

Users of Commercial Mediation In New Zealand: The First Empirical Study

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I recently carried out New Zealand's first empirical research on the users of commercial mediation. This is Part Three of a three-part study (Part One = the mediators, Part Two = the gatekeepers/lawyers). Getting to grips with what users think of commercial mediation is the Holy Grail for mediation professionals. Until now in New Zealand, it has been considered too difficult to find out who the individuals using mediation services are due to the confidential nature of the process. The way around this was to concentrate on specific commercial areas, for example, on mediations revolving around insurance claims. That meant we could identify the end users of the mediation process – the claims managers for insurance companies – and then survey and interview them as to what they think of the process.

Mediators, lawyers and users all agree that New Zealand's mediation industry operates to a very high standard. One insight gained from the research was that the users don't use mediation as frequently as the mediators and lawyers think they do. There has been a lot of anecdotal evidence about how people were turning to mediation over court proceedings but, until now, we have not had any real evidence to support those assumptions. It suggests there is room to grow the market for mediation services, if mediators and lawyers can influence perceptions about the effectiveness of mediation.

The next question is whether these findings apply to mediations involving other types of commercial disputes – in the construction industry for example. New Zealand insurance companies are relatively familiar with mediation because they've been using this approach for quite a long time. It is less established in other commercial areas, so there is always the chance we'll get some very different results. The good news is that now we have developed an effective methodology for identifying and surveying mediation users, we can start building a comprehensive picture of the commercial mediation market as a whole.

I carried out this research in collaboration with the Resolution Institute as a Victoria University Summer Scholarship project. The Summer Scholarship programme pairs Victoria University academics with senior students to research a specific part of the academic's project, while the students develop skills and knowledge to prepare them for further study. I worked with fifth-year law student Freya McKechnie on the research, and will be presenting the findings at the Auckland Global Pound Conference on 31 May. This is the perfect forum for the research.

Below is a more formal summary of the findings:

The respondents reported a good knowledge of mediation. They also indicated that the insurance industry as a whole is aware of mediation and supports the use of it. Users report they are using mediation often and believe that it is well utilised in the insurance sector. However, most estimate that the organisations they work for use mediation less than 25 times in any given year. Respondents' main reason for using mediation is its cost-effectiveness. Respondents' main reason for not using mediation is the other party's unwillingness. This indicates the party on the other side of a dispute may be a barrier to using mediation. Respondents also noted that the other party having a weak case or unrealistic expectations were reasons not to use mediation. Mediation is used in the insurance industry for various types of disputes: between the insurer and the insured, between multiple insurance companies, between the insurer and an employee and between the insurer and a third party claiming against the insured.

Users seem largely satisfied with mediations they have been involved in and reported high success rates. They clearly appreciate having the option to mediate, however the vast majority of users are against mediation being mandatory. Mediation is usually triggered by external legal advice or by a decision within the company. Most claims managers play a role in selecting a mediator – showing their engagement in the mediation process, and that it is not just lawyers choosing mediators. Those who did not select the mediator indicated that it was their senior managers, in-house lawyers or the insured's legal advisors who did. The most important attribute to users when selecting a mediator was their track record of previous success. The majority of respondents prefer mediators with a legal background, because of their ability to understand and engage with legal issues during mediation. Users are usually represented by external lawyers during mediation and believe lawyers generally improve the mediation process. Users are more supportive of mediation than lawyers; there may be potential for lawyers to support and suggest mediation more than they currently do.

Respondents were asked for their opinions on what the key challenges facing insurance mediation were. The top response was that the number of suitably experienced and qualified mediators is limited. Another common answer was that mediation becomes simply arguing over the amount of money in dispute, with growing expectations that insurers will usually pay up to settle disputes. Respondents were also asked how the use of insurance mediation could be encouraged or increased in New Zealand. Respondents suggested that promotion of the benefits of mediation could be helpful to increase awareness and in turn increase use of mediation.

The full report can be found [here](#), along with Parts 1 and 2 of the study