Mediation and Facilitation of Collective Employment Disputes in New Zealand from a historical and comparative perspective

A thesis submitted to the Auckland University of Technology in fulfilment of the requirements for the degree of Master of Philosophy

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Abstract

In Aotearoa (New Zealand) the State has provided employment dispute processes since 1894. The aim of this thesis was to build empirical and theoretical insights into the current dispute resolution processes, with a specific emphasis on facilitation, a process introduced in 2004 to assist parties experiencing difficulties in collective bargaining. It commences by reviewing the history of employment dispute resolution in New Zealand starting with the Industrial Conciliation and Arbitration Act 1894 before investigating the current processes provided for in the Employment Relations Act 2000, namely mediation and facilitation. To do this a literature review is undertaken. A review of all applications made for facilitation assistance, from October 2004 until 30th December 2017, was conducted, together with surveys and interviews with, the Minister of labour who introduced facilitation, and participants and providers of the processes. The survey also explores crucial attributes of effective facilitators and mediators and compares those findings to research undertaken in 1986.

The contribution mediators and facilitators made to collective bargaining was explored [and the different styles and processes discussed]. Regardless of whether the collective was settled, both mediators and facilitators provide a process to; reduce areas in dispute, assist parties to focus on the issues and encourage communication. The legislation sitting behind these processes creates differences how they do this, the timing of interventions, confidentiality provisions and power to determine outcomes being different between the mediation and facilitation processes.

Facilitation has emerged as a uniquely New Zealand process reserved for parties experiencing serious difficulties in collective bargaining. It is a more flexible process than mediation but is not widely used or understood. Propositions have emerged that facilitation is used; by Unions with less industrial muscle, employers concerned about the effect of industrial action on their business and as a mechanism to escalate a dispute. However, the contribution that facilitation has made to the objective in the Employment Relations Act 2000 to support collective bargaining and build constructive employment relationships is questionable.

A thematic analysis added, to previous research findings, two new facilitation models; final offer arbitration and a joint problem-solving model. While differences were found between the facilitation processes provided by Members of the Employment Relations Authority and

educative facilitation literature, one Employment Relations Authority Member's process demonstrated similarities to educative facilitation and early assistance mediation literature.

However, the flexibility given to an Authority Member to provide an unfettered process was found to create issues for parties. This research determined that while judicial intervention is required on occasions a process reliant on the provider's decisions about which model of dispute resolution to use may not be appropriate.

This thesis is timely [and important] because the new Labour Led Government is considering changes to collective bargaining frameworks. The empirical data provided about facilitation; the users of the process and how and when it is delivered provides valuable insights for policy development into the future of dispute resolution. Internationally, there is a move towards facilitated bargaining early in a dispute. Should New Zealand be following this trend by implementing state provision of [opportunities for] early intervention, to support good faith, address power imbalances and promote collective bargaining [or continue to require the escalation of disputes before facilitation assistance is provided]?

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Attestation of Authorship

I hereby declare that this submission is my own work and that to the best of my knowledge and believe, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for an award of any other degree or diploma of a university or other institution of higher learning.

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Judith Scott

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Ethics Approval

Ethics approval was granted by AUT Ethics Committee on 25th August 2014.

The ethics approval number for this work is 14/232.

Glossary of New Zealand Employment Terms

Not all these terms are used in this thesis. The glossary is intended to assist the reader to obtain an overview of current collective bargaining provisions in New Zealand.

Alternative Dispute Resolution ("ADR") is a means of settling disputes outside of a courtroom. It typically includes early neutral evaluation, negotiation, mediation, conferencing, conciliation, and/or arbitration.

Award is a document either negotiated, or the result of arbitration, between union(s) and employer(s) that includes terms and conditions of employment for the union members covered. The term has been replaced by 'collective agreement' in New Zealand employment legislation.

Bargaining (for a collective agreement) may be initiated by either union(s) or employer(s) 60 days prior to a collective expiring or at any time if there is no applicable collective in place. The Union requires at least two members to initiate bargaining and, if the collective is a greenfield agreement, they must undertake a ballot of the members the collective is intending to cover. If either the Union or the Employer party is seeking to amalgamate more than one collective, they may commence bargaining 120 days before the expiry date of the last applicable collective. Employers may opt out of bargaining provided they follow the requirements in the Employment Relations Act 2000 s44(B). There is not requirement to conclude bargaining. A party may apply to the Employment Relations Authority for a determination that bargaining has concluded because of difficulties in concluding bargaining.

Collective Agreement is a document agreed between union(s) and employer(s) that includes terms and conditions of employment for the union members covered. Agreements maybe between; a single employer and union, (SECA) multi employers and a single union, Multi-Employer Collective Agreements (MECA), between one employer and multi unions, (MUCA), or multi employers and multi unions. There must be at least 2 union members covered by the agreement.

Contract for service is an employment agreement, formed by either an individual agreement or a collective agreement.

Contract of service refers to self-employed contractors engaged to perform services as an independent contractor. In the event of a dispute over the contract status the Employment Relations Authority and/or the Employment Court determine the status of the relationship (i.e. contract 'of', or 'for' service).

Department of Labour was the state organisation responsible for employment matters from 1891 until its demise in 2012 when it was incorporated into the Ministry of Business Innovation and Employment

Dispute of Interests A dispute between an employee and their employer that arises from conflicting interests over the negotiation of a collective employment agreement.

Dispute of rights is a dispute over legal rights. Examples are a dispute over the interpretation of a collective agreement, a personal grievance or disadvantage claim

Employee The definition of 'employee' in New Zealand legislation is very broad and includes "any person of any age employed by an employer to do any work for hire or reward under a contract of service" (ERA 2000 s.5). It excludes volunteers, people involved in film production, unless it is agreed they are an employee and contracts for service. Employees are entitled to all the minimum rights under New Zealand employment laws (e.g. the Employment Relations Act 2000, Minimum Wage Act 1983 and the Holidays Act 2003), They also have the right to take a personal grievance.

Employment relationship problem includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

Facilitation is a term used in the Employment Relations Act 2000 to describe a process whereby the Employment Relations Authority provides assistance to parties experiencing difficulties in collective bargaining negotiations.

Good faith is an honest intention to act without taking an unfair advantage over another person. It incorporates mutual obligations of trust and confidence; being active and constructive as well as being responsive and communicative with the intent to establish and maintain a positive relationship; not doing anything, either directly or indirectly, with the intention to mislead or deceive. Under the Employment Relations Act 2000, good faith includes the requirement to provide information within a party's possession relevant to the matters in issue and giving an opportunity to comment; provided that information may not be disclosed for good reason such as statutory requirements, the privacy of natural persons or protection of a party's commercial position (Government Centre of dispute Resolution, 2018)

Government Centre of Dispute Resolution was established in 2015 as the lead advisor to the New Zealand government on dispute resolution.

Greenfield bargaining is bargaining for a collective agreement to cover union members that have previously not been covered by a collective agreement.

Individual employment agreement means an employment agreement entered into by 1 employer and 1 employee who is not bound by a collective agreement that binds the employer.

International Labour Organisation (ILO) is a United Nations agency dealing with labour problems, particularly international labour standards, social protection, and work opportunities.

Interest based bargaining is a form of bargaining that takes account of the parties underlying needs or interests.

Leading Edge Alternative Dispute Resolvers, (LEADR) is now called Resolution Institute. It is community of mediators, arbitrators, adjudicators, restorative justice practitioners and other

DR professionals, that amongst other roles, provides training for mediators using the Leadr model of mediation.

Lockout is an act of an employer closing their business or suspending workers with the objective of compelling employees, to accept the terms of a collective employment agreement,

Mediation is where an independent person called a mediator helps an employee and an employer resolve an employment relationship problem in a semi-formal and confidential environment.

Ministry of Business, Innovation and Employment (MBIE) was established in 2012. It brought together the Ministry of Economic Development, Ministry of Science and Development, Department of Building and Housing and Department of Labour. Their purpose is to grow the New Zealand economy to provide a better standard of living for New Zealanders. MBIE is the employing agency for employment mediators and provides administration services to the Employment Relations Authority.

Personal grievance is a type of complaint that an employee may bring against a current or former employer.

Rights based bargaining A form of bargaining in which solutions are sought on the basis of rules or principles without regard to the other parties needs or interests.

Strikes are provided for in New Zealand employment legislation. They may be a group of employees reducing their normal performance or discontinuing their employment either wholly or partly in pursuit of a collective agreement. Unions must hold a secret ballot prior to taking strike action, Strike are also permitted over health and safety matters. In these cases, secret ballots are not required.

Chapter 1: Conflict in the Workplace

Collective Bargaining Dispute Resolution

Conflict is said to be endemic to organisational life (Estlund, 2014), and in the workplace, it is structurally ingrained with the interests of capital (employers) being to extract as much work from employees for as little cost as possible, while labour (workers) seek to gain the maximum compensation for the minimum work (Godard, 2014). When conflicts are not resolved, they can linger on and create difficulties in workplaces, such as increased absenteeism, higher turnover rates, resentment, low productivity, and various forms of industrial and/or legal action (Estlund, 2014). There is both a public and a private good in seeking to reduce or quickly resolve disputes affecting employment relationships. The State can intervene to mediate the imbalance in power between employers and employees by ensuring that employees have the right to organise collectively and can provide institutions to resolve employment relationship problems (McAndrew, 2010).

Governments in New Zealand and in other countries have accepted the importance and economic impact of good employment relationships by providing State-funded support for the speedy resolution of employment disputes (International Labour Organization [ILO], 2011). The ILO, convention 154, supports Government intervention in the resolution of labour disputes as a means of supporting collective bargaining. This support is also included as one of the objectives of the New Zealand Employment Relations Act 2000 (s 3(a)(iii)). The desire for flexible and speedier approaches to collective dispute resolution has contributed to a growing interest in employment dispute resolution systems and structures (Lipsky, Seeber, & Fincher, 2003), but despite this growing interest in measures to prevent conflict in workplaces, very little empirical research has been done on the subject (Roche, Teague, & Colvin 2014). There is a therefore a need for practitioners and academics to consolidate and work together to progress the theory and practice of mediation (Hutchenson, 2008).

The current study emerged from my professional interest, as a mediator, in employment conflict resolution systems. The study focuses on dispute resolution mechanisms for collective bargaining disputes in New Zealand. I have been working with employment disputes for over

30 years. My involvement stems from the late 1970s, when I became interested in union politics and pursued my interest by becoming a delegate for the union and then applying for and obtaining employment with the State Services Commission (SSC). At that time, the SSC was the employing body for all public servants. Several years as an employer's advocate led to my subsequent employment as a human resources manager, and in the early 1990s, to a position on the Employment Tribunal. When the then Minister of Labour, the Honourable Margaret Wilson, introduced an Act to provide for a new institutional framework in 2000, I was appointed as a mediator under the Employment Relations Act 2000. My focus became the profession of mediation and its use as a tool to resolve employment disputes. My interest coincided with the wider development of mediation as an alternative dispute resolution mechanism, and the establishment of professional bodies for mediators. I am now a self-employed mediator, having completed my career as a public servant as Chief Mediator for the Ministry of Business, Innovation and Employment (MBIE). The resolution of collective bargaining disputes and alternative methods for resolving them remains an area of special interest for me.

The election of the Labour Government in the year 2000 resulted in a conceptual shift from employment legislation based on "contractual" relationships that had been in place since 1991, under a coalition National-led Government, to employment legislation based on the concept of "relationships" and "good faith" (Rasmussen and Greenwood, 2014). Mediation was promoted as the primary problem-solving mechanism, rather than as a step in the litigation process, and New Zealand was considered a world leader in employment dispute resolution (Gibbons, 2007). Today, the mediation process is defined on the MBIE's website as "an independent person called a mediator who helps resolve an employment relationship problem in a semi-formal and confidential environment" (MBIE, 2018 para 1.). The typical employment mediator is said to be "not very young, have a tertiary education, pursue the practice of mediation as a second or third career and work for the Government mediation service" (Risak & McAndrew, 2010 p.7). Further definitions of mediation and the mediator's role are discussed in chapter 3.

Research Questions

The primary aim of this study is to gain a deeper understanding of collective bargaining dispute resolution processes provided by the MBIE employment mediation service and the Employment Relations Authority (Authority). The key research question focuses on the differences and similarities between the processes provided and how they relate in practice. To answer this question, a further eight sub-questions have been proposed:

- What do applicants and respondents to these processes expect from the mediator and Authority member?
- Have these expectations changed since the 1980s?
- Have legislative amendments since the 1980s influenced the processes and practices of mediation?
- Do the mediation and facilitation mechanisms in sections 50 and 148 of the Employment Relations Act 2000 meet the objectives of the Labour Coalition Government?
- Do parties involved in collective bargaining today have an understanding of the support available when their bargaining breaks down, and assistance that might be provided?
- What contributions do mediators make to collective bargaining?
- Is the contribution made by mediators different from contributions made by facilitators?

The goal in answering these questions is to discover new insights about the resolution of collective bargaining disputes, thereby extending literature on theory, policy and practice. A related goal is to identify new questions for future research.

The idea for my research initially surfaced from an awareness that in recent years, the knowledge about collective bargaining shared between participants in the system has reduced. In addition, the environment has been changing, new systems unique to New Zealand have been implemented and there has been very little academic research into the new processes and procedures. I also wanted to understand if there were lessons practitioners could learn from

the past to contribute to modern theory, practice and process, and if those lessons were specific to current collective bargaining in New Zealand.

During the 1970s and 1980s, empirical research on employment mediation in New Zealand focused on collective bargaining (Howells, 1974; Howells & Cathro, 1986). In recent times, the focus has moved away from collectivism and has emphasised individualism, which has led to research focused on individual disputes (Greenwood, 2016; McAndrew, 2002; McAndrew & Risak, 2013; Morris, 2015; Walker, 2009) or on the institutional framework (McAndrew, 2010, 2014; Rasmussen, 2009, 2010). Research about mediation as a mechanism for resolving collective disputes has been limited to a handful of researchers (Foster, Rasmussen, Laird, & Murrie, 2011; McAndrew, & Risak, 2012; McAndrew, Edgar, & Geare, 2013; Rasmussen, 2009).

While the number of employees who are covered by collective bargaining has reduced in recent years (Blumenfield, Ryall, & Kiely, 2014), the effects collective bargaining outcomes have had on workplaces continue to remain high. An employer and a union may agree that a term or condition of employment of an employee, who is not bound by a collective agreement, is the same as a term or condition in the collective agreement covering the workplace (Employment Relations Act, s 59(B)(i)). This action, commonly referred to as "passing on", forms part of the collective bargaining discussions and sets the terms and conditions for all workers employed in the area covered by the collective.

Mediation and facilitation of collective bargaining disputes are the prime focus of my research, but because of the way in which third-party intervention in employment disputes in New Zealand has evolved since government first provided support for collective bargaining in 1894, it would be inadequate to consider collective bargaining in isolation from the other employment dispute resolution institutions. The Employment Court and the Authority both play important roles that interconnect with the role mediation services play. There is a close interrelationship between mediators and members of other employment institutions.

The Collective Bargaining Framework in New Zealand

New Zealand has had State-funded employment dispute resolution in place since the Honourable William Pember Reeves, Minister of Labour in the Liberal Government, introduced new employment legislation in 1894. The intent behind the 1894 legislation was to resolve industrial relations disputes in a better way than the strike culture that existed at the time, thereby reducing the power the unions held to some extent. The change was made in the interests of the nation. It was regarded as a kindly solution to the natural warfare that occurred between employers and unions (Martin 1996; Spiller, 1999). The legislation, dubbed the Industrial Conciliation and Arbitration Act 1894, was the first legislation in New Zealand to introduce a national compulsory arbitration system for the resolution of employment disputes. While it may not have been successful in eliminating strikes, it established the foundation of the country's industrial relations system. That system developed into compulsory arbitration and a central pay-fixing system that, except for the depression years of the 1930s, lasted until 1984, when the third Labour Government passed the Industrial Relations Amendment Act 1984 (Wilson, 2010). In 1987, they subsequently introduced the Labour Relations Act 1987, which swept away the existing industrial relations structure by establishing a new legislative framework that allowed unions and employers to operate independently of Government intervention.

The development of employment dispute resolution has always taken place in an environment of economic and social change. During the 1980s, New Zealand, under a Labour-led Government, went through a process of radical change. This change, led by the then Minister of Finance, the Honourable [Roger] Douglas and known as "Rogernomics", removed protection from industries and reduced union rights in the pursuit of a free market. Together with the anti-union legislation of the 1990s, the Employment Contracts Act 1991, which was introduced by the incoming National-led Government, Rogernomics changed relationships in the workplace and the nature of employment disputes.

Globalisation and technology have also contributed to the changing face of New Zealand workplaces. The traditional blue-collar, unionised workplace in the manufacturing sector has given way to service sector giants, and smaller enterprises, both with lower or no union coverage. Lawyers, rather than trade union officials, are now the main advocates for parties in

dispute. Personal grievances, such as claiming unfair dismissal based on individual rights, make up most mediation undertaken by the State-fostered employment mediation services (Rasmussen & Greenwood, 2014).

Far-reaching changes have heralded a move away from formal legalism and have set a precedent in the employment dispute resolution continuum for informal negotiation as the primary mechanism, followed by mediation, facilitation and finally, inquisitorial determination (Rasmussen & Greenwood, 2014). The Employment Relations Act 2000 provides for mediation (s145) and facilitation (s50) support for collective bargaining. The Act does not describe how those processes are to be delivered. The ERA 2000, section 143(d) recognises the services provided by mediators need to be flexible and that the facilitation process is determined by the Authority Member (ERA 2000 s50(1)(b). From the introduction of the ERA 2000, the Department of Labour, which merged into the Ministry of Business Innovation and Employment in 2012, has been responsible for providing support within the New Zealand employment jurisdiction. During that time, several different institutions and structures have been responsible for employment dispute resolution (McAndrew, 1995, 2010; Rasmussen et al., 2014; Rasmussen and Lamm, 2002).

The following provides a framework to assist the reader's understanding of the institutions involved in employment dispute resolution in New Zealand. The Employment Relations Act 2000 part 10 establishes the Institutions tasked with resolving employment relationship problems. The framework established is hierarchical, commencing with self-help education by way of internet and other similar resources, the provision of a telephone helpline, third party assistance by way of mediation services, investigation by a statutory body and review and appeal rights through a court system (Rasmussen et al., 2014). Mediation is the final part of the continuum where parties can meet to determine the outcome (Spiller, 1999). The Employment Relations Act 2000, section 144, provides for the Chief Executive to employ or to engage mediators. This task is managed by the MBIE resolution services branch. They employ or contract mediators to cover various areas of responsibility mandated by legislation. The resolution services arm is also responsible for administrative support to the Authority. The Employment Court, however, is part of the Ministry of Justice portfolio. If matters cannot be resolved in mediation, the New Zealand system makes provision for collective bargaining

facilitation, or, for other disputes, investigation and determination by the Authority. A party who wishes to challenge a determination of the Authority may do so by making an election to seek a full hearing of "the entire matter" by way of what is referred to as a "de novo hearing" at the Employment Court. Further appeal rights are provided in the Court of Appeal and Supreme Court (Employment Relations Act, 2000, s 187).

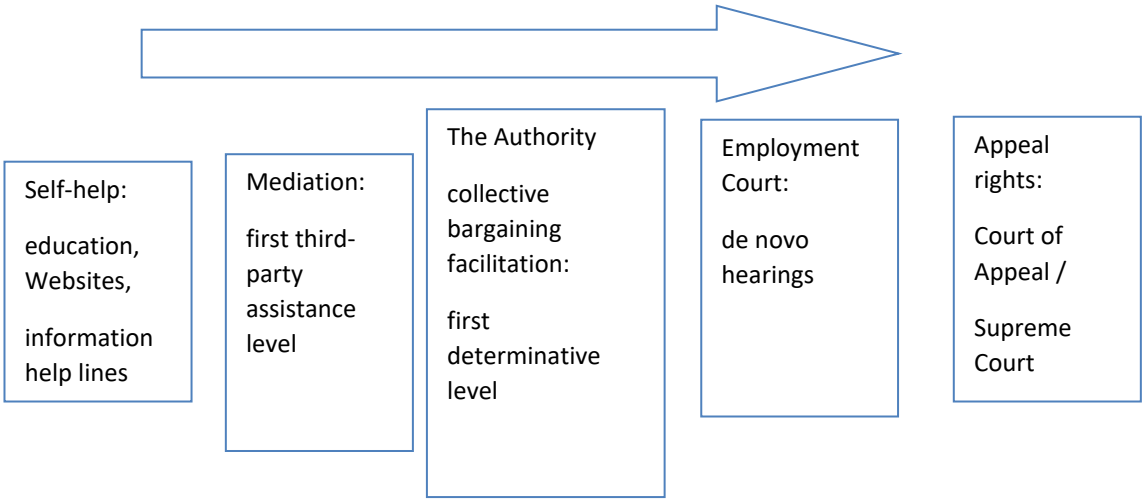

FIGURE 1. THE NEW ZEALAND EMPLOYMENT DISPUTE RESOLUTION CONTINUUM.

