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**COMMERCIAL MEDIATION IN NEW ZEALAND:  
TOWARDS A METHODOLOGY FOR MEASURING  
SUCCESS**

**LLM RESEARCH PAPER  
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**Abstract**

*This paper attempts to propose a new direction for the empirical study of commercial mediation in New Zealand. Specifically, this paper proposes that a new methodology is required for the measurement of commercial mediation success in New Zealand. There has been a global trend towards the development of comprehensive empirical methods to assess and quantify mediation outcomes. New Zealand's fledgling commercial mediation scholarship could benefit from an adapted replication of these studies. This paper provides a brief overview of commercial mediation in New Zealand and discusses the existing need for a better method of success measurement. This paper reviews existing empirical studies in the fields of commercial mediation and mediation outcome measurement.. This paper goes onto describe a possible methodology for measuring success. This methodology is based primarily on the identification of a range of individual facets of success and a mechanism for determining the relationship of those facets to the elements of commercial mediation. This paper concludes by outlining some next possible steps for the development of scholarship in this field.*

**Word length**

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,600 words.*

**Subjects and Topics**

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## *I Introduction*

The purpose of this paper is to make a case for the development of a structured methodology to measure success in respect of commercial mediation in New Zealand. This paper breaks down into eight parts, including this introduction (part one). Part two briefly introduces commercial mediation and outlines the development and current state of commercial mediation in New Zealand. Part three begins to build the case for developing a new method of measuring success in commercial mediation. Part four states and discusses key issues in relation to the construction of a new methodology to measure success. Part five reviews existing literature relevant to the proposed method for measuring success. This review will include: a) major empirical studies in the field of commercial mediation and dispute resolution; and b) various examples of research into mediation outcome measurement. Part six of this paper proposes an approach to the development of a new method for measuring success. Part seven of this paper identifies some next steps for the construction of a methodology. Part eight of this paper will conclude.

It is important to note at the outset of this paper that the structured academic study of commercial mediation in New Zealand is in an embryonic state.<sup>1</sup> This paper does not aim to provide a rigorous analysis of existing data or scholarship. Nor will this paper attempt to create a final, detailed methodology for measuring success. Instead, this paper has three aims. The first is to make a reasoned argument for the benefits of a new methodology for measuring success in commercial mediation. The second is to review relevant data and research methods relating to outcome measurement in the commercial dispute context. The third is to propose some informed directions for the continued development of an effective measurement of success for commercial mediation in New Zealand.

## *II Definition and Overview*

### *A Commercial Mediation: A Definition*

Mediation can be defined concisely as a consensual process by which parties seek to resolve a difference with the assistance of a third party.<sup>2</sup> Commercial mediation is the application of mediation to a dispute which is commercial in nature.

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<sup>1</sup> Grant Morris “From Anecdote to Evidence: The New Zealand Commercial Mediation Market” (2016) 22 NZBLQ 10 at 2.

<sup>2</sup> Peter Spiller *Dispute Resolution in New Zealand* (2<sup>nd</sup> ed, 2007, Oxford University Press, Melbourne) at 70.

## *B History and Development in New Zealand*

The history of mediation in New Zealand is difficult to comprehensively chronicle.<sup>3</sup> It is easier to trace the development and growth of mediation in some areas than it is in others; employment law and family law, for example, have an established statutory past which provides clear evidence of growth.<sup>4</sup> Commercial mediation, in contrast, has remained private.<sup>5</sup> Unlike employment and family law, there is no statutory regime that governs commercial mediation and no mandatory reporting of outcomes.<sup>6</sup> This makes it difficult to accurately assess the rate of growth of commercial mediation in New Zealand, or whether there have been any significant or on-going changes in either process or outcomes of commercial mediation.

There does appear to have been some growth in commercial mediation in New Zealand since the turn of the century.<sup>7</sup> Commercial contracts now routinely contain dispute resolution clauses that require the parties to attempt mediation before proceeding to either arbitration or litigation.<sup>8</sup> In particular, standard form contracts in the areas of licensing, franchising and construction often mandate mediation.<sup>9</sup> Various reports in the late 1990s and early 2000s called for greater judicial support of commercial mediation as an alternative to litigation, but have not received much follow-up.<sup>10</sup> In comparable jurisdictions such as Australia and some parts of the United Kingdom, court connected mediation is much more common than it is in New Zealand.<sup>11</sup>

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<sup>3</sup> Grant Morris “Towards a history of mediation in New Zealand’s legal system” (2013) 24 ADRJ 2 p87.

<sup>4</sup> At 89.

<sup>5</sup> At 97.

<sup>6</sup> At 97.

<sup>7</sup> Laurence Boule, Virginia Goldblatt and Philip Green *Mediation: Principles, Process, Practice* (2nd ed, LexisNexis, Wellington, 2008).

<sup>8</sup> At 30.

<sup>9</sup> Mark Kelly “Recent Developments in Commercial Mediation” (2014) 856 Lawtalk Page 34.

<sup>10</sup> At 34.

<sup>11</sup> Greg Rooney “The Rise of Commercial Mediation in Australia – Reflections and the Challenges Ahead” *Journal of Mediation and Applied Conflict Analysis* 99. Rooney claims that virtually all civil cases that reach the trial stage in Australia have been through mediation but does not substantiate this claim with specific evidence.

### *III The Case for a Framework to Measure Success*

This section will identify some of the wider consequences that may flow from the development of a structured framework to measure success in commercial mediation. Constructing a framework of the type contemplated in this paper will be costly and time consuming and will require coordinated input from a variety of groups and individuals. The benefits of constructing this framework must be clearly communicated to users and the larger groups affected by commercial mediation (stakeholders) to encourage their participation in the process.<sup>12</sup>

This section examines some of the potential benefits of an improved success measurement for both users and stakeholders. This paper is predicated on the argument that users and disputants should be considered the primary targets of research aimed at improving the measurement of success in commercial mediation.<sup>13</sup> As a corollary, realization of the benefits of an improved success measurement for users will also require the support of stakeholders.

