 35 UNSWLJ 929; Masood Ahmed "Implied Compulsory Mediation" (2012) 31 CJQ 151; K Mahoney "Mandatory mediation: A positive development in most cases" (2014) 25 ADRJ 120; Vicki Waye "Mandatory Mediation in Australia's Civil Justice System" (2016) 45 CLWR 214; Barbara Billingsley and Masood Ahmed "Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada" (2016) 45 CLWR 186; and Lola Akin Ojelabi "Ethical Issues in Court-connected Mediation" (2019) 38 CLQ 61.

38 As argued in Robert Baruch Bush and Joseph Folger *The Promise of Mediation* (Jossey-Bass, San Francisco, 1994).

mediation, such as Britain and New Zealand.<sup>39</sup> In some specialist areas of law, such as employment and family, the debate has largely been won by supporters of mandatory mediation. It is far more mixed in the traditional civil court jurisdiction, which consists largely of commercial disputes, including contractual, insurance, construction, banking and finance, and commercial property disputes.

In total, 71 per cent of our respondents were open to the possibility of mandatory mediation in the District and High Courts. Only four judges (29 per cent) did not support it. However, the 71 per cent is made up of two distinct groups. Only 21 per cent fully supported mandatory mediation, with 50 per cent answering that it "depends on which type". So while this suggests a strong majority in favour of the possibility, it is not a clear cut "yes" and "no" situation. The "depends" category was added to provide more nuance to this important question. Many people involved in commercial disputes have mixed views on mandatory mediation and in previous surveys a yes/no dichotomy undermined this reality. In the NZCMS Part 1 mediator survey, the three categories resulted in roughly similar results, with 65 per cent open to the idea (nine per cent "yes" and 56 per cent "in certain contexts") and 35 per cent against it.<sup>40</sup>

This can be contrasted with the views of lawyers who overwhelmingly dismissed mandatory mediation (70 per cent), with only 30 per cent supporting the idea (15 per cent "yes" and 15 per cent "in certain contexts").<sup>41</sup> At first glance, this suggests that views on mandatory mediation directly reflect the advantages and disadvantages to specific groups. Thus, most mediators support mandatory mediation because they believe in the power of mediation and it means more work opportunities. Most judges are open to the idea of mandatory mediation as it reduces the pressure on the courts and does not impact on judicial autonomy or salary. Most lawyers reject mandatory mediation as it undermines their influence over clients. Instead of engaging with mediation when it suits the lawyer and client, that freedom is effectively taken away.

However, when just two categories were made available in the second mediator survey (NZCMS Part 4), only 37 per cent of mediators supported mandatory mediation, with 73 per cent against. These results seem to undermine the logic in the preceding paragraph. Therefore, the different results appear to partly reflect the different ways in which the questions were asked. This again illustrates the complexity of the issue.

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39 See Morris and Shaw, above n 7; Bryan Clark "*Lomax v Lomax* and the future of compulsory mediation" (2019) 7866 NLJ 17; Michael Bartlet "Mandatory Mediation and the Rule of Law" (2019) 2 *Amicus Curiae* 50; and Asplin and others, above n 4.

40 NZCMS Part 1, above n 1, at 14.

41 NZCMS Part 2, above n 1, at 28.

This complexity can be explored better in the comments following the question. Given the small number of respondents in each category, these are ultimately anecdotal. The four respondents who answered "yes" were all District Court judges. The key reason provided was that litigation should be a last resort. The time and cost benefits of mediation are clear enough to warrant making it mandatory. Even if a mediation does not settle, mediation can establish common ground and narrow issues for hearing. For those respondents in the "depends" category, the most common suggestion was to have mandatory mediation where appropriate. However, if there are too many disputes deemed inappropriate then the process is not really mandatory. This is what occurred in the Family Dispute Resolution mediation regime.<sup>42</sup> It became relatively easy for parties to skip "mandatory" mediation by applying without notice and going straight to a court hearing. The appropriateness of mediation would most logically be a decision for the judge, but what would be the criteria?

The comments relating to "no" revolved around principle and pragmatism. A few respondents argued that claimants should have the right to choose the best dispute resolution method for them and that flexibility is needed. Others worried about increased costs for little benefit for those effectively forced to mediate. The assumption here is that unwilling parties are unlikely to settle. However, that is not necessarily the case in regimes such as employment, where many employers end up settling despite being reluctant to mediate.<sup>43</sup> Throughout the NZCMS, the principled argument has been the most pronounced, ie that mediation should be a matter of choice.<sup>44</sup>

This viewpoint from judges echoes the British situation. *Halsey v Milton Keynes General NHS Trust* held that cost sanctions can be imposed for an unreasonable refusal to mediate.<sup>45</sup> However, it is also well established that a court is unable to force unwilling parties to undertake mediation. In her 2011 speech, Winkelman J made a strong argument for the primacy of adjudication in relation to mediation.<sup>46</sup> There is a discernible split between judicial views on this issue, at least in New Zealand and Britain. On one hand, we have judges warning against overemphasising mediation. On the other hand, we have judges actively calling for mandatory mediation to reduce pressure on the courts and to make costs savings for potential litigants.