The objectives of the collective bargaining provisions in part 5, sections 31(a) and 31(b) of the Employment Relations Act 2000 are to promote a duty of good faith, and to explain, by way of a code, what good faith means, respectively. The third objective (s 31(d)) is to support orderly collective bargaining. Sections 32–39 outline the requirements of good faith, and sections 40–59 set out the processes required to initiate and conclude bargaining. The statutory support provided by the Authority when parties encounter difficulties in bargaining was introduced into the legislation in 2004 and is covered by sections 50A–50J. Other notable features of the collective bargaining provisions include the lack of an automatic provision for compulsory arbitration.

The Employment Facilitation Process

The Employment Relations Amendment Act (no 2) 2004, which came into force on December 1st, 2004, included a series of provisions dealing with the facilitation of bargaining (ss 50A–50J). The provisions were designed to ensure bargaining would continue by allowing facilitators to move the parties towards an agreement when difficulties were encountered. The Act emphasises mediation as the prime problem-solving remedy. It was intended that the facilitation process would only apply to a very small number of cases where the parties were clearly experiencing "serious difficulties" (Employment Relations Law reform Bill 2003) "Ordinary difficulties" encountered in bargaining, including strike or lockout action, would not be sufficient to trigger the facilitation process, but instead, there would need to be "serious and significant" difficulties (*PMP Print Limited and Anor v NZ Amalgamated Engineering Printing and Manufacturing Union Inc*, 2004, 1 ERNZ 749). The legislation established tight entry criteria, focusing on problems that were occurring within bargaining, or potential effects for the wider community.

The facilitation process is a two-stage process (Employment Relations Act 2000, s 50). Parties apply to the Authority for facilitation assistance, which if granted, provides access to actual facilitation by another Authority member. The criteria for granting facilitation are set out in the legislation, and applications for facilitation are argued by the applicant party on this basis.

The criteria are based on the way the bargaining between the parties has been conducted. Facilitation is offered only if:

- in the course of the **bargaining, a party has failed to comply** with the duty of good faith in section 4, the failure was **serious and sustained**; and has undermined the bargaining;
- or the **bargaining** has been unduly **protracted,** and extensive efforts (including mediation) have **failed to resolve** the difficulties that have **precluded** the parties from **entering into a collective agreement;**
- or in the **course of the bargaining** there has been one or more protracted or **acrimonious strikes or lockouts**;
- or in the course of bargaining, a party has **proposed a strike or lockout**; and if it were to occur, would be likely to **affect the public interest substantially**" (Employment Relations Act 2000, s 50C).

Applications made are based on legal argument (Figure 2). Therefore, determining the underlying **reasons why parties apply for facilitation** is difficult. The other, more significant change to the Act, intended to deal with **continued breaches of good faith**, is a provision under which the Authority can **fix the terms of the collective agreement** itself (Employment Relations Act, s 50G). This provision is only intended to **apply in extreme situations**. The power to fix an agreement can only be exercised where three conditions have been met:

- the **breach of good faith** is so **serious and sustained** that it has **undermined bargaining;**
- all other **reasonable alternatives** have been **exhausted**; and
- the "**fixing" of the provisions** of the collective agreement is the **only effective** remedy left (Employment Relations Act, s 50J(3)).

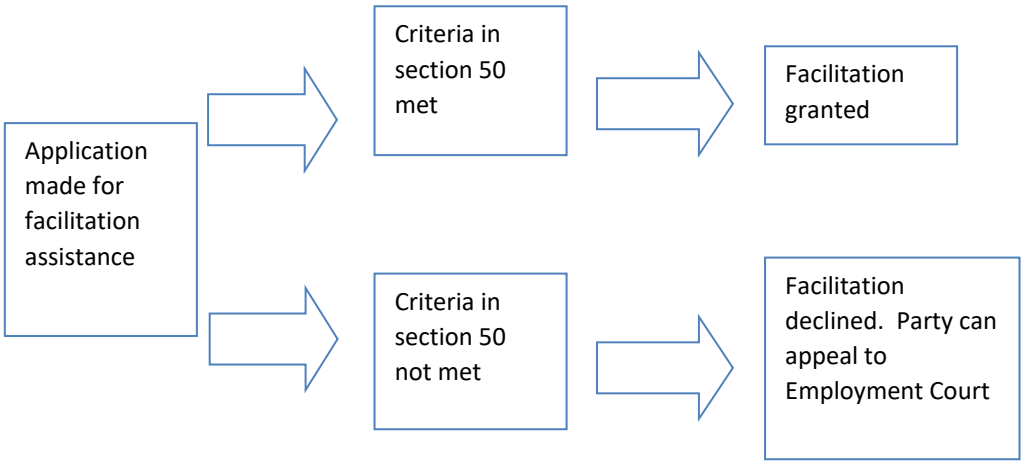

FIGURE 2. THE FACILITATION APPLICATION PROCESS IN NEW ZEALAND AS OF 2017.

This change represented a significant turnaround, because when the legislation was enacted in the year 2000, the Employment Relations Act 2000 specifically stated that the Authority was not permitted to act in the role of fixing terms and conditions of employment (s 161(2) of the original enactment). Except for special provisions applying to the Police and Defence Forces (McAndrew, 2014), until the introduction of the 2004 amendments, employment law in New Zealand legislation had not provided for compulsory fixing of terms and conditions of employment since the Industrial Relations Amendment Act 1984. The official rationale for introducing the "fixing" provision was to extend the range of remedies the Authority could utilise, thus creating another means for settling collective agreements (Office of the Minister of Labour, 2003a). It was a penalty and a remedy "for serious breaches", providing the Authority "with the power to apply a further penalty of fixing the terms and conditions of the collective agreement" (Office of the Minister of Labour 2003a p4)

The legislation does not provide a definition for facilitation, leaving the Authority member to determine the process they use (Employment Relations Act, s 50E). This decision is entirely the Authority member's and cannot be challenged. The only guidance given in the Act is that the facilitation process must be conducted in private, and that when facilitating, the

Authority is not to act as an investigative body (McAndrew, 2010). The wide scope afforded facilitation under the legislation is a significant issue at the heart of this research project threaded throughout the thesis.

Thesis Overview

This thesis begins with an explanation of historical perspectives that underpin dispute resolution policy and practice. In chapter two, the enabling legislation and development of dispute resolution processes in New Zealand are discussed. There is a gap in academic literature describing the New Zealand system of collective bargaining. Herein, I aim to contribute new empirical research for academic debate about the facilitation of collective bargaining in this country.

Chapter 3 reviews existing literature. Chapter 4 explains the methodology I used to conduct inquiries. My research findings are presented in chapters 5, 6, 7 and 8. Chapter 5 draws on literature introduced in chapter 3 and outlines the history of facilitation in New Zealand by reviewing the requests made to the Authority for facilitation. The way the Authority and the Employment Court have interpreted the provisions of section 50 of the Employment Relations Act 2000 is also discussed. The discussion reflects on why parties file for facilitation assistance and presents emerging findings from the review of cases.

Chapter 6 explores party perceptions of ideal personal attributes of mediators and facilitators for effective management of collective bargaining disputes. Here the research builds on a 1986 survey undertaken by Howells and Cathro (1986). The attributes Howells and Cathro (1986) identified are - confidence, self-esteem, trust, creativity, patience and persistence, self-control, dignity and respect, values, neutrality impartiality, belief in change, knowledge of subject matter, passion for the role and intellectual attributes. These attributes are debated in chapter 6.

Chapter 7 explains the New Zealand dispute resolution process; its uniqueness, the way it operates in practice, the legislative differences between facilitation and mediation, the role they have in collective bargaining and the tension between the aims of the Employment

Relations Act 2000, and the parties' and Government's expectations of the process. Chapters 8 and 9 explain and compare the different processes, models and strategies used by mediators and facilitators in collective bargaining. I answer the question of what factors can lead to resolution in facilitation when reaching an agreement is not achievable via mediation. Chapter 10 recaps to the original research questions and concludes by identifying the strengths and limitations of the current research. The final chapter also describes possibilities for future research.

My personal journey. At a personal level, the journey this research has taken me on has influenced my thinking about collective bargaining disputes. I have gained a wider understanding of different processes used for dispute resolution. Using the new tools, I have learned about during this long journey, has added to my personal and professional commitment to continuous improvement in the field. I have developed valuable new skills to enhance my contribution to real-time resolution of collective bargaining disputes.

At a national level, the New Zealand system is unique. The statutory framework that has evolved since the 1890s contains many items that are not a feature of other jurisdictions. Indeed, the political structure allows more rapid changes than might be present in other countries (Walker, 2009). A new Labour led coalition government has recently been elected, promising changes to collective bargaining making opportunities for further development of the collective bargaining support they implemented in 2000. My research conclusion is timely, it answers questions about the current system and provides further research questions that will assist in the development of new policies, practises and processes for collective bargaining processes.

Chapter 2: History of Employment Dispute Resolution in New Zealand

Provision for third party assistance in employment disputes was introduced into New Zealand Legislation in the 1890's. This chapter follows its development from that date to the present time. It does so by reviewing the major timelines, the period from 1894-1970, 1970-1991, 1991-2000, including the Employment Contracts Act 1991 and the current Employment Relations Act 2000. These timeframes signal four different approaches to employment relations regulation; 1894-1970, a conciliation arbitration approach, 1970-1991, a modified conciliation arbitration approach and the introduction of an industrial mediation service, 1991-2000, a contractual approach and 2000-2018, a relationship approach (Howell and Cathro 1986; Latornell 2006; Dell and Franks 2009). While the arbitration process during these years is well documented, mediation and conciliation are more difficult to research. Mediation leaves little or no documentary trace, much of it is confidential.

New Zealand's Legal Framework

New Zealand's government is voted by way of a Mixed-Member Party (MMP) system. It has predominately been a two-party system, the party that wins most seats normally gets to form the government. Over recent times, they have done so with the assistance of minor parties. However, in 2017 a government was formed between three minor parties, New Zealand Labour Party, the New Zealand First Party and the Green Party of Aotearoa New Zealand entering into Coalition and Supply and Confidence Agreement (New Zealand Gazette, 13th November 2017).

Parliament is unicameral, and the house system allows for speedy legislative change. A majority government, or one operating with the assistance of a minor party, can easily make changes to legislation. This was not always the case. When the first labour legislation was introduced, there was a two-house (bicameral) system in place. As discussed in the sections below, this bicameralism created difficulty for implementing early labour laws.

The Conciliation–Arbitration Years

The basis of New Zealand's industrial relations system stems from the 1890s and the Industrial Conciliation and Arbitration Act 1894 (Deeks, Roth, Farmer & Scott, 1982; Holt, 1986; Martin, 1996; Rasmussen, 2009; Roth 1999; Woods, 1963). That legislation had its roots in the labour conditions applying in the latter part of the 19th Century. During that period, New Zealand embarked on a legislative framework of State-imposed conciliation and arbitration that was to last for over a century (Deeks et al., 1982). Attempting to understand New Zealand's current labour relations "system" or industrial "climate" without a cursory attempt to review the nation's industrial relations history is folly (Deeks et al., 1982, p. 4). Therefore, I present a brief history in the following sections.

The 1894 labour laws.

New Zealand's population in the 1890s was small, widely spread, and, like today's labour market, many employees worked for small employers. The structure of the workforce led to difficulty in organising, and because of this demographic, strikes and lockouts were not a large feature of the industrial climate in the early 1890s (Holt, 1986). The first labour strike, resulting in the introduction of a 40-hour working week, had occurred some years previously (Geare, 1988), and the economic environment of the mid-19th Century did not encourage worker unrest. Gold rushes in the 1850s and 1860s had led to an influx into New Zealand of unskilled, foreign labour. When the gold ran out, the miners were forced to find alternative employment. This dire situation, coupled with a drop-in commodity prices in the 1870s, led the country into a long depression. Wages fell, hours of work lengthened and there was growing unemployment (Martin, 1995). It was not until the Maritime Council, formed in 1889–1890, established itself as a colony-wide union acting on behalf of other unions in a variety of disputes, that the country reviewed its industrial relations structure and made radical changes to the way employment relationships operated (Geare, 1988; Grant, 2012; Holt, 1980; Martin, 1996).

The State's role in collective bargaining. While the early industrial relations framework followed the British pattern of voluntary and independent organisations with a minimum of State intervention, after 1890, New Zealand abruptly moved to a centrally controlled system. In July 1890, at a time of increasing industrial action, a Bill was introduced into the New Zealand Parliament providing for the establishment of a mechanism for voluntary conciliation in labour disputes (Holt, 1986). The Bill did not have the support of the Government and failed to pass its second reading. The following year, William Pember Reeves, the Minister of Labour in the newly elected Liberal Government, took up the debate and pursued the introduction of compulsory arbitration by introducing an Act to "encourage the Formation of the Industrial Unions and Associations and to facilitate the Settlement of Industrial Disputes by Conciliation and Arbitration" (Introduction to the IC&A Act 1894). The resultant legislation, the first legislation of its type in the world, established a role for the state in a highly regulated and centralised industrial relations system by providing for; a wide definition of "industrial dispute" (s 17):

- the registration of union and employer groups (part 1); and
- a conciliation and compulsory arbitration process (part 1).

Employers, Government and unions were bound together in a controlled system, negating the need for individual action or advocacy for a sector of the workforce (Rasmussen & Lamm, 2002).

Institutional structure. The Conciliation Boards, the first of two levels of third-party intervention, were made up of an equal number of people chosen by employers and unions from their industrial districts, and a chairperson elected according to terms set out in section 32(3) of the Industrial and Conciliation Act 1894. Appointment to the Board was open to any person, provided they were not bankrupt; had not been convicted of a crime for which the punishment was death or hard labour; and were of sound mind. The Conciliation Board's mode of inquiry was established in section 43 of the Industrial and Conciliation Act 1894. The Board was required to "expeditiously inquire into" and "investigate" any industrial dispute "of which it shall have cognisance" (IC&A 1894 s 32). In completing an inquiry, the Board was to do what it considered "right and proper" to secure a fair and amicable settlement of the dispute, and where the dispute could not be settled between the parties, to decide the question "according to the merits and substantial justice of the case" (IC&A 1894 s 43).

The Arbitration Court heard matters that could not be resolved at the Conciliation Board level (Industrial and Conciliation Act 1894, s 52). The three-member Court had a national responsibility (Industrial and Conciliation Act 1894, s 47), and unlike Conciliation Boards, appointment to the Arbitration Court was restricted: The Chairperson was a judge of the Supreme Court, and two other members were provided for. One of these members represented workers, the other employers. The powers of both the Conciliation Board and Arbitration Court were wide (Industrial and Conciliation Act 1894, s 27). The institutional framework is shown in Figure 3.

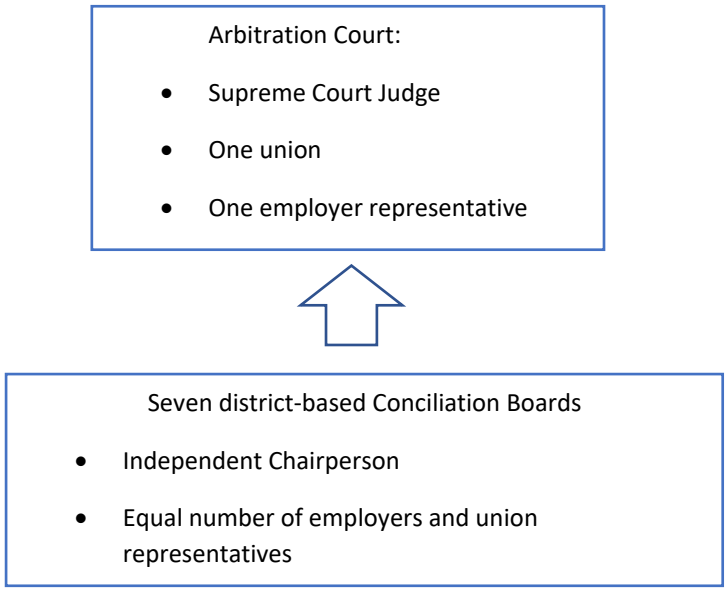

FIGURE 3. THE INSTITUTIONAL STRUCTURE FRAMING EMPLOYMENT RELATIONS IN NEW ZEALAND, CIRCA 1894.

The process to register a union and commence negotiations for a collective award was very simple, and costs were minimal. It simply required seven men to form a society, adopt suitable rules, pass a resolution in favour of registration at a general meeting and notify the Registrar of Industrial Unions. Provided there was no other union registered under the name chosen, registration was automatic. No registration fee was payable. To commence negotiations for a collective, registrants needed to draw up a list of demands and present them to the employer. The Conciliation Board and the Arbitration Court were available to assist if the claims could not be not agreed (Industrial and Conciliation Act 1894, part 1).

The operation of Conciliation Boards. The Arbitration Court was kept busy. However, for several reasons, the original Conciliation Boards were not successful. The entry into the system was simple, but once in it, the structure and processes were complicated (Holt, 1986). There were difficulties in obtaining suitable members, and the range of industrial matters the Board was required to consider was very broad. Members did not always have sufficient knowledge of the matters before them. They relied on the production of evidence that was time consuming, creating delays. The district structure of the Boards allowed the same matter to be heard de novo by seven different Boards and then to be referred to the Arbitration Court as seven different hearings (Howells 1974 p.85). Conciliation Boards were established to be a forum for direct negotiation between the parties, similarly to today's mediation process, but by 1900 it was clear to observers the Boards were acting more as an Arbitration Court, i.e. very little direct negotiation went on before Conciliation Boards (Holt 1980 p.198). Delays in issuing decisions, lack of competence and disorderly incidences were complaints laid against the Boards (Holt 1980 p197).

Amendments to the Act. Several administrative amendments were made between the introduction of the legislation in 1894 and 1901. The 1900 report of the Department of Labour noted that the Conciliation and Arbitration Act "had been fully taken advantage of during the year, and some important decisions have been given by the Court of Arbitration." The Department promoted the continuation of the legislation as a mechanism to support industrial peace, stating that. "the Act still holds its high position in the estimation of the industrial classes, and nothing could dismay the workers of New Zealand so much as the possibility that they might ever revert to the old warfare of strike and lockout". (DOL, 1900, p3)

The report also made comment about two disputes that year that had "unsatisfactory terminations"; (DOL, 1900, p3) the report suggested the Act needed amending to clarify the term "industrial worker" to determine preference for trade union members and to incorporate a provision for national awards. Unfortunately, when the Amendment to the Act was passed, it provided the ability to bypass the Boards and go directly to the Arbitration Court, causing Conciliation Boards to languish, and in some areas, they virtually disappeared (Holt, 1980).

While the outcomes and the findings of the Arbitration Court and some of the early conciliations are available, the reasons why the parties chose to use, or not to use the system, are purely conjecture today.

The early part of the 20th Century was a time of industrial unrest and for questioning the effectiveness of the legislation (DOL, 1914; Le Rossignol, 1914). The union movement was particularly concerned about the Court's narrow interpretation of the right to take industrial action. (Geare, 1988). The Act was saved by Amendments made in 1908 to strengthen compulsory arbitration (Industrial Conciliation and Arbitration Amendment Act 1908, s 82, s 28). The concept of essential industries was also introduced into the Industrial Conciliation and Arbitration Amendment Act 1908 (no 239, s 9). Those industries supplying water, gas, electricity or coal were classified as essential services, with unions and employers being required to give notice of any strike or lockout. This requirement still exists in the Employment Relations Act 2000, sections 90 and 91, but the list of essential services currently places such restrictions on prison officers, professional firefighters, hospital and ambulance staff, airline and shipping staff, and biosecurity officers.

The New Zealand employer–employee relations system remained largely unaltered until the 1990s, with successive Governments making amendments as needed to address issues in the economy or the industrial relations arena. In the early 1960s, an attempt was made to remove compulsory union provisions. Because of a concern that the removal of compulsory unionism would affect the arbitration provisions, compulsory unionism was replaced by an unqualified preference provision, to be placed in every award and agreement (Martin, 1996). The effect was that, unless unions and employers agreed in bargaining, union membership remained compulsory to all worker covered by the award. There was virtually no effect on union membership, the only difference being the union, not the Department of Labour was responsible to ensure all workers were members. The policy of centralisation and Government overview of industrial relations continued into the 1960s. In 1963, the Government introduced wide powers for the Minister to call a compulsory conference in relation to an industrial dispute (Industrial Relations Amendment Act 1963, no 9).

The legacy of the first Act. What the Industrial Arbitration and Conciliation Act 1894 clearly achieved was a two-stage process for the resolution of industrial matters (Deeks, Parker, & Ryan, 1994). The Arbitration Court issued general wage orders and set wage relativities, while conciliation became the main process for resolving collective bargaining disputes (Tyndall, 1960). This two-stage system of compulsory arbitration and conciliation lasted for over 100 years. The Act also set the foundation for the development of third-party intervention in employment dispute resolution (Deeks, et al., 1994). The Conciliation Boards, emerging as the answer to the growing difficulties with the arbitration system, were the forerunners of today's mediation service, and signalled the first movement towards a system encouraging parties to make decisions for themselves (Dell & Franks, 2007, 2009).