#### *A Move Away From Settlement Rate*

This paper posits that settlement rate is an inadequate measure of success for commercial mediation outcomes. Mediation literature consistently references settlement rate as an acceptable measure of success; it is the gold-standard for mediation outcome measurement.<sup>14</sup> Some authors have accused mediation of amounting to “justice on the cheap peddled by settlement-junkie mediators”.<sup>15</sup> However, a binary measurement of ‘settlement versus no settlement’ offers little information about the quality or effectiveness of the mediation process and outcome.<sup>16</sup> There is a lack of stakeholder support for commercial mediation in New Zealand and a lack of exponential growth in the commercial mediation field.<sup>17</sup> Evidence indicates that there is under-utilisation of commercial

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<sup>12</sup> Grant Morris and Annabel Shaw *Mediation in New Zealand* (1<sup>st</sup> ed, Thomson Reuters, New Zealand, 2018) at 247.

<sup>13</sup> At 257.

<sup>14</sup> James Wall and Timothy Dunne “Mediation Research: A Current Review” (2012) *Negotiation Journal* 28 217 at 226.

<sup>15</sup> Andrew Agapiou and Bryan Clark “Scottish construction lawyers and mediation: an investigation into attitudes and experiences” (2011) 3 *International Journal of Law in the Built Environment* 159 at 166.

<sup>16</sup> Jean Poitras and Aurelia Le Tareau “Quantifying the Quality of Mediation Agreements” (2009) 2 *Negotiation and Conflict Management Research* 363.

<sup>17</sup> Morris and Shaw, above n 12, at 248.

mediators.<sup>18</sup> This paper hypothesizes that these factors may all be tied (to some extent) to the lack of evidence demonstrating the overall benefits of mediation as a method of resolving commercial disputes. An improved measurement of success could encourage the focus to move away from settlement rate and towards the other potential benefits of commercial mediation (as far as those other benefits demonstrably exist).

## *B Improve Mediation Outcomes*

### *1 Quality benefits*

One theoretical benefit of mediation is its ability to produce tailored, quality agreements that benefit both parties, when compared to other forms of dispute resolution.<sup>19</sup> Currently, this statement (especially in a New Zealand context) reflects theory and anecdote more than it does evidence.<sup>20</sup> An improved framework for measuring success may provide valuable empirical evidence supporting the argument that commercial mediation can produce high-quality, satisfactory agreements.<sup>21</sup> It may also enable changes in quality to be tracked over time, and areas of the mediation process that are most linked to positive outcomes to be identified. Attention can then be focused on improving performance in those areas – possibly via training, funding and education. In contrast, such a framework could also enable identification of the areas of the mediation process most linked to agreements of poor or unsatisfactory quality. Future research and practice could focus on mitigating the impact of those areas.

Ultimately, any evidence that significantly reinforces the theoretical statement that mediation produces higher quality results than other forms of dispute resolution would be valuable.

### *2 Efficiency benefits*

Cost and time are consistently cited as two of the most valuable benefits offered by mediation for the resolution of commercial disputes.<sup>22</sup> A literature synthesis from Mediate

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<sup>18</sup> At 248.

<sup>19</sup> Mark Kelly “The Gatekeepers to Commercial Mediation – Who Are They, What Do They Want and Need, and Who Will They be in the Future?” 2016, Seminar Paper presented to AMINZ.

<sup>20</sup> Morris, above n 1, 6.

<sup>21</sup> Lin Adrian and Solfrid Mykland “Creativity in Court-Connected Mediation: Myth or Reality?” (2014) 30 *Negotiation Journal* 421 at 422.

<sup>22</sup> See the discussion of empirical sources in part 5 below, including: Thomas Stipanowich and Ryan Lamare “Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict



BC collated empirical studies in various locations (including several meta-analyses) across Canada, The United States and Australia. The majority of disputes in the Mediate BC literature review which settled via civil and/or commercial mediation were cheaper overall than similar cases which underwent litigation.<sup>23</sup> One interesting result, in the context of this paper, was a 2001 study which found that EU commercial cases which underwent mediation and did not settle still ultimately saved both courts and users money and time.<sup>24</sup> This may be due to several factors such as self-selection bias and less entrenchment of party positions at the litigation stage. Regardless, the results offer the possibility that mediation is an efficient dispute resolution mechanism in terms of cost and time, whether or not the parties settle at the mediation stage. Cost and time are cited in Morris' research as important motivators for the use of commercial mediation in New Zealand.<sup>25</sup> An improved methodology for measuring success could enable a more longitudinal view of the efficiency of commercial mediation. On overall measure of efficiency could account for the cost of re-adjudication and the effect of pre-adjudicatory mediation on the overall cost and time of the dispute's resolution.

### 3 *Other benefits*

Agapiou and Clarke state that "writing extolling the virtues of mediation is rife".<sup>26</sup> Stipanowich and Lamare list a number of benefits touted by mediation supporters, including "overcoming cultural barriers", "restoring or maintaining relationships", and "producing more creative, satisfactory and durable agreements".<sup>27</sup> Other authors refer to the degree of control that mediation affords users over the process and outcome of a dispute.<sup>28</sup> A new methodology for measuring success could test the reality of these claims

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Management in Fortune 1000 Corporations" (2014) 19 Harvard Negotiation Law Review 1 at 24; Andrew Agapiou and Bryan Clark "Scottish construction lawyers and mediation: an investigation into attitudes and experiences" (2011) 3 International Journal of Law in the Built Environment 159; and Grant Morris and Freya McKechnie "Resolution Institute/Victoria University of Wellington Users of Commercial Mediation in New Zealand – Insurance Industry Report" (April 2017) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015041](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015041)> [NZCMS Part Three].

<sup>23</sup> Sarah Vander Veen "A Case for Mediation: The Cost-Effectiveness of Civil, Family and Workplace Mediation" (January 2014) MediateBC <<http://www.mediatebc.com/PDFs/1-52-Reports-and-Publications/The-Case-for-Mediation.aspx>> pages 6-12.

<sup>24</sup> At 12.

<sup>25</sup> Grant Morris and Freya McKechnie "Resolution Institute/Victoria University of Wellington Users of Commercial Mediation in New Zealand – Insurance Industry Report" (April 2017) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015041](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015041)> [NZCMS Part Three].

<sup>26</sup> Agapiou and Clarke, above n 15, at 167.

<sup>27</sup> Thomas J Stipanowich 'An International Evolution of Mediation: A Call for Dialogue and Deliberation' (2015) 46 Victoria University of Wellington Law Review 1191 at 1192.