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42 Morris and Shaw, above n 7, at ch 11.

43 At ch 10.

44 NZCMS Part 2, above n 1, at 31.

45 *Halsey v Milton Keynes General NHS Trust*, above n 31; and see also *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288, [2014] 1 WLR 1386.

46 Winkelman, above n 15.

Extrajudicial writings and speeches provide evidence of these divergent views,<sup>47</sup> but developing case law is even more illuminating. In 2019, the English Court of Appeal held in *Lomax v Lomax* that it could order an early neutral evaluation (ENE) without requiring party consent.<sup>48</sup> This is but one step away from mandatory mediation. ENE is usually defined as a neutral third party voluntarily brought in by parties to help resolve a dispute. If the English Court of Appeal can justify mandating ENE, then it can easily justify mandating mediation.<sup>49</sup> As stated by Moylan LJ in *Lomax*:<sup>50</sup>

... ENE does not prevent the parties from having their disputes determined by the court if they do not settle their case at or following an ENE hearing. It does not, in any material way, obstruct a party's access to the court. Insofar as it includes an additional step in the process, this is not in any sense an "unacceptable constraint", to use the expression from *Halsey*. In my view, it is a step in the process which can assist with the fair and sensible resolution of cases.

In order to gauge perspective, we asked judges how they would describe the judiciary's overall support for mandatory mediation. Not surprisingly our respondents were split. A significant minority (41 per cent) believed that there is little support for mandatory mediation, whereas only 17 per cent thought there was extensive support. However, the remainder (42 per cent) believed that support was moderate. On a scale of 0–10, the mean was 4.2, ie near the mid-point. Interestingly, the important but dated 2004 Ministry of Justice study also found divergent views among judges on mandatory mediation.<sup>51</sup> Seventeen years later, the judiciary continues to be divided on the issue, making it unlikely that any fundamental change will come from our third branch of government. If change is to happen it will almost certainly have to come from the government. Some judges will welcome such change while others may oppose it.

## **X HOW BEST TO DO MANDATORY MEDIATION?**

As discussed throughout this article, mandatory mediation is a complex issue and can take at least three different forms. We asked respondents which form they preferred out of the following: (1) the court having the power to refer parties to mediation regardless of consent; (2) automatic mediation as

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47 See Ian Barker "Arbitration, Mediation and the Courts" [2004] NZLJ 489; Winkelmann, above n 15; Lord Neuberger "Has Mediation had its day?" (Gordon Slynn Memorial Lecture, 10 November 2010); and Lord Woolf "Access to Justice" (1994) 47 Current Legal Problems 341.

48 *Lomax v Lomax* [2019] EWCA Civ 1467.

49 Indeed, this possibility has been raised as obiter by Sir Geoffrey Vos in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) at [42].

50 *Lomax*, above n 48, at [26].

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

a pre-trial requirement; and (3) potential adverse costs order for those who do not attempt mediation. Approaches (1) and (2) could be seen as similar. Having automatic mediation before allowing access to the courts is effectively referring parties to mediation regardless of their consent, but approach (1) can potentially occur at any stage in the litigation process, including during a trial. Approach (1) provides the judge with more individual discretion. Approach (3) is the *Halsey* option. Respondents could choose more than one answer and many did.

Five respondents supported approach (1) because judges could choose which cases went to mediation. In other words, it provides flexibility and avoids a "one size fits all" process like in employment. This approach is used in other jurisdictions, such as New South Wales<sup>52</sup> and Tasmania.<sup>53</sup> There is a wide discretion for judges in these courts, but cases with a high likelihood of settlement and/or smaller monetary sums at stake are more likely to be referred.<sup>54</sup> The four respondents supporting approach (2) noted that it avoids the judges becoming directly involved in ordering mediation. The closest New Zealand analogy is the Employment Relations Act 2000, where the Employment Court and Employment Relations Authority have a duty to direct parties to mediation before hearing a dispute.<sup>55</sup> While exceptions can be made, they rarely occur. In practice, parties seeking to avoid employment mediation usually get referred straight back to mediation by Authority members and judges.

Approach (3) is the compromise option, as it creates a strong incentive to mediate without requiring mediation. It has been publicly supported by leading New Zealand mediators.<sup>56</sup> If a party is encouraged to mediate by the courts and unreasonably declines, then there could be an adverse cost consequence. The criteria set out in *Halsey* can provide some guidance as to what might be seen as "reasonable" and "unreasonable" when considering mediation as an option. Judges were split on the best approach to mandatory mediation. Given the similarities between the New Zealand and British legal systems, a *Halsey* approach might be the most realistic and nearly as effective as mandatory mediation in increasing the amount of commercial mediation occurring.