The Industrial Conciliation and Arbitration Act 1908, with minor amendments, remained in place until the 1970s, but continues to have an ongoing influence on employment relations in New Zealand, because it established several important principles that are still recognised today:

- the concept of State involvement in collective bargaining;
- a hierarchy of assistance for parties experiencing difficulties in collective bargaining;
- simple-to-access, low-cost support for parties experiencing difficulties in collective bargaining;
- an ability for collectives to have national coverage; and
- limited ability to take strike action.

An important feature of the Industrial Conciliation Arbitration Amendment Act 1908 was that once a matter had been referred to either conciliation or arbitration, the parties were unable to take any industrial action on the matters encompassed by the dispute (Industrial Arbitration and Conciliation Amendment Act, 1908, no 82, s 29). In implementing this provision, the State provided a mechanism for either party to bring industrial action to an end. Holt (1986) suggested that the Act was based on the principle that the State had the right and duty to intervene in labour disputes and to impose a settlement when the parties were unable to resolve their differences by peaceful negotiations. This right and duty had an appeal for weaker unions as the union gained recognition when the employer was, through compulsory arbitration,

compelled to enter a relationship with them. The arbitration process established terms and conditions for members of unions that were guaranteed by the state. The stronger unions appear to be the ones who rejected it on the basis that they could achieve more through their own resources (Holt 1986 p.25). As discussed in chapter 5, while compulsory arbitration is not a feature of current legislation the industrial power of a union or an employer appears to still be a determining factor in how dispute resolution mechanisms are used.

The changing continuum of Negotiation – Conciliation, Mediation and Arbitration - A shift towards proactive support.

There is debate about when the conciliation–arbitration approach of the Industrial and Conciliation Act 1894 was replaced with a "modified" approach (Latornell, 2006, p 90). As early as 1949, attempts were made to move to a cooperative means of working between employers and workers, with the establishment of an Industrial Advisory Council (Industrial Relations Act 1949, s 5(1)) being a prime example of this shift. The Industrial Advisory Council, made up of employer and workers representatives, was tasked with making recommendations to the Minister of Labour on ways and means of improving industrial relations and industrial welfare. Woods (1974) described the dramatic change as the shift from "compulsory unionism" to unqualified preference in 1961, which foreshadowed the Government's desire to modify its approach to labour law. Hince (1993) suggested, however, that a more evolutionary process of change began in 1973 with the introduction of the Industrial Relations Act 1973. Geare (1993) believed that the modified approach came even later, beginning in 1987 with the introduction of the Labour Relations Act 1987.

This new approach, however it happened, saw the Government stepping back from their previous hands-on role in industrial relations. In introducing the Labour Relations Act 1987, the Labour Government signalled less Government involvement and a shift away from the paternalistic attitude of previous Governments (Geare, 1989). However, they continued to maintain close contact with and control over State sector employee pay rates by way of funding decisions, while strategically maintaining a distance when it came to bargaining disputes (Budget of New Zealand Government 2017). For the purposes of this thesis, however, I highlight the

decade of the 1970s as the most important era, because it heralded the arrival of an attempt to provide proactive support to prevent disputes by the introduction of the modern mediation service.

Industrial relations legislation in the 1970s

Between 1960 and the early 1980s, New Zealand experienced widespread strike activity (Boraman, 2016). In an attempt to address the problem, significant changes to collective bargaining and arbitration were made. An Industrial Mediation Service, and the separate concepts of disputes of interest and disputes of rights, were introduced. Two new institutions; the Industrial Commission and the Industrial Court, were formed. These changes gave union members the right to pursue personal grievances, foreshadowing a change away from collective to individual disputes (Anderson, 1988). Prior to the legislative changes, workers and their unions took industrial action to challenge dismissals. The Industrial Conciliation and Arbitration Amendment Act 1970 established a process for managing personal grievances to prevent the industrial action. The resultant new provisions enabled workers to pursue a personal grievance against their employer on the grounds of wrongful dismissal, or in respect of any action by the employer which they believed disadvantaged them in their employment (Industrial Conciliation and Arbitration Amendment Act 1970, no 3, s 4). The personal grievance provisions only applied to union members. Because the union was the advocate, they also became the gatekeepers determining which cases to pursue. Non-union members who believed that they had a grievance could pursue a common law claim for breach of contract in the ordinary courts.

The Industrial Mediation Service, the forerunner of today's mediation service, was established in 1972, with the first Chief Mediator taking up their duties in January 1972. In total, 219 mediations matriculated to the service between commencement and January 1974. Howells and Cathro (1986) suggested this high matriculation rate demonstrated how positive unions and employers in New Zealand were about using a form of third-party intervention, that to them, would have been quiet novel. The New Zealand mediation service appears to have been based on the US Federal Mediation and Conciliation Service, but because of strong resistance to joint roles from the Federation of Labour, the New Zealand structure kept

conciliation and mediation separate (Howells & Cathro, 1986). This separation had an impact on the way employment dispute resolution developed in New Zealand. Two separate institutional structures were put in place. In fact, it was not until 1991 that the mediation and conciliation functions were brought together under the 1991 Employment Contracts Act as "mediation". A separate conciliation role has not been a feature of New Zealand legislation since that time.

Unlike the reactive role of a conciliator, mediators were tasked with proactively supporting employers, unions and workers to establish and maintain harmonious industrial relations (Industrial Relations Act 1973, s 64(3)). Their role required them to work closely with and to gain knowledge of industries (Industrial Relations Act 1973, s 6(4)(f)). The trend was for mediators to do this by specialising and developing strong links with employers and unions. Mediators worked closely with union and employer representatives to assist them to achieve and maintain effective labour relations. They did this by chairing conciliation councils, disputes committees and grievance committees (Labour Relations Act 1987, s 253).

The introduction of mediation did not change the way Conciliation Councils operated. They continued to be the body responsible for the recording and negotiation of collective agreements and awards as part of a system for settling industrial disputes (Howells & Cathro, 1986). The system remained easy to access but was highly centralised (Figure 4). Unions seeking to bargain new terms and conditions of employment for their members created disputes of interest with the relevant employer, or employers group. The created dispute was then heard by a Conciliation Council, which was made up of equal numbers of union and employer representatives and was chaired by a conciliator. The conciliator's role was to work with the parties to encourage a settlement, keep a record of the negotiations and write up the terms of settlement once an agreement had been reached. A conciliator could be active in encouraging settlement by making suggestions but had no decision-making authority. If the parties could not agree on the terms of a new collective, they could take the matter to the Industrial Court for determination (Industrial Relations Act 1973, s 63(2)).

FIGURE 4. INSTITUTIONS SUPPORTING EMPLOYMENT DISPUTES IN NEW ZEALAND, 1970–1991 (ADAPTED FROM HOWELLS & CATHRO, 1986).

Mediators and conciliators acted as facilitator chairpersons under the Industrial Relations Act 1973 (Dell & Franks 2007), but with no powers to make binding decisions, they were expected to resolve disputes by any means short of arbitration (Howells & Cathro, 1986). In reality, both mediators and conciliators performed an arbitration role in relation to disputes of rights, but the Industrial Relations Act 1973 specifically stated mediators "shall not have any functions … in relation to disputes of interest during the progress of any conciliation or arbitration proceedings in respect [of] the dispute" (s 64(5) and (6)).

Most disputes were resolved using mediators, or conciliators or the Court, but there was also a provision for the Minister of Labour to become involved in serious disputes. If there was strike or lockout action, the Minister could call the parties to a compulsory conference and appoint a chairperson, usually a mediator or conciliator (Industrial Relations Act 1973, ss 120 & 121). When the Industrial Mediation Service was established in 1970, the intention was for mediators to be proactive. They were given the power to offer their services prior to a dispute occurring, known as "early bird mediation", but conciliators were only able to become involved once a dispute had arisen. The reality was somewhat different from the intention, with early bird mediation being used infrequently (Howells & Cathro, 1986, p. 23).

The different forms of third party assistance during the 1970s produced a confusing and complex fabric of dispute procedures. Conciliators and mediators mediated, and supposedly, the Conciliation Service, Mediation Service and the Arbitration Court arbitrated. Neutrals could enter a dispute as a mediator and leave as an arbitrator, with persons masquerading as mediators while acting as arbitrators (Howells & Cathro, 1986). But this situation did not last long. The Industrial Mediation Service, the Industrial Conciliation Service and legislative support for collective bargaining were swept away in the reforms of 1991. These reforms are discussed in the following section.

The Employment Contracts Act 1991. The Employment Contracts Act 1991, probably the most radical industrial relations legislation within the Organization for Economic Cooperation and Development (OECD) (Bray & Walsh, 1998), was founded on notions of freedom of contract, representation and association, and in accordance with neoclassical economic theory (Oxenbridge, 1997). It was the foundation for many of the employment rights enshrined in New Zealand's current legislation. The Act's introduction was met with controversy (Harbridge, 1993; Harbridge & McCaw 1991; Hince & Vranken, 1991). The changes completed the deconstruction of the arbitration system by removing the legislative protections afforded to unions for almost a century (Boxall, 1991). The Employment Contracts Act 1991 completely altered the way employment relationships operated in New Zealand and signalled a philosophical move to deregulate the labour market by promoting individualism over collectivism (Geare 1993). It was partly responsible for decimating the union movement by removing the definition of a union as a worker's representative, expanding the definition of employee and inserting the right to make employee representation fully contestable (Oxenbridge, 1997).

The objectives of the Act significantly developed the concept of voluntarism, or the idea that individuals are free to choose the form of, and who will negotiate their employment terms and conditions (Latornell, 2006). What remained of the multi-employer award system, common before the Employment Contracts Act 1991, was demolished, and bargaining and contracting were repositioned at the level of direct dealings between employer and employee (McAndrew, 1995). Separating union membership from representation meant a worker's membership in a union no longer gave the union the automatic right to represent that worker in negotiations with employers. Employers and employees determined, in negotiation, the type of contract (individual or collective) they wished to enter, and employees could decide who, if anyone, would negotiate on their behalf (Employment Contracts Act, 1991, s 10). By removing the exclusive rights to protection that had been in place for unions and their members since 1894, the Act became all-inclusive, covering anyone in employment (s 2). Employees no longer needed to be a union member to access a major benefit, i.e., protection under employment legislation. They could pursue a personal grievance in New Zealand's employment institutions with no restriction on the representative used, rather than taking more expensive civil action. With the

unions no longer acting as a gatekeeper, employment law firms and employment advocates flourished leading to an increase in the number of cases being pursued in the institutions (Department of Labour Annual Report 1993).

While it may have seen that there was complete freedom for employers and employees to determine their employment arrangements, employers held the upper hand when it came to a union's, or bargaining agent's, access to and recruitment of workers. Right of access for recruiting potential members were limited to those cases where the employer agreed to provide access (ECA 1991, s13). Once a party had been recognised as the bargaining agent, they could gain access to the parties they were representing to discuss the negotiations but needed to leave a written notice addressed to the employer stating; their identity, the group or organisation (if any) to which they belonged, the date and time of the entry, and the reasons for the entry (ECA 1991, s149(3)(4)).

The legislation provided for new ways of conducting negotiations of terms and conditions of employment (ECA 1991, s77). To enter bargaining collectively on a worker's behalf the union needed to obtain individual bargaining authorisation from each union member to be covered by the collective (Boxall 1991). A union's ability to organise was further eroded by section 18(2) which clarified employers were 'not' required to enter bargaining for a multi-employer collective. The previous centralised system gave way to a system based on individual and enterprise contracts rather than the collective employment agreements. Research carried out by the Department of Labour found that it was the employer who normally commenced the bargaining process. This was a major change from the union initiated "dispute"-based process under previous legislation (McAndrew, 1995). Interestingly, in theory, employers were not allowed to enter into individual employment contracts that undermined the collective. Where a collective was in place, any individual contract's term could not be inconsistent with those applying in the collective. But where there was no collective, the parties were free to negotiate any terms they wanted to. As collective contracts only remained in force until their expiry date, if a union was unable to negotiate a new contract prior to this date, employers were free to negotiate new individual contracts for the workers, who were no longer covered (Employment Contracts Act 1991, ss 19 & 20).

The objects of the 1991 Act, with emphasis on strict contractual principles, were subject to a polarised debate between unions and employer groups. Employers welcomed the Act with the flexible contracts-based employment environment it provided, while unions vigorously opposed its introduction and its failure to recognise them. This controversy continued unabated until the Act was replaced in 2000. Indeed, the Act reduced the legislative backing for unions, but strengthen the direct relationship between employees and their employers by removing obstacles to different types of employment contracts and working arrangements (Employment Contracts Act 1991, s 5). The traditional working arrangements where employees became members of unions who had the exclusive right to use the institutional framework to resolve employment disputes were changed overnight. Some would say that this change is irreversible for New Zealand; despite successive changes of Government taking place today, the reduction in unions' bargaining powers has been a feature of employment relations in New Zealand since 1991, embedding the process (Rasmussen, Foster, & Murrie, 2012).

The 1991 institutional framework. A new institutional framework was established to support the Employment Contracts Act 1991 (Figure 5). The role of the conciliator was no longer part of the industrial relations system. Mediation and adjudication processes were brought together in an Employment Tribunal, and the Employment Court was established (Employment Contracts Act 1991, s 103).

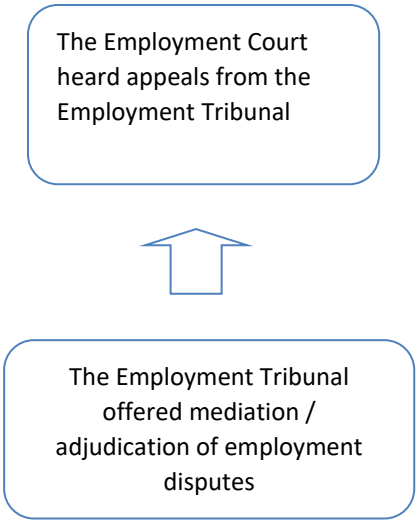

FIGURE 4. SPECIALIST EMPLOYMENT INSTITUTIONS CREATED BY NEW ZEALAND'S EMPLOYMENTS CONTRACT ACT 1991.

Section 3 of the Employment Contracts Act 1991 gave the Employment Tribunal and the Employment Court exclusive jurisdiction to hear all disputes and personal grievances arising from an employment contract. Barriers to access and cost were low (Employment Tribunal Regulations 1991).

The Employment Tribunal

The Tribunal had both a mediation and adjudication function, but in response to criticism of the dual roles played by mediators in grievance and disputes committees under the previous legislation, except in very limited circumstances, the same member was no longer allowed to provide mediation and adjudication services in the same dispute (McAndrew, 1995). It has been claimed by scholars that the forced separation of mediation and adjudication led to the Tribunal's high dispute resolution rate, with over 70% of cases being resolved (Grills, 1992; McAndrew, 1999). One case in which a mediator did make a decision was challenged at the Employment Court, who found a mediator's decision was final, binding and enforceable by the parties (*Shaffer v Gisborne High School Board of Trustees* [1995]) 2 NZLR 288). In addition, if the case was settled, or determined by mediation, the settlement could be enforced, if necessary, by a compliance order (*Tucker v Cerissi Leather Ltd* [1995] 2 ERNZ 11). There was no right of appeal from a mediated agreement (*Wilson v Serco Group (NZ) Ltd* [1992] 2 ERNZ 133). If a party believed that there was a flaw in the settlement, the only remedy was a common law action under general contract law, or by judicial review.

The functions of the Employment Tribunal, which were established in section 78 of the 1991 Act, while wide, contained a notable exception from previous legislation. There was no statutory ability to aid collective bargaining disputes. The Tribunal could offer mediation and adjudication services when a dispute arose. A dispute was defined in the Act as "a dispute about the interpretation, application, or operation of an employment contract" (s 2 definitions). As the contract had to be an existing contract, parties endeavouring to negotiate a new employment contract were effectively shut out. When unions required assistance with collective bargaining, they occasionally sought the assistance of an Employment Tribunal member, usually making a direct approach to one of the members who had had experience as a mediator under the previous legislation. Colleen Hicks, an ex-Tribunal member and one of the people they commonly approached, advised that this was a relatively rare event and sometimes was misrepresented as a dispute over a different matter (C. Hicks, personal communication, March 26th, 2017). That matter was usually quickly resolved when the collective agreement was settled.

As was the case under earlier legislation, Tribunal members were appointed as statutory officers by the Governor-General on the advice of the Government. They acted as a single

member sitting as an adjudicator or a mediator. While there was provision in the legislation to be appointed as either an adjudicator or as a mediator, it was expected that members would perform both roles. There does seem to have been a move towards a new culture. Initial appointments were a mixture of experienced negotiators and new appointments, with less than one-half of the initial appointments being from the previous mediation and conciliation services (McAndrew, 1995). The first Chief Mediator, Brian Stanton, had a background as a senior manager in the private sector, and other new members had legal backgrounds (C. Hicks, personal communication, March 26th, 2017).

The intention was for the Employment Tribunal to provide informal, low-level dispute resolution (Employment Contracts Act 1991, s 76(c)). There was no requirement for members to be legally qualified, but knowledge of industrial relations was said to be very valued attribute for Tribunal members to have (New Zealand Hansard, October, 8th 1992) The reality was, however, that most parties were legally represented, and knowledge of legal structures, systems and decision writing thus was an important, if not mandatory skill, for a Tribunal member. At any rate, their decisions were put to strong legal scrutiny by the Employment Court, who had oversight of the Tribunal (Employment Contracts Act 1991, s 78(d)). This reality meant legal qualifications were held by most new members appointed in the later years of the Tribunal's existence (New Zealand Gazette, 1999a; New Zealand Gazette, 1999b).

The Tribunal's mediation function. Mediation, despite being the prime mechanism for resolving disputes, was the least known process offered by the Employment Tribunal. Adjudications proceedings were open to the public, regularly reported in the media and the subject of academic research (McAndrew, 1999, 2000a, 2000b, 2001). Mediation, on the other hand, was a confidential process conducted in private, behind closed doors, with the outcome not being made public. Once the parties agreed to attend mediation, the detail of the procedure to be followed by a mediator was determined by the mediator involved (Grills 1992). While there was sometimes a mediation discussion session in Tribunal Member annual meetings, there was no formal training, or certification of mediators by professional bodies. A standard process was not included in either legislation or delegated legislation.

In contrast to adjudication, mediation was quicker, cheaper, less stressful, and more effective due to the voluntary nature of settlement (Roth 1999). As mediation was held in private, the parties were protected from public disclosure of information. Even if a personal grievance was not resolved at mediation, the process was not a waste of time. The procedure provided a forum to assist participants identify outstanding issues and concerns (Gardiner 1993).

Employment Tribunal Adjudication. If a matter was unable to be resolved in mediation, the applicant could refer the matter to a formal Employment Tribunal adjudication hearing. The Tribunal sat as a single member and the member could not be the same member who had provided mediation services (ECA 1991, s78). Unlike the provisions in the Employment Relations Act 2000, (ERA 2000) mediation was not a prerequisite to adjudication, (ECA 1991, s78(3) and s78(6)), and for matters involving questions of urgency or significant legal issues, the Tribunal could order that the proceedings be heard in the Employment Court (ECA 1991, s94).

Unlike the mediation process, there was a formality surrounding adjudication hearing. Regulation 49(1) of the Employment Tribunal Regulations 1991 provided the way adjudication hearings were to be conducted. All hearings of the Tribunal were recorded (ECA 1991, s88(7)), all evidence was heard under oath, each witness could give his or her evidence-in-chief by reading or confirming a written brief or statement of evidence. Cross examination and re-examination was allowed as were questions from the bench. Parties could examine, cross-

examine and re-examine witnesses; either party could sum up their case. Once cases had been completed the Tribunal considered the matter and dealt with it according to the appropriate legislation (McAndrew 2010).

Tribunal workload. The New Zealand Employment Tribunal's high workload and resultant delays in obtaining hearing dates was of concern (Muir 1993), and as discussed in more detail in chapter 7, was one of the issues the Minister endeavoured to address when introducing the Employment Relations Act in 2000. The initial appointment of 14 members had doubled by the end of 1994 (McAndrew, 1995), but despite the appointment of extra temporary members (New Zealand Gazette, 1999a; New Zealand Gazette, 1999b), the Tribunal was never able to meet its obligations in a timely manner. Several factors have been suggested as contributors to the rise in case numbers. Scholars have blamed the plethora of cases on:

- the result of an imbalance in power between workers and employers;
- disempowerment of union advocates and reduced access to collective processes; and
- an increase in legalism, a symptom of the neo-liberal discourse of competitive individualism (Greenwood, 2016; Rasmussen & Ross, 2004).