<sup>28</sup> Wall and Dunne, above n 14, at 232.

in a New Zealand context and provide a mechanism which measures both the empirical strength of these benefits and their relationship to the mediation process.

It is important to note that the issue of a gap between ‘theory’ and ‘empirical’ support as it relates to commercial mediation is not confined to New Zealand.<sup>29</sup> The global field of commercial mediation is still lacking in data-driven analysis.<sup>30</sup>

### *C Increase Stakeholder Support for Commercial Mediation*

The scope of this paper is not broad enough to include a discussion of all mediation stakeholders. Given that the judicial endorsement of mediation in New Zealand lags other, similar jurisdictions, this paper will discuss the role of the judiciary as a stakeholder.<sup>31</sup>

#### *1 A Judicial Perspective*

One perspective from the New Zealand judiciary on commercial mediation was provided by Winklemann J in a presentation to AMINZ in 2011. In her presentation, Winklemann J discussed the role of the ADR in relation to the judicial system.<sup>32</sup> Whilst the points raised in the presentation are those of Winklemann J alone and are not intended to represent the judiciary of New Zealand as a whole, the presentation does provide some insight into potential concerns that the judiciary may have regarding commercial mediation.

Winklemann J argues that there is no significant evidence, either in New Zealand or overseas, to suggest that judicially promoted mediation produces a better settlement rate than cases which are resolved without recourse to mediation. Neither, according to Winklemann J, is there significant evidence demonstrating that mediation has a positive effect on cost or time to disposition.<sup>33</sup> In addition, Winklemann J questions whether judicial promotion of mediation is the correct course of action.<sup>34</sup> Winklemann J’s view is that the “principal benefit to be derived from mediation is that the settlement will be constructed

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<sup>29</sup> Nadja Alexander *Global Trends in Mediation* (2<sup>nd</sup> Ed, Kluwer Law International, The Netherlands 2006) at 25.

<sup>30</sup> At 25.

<sup>31</sup> Morris and Shaw, above n 13, at 268.

<sup>32</sup> Helen Winklemann, Chief High Court Judge of New Zealand “ADR and the Civil Justice System” (Paper presented to AMINZ Conference, Auckland, August 2011).

<sup>33</sup> At 4.

<sup>34</sup> At 15.

by the parties for themselves and freely consented to".<sup>35</sup> Winkelmann J then goes on to state:<sup>36</sup>

"I acknowledge... that in individual cases there may be other benefits... but I think we should be hesitant in asserting those other claimed benefits are a general rule in light of the body of research gathered to date."

Winklemann J also argues that there are mediators whose primary focus is a high settlement rate, stating that: "mediators should step back from committing to achieve settlement, and focus on creating an environment in which good and lasting settlements can be reached".<sup>37</sup>

Without attempting to either confirm or rebut Winkelmann J's arguments, it is worth acknowledging that her arguments have some validity, at least insofar as there is a limited existing body of empirical research in New Zealand which provides evidence to the contrary. If Winkelmann J's views are representative of the judiciary, it may go some way toward explaining the comparatively low rate of court-endorsed mediation in New Zealand. If not representative, Winkelmann J's views still raise concerns that are worth addressing through research. A more robust measurement of success in commercial mediation, one which moves away from settlement rate, could help to convince the judiciary (and other stakeholders) that mediation is a valuable and worthwhile exercise for users.

#### *IV Issues Facing Methodology Development*

##### *A Lack of Research and Analysis in a New Zealand Setting*

There is a lack of informed data and scholarship relating to commercial mediation in New Zealand.<sup>38</sup> New Zealand has only recently begun to develop a meaningful body of research around commercial mediation.<sup>39</sup>

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<sup>35</sup> At 16.

<sup>36</sup> At 16.

<sup>37</sup> At 17.

<sup>38</sup> Morris, above n 1, at 4.

<sup>39</sup> For example, a search of the Westlaw database with the parameters "commercial mediation" and "New Zealand" yields eight results, only three of which are substantially relevant. The same search in Lexis Nexis yields seven results.. New Zealand does not have a dispute resolution journal. There is only one reference to private mediation in New Zealand statute.

This lack presents obvious hurdles to the development of a framework for measuring success. Hypotheses can be postulated, but only using scant data. Conclusions cannot be meaningfully tested. Comparative data can be used, and outside of Morris' work, is currently the only real source of empirical information available to New Zealand researchers.

### *B Barriers to Using Research from Other Jurisdictions*

While New Zealand undoubtedly faces similar commercial issues and disputes as other Common Law and western jurisdictions, the impact that cultural differences may have on private dispute resolution processes cannot be quantified. This presents a barrier to the use of empirical research from different jurisdictions and cultures. Culture (both human-made and social elements) can affect mediation processes and outcomes.<sup>40</sup> The extent of cultural effects would be extremely difficult to quantify. As such, comparative studies should not be dismissed on this basis. The potential for unmeasured cultural bias in comparative studies, however, is a factor that supports the need for empirical studies to be conducted in New Zealand.

Additionally, research suggests that the presence (or lack) of formal mediation institutions can also affect mediation.<sup>41</sup> In a study by Wall et al examining the effect of institutions on mediation processes and outcomes, New Zealand is categorised as having formal mediation institutions (defined by the authors as state-supported or regulated mediation). It is worth noting that *commercial* mediation in New Zealand falls outside the scope of this definition, unlike most jurisdictions across Europe, Australia and the UK.<sup>42</sup> The effect of this is not clear, but as with the possible cultural bias discussed above, it must at least be noted as a factor when comparing overseas research from traditionally comparative jurisdictions to New Zealand.

### *C Confidentiality and Privacy*

The confidential nature of commercial mediation presents the most immediate barrier to empirical research. The issue is succinctly summarized by Grant Morris, who states that:<sup>43</sup>

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<sup>40</sup> Wall and Dunne, above n 15, at 221.

<sup>41</sup> At 223.

<sup>42</sup> At 223.

<sup>43</sup> Morris, above n 1, at 3.