Respondents were particularly interested in who the mediator would be. One respondent supported allowing parties to choose an outside mediator. This is probably the default option in a New Zealand context. Some overseas jurisdictions have mediators (often registrars) who work directly for

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52 A court may order the referral of proceedings for mediation if it considers the circumstances appropriate: Civil Procedure Act 2005 (NSW), s 26.

53 Alternative Dispute Resolution Act 2001 (Tas), s 5.

54 Olivia Rundle "How court-connection and lawyer's perspectives have shaped court-connected mediation practice in the Supreme Court of Tasmania" (PhD thesis, University of Tasmania, 2010) at 188; and Tania Sourdin *Alternative Dispute Resolution* (2nd ed, Thomson Reuters, Sydney, 2005) at 102.

55 Employment Relations Act 2000, ss 188(2)(b) and 159(1)(b).

56 Sharp, above n 2.

the courts. Others have judges undertaking the mediation, as occurred in the Family Court from 1980 to 2014. Another respondent expressed a preference for judges to mediate in the form of Judicial Settlement Conferences (JSC). It is debatable whether the JSC can be considered mediation, but it certainly has strong similarities.

## ***XI WHAT ARE THE CHALLENGES FACING COMMERCIAL MEDIATION AND HOW CAN GREATER USE BE ENCOURAGED?***

All five NZCMS studies have asked participants about the challenges facing commercial mediation. Over a period of six years, consistent themes have emerged. As an open text question, there is a range of answers although some are variations on a similar theme. The majority of responses related to access to justice issues, including the following: the cost and availability of commercial mediation; lack of experienced commercial mediators; and the financial imbalance of parties. This perceived lack of experienced mediators has now been noted by lawyers,<sup>57</sup> users,<sup>58</sup> and judges, and yet there is an oversupply of commercial mediators and capable practitioners who have capacity to take on more work. This overlaps with the concern expressed by some mediators that it is challenging for newer market entrants to get work due to the dominance of a few high-profile practitioners. These high-profile mediators obviously have limited capacity, but there appears to be a hesitancy amongst legal professionals and users to hire an "unknown". This is despite the credibility guarantee of Resolution Institute and/or Arbitrators' and Mediators' Institute of New Zealand credentials.

Only two respondents cited lack of support by lawyers as a key challenge. Mediators in NZCMS Part 1 and NZCMS Part 4 have claimed that many lawyers are reluctant to recommend mediation to clients. The NZCMS Part 2 gatekeepers study and lawyers' own code of conduct suggest that this is unlikely. While there will be some lawyers wary of mediation for various reasons, consideration of ADR is part of being a legal advisor in 21st century New Zealand.<sup>59</sup> Overall, the impression is that our respondents were aware of challenges but believed that none of these challenges was particularly fatal to mediation.

Advocating for an increase in commercial mediation involves a value judgement. Firstly, it assumes that commercial mediation is a positive dispute resolution process and, secondly, that there is not enough and should be more. The question is vital to the NZCMS but has met some resistance from respondents who may not agree with its premise. Of the 11 comments provided, four disagreed with the question, either noting that it is not the judiciary's role to promote commercial mediation or that enough was already being done. Two comments suggested mandatory mediation as the way to

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57 NZCMS Part 2, above n 1, at 31.

58 NZCMS Part 3, above n 1, at 20.

59 A lawyer must raise the possibility of ADR options, unless the client already understands these alternatives: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.4.

increase usage and two comments suggested raising mediation with parties (which presumably is already happening where appropriate). One comment referred to the judiciary needing to alter its attitude towards mediation before greater use will occur. This lonely comment highlights two important findings in this study. Firstly, there is little appetite amongst judges for significantly increasing mediation through the District and High Court processes. Secondly, if there is to be a significant increase, it will require an alteration of attitudes towards mediation. So, this comment is very insightful but, at the current moment, somewhat futile.

## *XII CONCLUSION*

Judicial promotion of mediation has been identified as an important way to encourage and increase the amount of commercial mediation in New Zealand. This has been highlighted by mediators, lawyers and users in previous NZCMS studies.<sup>60</sup> It is unlikely that the judiciary will be moved by these views. The relatively low response rate to this study and the conflicted views over mandatory mediation suggest that many judges do not value mediation as highly as those in the mediation community. While it is possible that some judges see mediation as a threat to litigation's dominance, this did not come through as a strong theme in our study.

The judiciary is well placed to increase the amount of commercial mediation in New Zealand. However, it is unlikely that this potential will be realised under the current civil procedure settings. Change will either come from the judiciary itself (as under Lord Woolf's leadership in the United Kingdom during the late 1990s) or from the government through legislative reform (or both). At this point in time, neither of these seems likely. Therefore, after five years of study we can conclude that New Zealand has a robust and high-quality private commercial mediation market, but it is unlikely to see significant growth in the medium-term future.

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<sup>60</sup> NZCMS Part 1, above n 1, at 18; NZCMS Part 2, above n 1, at 33; and NZCMS Part 4, above n 1, at 27.