An unrealistic assessment of the increased case numbers, and the extension of personal grievance provisions to all employees including those who were not union members but who meet the wide criteria of an employee in the ERC 1991, (s 2), also potentially caused backlog issues. Under previous legislation, unions, with their limited resources, acted as gatekeepers. The new legislation opened representation to lawyers and advocates, practitioners with a greater self-interest in pursuing grievances. Some even offered their services on a contingency basis, undertaking extensive advertising campaigns to attract clients (McAndrew, 1999).

The reduction in union influence. Before 1991, the legislation governing labour relations in New Zealand encouraged and promoted the collective organisation of workers through State regulation of the processes of bargaining and representation. The award system that prevailed extended award conditions to all workers in an industry or occupation through "blanket coverage" provisions. This structured bargaining gave registered occupational unions the right to monopolise bargaining representation in an industry or occupation (Anderson, 1991). The freedom of representation introduced in the Employment Contracts Act 1991 removed that monopoly. No restrictions on representation, the growth of boutique unions and the freedom for workers to select a bargaining agent, led to the development of multiple unions covering the same workers on one site. This caused issues with union coverage, and difficulties in settling some collective agreements. Unions became reluctant to be the first to settle an agreement in a workplace, as it could be seen as providing a base for the following settlements to achieve better conditions. As discussed in chapter 5, the first matter referred to facilitation arose because of multiple unions covering the same workers on the same worksite. The union representing members covered by the second collective agreement to settle, the subject of a facilitation hearing, was seeking the same terms and conditions of employment as ware negotiated by the first union.

While union membership numbers were static, union registrations increased with the arrival of several new boutique unions, usually operating at the same worksites. These unions, often referred to as employers' unions, were seen by some as an employer attempt to undermine existing unions by supporting the establishment within their business of "employer friendly" unions. An example of this is the Air New Zealand Pilots Society, which was formed by a breakaway group from the New Zealand Air Line Pilots' Association (NZALPA) during a dispute over the introduction of a new aircraft, the Boeing 747-400. This new group was to be joined later by other aircrew and became the Federation of Air New Zealand Pilots (FANZP 2017). In 1991, there were 65 registered unions in New Zealand, and by the year 2000, this number had grown to 184 (Foster, t al., 2011).

Accusations were also made of member poaching. Unions and employers traditionally belonged to a central body. Those organisations co-ordinated bargaining under earlier legislative structures. When this centralised bargaining role disappeared under the 1991

legislation, new unions were able to recruit members at will. A total of 40 unions-maintained membership of the central body, the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU, 2004). The CTU was able to establish rules for their member unions around "poaching" members, sometimes referred to as the Hyatt Agreement, named after the hotel it was negotiated in. The other boutique unions with no affiliation or interest in joining the CTU were free to extend their coverage to new workplaces and to approach members of other unions to join them. This has led to issues for employers around different terms and conditions in the workplace. Multiple unions covering the same workers and workplaces creating competition in a tight market is a continuing problem under today's legislation.

The 1990s trend for boutique unions resulted in 50 new unions (60% of total unions) having fewer than 1,000 members each (Blumenfeld & Ryall, 2014). As well as encouraging boutique unions, the Act encouraged individualisation of bargaining for employment contracts. Union membership and collective bargaining remained high in the State sector, but the private sector moved away from collective bargaining to individual contracts (Harbridge, 1993). A 1997 DOL survey noted that employees under the Employment Contracts Act 1991 were covered in equal proportions by individual and collective contracts (DOL, 1997). This was a big change from previous legislation, under which nearly every employee covered by the legislation was a member of a union and had their terms and conditions negotiated by way of collective bargaining. It was also estimated that the Act resulted in over 110,000 workers losing their collective bargaining coverage because of the move to individualised employment agreements (Harbridge, 1993).

Trade union membership more than halved over the 15 years from 1985–2000, from 683,006 union members in December 1985 to 318,519 union members in December 2000, only 17.4% of the workforce (May, Walsh, & Otto, 2003), and membership figures did not recover when union-friendly legislation was introduced in the year 2000 (Foster, Murrie & Laird, 2009). Only 361,419 workers (15.7% of the workforce) were union members by 2014 (Blumenfeld & Ryall, 2014). While this trend was not restricted to New Zealand, the Labour Relations Act 1987 that introduced minimum union size restrictions and removed compulsory unionism, and the Employments Contract Act 1991, were considered to be the major contributors to the reduction

in union numbers in New Zealand, with major union membership reduction occurring during the term of the 1991 Act (Crawford, Harbridge, & Walsh, 2000).

Disestablishment of the Employment Tribunal. The Employment Tribunal was disestablished in the year 2000, when the Employment Relations Act was enacted. The Minister responsible for the implementation of the replacement legislation, stated in an interview I conducted as part of this research that there seemed to be a structural problem with going straight from mediation to the Court, and that everybody hated the Tribunal (M. Wilson, personal communication, April 26th, 2017). She wanted to find a middle ground to de-legalise the system, and a way to issue quick decisions and to reduce costs and delays. She further stated that there were issues with the concepts of conciliation and arbitration. The previous "dispute resolvers" had been replaced with lawyers and advocates. She believed there was a better way to settle disputes whereby the parties, with skilled assistance, would resolve the issues themselves, and only matters that needed a precedent would proceed to the Courts. The Tribunal did not meet these objectives and was therefore disestablished by her.

The Employment Contracts Act 1991 in retrospect. The Employment Contracts Act 1991's strong support of individualism over collectivism changed the collective bargaining environment. The protection given to unions since 1894 was removed and union membership substantially reduced. What the Act did achieve was employment rights protection for "all" employees in New Zealand. It also established the principle of mediation and adjudication being available to employees prior to formal Court proceedings. It expanded the field of employment law to a wider advocacy base, beyond unions and employer associations, and removed the ban on lawyers acting as advocates. The Act also established the concept of employers and employees resolving their own problems, which continues today under the Employment Relations Act 2000.

The Employment Relations Act 2000. In October 2000, the fifth Labour Government introduced the Employment Relations Act 2000. The Act was seen as signalling an ideological move from the unitary-orientated, free-market neoliberalism of the former National Government to the pluralist roots of the new Labour-led Government (Rasmussen, 2009; Rasmussen, Hunt, & Lamm, 2006; Rasmussen & Lamm, 2002; Rasmussen & Ross, 2004).

> Successful relationships are about parties investing in each other — the worker investing energies in the firm; the employer's investment in workers' training, development and providing opportunities for growth and the best way to promote and manage such investment decisions for the best returns is a collaborative and collective approach involving employers, unions and workers. (Wilson, 2003)

The primary objective of the Employment Relations Act 2000 was "to build productive employment relationships through the promotion of mutual trust and confidence" (s 3(a)). Good faith, the promotion of collective bargaining and recognition of unions were introduced as concepts to assist the achievement of these objectives. In a more collectivist approach than the previous legislation, the Act treated employment relationships as human, rather than purely contractual relationships (Rasmussen, 2009). The new legislation was based on the assumption that there is an "inherent inequality between employers and employees, and that collaboration and collectivism would lead to increased productivity" (New Zealand Hansard, July 5th, 2000). The legislation sought to balance the rights of employers to run their businesses and the rights of workers to be treated fairly (Wilson, 2001). Union growth was supported through the promotion of collective bargaining, which provided for multi-employer agreements, limiting the negotiation of collectives to unions and increasing unions' right of entry (Wilson, 2001). Individual contracts, the right to strike or lockout and personal grievance provisions from the previous legislation remained (ERA 2000, part 6 & part 8)

The separation of mediation and adjudication processes was further enforced under the new Act by the establishment of two institutions, the Employment Mediation Service and the Employment Relations Authority, which replaced the Employment Tribunal (Figure 6). Mediation was regarded as the prime dispute resolution tool. Resourcing to support the newly

established institutions was sustainably increased (DOL, 2000). The Government also grouped employment disputes, conflicts and grievances together as "employment relationship problems" to merge collective rights and individual dispute concerns (Greenwood, 2016). The process allowed anyone with an employment relations problem, be it individual or collective, to access free mediation support. The underpinning philosophy, early intervention in problems would prevent escalations of disputes. (McAndrew, 2010 p79). The institutional framework being designed for parties to solve problems early as close as possible to the workplace. Institutional support being provided when they were not able to do so (Greenwood, 2016).

The new institutions. The then Minister of Labour endeavoured to find a new means of resolving disputes. She credited "some excellent people in the DOL" as helping her meet the 100-day deadline she had to implement a new system. The system needed to gain acceptance from both unions and employers. She realised the new investigatory model proposed for the Authority would be "an uphill battle" with lawyers, but her background was in academia, and dispute resolution was a compulsory subject at Waikato University, where she had taught. She believed lawyers needed to learn that there was more than one way to resolve disputes (Hon. Margaret Wilson, personal communication, April 26th 2017). Her aim was to reduce legalism in mediation. In previous law, the concept of parties needing to be in dispute to access mediation was removed, with support made available for anyone with an employment relationship problem. The new structure created a hierarchy of specialist employment dispute resolution institutions, commencing with mediation.

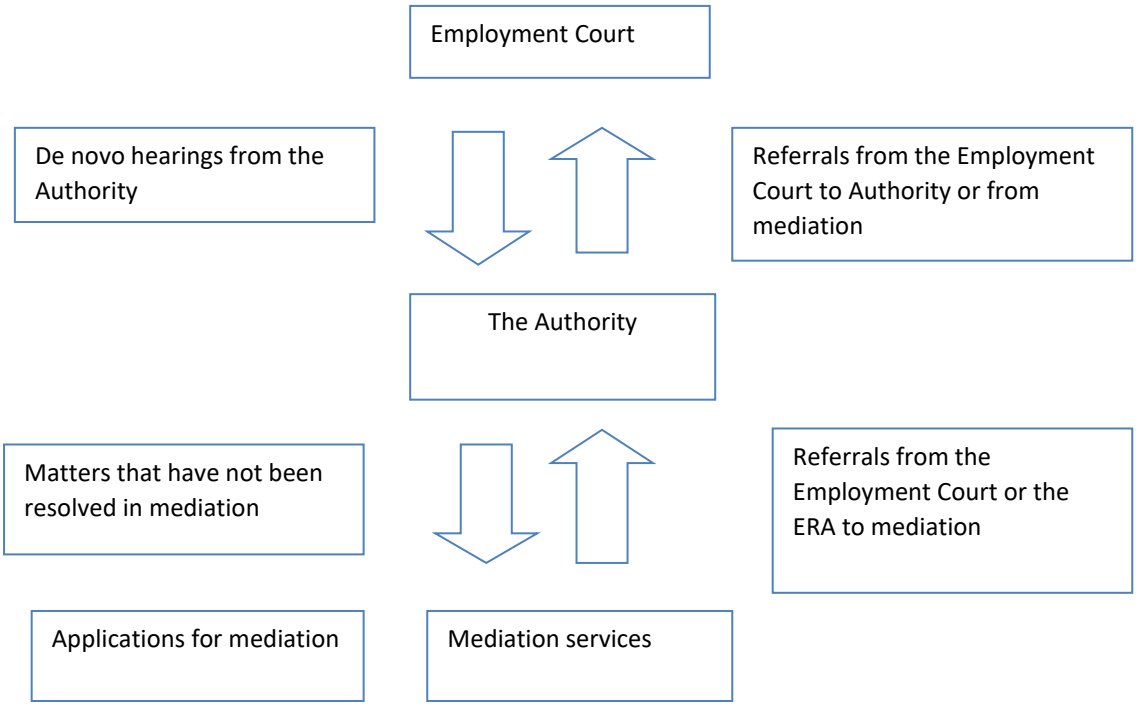

FIGURE 5. SPECIALIST EMPLOYMENT INSTITUTIONS FORMED UNDER NEW ZEALAND'S EMPLOYMENT RELATIONS ACT 2000.

Abbreviation. Authority, Employment Relations Authority (New Zealand).

Applications for mediation. Initially, like the previous legislation, the Employment Relations Act 2000 was not widely supported, employers believing that the mediation provisions meant an employee could bring any issue they had in a workplace to a mediator (Burton, 2010). When the Act was introduced, it contained a clear philosophical change from the previous legislation. The Act incorporated a shift in employment dispute resolution methods from game theory, market transactions and zero bargaining towards mutual problem solving in interest-based negotiations (Greenwood, 2016). Good faith between employers and employees, and facilitated consensual resolution of personal grievances, were cornerstones of the new legislation. Mediation was given status as the most important element in resolving disputes.

Mediator appointments had previously been made with input from the central Bodies, the CTU and the Employers Federation. The persons appointed had wide legal or employment experience. The initial mediator appointments made under the Act signalled a move away from the traditional recruitment pool for mediators, older experienced employment relations specialists, to some younger appointments, including new graduates with a primary interest in being a mediator rather than an employment relations specialist. Mediators were appointed as employees rather than statutory offices and at a lower remuneration than paid under the Tribunal. While the new mediators introduced new ways of managing disputes, some users remained consistent with their understanding of mediation based on their experience of the old system. This led non-acceptance and complaints (Lowe 2001).

The signals made by the initial Chief's appointment and the training programme put in place for the new service were that the style of mediation as undertaken by the Employment Tribunal was not the future. It is arguable that the Employment Relations Act 2000 was the beginning of the profession of mediation being introduced into employment disputes. Training and quality measures, and a position of training manager for mediators, were put in place. The first appointment to the training manager's position, Stephen Hooper, brought an academic influence on the service (Hooper 1999).

It thus appeared that the Government was endeavouring to change the focus of mediation via a change in legislation. The emphasis moved away from reactive mediation, conducted after a relationship was terminated, to proactive mediation, enabling the relationship

to continue. The Minister recognised that users of the system would take some time to accept the changes (Hon. Margaret Wilson, personal communication, April 26th, 2017). Her concern was justified, because mediation parties, accustomed to an evaluative mediation style, felt the passive, facilitative style of some of the new mediators was rudderless (McAndrew & Risak, 2013). However, by 2010, concerns about the mediation service's more passive facilitative style of operation had reduced (McAndrew & Risak, 2013).

The Employment Relations Amendment Act 2004. When union membership numbers plummeted under the Employment Contracts Act 1991, collective bargaining's role in determining terms and conditions of employment significantly reduced (Crawford et al., 2000). One of the overriding intentions of the Employment Relations Act 2000 was to address this problem by the promotion of collective bargaining (s 3(a)(iii)). The new Act gave unions the role of bargaining agents in what seemed like an effort to both increase union membership numbers and to promote collectivism. Despite the high hopes of the unions and Government, and the dire predictions of business, collectivism did not eventuate in the way the Government intended (Rasmussen & Ross, 2004). In fact, the most notable feature by 2002 was the lack of change in union numbers. Several reviews were undertaken into the operation of the Act during 2002 (DOL 2002a, 2002b, 2002c, 2003), and in 2002, the Government announced a proposal to review the Act, to identify if any "fine-tuning was needed, either in the law or in its administration" (Wilson, 2003 p2) for the Act to achieve its "statutory objectives of promoting productive employment relationships, good faith, collective bargaining and the effective resolution of employment problems" (Cabinet Economic Development Committee, 2003a, 2003b). The review undertaken was extensive, drawing on many sources including DOL research projects (Waldegrave, Anderson, & Wong, 2003).

The DOL research projects, which formed part of the review, found there had been relatively little change to collective bargaining coverage since 2000 (Waldegrave et al., 2003). Their logic model suggested that an initial step in addressing the inherent inequality of bargaining between employers and employees should be to increase the volume of collective bargaining. The DOL findings, published in 2003, suggested a mixed situation. While it noted many areas where the Act seemed to be producing the desired outcomes, it also identified a number of "behavioural, administrative and regulatory issues" that acted as barriers, preventing

the Act from achieving its goals (DOL 2003 p25). Thus, a series of legislative amendments (Employment Relations Amendment Act (no 2) 2004) were developed to support collective bargaining. These changes were based on the recommendations of the review and had the aim of clarifying and strengthening the Act to assist it to better achieve its objectives (Cabinet Economic Development Committee. 2003a, & 2003b). Key amendment areas centred on the definition of good faith, along with accompanying changes, which sought to promote collective bargaining, offering greater incentives to encourage parties to enter into collective agreements. Amendments also sought to remove barriers and to prevent employer behaviours that could undermine collective bargaining.

Business New Zealand had been very vocal in their opposition to the 2000 Act (Rasmussen & Ross, 2004). This body predicted increased unemployment and industrial unrest (Deeks & Rasmussen, 2002). In their strongly worded submissions against the legislation they made at the time it was introduced, Business New Zealand (2004) submitted that:

- the existing legislation should remain in place;
- the Bill not proceed; and
- if it was to proceed, further work should be done on the Bill to promote labour market flexibility and to reduce compliance costs.

The organisation further submitted that promoted third-party intervention, as proposed in the Bill, was a more significant cost to employers and the future economy than was the original Act (Tritt, 2004).

In contrast, the CTU (2004), who had suggested a return to arbitration, asked for greater services to be made available, especially mediation services. They said employers' exploitation of loopholes in the legislation undermined growth in collective bargaining and union membership, stopping the Act from achieving its goals. The proposed amendments were seen by the union movement as "modest improvements to a modest law" (Conway, 2004). Indeed, it was recognised that incentives in the Act for the settlement of collective agreements were relatively weak, with unions facing significant practical (and some legislative) barriers in organising workers collectively (DOL 2003). Multi-party bargaining and employers passing on

collective bargaining terms and conditions to workers on individual agreements, i.e. "free riding", were seen as particular hindrances to collectivism. To encourage the settlements of collective agreements, the DOL review package suggested that:

- collective bargaining should normally result in a collective agreement unless there was good reason not to;
- the ratification process for unions should be simplified; and
- a new process of third-party facilitation for parties experiencing difficulties in achieving a collective should be introduced (DOL 2003).

Using Facilitation to Resolve Disputes

As a result of the DOL 2003 report, the Minister of Labour accepted that a process was needed to overcome genuine deadlocks in bargaining. As with the changes to institution structures she implemented in 2000, she wanted to bring in some new thinking to be "imaginative" about dealing with old problems. She believed employers would not accept a return to arbitration, and instead, she proposed a facilitation process. She saw this as a flexible model that could suit all the parties and hoped that after a few cases were referred to facilitation, employers would see it as a way forward. The Minister emphasised the common interests of workers and employers in support of the Bill, and in line with the work of Walton and Mckersie (1965), and Preuss and Frost (2003), she suggested a relationship between "good profit and improved working conditions" (Wilson, 2004 p 4).

The origins of facilitation.

McAndrew (2012) has suggested that the origins of New Zealand's facilitation model remain something of a mystery, with the fact-finding process used in parts of the North American public sector as its closest model, but there is no substantial evidence that the North American processes were actually used as a model for facilitation in this country.

Facilitating bargaining. Mediation and facilitation under the ERA 2000, both have distinct advantages and disadvantages (Table 1).

TABLE 1

COMPARISON OF MEDIATION AND FACILITATION UNDER THE NEW ZEALAND EMPLOYMENT RELATIONS ACT 2000

Collective bargaining mediation	**Collective bargaining facilitation**
Mediator determines process	Facilitator determines process
Process usually conducted in private, but not confidential under the Act	Process conducted in private; confidential under the Act
Outcome (collective agreement terms) usually limited to parties represented	Outcome (collective agreement terms) can be made public
Parties agree terms of collective	Facilitator can fix terms of collective
Voluntary process; can only proceed if both parties agree	Once facilitation granted, process proceeds regardless of parties' wishes

Restrictions on strikes and lockouts during facilitation. In the past, the Industrial Conciliation and Arbitration Act 1894 provided a mechanism for either party to bring industrial action to an end by raising a dispute. Under the Employment Relations Act 2000, the Minister's original proposal was to provide a similar restriction to disallow strikes and lockouts during the facilitation process. This provision did not become part of the amendments because it was felt that "prohibiting strikes and lockouts would be inconsistent with the current ability to strike or lockout during mediation and may deter union or employers from entering the process" (Office of the Minister of Labour, 2003b p3). Large sections of the Minister's request to change from strikes and lockouts being "allowed" to "not allowed" were blacked out before the paper was released to me under my Official Information Act request, so it is unclear whether further discussion on this matter occurred. Some issues with the reasons given in the paper are apparent: for example, mediation, unlike facilitation, is a voluntary process, and if strike action is taking place or threatened, the employer party on occasions refuses to attend mediation until the action is lifted. They do not have this choice when facilitation is directed by the Authority.

Fixing terms and conditions of employment. The Authority was given the power to make non-binding recommendations as to the terms and conditions of employment, but where there was a serious and sustained breach of good faith, they could fix terms and conditions of a collective agreement. This clause was to be used only for cases where there was a breach of good faith so large that it undermined bargaining. The change represented a significant turnaround in Government policy, as the original enactment had specifically stated that the Authority was not permitted to act in the role of fixing terms and conditions of employment. The reason given for introducing the "fixing" provision was to extend the range of remedies the Authority could utilise, thereby creating another means for settling collective agreement deadlocks (Cabinet Economic Development Paper, 2003a). It has been argued that, except for the special final offer arbitration provisions that apply under the Police Act 2008, this is the only provision that allows external intervention and resolution of collective bargaining disputes by setting the terms and conditions of a collective agreement (McAndrew 2012, 2014). There is, however, an exception noted in section 150 of the Employment Relations Act 2000, which allows a mediator to make a final, binding decision when asked to do so by both parties, and while accepted that in this was not the intention of the Government when they introduced the Act, there is no restriction on section 150 applying in the case of collective agreement disputes.