“commercial mediation is a private process protected by legally binding confidentiality obligations. It is very difficult for researchers to examine the most important primary source documents, that is, the actual mediations. This poses a major challenge for the empirical researcher.”<sup>44</sup>

This paper will not attempt to offer a practical solution to the problem of confidentiality in data collection. Rather, it is important to note that confidentiality is but one contributing factor to the lack of relevant existing research in commercial mediation. To overcome the barriers that are preventing research, a strong argument must be made in favor of data collection.

## *V Current Empirical Data and Research Methods*

The next step in this paper is to examine various examples of empirical evidence and research relating to commercial mediation and mediation outcome measurement. These studies will inform the methodology for success measurement proposed below.

### *A Empirical Data Relating to Commercial Mediation*

#### *1 CEDR Audits*

CEDR (the Centre for Effective Dispute Resolution) runs a biennial audit of the mediation sector in the United Kingdom. The current audit is the 2018 audit. There have been 7 previous audits. Each audit surveys the mediation sector in the United Kingdom. There were 319 responses to the survey published in 2016.<sup>45</sup> The audit measures, in its own words, “the attitudes of civil and commercial mediators”.<sup>46</sup> This provides an inherent limit to its usefulness as a source of data for measuring success in commercial mediation, as it is primarily concerned with the views of the mediators themselves (as opposed to the users).

In reviewing these audits, it becomes immediately apparent that overall ‘performance’ in mediation (an analogue of sorts for success) is measured almost entirely by settlement rate. For example, the audit published in 2012 includes a heading ‘performance in mediation’,

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<sup>44</sup> At 3.

<sup>45</sup> CEDR “The Seventh Mediation Audit: A survey of commercial mediator attitudes and experience” (May 2016) <[https://www.cedr.com/docslib/The\\_Seventh\\_Mediation\\_Audit\\_\(2016\).pdf](https://www.cedr.com/docslib/The_Seventh_Mediation_Audit_(2016).pdf)> at 2.

<sup>46</sup> At 2.

under which is a discussion of settlement rate (around 90%).<sup>47</sup> The report then compares this to the settlement rate measured in the previous audit. There is no discussion of the quality of these settlements and no measurement of clients' overall satisfaction with the agreement. The only other measure in the section is a rating of mediator performance, broken down broadly into 'very well', 'adequate' and 'less than adequate'.<sup>48</sup> The 2016 audit reported concerns that while settlement rate had stayed consistent, the time taken to reach settlement had increased. The audit report suggested that this change may have been attributable to "cases becoming harder" but did not consider any other potential explanation for a change in settlement rates.<sup>49</sup> The audit did not collect data connecting performance to changes in other possible variables (such as mediation style or the emphasis placed on resolution quality).<sup>50</sup> Nor do the CEDR audits, in general, collect data relating to any other measures of performance in mediation.

## 2 *New Zealand Commercial Mediation Study*

Another source of empirical data that could help to inform the construction of a methodology to measure success in New Zealand commercial mediation is a series of surveys conducted by Dr Grant Morris entitled the New Zealand Commercial Mediation Study ("NZCMS"). As opposed to the CEDR audits discussed above, Dr Morris surveyed users of commercial mediation, lawyers involved in commercial mediation (gatekeepers) and commercial mediators. This range of perspectives provides a more diverse data set and a range of empirical perspectives on similar types of data. However, the surveys conducted by Morris are the first of their kind in New Zealand and have not yet developed longitudinal validity.

The first study in the NZCMS series (NZCMS Part One) surveyed commercial mediators in New Zealand.<sup>51</sup> Of note to the topic of success measurement was the following question: "What factors do you think influence people to use commercial mediation?". This question addressed user motive, a topic which is absent from the CEDR audits. The most commonly

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<sup>47</sup> CEDR "The Fifth Mediation Audit: A survey of commercial mediator attitudes and experiences" (May 2012) <<https://www.cedr.com/docslib/TheMediatorAudit2012.pdf>> at 7.

<sup>48</sup> At 8.

<sup>49</sup> CEDR, above n 46, at 7.

<sup>50</sup> At 8.

<sup>51</sup> Grant Morris and Daniella Schroder "LEADR/Victoria University Commercial Mediation in New Zealand Project Report" (June 2015) SSRN < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015041](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015041)> [NZCMS Part One].

cited reason was avoiding the cost of litigation (62% of respondents) followed by speed and efficiency (50%), confidentiality (26%) and preservation of relationships and reputation (21%). The desire to settle was only the fifth most cited factor, along with the parties having control over the outcome and acting on the advice of lawyers.<sup>52</sup> These results suggest (preliminarily) that a simple, binary measure of settlement is not necessarily the best way to assess whether a mediation should be considered ‘successful’.

These results were only somewhat reflected in the NZCMS Part Three, which surveyed users of the mediation within the insurance industry. The most commonly cited reason by users for using mediation to resolve a dispute was cost-effectiveness (61% of respondents) followed by the desire to avoid litigation or to settle out of court (44%).<sup>53</sup> Other reasons cited included confidentiality and control of outcome (17%).<sup>54</sup> These results indicate that while settlement is a priority for respondents, it is less important than finding a cost-effective resolution. The results also indicate that ‘settlement’ may only be valuable to the extent that it avoids litigation. If litigation can be avoided without a resolution of the dispute, then a mediation which brings about this result may still be considered a success. Alternatively, a quick settlement is unlikely to be considered either cost effective in the long-term or litigation-avoidant if it only delays litigation (e.g. if the parties settle but subsequently one party reinitiates the dispute or challenges the settlement).

It is important to note that the user survey discussed above was specifically directed at users of commercial mediation within the insurance industry, and more specifically at people within insurance companies who are responsible for resolving disputes.<sup>55</sup> The majority of the respondents were claims managers for insurance companies.<sup>56</sup> This deliberately narrow approach enables targeted research and at the same time limits the wider applicability of the findings.<sup>57</sup> The motivations of claims managers in relation to an insurance dispute may not necessarily correlate to the motivations of other participants in commercial mediation.

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<sup>52</sup> At 16.

<sup>53</sup> At 9.

<sup>54</sup> At 9.

<sup>55</sup> At 1.

<sup>56</sup> At 2.

<sup>57</sup> At 1.