The introduction of a facilitation process received considerable opposition from business groups, who saw it as a return to a regulated and centralised system of employment relations. It was alleged that "authority fixing is nothing so much as compulsory arbitration by another name" (Burton, 2004, p. 134). In fact, the Authority's "facilitation" role is quite limited. The Act amendment "encourages — but does not compel — settlement " Employment Relations Amendment Act (No 2) 2004). The Authority only has very limited powers to determine the outcomes of bargaining. Unless there are serious breaches of good faith, it can only recommend a conclusion; the recommendation is not binding, with the parties still retaining the freedom to accept, or not to accept, that option (Employment Relations Act 2000, ss 50A, 50B & 50C). Experiences over the past 12 years show that business' fears were largely unjustified. The Authority has never set terms and conditions of employment, and employers have demonstrated that they see the advantages of this type of third-party assistance by applying for facilitation support.

Political Challenges to Collective Bargaining

Labour Government support for collective bargaining continued during their fifth term, 1999–2008. A Partnership Resources Centre was established in 2005 (Ballard & McAndrew, 2006). The Centre was tasked with providing support for parties experiencing difficulties in collective bargaining (McAndrew, 2006). Unfortunately, it did not have a lengthy existence, being disbanded by the National Government when it came to power in 2008. The National Government further reduced collective bargaining provisions contained in the Employment Relations Act 2000; i.e., employers could opt out of multi-employer bargaining (Employment Relations Act 2000 s 44A(2)), and the Authority could conclude bargaining summarily (s 50K).

In September 2017, that Government was replaced by a coalition Government led by the Labour Party. While it is early days, the new Coalition's election promises signal changes in collective bargaining. The Labour Party's manifesto seeks to support collective bargaining by:

- restoring and improving bargaining rights for all workers,
- extending bargaining rights to dependent contractors, and
- introducing industry-based fair pay agreements (Foster & Rasmussen, 2017).

Chapter Conclusion

Chapter 2 has provided an overview of New Zealand's industrial relations policies from 1894, when the Government first introduced statutory assistance to parties experiencing difficulties in collective bargaining. Some of the concepts established in the 1894 legislation continue to influence current legislation:

- the concept that employers and employees are best placed to resolve their own employment disputes, but on occasion, need assistance;
- the provision of easy access to low-cost dispute resolution assistance from the State when required; and
- access to a determining body when agreement cannot be reached between the parties.

Despite the changes, the steps taken by the fifth Labour Government (1999–2008) to support collective bargaining have had little effect. Union membership and collective bargaining did not alter significantly during the balance of their term in office (DOL, 2009a). The steps taken by the following National Government (2008–2017) reduced, rather than enhanced, incentives for employers to enter collective bargaining. Unlike the period between 1894 and 1987, current legislation only provides arbitration for collective bargaining in very limited circumstances. Table 2 provides an overview of the four different approaches to employment relations in New Zealand since 1894 and includes the 2004 Amendments to the Employment Relations Act 2000.

The courts and conciliation institutions have had several different titles from 1970–1987. The Labour Court, established in 1987, only provided arbitration by agreement of both parties. While there continues to be an Employment Court, their jurisdiction in relation to collective bargaining is very narrow. They may not make an order cancelling or varying a collective agreement (Employment Relations Act 2000, s 192). The current support available for unions and employers is mediation through the MBIE, and, for matters where the parties have encountered serious difficulties in collective bargaining, facilitation through the Authority.

Facilitation is a process that is unique to New Zealand employment legislation. It was introduced following a review of the Employment Relations Act in 2004. The purpose of the review was to consider if the primary intentions of the Act "to build productive employment relationships through the promotion of mutual trust and confidence" (s 3(a)) had been met. It was determined that a process to assist parties encountering difficulties in bargaining was required. The Minister of Labour sought a process that would be accepted by both employers and unions, and in doing so, ruled out arbitration. Despite facilitation not being successful in increasing collective coverage, it has been adopted by bargaining parties as a means of support for collective disputes. The criteria used by the Authority for access to facilitation, and the parties' adoption of the facilitation process, are discussed in chapter 5. Chapter 7 discusses the way the Authority provides facilitation support.

TABLE 2

COMPARISON OF STATE ASSISTANCE AVAILABLE FOR PARTIES EXPERIENCING PROBLEMS NEGOTIATING A COLLECTIVE AGREEMENT IN NEW ZEALAND, 1894–2017

1894–1970	1970–1991	1991–2000	2000–2004	2004–2017
Regulation	Reducing Government regulation	No Government regulation	Return to Government regulation	Increased Government involvement
Hierarchy of third-party assistance 1. Arbitration Court 2. conciliation 3. Boards	Hierarchy of third-party assistance 1. Labour Court 2. conciliation, or 3. mediation	No State assistance for negotiating collectives	Mediation assistance for negotiating collectives	Hierarchy of third-party assistance 1. facilitation 2. mediation
Simple-to-access, low-cost support	Simple to access low cost support	No State assistance for negotiating collectives	Simple to access low-cost support	Mediation Simple-to-access, low-cost support Facilitation High threshold to access

Emphasis on centralisation and national awards	Emphasis on centralisation and national awards	Emphasis on enterprise agreements	Provision for national awards, but majority enterprise agreements	Provision for national awards but majority enterprise agreements
Compulsory arbitration	Arbitration by agreement	No Sate-provided arbitration	No State-provided arbitration	Arbitration in very limited circumstances
Only union members covered by legislation	Only union members covered by legislation	Coverage extended to all employees	Coverage continued for all employees	Coverage continued for all employees

Chapter 3: Literature Review

Overview

Collective bargaining emerges out of a bottom-up mobilisation of workers within a public statutory framework (Estlund, 2014). Different approaches to conflict management often reflect the specific environmental and institutional contexts in which they are developed (Roche, Teague, & Colvin, 2014). Because of the tremendous number of extant empirical studies in conflict management (Lewicki, Weiss, & Lewin, 1992), the approach taken is to limit the study to third-party processes designed to help resolve problems in collective bargaining, i.e., the actions taken by parties external to a conflict to resolve it or to restore effective negotiation.

Chapter 3 is therefore a literature review of facilitation and mediation practices and processes used for collective bargaining. First, I cover the various definitions currently used to describe third-party neutrals in collective bargaining. After briefly describing conciliation, I move on to discuss the different models of facilitation and mediation, and I conclude with a discussion on alternative dispute resolution (ADR) processes in New Zealand. Subsequently, I review the strategies used by facilitators and mediators to resolve collective bargaining disputes, and the contribution they both make to the process in Aotearoa (New Zealand).

Incompatibility between different forms of dispute resolution is a well-understood problem that creates issues with categorising, defining and researching the issue (Welz & Kauppinen, 2005; Teague, Roche, Gormley, & Currie, 2015). For example, one strength of mediation is its flexibility, but this also presents a challenge in defining and describing mediation practices, and in determining the appropriateness of styles and processes (Boulle, Goldblatt, & Green, 2008). In the introduction to his 1986 research, Howells (1986) expressed a view that the community at large had little understanding of the mediation process, but especially disturbing to him was that it was not thoroughly understood by some of those intimately involved in labour management relations. To address this issue, he included a background discussion of different forms of third-party intervention (Howells, 1986). His description included conciliation, arbitration and mediation, and as relevant in New Zealand at the time, Ministerial intervention (Howells, 1986). The confusion about mediation apparent in the 1980s

has continued since that time, with several different titles used to describe broadly similar processes.

Definitions of Third-party neutrals

Third-party neutrals are consistent participants in employment dispute resolution. They need to provide a process that enables the parties to move past impasse (McAndrew, 2014). A variety of processes are used to do this. The following discussion describes the differences, similarities, consistencies and inconsistencies in the conceptualisation of process terminology. This comparison highlights a systemic problem in ADR, where particular terms such as mediation, facilitation and conciliation are used across jurisdictions in ADR systems to describe similar, but different, processes for dispute resolution. A key principle of voluntary collective bargaining is that parties are expected to take primary responsibility for their mutual dealings, seeking to reach their own settlements before seeking assistance from third parties (Steadman, 2003). Therefore, the dispute resolution continuum typically begins with negotiation, with a range of process options, and ends with litigation as the mainstream option, where disputes are resolved by judges. The "classic triad" of dispute resolution activities, conciliation, mediation and arbitration pivot around that continuum (Figure 7) (Roche, et al., 2014; Valdés Dal-Ré, 2003; Welz & Kauppinen, 2005). This chapter concludes with a critical discussion of ADR processes in New Zealand, in which I question the process ambiguity most critical to my work — that is, the similarities and differences between processes of facilitation and mediation, and how differences contribute to collective bargaining outcomes.

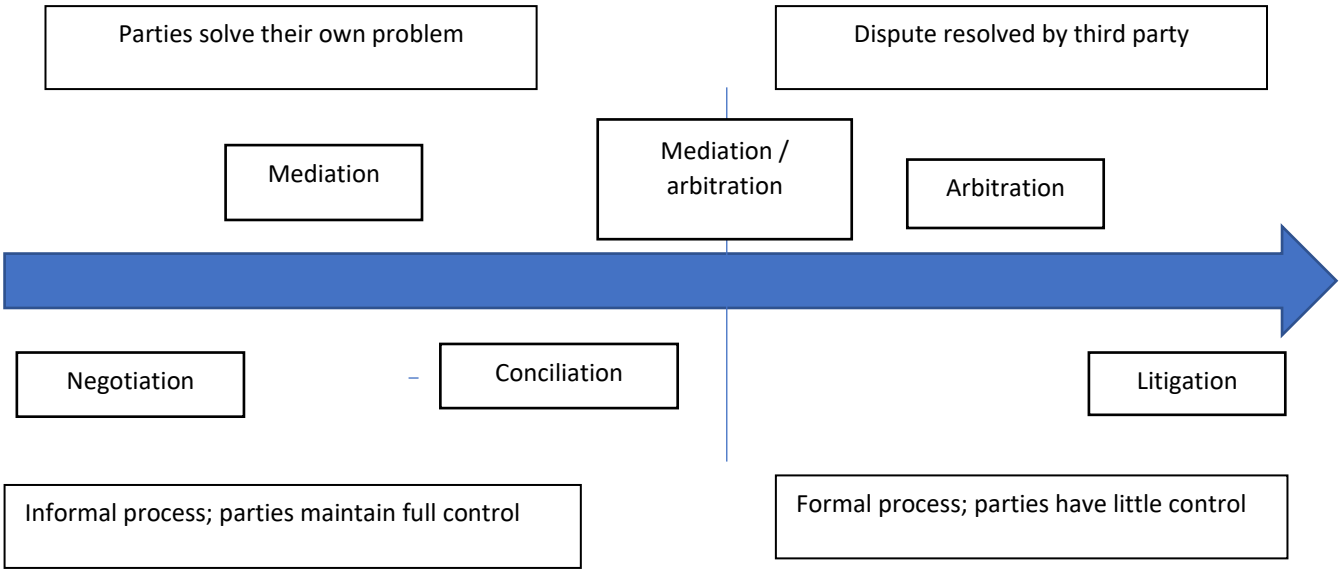

FIGURE 6. DISPUTE RESOLUTION ACTIVITIES FOR COLLECTIVE BARGAINING IN NEW ZEALAND.

Notes. Negotiations start with the anticipation that parties will be able to resolve their differences on their own, without third-party intervention. Disputes can escalate to litigation, where third-party lawyers become involved. The illustrated process is current to 2019 legislation.

I begin by defining the key concepts embedded in the processes. Here, I compare key principles of ADR: voluntariness, confidentiality, party self-determination and impartiality. "Model" and "process" are terms used to describe mediation and facilitation, and in this thesis, a model is the style of dispute resolution provided, while process relates to the series of actions, or steps, taken to achieve the object of the mediation, or facilitation.

Conciliation.

Conciliation is not currently legislated for in New Zealand's employment law. However, it was a cornerstone process for resolving collective bargaining disputes in New Zealand employment law from 1894 until 1987 (see chapter 2 for a more detailed discussion). Conciliation is used as a title in other jurisdictions, i.e., in the UK, the term "conciliator" is used to describe practitioners who are involved in collective bargaining, with the title "mediator" reserved for those involved in other types of employment disputes (Advisory Conciliation and Arbitration Service [ACAS], 2017).

The terms conciliation and mediation are used interchangeably in the literature, and in practice. Conciliation is often taken to mean a more directive style than mediation, during which proposals for settlement may be put to the parties by the third party (Roche, et al., 2014). However, in some jurisdictions, conciliation and mediation have completely the opposite meanings (Brenninkmeijer, Sprengers, de Roo, & Jagtenberg, 2006). McAndrew (2014) has stated that in New Zealand, mediation and conciliation are recognised as different processes, conciliation denoting a more active involvement in the process by third-party neutrals than in mediation. This is in sharp contrast to the definition given to conciliator in the EU, where conciliation is said to be the less structured form of intervention (Silverstein, 2011 p. 122), while mediation is a process in which the third party takes an active role in tabling proposals directed towards a resolution of the conflict (Valdés Dal-Ré, 2003). For the purposes of the current research, it is not necessary to determine which description is correct. McAndrew (2014) used the word "conciliation" to describe a model of facilitation promulgated by the Authority, so in comparing conciliation to other processes later in this chapter, I adhere to his definition. This definition sits comfortably alongside the description given by Roche et al. (2014).

Facilitation.

The New Zealand Oxford Dictionary states that the word "facilitate" comes from the Latin word "facilis" and defines the root word, "facilitate" as "to make easy"; thus, the task of the facilitator is to create an environment where complicated work is made easier for the participants. The

aim in facilitation is for the parties to work together to achieve their objectives as smoothly and productively as possible and in a consensus style. Three streams of facilitation literature are important to this research:

- that arising from facilitation as an educative or "learning" process (Gregory, 2002; Heron, 1999; Hunter, 1999; McCain & Tobey, 2007; Wardale & Thorp, 2008);
- literature where the term "facilitation" is used as a descriptor for a historic assistance–mediation process in collective bargaining (MacNeil & Bray, 2013; Roche, 2015); and
- literature concerning the facilitation process in the Authority.

In the following sections, I review the literature from each of these areas, commencing with facilitation as an educative process before moving on to the Authority and other facilitation processes used in collective bargaining. Facilitation models are discussed before describing the mediation process.

Facilitation, like mediation, is an ancient art. It has had a place in spiritual and monastic traditions in the form of a spiritual guide, a spiritual master and a spiritual director. Monastic traditions involving facilitation still flourish. Over time, its use has expanded into many fields, including education, healthcare, counselling, management, practice development, quality improvement and audit (Kitson, Harvey, & McCormick, 1998). Facilitation is claimed to be more than a process; it is one of the major human resource management philosophies of managing people. A facilitative style is one in which employee development and enhancement are valued, and new knowledge and skill acquisitions are facilitated, rather than provided by the organisation. The organisation assists the employee to gain new knowledge by way of financial or non-financial support (Schuler, 1989; Schwarz, 1994, 2002).

McCain and Tobey (2007) have argued that the many roles of a facilitator include being the leader of the group, manager of the agenda, role model for positive behaviours, content expert and consultant; to be effective, facilitators need to be competent in the three major areas of knowledge, skills, and behaviour. The role they undertake has also been described in terms of who they are and what they do (Gregory, 2002). These two things are interconnected, and competence in both is important for effective facilitation (Gregory, 2002). For example, an effective facilitator does not stand in front of a group and lecture. Rather, they work with the

group to assist it to achieve a self-defining purpose, to understand common objectives and to achieve these objectives without taking sides in any conflict or group deliberations (Hunter, 1999; McCain & Tobey, 2007; Priest, Gass, & Gillis, 2000). Facilitators are also instructors who create an environment that allows parties to think and direct their own learning and development (Gregory, 2002; Wardale & Thorpe, 2008). Furthermore, facilitators guide groups towards their predefined purpose, "intervening as and when necessary to draw out the wisdom lying dormant in the psyche of the learner" (Gregory, 2002 p 80). They provide guidance, rather than direction, supporting the group in dialogue, self-discovery and self-determination (Rogers, as cited in O'Hara, 1989). Facilitators have no power to impose a solution; instead, they support the group to work towards their own goals (Murray, 2012). Equal power, partnership and participation are important components of a successful facilitation process (Hunter, Thorpe, Brown, & Bailey, 2007).

There is, however, debate about whether a facilitator can truly be unbiased in the delivery of a facilitation process. Facilitators bring their own set of values to the process creating tension and conflict between the need for a set of values and the need to be impartial (Heron 1999). Furthermore, having a set of values contradicts the expectation of involved parties that values, like mediators, are impartial (Heron, 1999 Schwarz (1994).

Van der Merwe (1998) made a clear distinction between facilitation and mediation, defining mediation as being a goal-oriented procedure, and facilitation as a process-oriented procedure restricted to one aspect of mediation: the facilitation of communication between conflicting parties. In this author's view, the facilitator does not suggest solutions, and is primarily concerned with technical, rather than moral, issues (Van der Merwe, 1998). In addition, the facilitator is supposed to be involved in the process of improving communication, rather than in the goal of reaching a solution (Van der Merwe, 1998). The Government Centre for Dispute Resolution's (2016) definition of facilitation concurs with Van der Merwe's (1998) definition. They have said that facilitation is "a process in which the parties (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), agree outcomes, identify tasks to be accomplished, problems to be solved or disputed issues to be resolved" (Government Centre for Dispute Resolution, glossary, 2016). A confusion in job titles describing those involved in ADR processes confirms the philosophical split. A notation warns that facilitation is also a

term used in the Employment Relations Act 2000 to describe a process whereby the Authority helps parties experiencing difficulties in collective bargaining negotiations.

Schwarz (2002) contended that there is a difference between the roles carried out by a mediator and a facilitator; mediators only work with people in conflict, so they do not fit the description of a facilitator, because conflict is not a feature of facilitation. On the other hand, the concepts of mediation and facilitation have been brought together in "facilitated mediation", the title given to an ADR process used to support parties in collective bargaining (Roche, 2015). A process described as "a State provided facilitated mediation process" is strongly promoted in the Employment Relations Act 2000, and is used for both ongoing relationships and collective bargaining disputes (Cotter & Dell, 2010; Rasmussen & Greenwood, 2014). The term "facilitator" is used to describe practitioners engaged by employers, unions and State agencies to assist the process of collective bargaining in various ways; the term also describes professionals used to support dispute resolution (Roche, 2015). As part of initiatives, commencing in the 1999s, to support work–life balance, the title "facilitator" is used in the US and Canada to describe people involved in processes to support "workplace partnerships" (Chaykowski, Cutcher-Gershenfeld, & Kochan, 2001, chapter 2). The facilitation process has evolved in some cases into addressing deeper, underlying issues surrounding the relations between the parties to collective bargaining (Chaykowski et al., 2001; Ferguson, & Barrett, 2007; Lipsky, Avgar, Lamare, & Gupta, 2014). The role these North American facilitators played appears more closely aligned to a mediator's role, rather than a facilitator's role, under New Zealand legislation. These facilitators

- enter the dispute by joint agreement and invitation of the parties;
- their involvement occurs early in the dispute;
- they do not, unless with permission from the parties, have decision-making power;
- they provide private facilitation services; and
- the contractual relationship with the parties empowers the parties to have input into the process used (Roche, 2015).

Facilitation by the Authority. Some commentators have described facilitation as part of an overview of industrial relations in New Zealand (but empirical research into employment facilitation has been undertaken by one person only, Dr Ian McAndrew from Otago University, Dunedin). McAndrew's (2010) work, based on a limited number of cases, compared the facilitation process available under the Employment Relations Act 2000 with the final-offer arbitration system used by the New Zealand Police. The incentive to agree a voluntary outcome, rather than an outcome determined by a neutral third party, was an incentive used to effect voluntary resolution in the Police process described by McAndrew (2012). Furthermore, the facilitation process, where a neutral third party only had the power to make a non-binding recommendation, was effective in some cases, but was entirely dependent on the facilitator, the parties and the issues (McAndrew, 2012). Neutrals were more effective in settling issues in the pre-recommendation stage, when a directive conciliation approach was taken; this finding confirmed that a blunt, settlement-oriented mediation approach is often ineffective (McAndrew, 2012).

McAndrew's (2012, 2014) research reviewed the facilitation process from two main perspectives. He sought to compare the New Zealand facilitation process to other international employment dispute resolution processes, and he sought to analyse the process as a stand-alone proceeding. His key findings were that facilitation is not a substitute for mediation, and that three models of facilitation were used by Authority facilitators: 1) an (advisory) adjudication model, 2) a mediation model, and 3) a conciliation model. McAndrew (2012) further found that applications made were dependent on the parties' power or strategic objectives. He noted that while recommendations made thus far have generally been a mixture of process and substance, any substantive recommendations issued clearly favoured one of the parties (McAndrew, 2012). In the year in which his study was undertaken, 2009, for example, most facilitations involved the transport sector, bus drivers, airline pilots and flight attendants, five were in primary processing (meat workers, pulp and paper, food), one involved a small State agency and one occurred in the public service sector. The reason the application for facilitation was made depended on the parties involved. In four out of the five cases where the union was the applicant, he suggests they came from a weak position, representing a minority of workers in the workplace, and

therefore, they had little industrial muscle. Strategically playing to one or more audiences was a common feature, winning the support of the facilitator being the prime objective.

Of the three facilitation models that emerged, McAndrew (2012) further found that a directive conciliation process was the most effective for achieving a settlement, because the role was more active, aimed at settlement through compromise. McAndrew (2012) therefore made a distinction between mediation and conciliation: while facilitators used conciliation, mediation or adjudication styles during the facilitation process, the author found that the key factor to the facilitator's higher success rate above that of a mediator lay in the facilitator's ability to make public recommendations for settlement.

McAndrew (2012) described most facilitation scenarios as beginning with a joint organising meeting, followed by separate briefings, and usually, with written submissions (Figure 8). The process he described then moved into a conciliation, or alternatively, a mediation–arbitration model. Facilitators issued draft recommendations for rebuttal by the parties before issuing final recommendations privately to the parties (McAndrew, 2012). The recommendations were subject to public release on the facilitator's own initiative, or on the application of one of the parties, but of course the facilitator would need to agree to the release. The recommendations given by the facilitator were generally a mix of substance and process, although the issuing of substantive recommendations that clearly favoured one of the parties ran the risk of having the other rejecting or ignoring these recommendations, although, in some cases, even rejected recommendations played some role in eventual settlement (McAndrew, 2012).

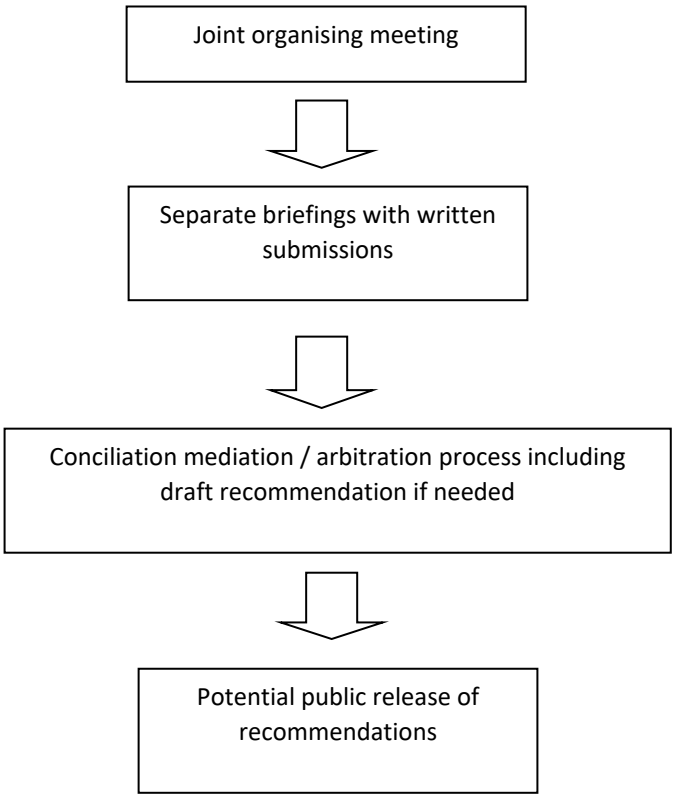

FIGURE 7. THE EMPLOYMENT RELATIONS AUTHORITY (AUTHORITY) FACILITATION PROCESS AS IT IS USED IN NEW ZEALAND TODAY (ADAPTED FROM MCANDREW, 2010, 2012).

In McAndrew's study (2012), parties were found to use facilitation in one of two ways: either a process steered by the facilitator, or, when close to a settlement, a short, sharp circuit-breaker process where the parties were given the "push'" to get back to work themselves to resolve the dispute. He found facilitation as a settlement-orientated process worked best when the facilitator used a conciliation process and chaired the negotiations between the parties. Like mediation, facilitation was not successful in every case McAndrew (2012) examined. Of the cases studied by McAndrew (2012), only about one-third of the facilitations reached settlement directly and relatively immediately. A comparison with mediation is not possible as the numbers are not available. Regardless of the outcome, time spent in facilitation was seen as helpful to

resolution, as in the cases that did not resolve during the actual process, parties believed the intervention was instrumental in bringing about an eventual resolution (McAndrew, 2012).

McAndrew (2012) also found that facilitation elevated the seriousness of the dispute, with an application for facilitation causing the parties to bring in lawyers to argue their cases. This escalation, together with a formal Authority decision to refer to matter to facilitation and the introduction of a "judicial officer" into the negotiations (a person statutorily authorised to intervene), capped it off (p 506). The investigative, questioning approach taken by facilitators was a more searching approach than mediators took, and was consistent with and enhanced the elevation of the seriousness of the dispute that came with the referral to facilitation. Increased formality and gravitas were credited with getting the attention of players higher in the bargaining organisations, or those behind them. They, in turn, often brought more settlement authority to the dispute (McAndrew, 2012). McAndrew acknowledged, however, that the gravitas was not always the trump card, but stipulated that the key advantage the facilitator had over even an experienced mediator was the power to issue and publicise a report and recommendations. Parties were very conscious of the audiences that would be influenced by the facilitator's recommendations, and of the potential benefits and harms public disclosure could cause a party (McAndrew, 2012). Much of the criticism of facilitators by McAndrew (2012) related to the facilitator making too little use of the ability to issue recommendations to challenge and move the parties from their positions. It was widely acknowledged that the value of facilitation was the opportunity for a credible, neutral third party to express their view on a way to settle the collective. The views expressed by the facilitator introduced a reality check for the parties during the recommendation phase of the process (McAndrew, 2012).

Facilitation in the international context. In contrast to New Zealand perceptions of facilitation, international literature has cast a different role for a facilitator involved in collective bargaining, as outlined in chapter 1. A facilitator in Ireland has been described as an independent chair brought in early to resolve employment disputes (Roche, 2015; Thompson, 2010), while a facilitator in the New Zealand context is only used when the parties have exhausted other options such as mediation (Employment Relations Act 2000, s 50). The ILO's guide to dispute resolution suggests the facilitator's primary focus should be on the process as a means to an end (ILO, 2011). The facilitator's mandate should be twofold, according to the ILO (2011): 1) to set and keep the parties on the most productive pathway to maximise mutual, as opposed to partisan gains; and 2) to steer the parties into looking at wider interests, multiple perspectives and longer time horizons.

Roche (2015) used the term "facilitator" to describe practitioners engaged by employers and unions, and possibly by State agencies, to assist the process of collective bargaining and to support dispute resolution. Private facilitation commonly involving a blend of assisted bargaining, conciliation, investigation or fact-finding and arbitration has been used in Ireland, for example, where historically, there has been a reluctance to use processes that could result in a dispute being adjudicated by a dispute resolution agency (Roche, 2015). Except where the facilitation process is being undertaken at the direction of the Court, parties are free to determine who the facilitator is, and the terms of contract entered into (Roche, 2015). Roche (2015) described private facilitators as able to provide flexibility in processes and outcomes, which is preferred over the State process in Ireland, where a reluctance to let a third party make a recommendation governs outcomes. Employers and unions in the public service sector in Ireland have used private facilitation processes when they were reluctant to enter a dispute resolution process that culminated in arbitration (Roche, 2015).

Roche (2015) elucidated contrasting modus operandi between facilitators with an industrial background and those with an organisational development background. An interest-based bargaining model involving joint problem solving was preferred by those with an organisational development background. While people with an industrial background sometimes used these methods in Ireland, those interviewed by Roche (2015) saw joint problem-solving methods as "just one tool in their tool box". In contrast to facilitators with an

industrial background, who preferred a mediation–arbitration process, organisational development facilitators were reluctant, as a matter of principle, to act as conciliators or arbitrators within the facilitation process (Roche, 2015 p 301).

A process described as facilitation is not limited to private sector providers. A flexible, multi-purpose mode of dispute resolution called facilitation is also used by the Labour Relations Commission in Ireland (Roche, 2015). The types of facilitation they are involved in are described as:

- exploratory and informal diplomacy, nondirective exploratory sounding, informal offers of assistance with proposals for resolution (mainly coming from the facilitator);
- brokerage in the shadow of adjudication, involving direct conciliation following a recommendation of the Labour Court or a decision by the Rights Commissioner; and
- assisted bargaining, non-directive facilitation conducted outside the context of a dispute to address complex or technical agendas within a long-term framework (Roche, 2015).

The different processes used by facilitators providing support in collective bargaining disputes in Europe have also been described as assisted bargaining, conciliation, determination by way of investigation/fact-finding and adjudication–arbitration (Goodman, 2000; Steadman, 2003). The process used links to the timing of the facilitation assistance provided; interest-based bargaining, joint problem solving or conciliation activities, such as exploring compromise, are models used for "assisted bargaining" prior to a dispute arising. Conventional third-party collective conciliation is typically entered into after deadlock, or a dispute, has arisen, with the third-party shuttling between the primary parties to seek an agreed resolution. Finally, investigation coupled with fact-finding, nonbinding adjudication or binding arbitration are all methods commonly deployed when agreement or compromise has eluded the primary parties (Goodman, 2000; Steadman, 2003).

Assisted and interest-based bargaining contrasts with the distributive win–loss, positional, or zero-sum strategy, which applied to negotiations prior to the 1990s (Fisher, Ury, & Patton, 1981). Collective bargaining then was a competitive environment, the negotiators' sole focus to gain the maximum of a fixed resource (Walton & McKersie, 1965). The result of

negotiating in this way, more gain for one side of the table, meant less gain available for the other side. Distributive bargaining in this manner led to inefficient negotiation due to tactics such as walkouts, "dirty tricks" involving resistance to honest exchanges of information and delays in decision making (Walton & McKersie, 1965). Mediators were confronted with a destructive situation that was likely to damage ongoing relationships (Fisher, et al., 1981).

Since the 1960s, there has been a gradual shift away from win–loss positional bargaining to a model described as interest based, integrative or problem solving, starting with the work of Walton and McKersie (1965) and further developed by Fisher et al. (1981). For negotiating "rights and responsibilities" as opposed to hard economic issues, Walton and Mckersie (1965) suggested there could be increased joint gains if the parties followed a joint problem-solving format. In this format, the parties can recognise and define a problem, search for possible solutions to it, evaluate them, and select one that maximises joint gain. The concept of integrative negotiation rests on a value system that stresses interpersonal trust, cooperation and a search for mutually acceptable outcomes (Mckersie, 1965). A willingness to share information, combined with open communication, is essential to this form of negotiation (Lewicki et al., 1992). There is strong support internationally for problem-solving models and interest-based negotiations with a focus on joint gains, because relationships are strengthened rather than destroyed (Cohen, 2010; Fonstad, McKersie, & Eaton, 2004; Roche & Teague, 2011, 2012; Roche, 2015).

Fisher et al.'s (1981) work in the USA was greeted by many in labour and management with scepticism. Their suggested model was regarded as overly simplistic because it did not consider the hard reality and power dynamics of labour management bargaining (Barrett 2015). However, the movement of manufacturing to cheaper countries, and the ensuing problems for the union movement, provided a platform for change to move bargaining from a distributive to an integrative, or interest-based format, and for providers of mediation services such as the US Federal Mediation and Conciliation Service (FMCS) to change their mode of practice (Barrett, 2015; Cutcher-Gershenfeld, Kochan, Ferguson, & Barrett, 2007), which saw the FMCS develop what they called a cooperative model of dispute resolution assistance based on integrative, or interest-based bargaining (Brommer, Buckingham, & Loeffler, 2002).

Early assistance in bargaining is currently offered by organisations such as ACAS in the UK and the South African Commission for Conciliation, Mediation and Arbitration (SACCMA) (Thompson, 2010). In recent years, interest-based bargaining has developed into other processes. The joint problem-solving work undertaken at Kaiser Health in the US (Kochan, Eaton, McKersie, & Adler, 2009; McKersie, Eaton, & Kochan, 2004) is one example. Approaches that the FMCS see as going beyond interest-based bargaining include modified traditional bargaining (MTB) and enhanced cooperative negotiation (ECN) (Brommer, et al., 2002; Cutcher-Gershenfeld, 2014; Cutcher-Gershenfeld & Kochan, 2004; Cutcher-Gershenfeld, et al., 2007; Cutcher-Gershenfeld, Kochan & Wells, 1998).

A comparison of facilitation methods in New Zealand.

To broaden the scope of my research on facilitation, I consider other areas where facilitation processes are provided in New Zealand statutes. For example, facilitation is provided under the Victim's Rights Act 2020 statutes governing the criminal offending area. Like the provision for employment facilitation, the process for restorative justice facilitation is not defined in legislation; however, a facilitator's role is defined as contributing to the restoration of just relationships between adult victims, offenders and their communities (Victim's Rights Act 2002). The facilitator provides a safe process under which all parties involved in a criminal event, the victim(s), the offender(s) and their communities, are given an opportunity to address the facts and consequences of the crime in a conference led by a trained facilitator. The victim becomes the centre of the process, with the primary participants meeting face-to-face in a safe situation to recount their perspectives of the offence and to work to repair the harm done by the offending.

The process is based on a set of principles which include voluntariness, accountability, emotional and physical safety, and appropriateness (Ministry of Justice, 2010). Murray (2012) has defined the restorative justice facilitator as "a person who helps a group achieve its purpose using their own unique style to set up the working environment, manage the dynamics of the group and encourage group members to work together." Effective facilitators in this field require five crucial attributes: 1) personal presence, or an awareness of their own self and the wider community; 2) a wide range of facilitation skills; 3) knowledge about the system they are

working under and 4) where it fits in the social and political context; and 5) personal, collegial and organisational support (Murray, 2012).

Facilitation models. As with mediation models discussed later in chapter 3, several different facilitation models exist. The models arise from the idea that facilitation is an educational, rather than an industrial process. I present them here to provide a base with which to compare and contrast the facilitation process used by the Authority under the current Act. In Heron's (1999) work on the facilitation process, he developed two basic categories of facilitator, the authoritative and the facilitative. He extended these two styles into three different models, the 1) hierarchical, 2) cooperative and 3) autonomous models (Heron, 1999). In these models, the understanding is that the facilitation process is one in which the parties are more or less in a learning environment. Herein, I use Heron's (1999) work as a framework for comparing facilitation processes common to the Authority with those espoused in the literature. Using Heron's work as a benchmark is appropriate, because it is widely accepted by other scholars in the field (Gregory, 2002; Hogan, 2002; Hunter et al., 2007; Thomas & Pyser, 2008).

TABLE 3

FACILITATION MODELS

Facilitation model	Characteristics
Authoritative	Prescriptive, informative and confronting. Facilitators instruct and guide, challenge the other person or suggest what to do.
Facilitative	Cathartic, catalytic and supportive. Facilitators draw out ideas, solutions and self-confidence from the other person, and help them to reach their own solutions.
Hierarchical	Responsibility, oversight and control are taken for major decisions. Facilitators direct the learning process, exercise power over it, and do things for the group: leading from the front; thinking and acting on behalf of the group; deciding the objectives and the programme to be followed. Feelings and emotions are interpreted, given meaning to and managed. Resistances are challenged, and claims of authentic behaviour in the group honoured.
Cooperative	Power over the learning process and management of the different dimensions within the group are shared. The group is guided to become more self-directing, with group members deciding on the programme to give meaning to experiences and to confront resistance. The facilitator's views are shared, as just one among many. Outcomes are always negotiated. Collaboration with the members of the group in devising the learning process is important.
Autonomous	Total autonomy of the group is respected. The facilitator does not interfere in the group's freedom to find their own way by exercising their own judgment. The group evolve their own programme, give meaning to what is going on and find ways of confronting their own avoidances. Learning is unprompted and self-directed. The facilitator's skill is the subtle art of creating conditions within which people can exercise full self-determination in their learning.

Note. Table adapted from Heron (1999).

The Heron (1999) models (Table 3) are about who controls and influences the management of the group. Models are defined by who makes decisions about what people learn and how they

learn it. The facilitator may act alone, the facilitator and group members may make decisions and share power together, or group members may take total control (Heron, 1999). An effective facilitator is someone who can use all these models appropriately, depending on the changing situation in the group, and who can also move between models smoothly (Heron 1999).

The facilitation process. According to Heron (1999), the facilitation process moves through six different dimensions (Table 4). The dimensions Heron (1999) has suggested are planning, meaning, confronting, feeling, structuring and valuing. They are designed for the purpose of eliciting and empowering learning. The facilitator decides on how they can achieve that outcome through by framing their interventions according to these dimensions (Heron, 1999). Each intervention is intended to achieve a certain result in a certain way.

TABLE 4

THE SIX DIMENSIONS OF FACILITATION

Dimension	Purpose	Facilitative question
Planning	The goal-oriented, ends and means aspect, which relates to the aims of the group, and shape what programme it should undertake to fulfil their aims.	How shall the group acquire its objectives and its programme?
Meaning	The cognitive aspect, or the participants' understanding of what is going on, making sense of their experience, their reasons for doing and reacting to things.	How shall meaning be given to and found in the experiences and actions of group members?
Confronting	The challenge aspect, or raising consciousness about the group's resistances to and avoidances of things it needs to deal with.	How shall the group's consciousness be raised about these matters?
Feeling	The sensitive aspect, aka the management of feelings and emotion within the group.	How shall the life of feeling and emotion within the group be handled?
Structuring	The formal aspect, or the methods of learning, what sort of form is given to learning within the group, with how is it to be shaped.	How can the group's learning be structured?
Valuing	The integrity aspect, which is about creating a supportive climate that honours and celebrates the personhood of group members; a climate in which they can be genuine, empowered, disclosing their reality as it is, keeping in touch with their true needs and interests.	How can such a climate of personal value, integrity and respect be created?

Note. Adapted from Heron (1999).

The relationship between dimensions. Heron's (1999) six dimensions of facilitation interweave and overlap. While they are mutually supportive of each other, the effective facilitator needs must actively distinguish between them to organise and use them over the course of the facilitation. Effective facilitation is seen by Heron (1999) as a process that takes participants through various structured stages, where each stage has a well-define part in the overall process. While a structured process is common between all facilitation models, there is tension within the autonomous model Heron (1999) proposes, which gives the group the freedom to find their own way, exercising their own judgement without intervention, but at the same time imposes structure on group discussions. The facilitator's role is to create conditions within which the people can exercise full self-determination in their learning.

Facilitation stages. While the literature suggests facilitated learning is part of any process, Heron's (1999) proposed structure could potentially dovetail with other facilitation processes set up for other purposes. Heron's (1999) model requires that at various stages of the facilitation process, the facilitator must use different communication skills, commencing with advice and guidance. The second stage requires information sharing, followed by confronting participants. Other stages are identified as cathartic, catalytic and supportive. In each of these stages, the facilitator must be able to adjust their style to communicate in an appropriate. They must also be flexible according to the needs of the parties' self-determined outcome (Heron, 1999). The stages are fluid, with the ability to overlap if required; earlier stages carry on in reduced form beside latter stages, with each group requiring a difference balance of hierarchical, cooperative and autonomous methods. During facilitation, the balance between the modes may need to change at any time, with the group's fluid objectives and prior experiences being relevant considerations for driving changes (Heron, 1999).

Early in Heron's (1999) model process, a clear hierarchical framework is needed to develop group cooperation and autonomy. The presumption is that the participants are insecure and dependent in their learning, defined by their lack of knowledge and skill, and therefore, they have little ability to orientate themselves. The Heron (1999) hierarchy is based on the participants' consent to this type of structure. Mid-way through facilitation, a more

cooperative process may be required, with increasingly open collaboration between group members in managing the process (Heron, 1999). From a learning perspective, the facilitator negotiates the curriculum with them, and cooperatively guides their learning activities, with various forms of "staff–student" contracts and agreements formed. The presumption is that parties gradually acquire confidence in learning (Heron, 1999). In this way, they can orientate themselves and participate with the facilitator in decisions about how the process should proceed.

In the later stages of facilitation, Heron (1999) has suggested that there is room for much more delegation and scope for the group to be autonomous and self-directed. The presumption here is that group members have gained considerable confidence, and have acquired evident competence in a sizeable body of knowledge and skill. However, in proposing this facilitation model, Heron (1999) acknowledged that not all groups would need to progress through the entire process. Heron (1999) stated that hierarchical, cooperative and autonomous stages in facilitation are required for training absolute beginners, but that skilled participants may not need a hierarchical approach at all. While preliminary stages may be omitted from a process by experienced facilitators, Heron's (1999) model provides a structured process for the mediator or facilitator to follow. The potential tension between structure and flexibility in mediation (and facilitation) processes (Boulle, et al., 2008) is explored in more detail in chapter 8.