### 3 *Global Pound Conference*

The Global Pound Conference of 2016/17 (GPC) was a global study primarily aimed at examining the use of civil and commercial dispute resolution. The GPC was not limited to mediation or users, but it did focus on disputants and their desires.<sup>58</sup> The GPC collated data from 4000 people across 28 conferences, which is a comparatively large data set versus other empirical studies.<sup>59</sup> However, the findings were relatively shallow.<sup>60</sup> Key findings from the GPC surveys are consistent other findings presented in this paper; efficiency is the primary motivator for commercial parties and other potential benefits are secondary. Efficiency in the context of the GPC did not necessarily mean the fastest or the cheapest method, but the most effective given the nature of the dispute.<sup>61</sup>

The GPC survey report acknowledges immediately that respondents were self-selected, which limits the wider applicability of the results. However, the GPC was not intended to replicate a vigorous academic study, but rather to function as a pulse-measuring exercise: identifying general trends, views and desires.

The most relevant survey results from the GPC, in the context of this paper, were those relating to user motivations. Of the range of responses, efficiency was the most commonly cited (65% of possible scores). This was followed by advice (46%), predictability (32%) and relationships (24%).

### 4 *Agapiou and Clarke: Scottish Construction Lawyers and Mediation: an Investigation into Attitudes and Experiences*

Agapiou and Clarke conducted a two-part study of the use of mediation in Scottish construction law disputes. The first part of the study was a quantitative analysis of Scottish construction lawyers who used mediation and recommended mediation to clients.<sup>62</sup> The data obtained from this study was used as the basis for a second qualitative analysis on the

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<sup>58</sup> International Mediation Institute, Herbert Smith Freehills and PwC “Global Pound Conference Series: Global Data Trends and Regional Differences” (2017) <<https://www.globalpound.org/>> at 5.

<sup>59</sup> At 2.

<sup>60</sup> Morris and Shaw, above n 12, at 5.

<sup>61</sup> International Mediation Institute, above n 59, at 10.

<sup>62</sup> Andrew Agapiou and Bryan Clark “Scottish construction lawyers and mediation: an investigation into attitudes and experiences” (2011) 3 *International Journal of Law in the Built Environment* 159.



same subject.<sup>63</sup> The use of a mixed-method approach yielded results with significant validity, tempered by the small sample size of the studies and the fact that neither study has been repeated.

The Scottish commercial mediation environment (at the time of the study) closely resembles New Zealand's present environment, in some key respects. Scotland had not yet followed in the footsteps of the UK and Australia in developing a significant culture and practice of court-connected or court-endorsed mediation.<sup>64</sup> There had been pilot programs run with some success, but commercial mediation was still an unregulated and private industry lacking in significant judicial or government support.<sup>65</sup>

The authors developed a 69-item questionnaire for their survey of Scottish construction lawyers, with each item utilizing a 5-point Likert Scale.<sup>66</sup> A range of analytical methods was used to process and verify the data. Of most relevance to the issue of success measurement was the series of items used to measure factors relevant to the decision to recommend mediation to a client.<sup>67</sup> The results support an emerging theme in the literature: the most important factors in determining whether to recommend mediation were a) a reduction of legal costs (88% of responses circled either 'always relevant' or 'often relevant', with 57% circling 'always relevant') and b) achieving a speedier settlement (95% of responses circled 'always relevant' or 'often relevant' with 49% circling 'always relevant').<sup>68</sup> These were followed by the possibility of reaching a creative settlement (63% circling 'always relevant' or 'often relevant').<sup>69</sup>

##### *5 Stipanowich and Lamare: Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*

In 2011, Cornell University, the Straus Institute and the International Institute for Conflict Prevention and Resolution co-sponsored a survey of in-house counsel at Fortune 1000 companies in the United States, focusing on their interaction with ADR.<sup>70</sup> This survey was

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<sup>63</sup> Andrew Agapiou and Bryan Clark "A follow-up empirical analysis of Scottish construction clients' interaction with mediation" (2013) 32 CJK 362.

<sup>64</sup> Agapiou and Clarke, above n 63, at 161.

<sup>65</sup> At 162.

<sup>66</sup> At 162.

<sup>67</sup> At 167.

<sup>68</sup> At 169.

<sup>69</sup> At 169.

<sup>70</sup> Thomas Stipanowich and Ryan Lamare "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations" (2014) 19 Harvard Negotiation Law Review 1 at 24.

the second of its kind, following a landmark survey of the same type conducted in 1997.<sup>71</sup> The two surveys comprise the most comprehensive empirical study of alternative dispute resolution in a commercial context in the United States and provide valuable data concerning the use of commercial mediation.<sup>72</sup>

Stipanowich and Lamare subsequently published a study of the 2011 survey results. The participants of the survey were in-house lawyers, whom the authors categorized as users. Counsel for 368 Fortune 1000 companies responded to the 2011 survey (compared to 606 for the 1997 Survey).<sup>73</sup> The 1997 survey was a response to what the authors term the ‘Quiet Revolution’; a significant change in the management of corporate conflict, associated with the rise of ADR.<sup>74</sup> The purpose of the 2011 survey was to track the development of ADR use in the ensuing years and identify any important patterns or trends.<sup>75</sup>

The 2011 survey utilized a questionnaire method and focused on capturing similar data to the 1997 survey, to enable some longitudinal analysis. One set of data, present in both surveys, provides some key insights in relation to user motivation. The surveys sought to establish the ‘reasons companies used ADR instead of litigation’.<sup>76</sup> Outside of contract-mandated mediation, the most popular reasons, in both the 1997 and 2011 surveys, were ‘saves time’ and ‘saves money’.<sup>77</sup> The reasons fell into the category entitled ‘General Efficiency and Process Control’. Stipanowich and Lamare grouped reasons into various categories for discussion purposes. Other categories that included common responses were “Control Over Results” and “Preserving Relationships”.<sup>78</sup>

There is some difficulty in analyzing the percentage of responses for each reason type, as the 2011 survey did not differentiate between arbitration and mediation. Given the fundamentally different nature of these dispute resolution methods, the grouping of the two is somewhat confusing. However, the 2011 survey results do show that mediation is the more popular method of dispute resolution.<sup>79</sup> As such, it may be possible to hesitantly consider that the 2011 results are weighted towards mediation. The 1997 survey, however, did differentiate between the two types. The most popular reasons for using mediation

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<sup>71</sup> At 3.

<sup>72</sup> Morris and Shaw, above n 12, at 251.

<sup>73</sup> Stipanowich and Lamare, above n 71, at 9.

<sup>74</sup> At 9.

<sup>75</sup> At 24.

<sup>76</sup> At 37.

<sup>77</sup> At 37.

<sup>78</sup> At 37.

<sup>79</sup> At 37.

instead of litigation in the 1997 survey were: a) saves time (80.1%); b) saves money (89.2%); c) allows the parties to resolve disputes themselves (82.9%); d) provides a more satisfactory process (81.1%); e) gives more satisfactory settlements (67.1%); and f) preserves relationships (58.7%).<sup>80</sup>

There were drops in every one of these percentages in the 2011 study, some more significant than others.<sup>81</sup> Settlement satisfaction went from 67.1% to 26.0%. Relationship preservation went from 58.7% to 43.5%. Even factoring in that the 2011 percentages incorporated arbitration (which scored lower on most reasons than mediation in the 1997 study), the drops are still reasonably severe. There are various possible explanations for these drops, including reduced expectations or changes in performance. This type of trend identification could be immensely valuable in a New Zealand context, if accompanied by data and analysis which linked the changes in reasons to corresponding changes in outcome types or quality, and/or changes in elements of the mediation process. Such a study could enable the targeting of resources towards mediation outcomes that most reflected user desires.

Additionally, the Fortune 1000 surveys are valuable in that they provide groupings of similar user desires that could be translated into 'dimensions' of success. Grouping individual measures into dimensions based on statistically verifiable similarity could enable a simpler measurement of success outcomes. Instead of needing to measure success in relation to both time and cost, researchers could measure efficiency. Again, this data is only relevant in an exploratory sense, given the limitations associated with translating overseas research to a New Zealand context.

## *B Research Methods and Data Collection in Mediation Outcome Studies*

### *1 Poitras and Tareau: Quantifying the Quality of Mediation Agreements*

Jean Poitras and Aurelia La Tareau produced a paper that attempted to quantify the quality of mediation agreements in the context of workplace mediation.<sup>82</sup> Beginning from the premise that "the success of a mediation program cannot be limited to its agreement rate" the authors sought to develop a method that provided a more comprehensive assessment of quality.<sup>83</sup> Poitras and Tareau proposed that an effective measurement of success needs to

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<sup>80</sup> At 37.

<sup>81</sup> At 37.

<sup>82</sup> Jean Poitras and Aurelia Le Tareau "Quantifying the Quality of Mediation Agreements" (2009) 2 363.

<sup>83</sup> At 363.

"step outside" the simplistic formulation of agreement versus no agreement.<sup>84</sup> Poitras and Tureau's thesis was that the quality of mediation agreements should be assessed according to a multidimensional framework.<sup>85</sup> This framework needed to account for the weight of various dimensions on the assessed quality of the agreement. The authors reviewed previous studies which had attempted to create models for evaluating the outcomes of mediation programs.<sup>86</sup> The authors then consolidated the different dimensions suggested by the prior studies to propose a five-scale evaluation model to measure qualitative success. The scales proposed were: a) mediator's usefulness; b) procedural justice; c) satisfaction with the agreement; d) confidence in the agreement; and e) reconciliation between the parties.<sup>87</sup> Poitras and Tureau's argued that the quality of an agreement is dependent (to varying extents) on the score of the agreement on each scale.

To measure this thesis, the authors grouped agreements into various types and then attempted to determine relationships between scores on each scale (and in each dimension) and the final type of agreement reached. Instead of grouping agreements solely into those that settled and those that did not settle, the authors grouped agreements into 'no agreement', 'disappointing agreement', 'satisfactory agreement' and 'value-added agreement'.<sup>88</sup>

The authors' used a questionnaire developed by Tareau to measure the five scales: The Mediation Outcome Standard Evaluation Questionnaire ("MOSEQ").<sup>89</sup> The questionnaire involves the use of 3 statements for each scale (15 questions in all) each of which uses a likert-type scale to assess each participant agreement for each statement. Scores on the scale ranged from 1 (no agreement with statement) to 6 (strong agreement with statement). The questionnaires were given to consenting users at the end of mediations. Poitras and Tureau then used a cluster analysis to determine the relationship of the score on each scale to the type of agreement reached.<sup>90</sup>

The user-focused method of data collection and the multidimensional method of quality evaluation would be valuable and relevant tools for measuring the success of commercial mediation in New Zealand, if adapted to a commercial setting.

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<sup>84</sup> At 364.

<sup>85</sup> At 365.

<sup>86</sup> At 365.

<sup>87</sup> At 368.

<sup>88</sup> At 373.

<sup>89</sup> At 371.

<sup>90</sup> At 372.

## 2 *Klerman and Klerman: Inside the Caucus: An Empirical Analysis of Mediation from Within*

An empirical study by Klerman and Klerman sought to evaluate the success of mediation using a quantitative method.<sup>91</sup> The authors used the notes of a single mediator, spanning 400 mediations, as the data set for a multi regression analysis. The authors used this analysis to establish the strength of the relationship between independent variables (such as gender and dispute value) and a dependent variable (settlement rate).<sup>92</sup> The conclusions reached by the authors are of little relevance to this paper, as the authors focused primarily on determinants of settlement as opposed to agreement quality. In addition, the results are severely limited by the single source of data.

However, the value of the study lies in its relatively novel approach to data collection, in the context of mediation research. In the context of this paper, a single case study of a full-time commercial mediator could be a helpful addition to the body of research and an effective longitudinal control for other empirical studies. The New Zealand commercial mediation environment suffers from a lack of easily accessible data but contains a small number of full-time commercial mediators. It may be easier to collect large amounts of measurable data from one or two busy mediators who are willing to collaborate with researchers, than to attempt to collect data from many under-utilised mediators or sporadic users. The mediator(s) could focus on collecting the same data each time, which would provide a robust level of consistency. If the types of data to be collected were specific and well-defined, the results could (at the least) provide a more targeted direction for subsequent studies with greater statistical validity.