Mediation

Mediation is defined as third-party intervention in a negotiation or conflict where the third party has limited, or no, authoritative decision-making power (Boulle et al., 2008, chapter 1). The third party's role is to assist the disputants to voluntary reach a mutually acceptable settlement (Boulle et al., 2008; Moore 2003, 2014). Thus, mediation entails high control over the process of dispute resolution, but low control over the outcome (Thibaut & Walker, 1975). Mediators employ a variety of strategies and tactics to initiate and facilitate interactions between disputants, leaving the final resolution, or terms of settlement, in the hands of the parties themselves (Lewicki, et al., 1992). The mediator aims to help the parties negotiate more effectively, not to solve the problem (Lewicki, 1996).

Mediator contribution to collective bargaining. The purpose of mediation in collective bargaining remains, as it was in the 1980s, to achieve a collective employment agreement. The contribution made by the mediator is dependent on the nature of the dispute and the parties' requirements, with collective bargaining disputes being more readily settled than personal disputes (Martinez-Pecino, Munduate, Medina, & Eumewa, 2008). Mediators provide a process for parties in a dispute that is non-adversarial, and a mediator's ability to establish rapport and trust, gain the confidence of the parties and develop empathy for participants, are important for successful outcomes (Ardagh & Cumes, 1998).

North American research has identified that unions and employers see the mediator's contribution in different ways (Ahmad & Pegnetter, 1983). Union negotiators place their faith in mediators to devise a framework for negotiations, to change expectations and to impart and neutrality and confidentiality, while employer negotiators value face-saving tactics brought to the table by the mediator; employer negotiators also value discussion about the cost of the disagreement, plus the mediator's expertise and impartiality (Ahmad & Pegnetter, 1983). The contributions mediators make include:

- changing the dynamics of bargaining by introducing objectivity and reducing personal antagonism (Blake, Mouton, & Sloma, 1965; Deutsch & Krauss, 1960; Douglas, 1962; Meyer, 1960; Rubin & Brown, 1975; Walton & McKersie, 1965).
- increasing understanding between the parties of each other's position by accurately conveying information needed to make decisions (Blake, Hammond, & Meyer, 1973; Rhemus, 1965; Simkin, 1971; Stevens, 1963; Walton & McKersie, 1965; Young, 1972).
- using agendas to remove structural impediments to the negotiation process, parking difficult matters until a later stage in the process and making suggestions as to trade-offs (Maggiolo, 1971; Simkin, 1971).
- facilitating the exploration of possible solutions by repackaging proposals and raising compromise solutions for discussion (Bartunek, Benton, & Keys, 1975; Douglas, 1962; Simkin, 1971; Young, 1972).

- reality-testing the parties' perceptions of the cost of continued conflict compared to the cost of resolution (Bigoness, 1976; Johnson & Pruitt, 1972; Johnson & Tullar, 1972).
- providing for face-saving to allow for concessions or the resumption of negotiations (Maggiolo, 1971; Pruitt, 1971, 1981; Simkin, 1971; Stevens, 1963; Vidmar, 1971).

Different factors have been used to determine mediators' effectiveness (Martinez-Pecino, et al., 2008). The mediation of rights issues dealing with principles, or indivisible factors, is generally more difficult than the mediation of issues dealing with disputes over preferences or interests (Wall & Lynn, 1993). The contributing factors are the type of dispute, scarcity of resources, commitment levels and receptiveness of the parties to mediation (Carnevale & Pruitt, 1992; Wall & Lynn, 1993; Wall, Stark, & Standifer, 2001). Rights conflicts tend to be more legalistic and adversarial (Bain, 1997) because they deal with ideas of right and wrong. When parties are locked into rigid positions about what they believe to be "right", there is little to trade. Conflicts of interests, on the other hand, are not subject to black-and-white values judgements, making them easier to deal with (Messing, 1993).

A resource limitation has more repercussions in rights disputes than in interest disputes, because conflicts over interests allow opportunities for both integrative and distributive negotiations (Gallagher & Gramm, 1997), but when parties focus on their rights and legal considerations, a zero-sum outcome often eventuates, one in which there is a winner and a loser (Lytle, Brett, & Shapiro, 1999). Parties focus on what they see as justice and fairness, making the conflict more difficult to resolve (Messing, 1993).

The New Zealand position in the literature is consistent with international research. Most collective bargaining applications result in a new collective employment agreement, while only 85% of rights cases settle in mediation (DOL, 2012). The result is not surprising. Rights disputes are based on an individual's core values, and if the matter does not settle in mediation, the party bringing the dispute has the right to apply to the Authority and / or the Court to get a determination. Collective bargaining, on the other hand, is an interest dispute between a union, on behalf of a number of workers, and their employer, over terms and conditions of employment. Except for the facilitation services offered by the Authority, and a very limited

provision to set terms in serious breaches of good faith, there is no remedy available in either the Court or the Authority to determine the outcome of a dispute of interests.

Once a collective agreement expires, the employer is free to offer new employees individual contracts, which puts added pressure on the parties to settle a collective employment agreement. The parties' attitude to resolution is, therefore, important. To reach a resolution, parties must be willing to consider creative solutions, be ready to give and take, and must be prepared to compromise on some points (Slaikeu, 1996). When parties are convinced of the legitimacy of their position, however, they believe that the third party will undoubtedly rule in their favour and prefer a more rule-bound resolution procedure to mediation (Schuller & Hastings, 1996). Full commitment to the mediation process is required to achieve resolution.

Mediation Models. There is a large amount of literature describing mediation models (Boulle, et al., 2008; Charkoudian, de Ritis, Buck, & Wilson, 2009; Golann, 2000; Morris, 2015; Stempel, 2000). Unfortunately, similar to the confusion that exists about the different processes of mediation, facilitation and conciliation, there is a lack of common understanding among practitioners about different mediation models. Until the 1990s, discussion about mediation centred around classifications of facilitative versus evaluative mediation. In its "purest" form, mediation was said to be facilitative, but it was accepted that mediators usually intruded on the process to a degree (Menkel-Meadow, 1995).

Bush and Folger (1994), on the other hand, saw mediation in a wider context, and presented transformative mediation as an alternative. They claimed that transformative mediation created an opportunity to transform people's conflict interactions into resolutions (Bush & Folger, 1994). Their approach reduced the importance of actually reaching an agreement, with mediators intervening only as needed to support empowerment and mind shifts. They claimed that when a mediator followed one set of gaols, he or she could not follow another (Bush & Folger, 1994). Fisher (2010), somewhat similarly, has argued that mediators must be committed to a style (model), rather than using a variety of styles. He has suggested that a shift from facilitation to settlement has occurred in modern mediation styles (Fisher, 2010). Fisher (2010) has stated that this shift has occurred because mediators now energetically

reason with, persuade, cajole, badger and wear down parties, and that in the field of litigating money claims, the settlement approached has flourished in the ADR market. Mediators who persist in passive, facilitative, therapeutic or non-interventionist styles are equally successful, but operate increasingly at the personal, family, relationship and community end of the spectrum (Fisher, 2010). Collective bargaining often deals with both money and relationships, the relationship between the parties being determined to some extent by the bargaining process and outcome.

As discussed at in Chapter 2, when the Employment Relations Act 2000 was introduced, it contained a clear philosophical change from the previous legislation. The new Act defined employment as a "relationship" rather than a "contract", and strong emphasis was put on good faith. The mediation provisions of the Act, clearly inspired by the interest-based approach popularised by Fisher et al. (1991), favoured a facilitative mediation style (Morris, 2015). The Act incorporated a shift in employment dispute resolution methods from positional, zero-sum bargaining to mutual problem-solving, interest-based negotiation (Greenwood, 2016). Good faith between employers and employees, and facilitated consensual resolution of personal grievances, were cornerstones of the new legislation. Mediation under the ERA 2000 now appears to feature "an effort at least at proactive, remedial mediation, despite a continuing preponderant demand for evaluative, 'divorce' orientated mediation" (McAndrew & Risak, 2013 p. 8).

Mediation was given status as the most important element in resolving disputes. Enabled by the 2000 Act, a mediator in the MBIE's Mediation Service could implement a wide range of different mediation procedures, whether "structured or unstructured, or do such things as he or she considered appropriate to resolve the problem or dispute promptly and effectively" (s 147(2)(a)). The DOL mediators Cotter and Dell (2010) noted a focus on the empowerment of parties during all mediation interventions. Such interventions were delivered in a range of flexible styles and models, contingent on the requirements of the parties and the dispute (DOL 2009b; Greenwood, 2016; Morris, 2015). The initial training of mediators by CDR Associates, a mediation provider and trainer based in Denver, CO, and subsequent changes to the New Zealand Act's section 147(2)(ac) reinforced proactive, remedial mediation.

A Comparison of Mediation Models. In addition to the models discussed in the "Mediation Models" section, other forms of mediation have evolved. These include:

Advisory — where the mediator considers the dispute and provides advice about the facts presented, the law and, in some cases, possible or desirable outcomes and how these may be achieved.

Therapeutic — where the mediator assumes the source of conflict is a result of misunderstanding or failure to communicate and emphasises the resolution of conflict through rational discussion and compromise (Brett, Drieghe, & Shapiro, 1986).

Wise council — where the mediator evaluates the merits of the case, focusing on the broader interests and concerns of the parties by combining a problem-oriented mediator intervention with the parties engaging in interest-based negotiation (Alexander, 2008).

Style of mediator intervention. There are five major styles of mediator interventions. These are described in detail below.

Settlement. Settlement interventions are future focused, based on parties' positions. The mediator pushes parties into settling disputes through compromise and bargaining. It is more likely to be used in employment mediations when the outcome is more important than the relationship (Cotter & Dell, 2010; Kressel, Frontera, Forlenza, Butler, & Fish, 1994; Spangler, 2003; Spencer, 2005)

Evaluative. Evaluative interventions focus on reaching a deal. They are based on legal risks and litigation risk analysis, rather than needs and interests. The mediator points out the weaknesses of the cases. Mediator might make recommendations about outcomes. The mediator structures the process, and directly influences the outcome of mediation. The process is predominantly conducted via separate meetings and "shuttle diplomacy" (Boulle, et al., 2008; Della Noce, 2009).

Facilitative. In facilitative mediation, the parties are encouraged to negotiate based upon their needs and interests, instead of their strict legal rights (Spencer, 2005). Facilitative mediators assist parties to come to agreements based on information and understanding. The process is predominantly conducted via joint sessions, but does involve caucusing. The mediator identifies underlying needs and interests, allowed the parties to create an appropriate, unique solution (Stulberg, 1997). A facilitative mediator usually does not carry out a litigation risk analysis, i.e., they do not comment on what would happen if the matter went to court (Fisher, et al., 1991).

Transformative. The transformative approach is based on "empowerment" of the parties and "recognition" by each of the other's needs, interests, values and points of view. The process consists of joint sessions. The parties structure both the process and the outcome, and the mediator follows their lead, supporting the parties to determine the direction of their own process. The transformative method is part of a general move away from game theory and positional bargaining towards problem solving (Bingham, 1997; Fisher & Ury, 1991; Riskin, 1996; Walton, Cutcher-Gershenfeld, & Mckersie, 2000).

Narrative. The narrative approach stems from post-modernism and social constructionism, and it is based on the parties telling their stories. The mediator provides the environment for them to so safely, which allows understanding on both sides, thus enabling participants to find solutions. The narrative style is a new and relatively unexplored phenomenon in practice (Cobb, 1994; Cotter, 2008; Hansen, 2003; Winslade, Monk, & Cotter, 1998).

Greenwood (2016) found that aspects of narrative problem transformation, and acknowledgement and recognition aligned with transformative mediation, enhanced new understandings and helped facilitate resolution of problems in New Zealand Schools (p. 222). Linking her work back to the good faith requirements in the ERA 2000, she concluded taking a

problem-solving approach intersected with requirements for good faith behaviour in all aspects of the employment relationship, under the ERA 2000 (p. 231).

The eclectic approach argues that all models are equally valid and the approach the mediator chooses to use is based on the context of the matter in dispute; therefore, it just depends on the context as to which approach is used (Fisher, 2010). Mediators need to be sufficiently flexible to employ the most appropriate orientation, strategies and techniques (Riskin, 1996), changing their approach across different mediations, and during a single mediation process, altering their approach as the participants' needs present themselves (Golann, 2000; Poitras & Raines, 2012).

Mediation Processes. The Employment Relations Act 2000 does not describe a mediation process per se. Despite this, mediators, the MBIE and professional bodies (such as the Arbitrators and Mediators' Institute of New Zealand AMINZ and the Resolution Institute (formally LEADR) operate within codes of practice that are used to measure mediator competency and grading. Sharp (2009), a New Zealand-based meditation practitioner, suggests that such codes set by professional organisations may — or may not — meet the needs of the users of the system. For example, in the year 2000, when formal training was introduced to the New Zealand employment mediation service at large, users expressed concern at the formulaic processes being used by new mediators (Lowe, 2001). The issue seemed to be that experienced users of the system had an understanding of mediation based on their experience of the "old" system, while new mediators introduced new ways of managing disputes. This clash led to non-acceptance and complaints.

Moore (2014) described a structured, but flexible process for compromise. He suggested that a mediator should work through stages of a process, but that the process should be fluid to meet the needs of the parties. For example, a focus on the parties' relationship and psychological conditions could be appropriate in a transformative mediation (Bush & Folger, 1994) or in a restorative justice mediation, (Murray 2012), but not for collective bargaining, where the focus is likely to be on substantive, or procedural matters (Moore, 2014). Moore's (2014) process generally commences with private meetings, with each party enabled to share

their views in private, which then moves joint meetings, where the mediator explains the process and the parties put forth their views of the dispute. The underlying reasons for the dispute are then examined jointly, the mediators using such active techniques as listening-questioning-summarising-acknowledging, mutualising and reframing, while working towards establishing common ground and finding a solution (Brown & Marriott, 1999; Latreille & Saundry, 2014; Wall, 1981). This structured but flexible mediation is often a non-linear process, relying heavily on the skills of the mediator, their style and approach (Brown & Marriott, 1999; Latreille & Saundry, 2014). The important components are voluntariness, confidentiality and self-determination.

The Resolution Institute mediation process. The resolution Institute mediation process used by MBIE mediators was developed by LEADR (a former name for the Resolution Institute) as a tool for mediators, is now the default model for mediation of legal disputes in Australasia (Sharpe, 2009). To understand the employment dispute resolution system in New Zealand, it is important to understand this model because currently, MBIE employment mediators all attend Resolution Institute training and apply their processed to mediations. The model they are shown teaches mediators to work through a structured process. It promotes a facilitative style of mediation, rather than settlement or evaluation, but because a staged process is applicable for all mediations, it can be applied to all mediation models. Each stage of the process must be dealt with before moving to the next stage. In this process, the main part of the mediation is the joint session where issues are explored, and parties drill down, usually with the assistance of the mediator, into key matters identified in the opening statements as requiring debate and dialogue. The mediator's role is to facilitate an exchange of the party perspectives. The process is flexible, allowing the mediator to return to an earlier stage if required.

The process adds rigidity to the mediation process. However, "process" can be seen as the steps taken, distinguished from the "model" of mediation (or facilitation), where flexibility is important (Cotter & Dell, 2010; Morris, 2015). Using a stepped process to work through a

mediation event is in line with Heron's (1999) facilitation process that establishes three stages in a facilitation process. The stages of the Resolution Institute process are fluid and overlapping, as required by Heron's (1999) model. The process proceeds thus:

- planning — equating to premeditation work undertaken to plan the process and to ensure the parties' commitment;
- the understanding and exploration stage of mediation;
- confronting — the problem-solving stage;
- feeling — a return to the understanding and exploration stage; and
- structural and valuing — the agreement and closure stage.

The key principles of facilitation and mediation processes in New Zealand

The different models of facilitation and mediation discussed demonstrate that there can also be large differences in processes given the same title, or name. Based on my literature review and comparing the descriptions of key concepts such as voluntariness, confidentiality, self-determination and impartiality, it is clear to see that confusion can arise from placing reliance on names alone, without understanding the process being delivered. The similarities between mediation and facilitation are, to some extent, reliant on the model being used. Voluntariness is often thought of as a feature of mediation, a facilitation process based on learning and facilitated mediation. However, under New Zealand employment law, parties may be directed to attend mediation (Employment Relations Act ss 159(1)(b) and 188(2)(b)). Under the same Act, facilitation is a process parties, while not forced to attend, need to attend to have their position considered via any recommendation made by the Authority pursuant to section 50H, or any remedy awarded pursuant to section 50J.

Confidentiality is regarded as a key requirement of mediation and facilitation. However, unless the parties agree, confidentiality is not a feature of collective bargaining mediation provided under the Employment Relations Act 2000, but is a feature of collective bargaining

facilitation provided under the same legislation. This is in stark contrast to any other mediation provided under that Act, where strict confidentiality provisions apply (s 148). This difference in how confidentiality is handled between processes provided also applies to the Authority. When they are providing facilitation services, these services are confidential, while in their role, determination hearings and decisions made are public, unless suppression orders are in place.

Self-determination is a feature of mediation, particularly ADR (Heron, 1999) and in Ireland, having self-determination is one of the suggested reasons why parties used facilitated mediation processes rather than State-provided processes, which do not allow self-determination (Roche, 2015). In contrast, self-determination is an underlying principle of the Employment Relations Act 2000 in New Zealand, and applies to facilitation, if the parties can reach an agreement. There is provision for the Authority member to determine the terms of a collective agreement without the parties agreeing that they do so. In Ireland, facilitated mediation is provided to support parties early in an employment dispute (Roche, 2015). Early mediation under the Employment Relations Act 2000 is also provided for, but to access facilitation, parties must have escalated their dispute, and in doing so, they potentially lose control of the outcome. By this I mean the Authority facilitator has the power to determine the contents of a collective agreement. And if they decide to take this action, the normal ratification process, whereby the union members covered by the collective can vote on the proposed terms and conditions, does not apply.

Impartiality is another key concept in mediation and facilitation literature. While there is obviously debate about whether a mediator or facilitator can be truly neutral, neutrality is one of the underlying principles of mediation. Impartiality is not referred to in the 2000 legislation, however. During a facilitation process, parties must deal with the Authority in good faith (Employment Relations Act 2000, s 50(I)), but there is no such requirement for Authority members or mediators to act in a similar fashion.

In 1986, Howells and Cathro described the confusion between the various roles of ADR providers in the employment jurisdiction. Confusion continues today, not only about the roles, but also in the comparison of the titles given to those roles, and how they are described in the literature. In the remainder of this thesis, I attempt to bring some clarity to this area. First, I explore strategies mediators use in collective bargaining disputes. I then obtain an

understanding of recent and historical applications made for facilitation (detailed in chapter 5), before moving on to look at the facilitation processes themselves from the parties' and users' perspectives.

Strategies Used in Collective Bargaining Disputes

In the following sections, I discuss the strategies used to resolve collective bargaining disputes. While this section of the literature review focuses on mediator strategies, it is appropriate to do so, because Authority facilitators use both mediation and mediation–arbitration models when providing collective bargaining assistance (McAndrew, 2012).

Mediator strategies.

Overview. Mediators use a variety of strategies to assist them in the resolution of disputes (Martinez-Pecino, et al., 2008). The strategy selected is linked to the model of mediation used, and to the characteristics of the dispute (Boulle et al., 2008; Carnevale & Choi, 2000). Some strategies are effective across all types of disputes, while others may be ineffective or detrimental if applied in the wrong dispute (Carnevale & Pruitt, 1992; Esser & Marriott, 1995; Kochan & Jick, 1978; Posthuma, Dworkin, & Swift, 2002).

Approximately 25 different strategies for mediation have been identified by scholars worldwide. These include the evaluative (Della Noce, 2009; Riskin, 1996; Wall & Chan-Serafin, 2014); the pressing or directive (Carnevale & Pruitt, 1992; Wall, Dunne, & Chan-Serafin, 2011); the neutral (Kydd, 2003; Wall, & Chan-Serafin, 2014); the facilitative (Gabel, 2003; Kressel, 2007; Riskin, 1996); the narrative (Hardy, 2008; Winslade et al., 1998); the problem-solving strategy (Fisher et al., 1991; Harper, 2006); a strategic (Kressel, 2007); pragmatic (Alberstein, 2007); transformative (Bush & Folger, 1994; Kressel, 2007); a deal-making and orchestration approach (Kolb, 1983); and the trust caucus (Poitras, 2013). To discuss strategies in a sensible manner, I

have broken them into the three groups that have received the strongest empirical support (Lim et al., 1990). These are:

- **assertive strategies**, where the mediator plays a very active role (sometimes evaluative, sometimes directing or pressing);
- **trust strategies**, where the mediator works with the parties to build trust between the mediator and the parties, and between the parties themselves by facilitating, problem-solving and trust caucusing; and
- **neutral strategies**, where the mediator plays a minimal role (either narrative, neutral or transformative).