## 3 *Adrian and Mykland: Creativity in Court-Connected Mediation: Myth or Reality?*

Another robust quantitative analysis of mediation outcomes was conducted by Adrian and Mykland, who examined creativity in court-connected mediation.<sup>93</sup> Instead of using data collected from users (as per Poitras and Tureau), or mediators (as per Klerman), the authors analysed the content of settlement agreements. They coded the agreements according to whether the final settlement included elements addressing the disputants' demands only,

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<sup>91</sup> Daniel Klerman and Lisa Klerman "Inside the Caucus: An Empirical Analysis of Mediation from Within" (2015) 12 686 at 687.

<sup>92</sup> At 692.

<sup>93</sup> Lin Adrian and Solfrid Mykland "Creativity in Court-Connected Mediation: Myth or Reality?" (2014) 30 Negotiation Journal 421 at 422.

or elements beyond the disputants' demands ('value-added settlements').<sup>94</sup> The greater the number of novel elements included in the settlement agreement, the higher the assessed level of creativity.

The study has serious limitations, as acknowledged by the authors. The sample size was small, and the authors were unable to control for third-variable effects.<sup>95</sup> Direct relationships between two independent variables (length and type of mediation) and one dependent variable (creativity) were established, but without further statistical controls, no firm conclusions could be reached as to the reasons for those relationships.<sup>96</sup>

Nevertheless, the study by Adrian and Mykland offers another empirical method for examining success – content analysis. Instead of relying on self-reported data from either users or mediators, Adrian and Mykland used data produced by the mediation process itself. This could, with the right controls, provide a level of objective accuracy not obtainable through methods which utilise surveys or questionnaires. It would be difficult to translate this method directly to a New Zealand context given that a) there is no database of recorded settlement agreements for commercial mediation and b) mediation outcomes and agreements are protected by strict confidentiality. However, the principle could be adapted. An effective and robust research method for measuring outcomes based on content analysis could be developed and presented as part of a proposal to both the judiciary and to New Zealand's alternative dispute resolution industry bodies. These stakeholders could offer mediation disputants the opportunity to submit their final agreements for anonymous and confidential study. The backing of industry bodies and the judiciary could provide sufficient comfort to disputants that confidentiality would not be breached by the researcher.

## *VI A New Measurement of Success*

Based on the data and methods discussed above, this paper proposes (as a hypothesis) that a methodology for measuring success in commercial mediation should involve the analysis of three distinct sets of variables: 1) elements of mediation; 2) individual facets of mediation success; and 3) an overall measure of mediation success. This section will briefly define each set of variables before introducing a rationale for the proposed approach.

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<sup>94</sup> At 427.

<sup>95</sup> At 435.

<sup>96</sup> At 435.

### *A Elements of Mediation*

Elements of mediation, in the context of the above hypothesis, would act as independent variables in the success measurement methodology. They are the factors which can influence the degree to which the mediation ‘succeeds’ in each individual facet. Elements could include the style of mediation used, the age and experience of the mediator, the timing of the mediation, the value of the amount in dispute and the complexity of the dispute.

### *B Individual Facets of Success*

Instead of focusing solely on one overall measurement of success for any given commercial mediation, this paper proposes that a methodology for measuring success should first measure individual facets of success. This argument draws on a range of the above studies, including: a) Stipanowich and Lamere’s categorization and groupings of user motivation b) the MOSEQ questionnaire and dimensions developed used by Poitras and Tureau for their quantitative analysis of quality in mediation outcomes; c) the data and analysis provided by Morris in the NZCMS and d) the two-part study conducted by Agapiou and Clarke.<sup>97</sup>

The reason for developing a multifaceted concept for measurement is that it provides a more comprehensive overview of success. It (a) recognizes that a high likelihood of settlement, while important, may not always be the sole desire of a party engaged in mediation;<sup>98</sup> and (b) could help to determine whether commercial mediations are consistently meeting desires other than mere settlement.

To create a multi-faceted definition of success, different facets of success first need to be identified. There are multiple sources from which possible facets can be drawn: theory, empirical research and anecdote. This paper has already identified several important theoretical and empirical benefits of commercial mediation to users and several common reasons for using commercial mediation, which could be suitable as individual facets of

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<sup>97</sup> Other influences not discussed specifically in this paper: E. Patrick McDermott and Ruth Obar “What’s Going On in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit” (2004) 9 Harvard Negotiation Law Review at 75”; and William Ross “Measuring Success in Mediation” (2000) 1 The Mediation Journal 1.

<sup>98</sup> Poitras and Tureau, above n 83, at 364.

success. Consistent with the arguments made earlier in this paper, the multiple individual facets of success should be user-driven, first and foremost.

### *C An Overall Measurement of Success*

This paper proposes that a methodology for measuring success should still culminate in an overall success score. While it is important to measure individual facets of success, it is also important to understand the relative weighting of those individual facets in relation to an overall concept of success. Success in one area may be significantly more important to users in general, or to specific types of users, than success in another area. It is important to understand the relationship between those types of success, and the motivations and goals of the different users of commercial mediation.

### *D Mechanism of Analysis*

This paper suggests, as a hypothesis, that a methodology for measuring success should first focus on establishing a statistical relationship between the various elements of mediation and the individual facets of mediation success. The goal should be to determine both the direction and strength of those statistical relationships. If sufficient data is collected and appropriate research methods are utilised, it may be possible to establish the extent to which the presence or value of any given element of mediation affects each individual facet of success, and whether that effect is positive or negative.

The second relationship that should be established is between each individual facet of success and the overall success score. The methodology for measuring success should be able to determine the relative weighting of the different individual facets of success to the overall success of the mediation. Some individual facets of success may be much more influential on the overall measurement of success than others.

The final relationship that should be established is between the overall measurement of success and the profile of the user. Users of commercial mediation will have different goals, different qualities and different motivations. 'Success', as a concept, may depend to some extent on these variations.

Ultimately, it should be possible for a potential user of commercial mediation to identify which elements of mediation are most likely to produce the desired results for each individual facet of success, and which individual facets of success are most likely to produce overall success. There may well be trade-offs between individual facets of success – achieving one type of success (for example, agreement quality) may necessitate foregoing



another type of success (for example, cost and time). However, if agreement quality is more important to overall success than cost and time for a particular type of user, this trade-off is a logical one to make.

The goal is to develop a method of measuring success that can establish significant and (to the extent possible) predictable relationships between these three sets of variables. The measurement of success should provide evidence to users that commercial mediation is, in the right circumstances, a valuable and effective tool for resolving their dispute. It should provide evidence to stakeholders that commercial mediation is worth promoting and supporting. And it should provide mediators and users with a set of tools for improving and tailoring commercial mediation to ensure that that mediation is used as effectively as possible. This final point draws particularly on the analysis of Stacie Strong's empirical assessment of International Commercial Mediation.<sup>99</sup> Strong analysed international commercial mediation, as opposed to private commercial mediation at a national level. However, Strong's analysis of data concerning user motivation produced similar results to the empirical studies reviewed above: cost and time savings were the most important motivators. Strong's suggestion for the most effective way to increase mediation use, based on the data, was to focus on improving the process of mediation to obtain better results for cost and time in future mediations.<sup>100</sup>

### *VII Methodology and Methods: Next Steps in Commercial Mediation Success Measurement in a New Zealand Context*

This paper has described the need for a more comprehensive, tailored measurement of success in commercial mediation. This measurement needs to emphasise the benefits of mediation that are a) most important to users and b) most convincing to mediation stakeholders.

As stated earlier, the aim of this paper is build a case for the development of a new framework for thinking about and measuring success. The scope of this paper is not extensive enough to allow for the construction of that framework. As such, this section will only offer some brief suggestions as to the next steps that could be taken in this area.

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<sup>99</sup> S.I. Strong "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 Wash. & Lee L. Rev at 2016.

<sup>100</sup> At 2023.

### *A Synthesise Individual Facets of Success*

Drawing on the empirical studies of commercial mediation discussed above, and to a lesser extent on the empirical studies of mediation outcomes generally, some consistent themes of user desire and success conceptualisation need to be identified. These themes could form the basis of the individual facets of success in the proposed methodology for measuring success. Future research would need to first verify the validity of these facets among a user base, before attempting to measure their relationship with mediation elements.

Based on the theory and research discussed so far in this paper, possible facets of success could include efficiency (as a measure of time and cost), agreement quality and creativity, relationship preservation and/or maintenance, outcome satisfaction, process satisfaction and perceived control.

Future research should first focus on creating a set of individual success facets that strike a balance between ease of measurability, accurate reflection of user motivations and sources of user satisfaction.

### *B Develop a Range of Data Collection and Research Methods to Validate and Measure Individual Facets of Success*

This section will conclude with some recommendations for future data collection and research methods in the field of commercial mediation success measurement.

#### *1 Utilize both qualitative and quantitative methods*

Qualitative methods: a) can be conducted with less resource; b) can be conducted with smaller sample sizes; c) can effectively draw on the researcher's experience and knowledge; and d) allow for in-depth analysis of factors which may not suit discrete measurement (such as a subjective analysis of creativity or user engagement). However, results may be less verifiable and more susceptible to bias or error on behalf of the researcher. Qualitative processes generally require either the presence of the researcher during the mediation, or researcher access to the groups in question. Qualitative studies would be best suited to deeper analysis of quantitative data, or for measuring more subjective factors such as relationship preservation or overall quality of the mediation process.

Quantitative methods gather data and use statistical analysis to determine changes in or relationships between that data (as per Agapiou and Clarke and Poitras and Tureau). In relation to commercial mediation, quantitative methods could involve: a) conducting surveys; b) observing mediations to identify and track discrete data; and c) utilising exit-questionnaires. Quantitative studies could first aim to create a measurable concept of success (such as efficiency) and then determine the extent to which those measurable concepts of success are affected by changes in the elements of mediation. Quantitative methods would be best suited to measuring objective, discrete data, such as time and cost.

## *2 Encourage court-connected mediation pilot programs*

Responding to judicial concerns about the appropriateness of mediation as a civil dispute resolution mechanism should be a key aim of the research. An increase in court-endorsed mediation, even if voluntary, could significantly grow the use of commercial mediation. Further, court-endorsed mediation could provide a valuable and accessible data set and a degree of user access not currently available to researchers.

## *3 Utilize similar methods and questions across groups and studies*

Considering the difficulties associated with data collection and user access, each study in this field should maximise its contribution to the overall body of research by targeting the same types of data and analysis. This could help to overcome issues associated with small sample sizes and longitudinal validity.

## *4 Utilise short, focused surveys*

‘Survey fatigue’ is a noted phenomenon that can affect the efficacy of repeated studies.<sup>101</sup> Empirical research in the field of commercial mediation is best aimed at repeat users.<sup>102</sup> This, combined with the need for longitudinal studies, increases the risk of survey fatigue. Surveys, questionnaires and quantitative data collection methods should be kept as simple and focused as possible.

## *5 Adapt existing research*

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<sup>101</sup> Stipanowich and Lamere, above n 70, at 24.

<sup>102</sup> Morris and Shaw, above n 12, at 257. Morris and Shaw identify a number of characteristics about repeat attendees that make them better suited as research participants than one-time users.

Where possible, existing research in the areas of commercial mediation and outcome measurement should be used as platform for future research in New Zealand. Data in this field is scarce and the use of existing studies may enable a more efficient use of limited resources for research. This recommendation remains subject to the limitations described above.

### *6 Target specific groups*

As with the NZCMS Part Three, future studies should (where possible) target specific groups and use meta analyses to identify wider trends. Groups with similar characteristics will provide data that is more suited to quantitative analysis. Too much variation in data can lead to poor results if sample sizes are small, and the opportunities for data collection are too limited to waste.

## *VIII Conclusion*

A combination of factors means the commercial mediation environment is well-placed for further academic study. There has been ad-hoc growth over the last two decades, but without any structure. There is an emerging body of empirical data, but this is currently limited to the work of only a few individuals. Commercial mediation offers potential value to both the private and public sectors that has not been fully realised. Arguably, the missing link is a coordinated direction forward. There needs to be a transition from impromptu growth to growth-by-design. A methodology for measuring success which is derived from a solid foundation of evidence and theory would help to establish mediation's validity as a method of commercial dispute resolution. This validity is necessary pre-cursor to obtaining the kind of private and public support required to systematically grow commercial mediation. The empirical research conducted to date provides valuable insight, but further (and more specific) data collection methods need to be developed and adopted to supplement and support this research.

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