This three-group division is supported by work undertaken by Kressel and Pruitt (1985), who have described mediator involvement as substantive (assertive), reflexive (trusting) or contextual (neutral).

Assertive, substantive strategies . Assertive, substantive strategies are interventions that deal directly with the issues in dispute to move the negotiation towards a settlement (Kressel & Pruitt, 1985; Lim, et al., 1990). Examples of this type of intervention are suggesting the terms of a settlement or attempting to move one or both parties off a committed position. The mediator's behaviour is assertive. These interventions are widely used in employment dispute resolution mediation (Martinez-Pecino, et al., 2008) by the mediator exploring with the parties ways in which the dispute might be resolved and making suggestions as to how this might occur (Lewis, 2000; Mason, 2000). In the context of collective bargaining negotiation, mediators' suggestions and alternatives have been described as helpful by both management and unions (Posthuma, 2000), with disputants sometimes preferring pressure to push the parties to settle (Posthuma, 2000).

Trusting, reflexive strategies. Reflexive strategies are interventions designed to orient mediators to the dispute, gain the acceptance of the disputants, generate trust towards the mediator and the mediation process, and to create the foundation for the development of group resolution activities. Examples of this type of intervention include using humour to lighten the atmosphere and developing rapport with the parties. Kressel and Pruitt (1985) have argued that mediators using reflexive strategies can improve acceptance of mediation by establishing trust in the mediator and confidence in the mediation process; the establishment of this trust leads to a resolution of the issues. This strategy may not be as successful in rights disputes as in conflict of interest disputes (De Dreu & Carnevale, 2005; Posthuma, et al., 2002). The entrenched positions held in rights disputes creates a situation whereby the mediators attempt to build trust, but attempted mediation further entrenches positions, with the parties choosing to reject a settlement, instead becoming more committed to "a day in court" to achieve their strongly held positions (Martinez-Pecino, et al., 2008).

Neutral, contextual strategies. Contextual strategies are interventions geared towards facilitating conflict resolution by altering the circumstances in which the mediation occurs. Parties search for an acceptable solution to the problem using their own initiative. The role the mediator plays is a minimal one. The mediator does not directly approach the issues. Instead, they try to facilitate the process by allowing the parties to find their own acceptable solution to resolve their differences. Examples of this type of intervention might be establishing priorities on the list of issues to discuss or simplifying agendas. In a review undertaken by Carnevale and Pruitt (1992), a mediator's contextual behaviours, such as controlling the agenda and controlling the process, were positively associated with settlement in a variety of disputes. The role of the mediator being the "provider of a process" is also consistent with Kressel and Pruitt's description (1985).

The use of different strategies. An effective mediator is one who can time the delivery of the appropriate strategy for the stage parties are in and for the type of dispute, thereby establishing legitimacy before moving to other strategies (Wall & Chan-Serafin, 2014). Research has identified that contextual and substantive strategies relate positively to settlement in conflicts, but the effectiveness of reflexive strategies varies, depending on whether the disagreement is a conflict of interests or rights (Martinez-Pecino, et al., 2008). Reflective strategies play a more important role in interest-based disputes, where trust in the third-party neutral is essential, than they do in rights-based disputes, which relate to rights arising from contract or law. Use of reflexive strategies can lead to unsettled differences, particularly in rights conflicts (Martinez-Pecino, et al., 2008).

In short, third-party neutrals in employment disputes need to be trusted and to have knowledge and personal credibility for parties to have confidence in them and in the process (McAndrew, 2014). Building a rapport by way reflective strategies before nudging parties towards settlement by making suggestions and recommendations is essential (Wall & Chan-Serafin, 2014).

Chapter Conclusion

Chapter 3 provides an overview of employment dispute resolution literature from both a New Zealand and an international perspective. New Zealand has a unique system for assisting parties to overcome blocks in collective bargaining; however, there has been very little research on the process and the New Zealand context. The focus of chapter 3 was therefore to set the framework for contributing to the body of knowledge that has been undertaken to date.

Mediation and conciliation are the traditional mechanisms for supporting collective bargaining. In some countries, "conciliator" is the title given to a third-party neutral involved in collective bargaining disputes, and in others, including New Zealand, the title given is "mediator". The terms "mediation" and "conciliation" are used interchangeably. There is, however, general agreement that conciliation is a more settlement-focused process in which the parties' relationship is less important than achieving a resolution.

Facilitation is a term used for private third-party assistance in some nations. New Zealand legislation also provides support by way of facilitation assistance. It is difficult to distinguish mediation and facilitation from other dispute-resolving mechanisms, however. Because of the size of the New Zealand collective bargaining market, mediators in New Zealand work across all different types of employment disputes, and for collective bargaining disputes they are unable to resolve, facilitation is available.

Distinguishing between different forms of dispute resolution is problematic. The different models of facilitation and mediation offer large differences in processes, which are all lumped with the same title. The similarities between mediation and facilitation are somewhat reliant on the model being used. There are many different mediation and facilitation models, as well as different strategies used by both mediators and facilitators to assist parties. How the Authority might use these models does not address the question of how they relate to the models used by other mediators.

I deliver a synopsis of research methodology in chapter 4. To provide a deeper understanding of the facilitation process, in chapter 5, I review the applications made for facilitation in New Zealand to date. My aim is to gain further insight into the parties using the process, and their reasons for doing so. In chapter 6, I describe the personal attributes required

of mediator and facilitators. The relationship between international processes and the New Zealand process is discussed in chapters 7, 8 and 9. Chapter 7 explores the origins of facilitation and the statutory differences between mediation and facilitation, bargaining parties' and Government's expectations, and the tensions between those expectations and the intentions of the Employment Relations Act 2000. Chapters 8 and 9 review models and strategies used by mediators and facilitator in collective bargaining, the contributions they make, and the process steps used to achieve outcomes.

Chapter 4: Methodology

Introduction to the Research Questions

This chapter outlines the methodological approach and design of my project to add to empirical research in mediation and facilitation. It explains why I adopted an interpretive paradigm, the processes I used for the collection and analysis of data and limitations of methods applied to this project. The research questions I am seeking to answer are set out in chapter one.

After I conducted a general literature review, I divided the research project into three distinct parts, commencing with a review of all cases that have been the subject of an application for facilitation assistance, followed by a survey of applicants. I then conducted semi-structured interviews with a selected number of participants involved the mediation and facilitation processes. In chapter 4, I explain and defend the methodology and method of data collection I chose. I discuss different paradigms and justify why I have chosen to use interpretive methodology. I also explain why the project required three data collection methods, or parts. The limitations of these research methods for collecting data, and the steps I took to address them, are discussed.

In my research, reality is socially constructed, rather than objectively determined. The aim is not to establish one correct way of implementing a process or practise but is rather to reflect upon the meaning participants attribute to processes and practices.

Research Design

Research design provides an overall configuration to approaches. The design is crucial to understanding theoretical and methodological perspectives adopted to provide context and philosophical background (Crotty, 2003; Kuhn, 1972). Denzin and Lincoln (2005) have described research design as requiring a flexible set of guidelines that connect theoretical paradigms to strategies of inquiry. Design must also reflect methods of collecting empirical data (Phillimore & Goodson, 2004). Three basic questions can be answered during the design phase (Denzin & Lincoln, 2005):

- What determines the paradigm and how paradigm relates to design;
- strategies of inquiry that will be used; and
- methods that will be used for collecting and analysing raw data.

Paradigms A paradigm serves to define what should be studied, what questions should be asked, and what rules should be followed in interpreting the answers obtained. It is a set of basic beliefs or assumptions that determine a "worldview", defining for its holder the nature of the world and their place in it (Creswell, 2007). A paradigm influences what a researcher sees as real and what can be known. Paradigms shape research inquiry by determining how this information can be given to others by way of a credible account (Miles & Huberman, 1994).

Different paradigms Paradigms fall into two main categories: "positivist" and "interpretive forms of inquiry" (Denzin & Lincoln, 2005). These paradigms differ significantly in terms of fundamental axioms defining their ontology, epistemology and methodology. The ontological assumption is concerned with the nature of reality, and the epistemological assumption is concerned with what people accept as valid knowledge (Collis & Hussey, 2009). Table 5 compares positivist and interpretive paradigms.

TABLE 5

POSITIVIST AND INTERPRETIVE PARADIGMS CONSIDERED IN THE CURRENT RESEARCH

Research element	Positivist	Interpretive
Assumption	Real world, true state of affairs	Perceptions shape social reality
Research purpose	Discovers how things are and how things really work; capable of scientific verification, whether logical or mathematical	Measures the complexity of social phenomena to gain understanding using methods that seek to describe, translate and come to terms with the meaning (not frequency) of naturally occurring phenomena
Researcher focus	Is objective and value-free; can investigate the object of study without influencing it	Is not value free; what exists in the social world is linked to the researcher's mind
Outcome	Knowledge is derived from "positive information"	Findings are not derived from a statistical analysis of quantitative data
Ontological assumption	Only one reality	Multiple realities; multiple perspectives
Epistemological assumption	Independence and objectivity between researcher and collection of data	Close and subjective relationship between the researcher and participants

Table adapted from Creswell & Piano Clark (2007) and Hussey & Hussy (1997)

Issues with positivist research. Collins and Hussey (2009) listed several potential problems with undertaking positivist research. They pointed to limitations in using a constrained design methodology, the relationship between people and the social context in which they exist and the lack of objectivity on the part of researchers. They concluded that capturing reality by assigning numerical values is not possible in all research projects (Collins & Hussey, 2009).

Issues with interpretive research Objective reality can never be fully captured (Denzin & Lincoln, 2005). Rather, interactive processes are shaped by one's personal history, biography, gender, social class, race, ethnicity and study subjects. Interpretive research tends to be more time and resource intensive than positivist research in data collection and analytic efforts. Data collection needs to be carefully balanced to allow for effective processing and recognition that data sources may have undisclosed political agendas and may not be equally credible, unbiased, or knowledgeable about the phenomenon of interest.

Determining Research Methodology

Recently, complex social processes underlying human relations in the workplace have been explored by way of interpretive paradigms. These processes have been recognised as human experiences, rather than physical elements, and consequently, an interpretive paradigm, with its rich world view, has become more accepted as a research paradigm because the method allows the researcher to explore the way people make sense of social phenomena (Greenwood, 2016). The power of this model "lies in its ability to address the complexity and meaning of situations" (Black, 2006, p. 319). With less emphasis placed on classical structures and formal proposals, well-formulated hypotheses, predetermined research strategies and analytical procedures, a new path of discovery is possible (Denzin & Lincoln, 2000).

My current project is an effort to obtain a richer understanding of a phenomenon, the processes of mediation and facilitation. The research sample is small and using several research methods therefore enables different perceptions to be obtained (Creswell, 2007; Denzin & Lincoln, 2005).

Interpretive research builds on layers of information and multiple methods and data triangulation can be used to obtain in-depth understanding of the phenomena being studied, (Denzin & Lincoln, 2005). My research is being undertaken in a novel area of dispute resolution practice. Given the small amount of empirical data currently available in this field and the exploratory nature of this research, I chose an interpretive research model because it is best suited for examining the multiple realities common to mediation and facilitation. I acknowledge that interpretive research is not value-free I have taken steps to address the influence of personal values on my research. These are explained further in the "Addressing Potential Bias and Ethics Issues" section of this chapter.

Research epistemology. Denzin (1994) has described epistemology as the theory of knowledge and how we, as observers, view the world. Constructivist epistemology is built on the view that reality is constructed, rather than discovered. Reality is created by the observer, who gives meaning to what they observe, and in doing so, constructs reality around their active experience of it (Johnson, 1994). The current project is exploratory, because I seek to understand and describe the way people construct or make meaning from their mediation or facilitation experience, rather than testing a hypothesis or drawing on scientific propositions (Cooperrider & Barrett, 1990; Creswell & Plano-Clark, 2007; Crotty, 2003; Davidson & Tollich, 1999; Guba & Lincoln, 1994; King & Horrocks, 2010). Using a constructivist epistemology allowed me to capture the varied experiences of participants in mediation. Capturing multiple viewpoints allowed for a more accurate assessment of mediation processes and thus complemented the research aim, which was to obtain an in-depth understanding of collective dispute resolution processes amalgamated from different perspectives. Thus, I felt that building knowledge from information I collected via a face-to-face approach better informed theory and practice than survey or experimental approaches (Guba & Lincoln, 1994).

Qualitative and quantitative research models. Qualitative research involves examining a social or human problem. It also involves taking a holistic approach based on recording the words and reporting the views of the participants conducted in a natural setting, and thus, my endeavours were a comprehensive, transparent personal journey (Corbin & Strauss, 2008; Grant & Giddings, 2002; Patton, 2002). In contrast, quantitative research methods involve collecting richly detailed information from participants and using it to support and develop theories (Creswell, 2007; Denzin & Lincoln, 2000; Guba & Lincoln, 1994). Qualitative and quantitative methods are tools to help answer the research question asked, their contributions depending on their power to answer the question being asked (Kvale, 1996; Zikmund, Babin, Carr, & Griffin, 2010). Quantitative methods generally use a representative sample that can be generalised and applied to a parent population, involving enquiring into a social or human problem by studying relationships between numeric variables (Brannen, 1992). The integrity of the data must be sound, and data collected must be about actions, rather than behaviours (Miles & Huberman, 1994). A qualitative research approach is usually associated with interpretive models such as mine, because it allows for authentic inquiry about people's personal experiences of mediation and facilitation, rather than relying on simulated experimental problems constructed in contrived contexts.

Positivist research is usually associated with quantitative studies, not interpretive studies in which there is no intention of analysing information statistically. Thus, using multiple sources of data created an issue for me. To obtain an understanding of facilitation, I wanted to review all the applications made in this country, conduct a questionnaire to update previous findings according to the methods of Howells & Cathro, 1986, and conduct interviews to understand the differences or similarities between mediation and facilitation under the Employment Relations Act 2000. The multiple data sources required flexibility in data collection processes, and this proved a challenge for my research, as explained below.

Mixed methods research. Multiple viewpoints within a single study are given meaning by using more than one approach to research design, data collection and data analysis (Johnson, Onwuegbuzie & Turner, 2007), but care must be taken to ensure research paradigms are not confused (Creswell, 2007. In mixed-methods research, the researcher mindfully creates designs that "effectively answer the research question; this stands in contrast to the common approach in traditional research where students are given a menu of designs from which to select" (Johnson, et al., 2007, p. 20). Mixed-method models provide superior research findings and outcomes when the research is of an exploratory nature, and where there is a lack of empirical data to support normative claims in literature (Johnson, et al., 2007), thus making my current study idea for such an approach.

In using mixed models, the research continuum contains three possible priorities for research design. Either qualitative or quantitative research is the dominant model, or they may be of equal status. A qualitative-dominant approach recognises that the type of mixed-methods research being undertaken relies on "a qualitative constructivist approach, poststructuralist critical view of the research process, while concurrently recognising the addition of quantitative data and approaches … likely to benefit most research projects" (Johnson, et al., 2007, p. 124).

Part of my present study seeks to update previous quantitative research, a 1986 survey (Howells & Cathro 1986). However, the purpose of the update is to provide a comparison of parties' preferred attributes in facilitators and mediators, a more qualitative endeavour. Yet, the important aim of this thesis is to contribute new empirical research in an area where there is little theory to base the research on. Thus, I chose a qualitative-dominant model encompassing both quantitative and qualitative research methods to achieve cohesiveness, because mixed methods allowed for richness of data. The Qualitative research methods I relied on included detailed interviews with the authors of the system, ERA members, mediators and participants in both processes. This qualitative analysis was used to determine what people's experiences had been. For example, participants' opinions were sought to identify their satisfaction with their experience of facilitation and mediation. Providers of the service were also questioned to gain an understanding of the service being delivered.

Data Collection

Overview. To organise a mixed-methods approach, the data collection process I required needed to be consistent, with a systematic process guiding the use of methods, data collection and analysis. I determined a process of establishing and outlining specific steps prior to data collection commencing (Yin, 1994, 2003, 2009). Because my research involved three distinct parts, I used different methods to improve credibility and reliability in each part of the study. These methods are discussed in more detail in the following sections of this chapter.

Data triangulation. To construct internal validity, the degree to which the findings correctly mapped the phenomenon in question, and to construct external validity, the degree to which the findings could be generalised to other settings, I triangulated data (Yin, 1994). Reliability, the extent to which the findings can be replicated or reproduced by another inquirer was essential to my research, with the unit of analysis being a critical factor. Thus, I used multiple sources of evidence according to the principles of data triangulation, which provided a broader assessment of phenomena under question (Robson, 2002). Data triangulation allowed improved judgement, which I obtained by using a variety of techniques to investigate a single phenomenon (Robson, 1995). This technique was particularly beneficial in improving data accuracy, corroboration and adequacy in qualitative studies (Buchanan, 1999; Patton, 1987).

The research I undertook was designed to obtain an in-depth understanding of the facilitation process and the differences or similarities between mediation and facilitation under the Employment Relations Act 2000. Determining the expectations of applicants and respondents to these processes yielded a measure to judge the process against. Data triangulation is time consuming, and the resources required can make it impractical to use (Robson, 2002). In fact, triangulation should only be used if it is integral to the design of the study (Hussey & Hussey, 1997). To answer the research questions I proposed, it was important to obtain more than one view of the facilitation and mediation processes, however. My research design led me to limit the numbers of cases reviewed, while maximising the parties interviewed in each of those cases. The use of data triangulation, and face-to-face interviews with mediators, Authority members providing facilitation, and union and employer's representatives involved in

the same disputes improved the significance of the data collected; this approach also promoted insightful and creative data collection and interpretation (Buchanan, 1999).

Facilitation under the Employment Relations Act 2000

Overview. To understand interpretations of statutory provisions the Court and the Authority have made about cases decided under section 50 of the Employment Relations Act 2000, it was necessary to review either a representative number, or all the cases heard, since the legislation was implemented in 2004. Because of the limited number of cases heard, approximately 60, reviewing them all was possible, and I saw this option as giving the best result. Reviewing all the determinations also allowed me to gather a list of potential participants for a survey and for face-to-face interviews.

Methods used to collect data All Authority decisions are held on a central database (http://employment.govt.nz/workplace/determinations). By searching facilitation applications and cross-searching section 50, I obtained a list of all applications for facilitation assistance (Appendix 1). I then downloaded the cases for analysis. Parties can seek a de novo hearing of all Authority decisions at the Employment Court. Since 2006, all Employment Court decisions have been filed centrally (http://www.employmentcourt.justice.govt.nz/judgments). I was aware, from my knowledge and interest in the area, that some cases had been filed at the Court. I therefore searched the Employment Court database as well. The public record of Court and Authority decisions, and the assistance I was given by MBIE staff and the users of the system themselves, made this part of the data collection relatively straight forward. The central database also provided confidence in the quality of the data collected.

Understanding the data. During the data collection process, it became obvious that the same lawyers or advocates were representing several parties. My knowledge gained from working in this area assisted me to understand this phenomenon. There are few specialist union lawyers in New Zealand, resulting in just two lawyers bringing most of the cases on behalf of union clients. This was important to consider when analysing the data collected, because employer and union parties take the leading role in determining whether to pursue a matter before the Authority. They brief a lawyer to file the matter based on legal advice on how to address their problems, rather than the lawyer deciding to file proceedings. This knowledge and understanding helped me to determine what information was pertinent to obtain from the cases.

I initially considered using software to assist in the analysis of Authority and Court decisions. But the Authority and the Employment Court do not follow a template when writing their decisions. There is no consistent use of language to describe the factors or the outcomes of a case. Because of the numbers involved and my concerns about being able to capture relevant information, I decided to manually analyse the cases. I used coding to reduce the data. Coding separated data into categories. Criteria I used for coding included determining the matter had been filed by a union or employer, the nature of the industry involved, the outcome of the application and the grounds for the decision. The purpose of conducting an analysis of the cases was to understand the factors considered by the Authority when determining if an application for facilitation should be granted or not.

I also wanted to see if some industries were more inclined to use facilitation. My motive was to ascertain if a pattern existed, and to try and determine why that pattern might be occurring. Analysing what type of worker was represented in cases, and what the nature of the industry and the union coverage under the collective employment agreement was, could demonstrate reasons behind the application that may not have been obvious at first glance.

At the start of the research process, I was not sure what data I would be able to collect, and more importantly, the best way to structure my analysis of these data. Thus, all facilitation cases needed to be read and analysed individually. Because of the uncertainty and the nature of the data being collected, I found that the easiest way of analysing and reporting was to create

tables for each coded category (data not shown). These tables allowed comparisons to be made between the various cases.

Updating 1984 Research

The survey.

To find information about the differences or similarities between mediation and facilitation under the Employment Relations Act 2000, and to elucidate changes to parties' expectations between 1986 and today, I decided to survey parties who had applied for facilitation assistance. The principle reason for my survey was to determine their facilitation and mediation experiences; however, I was also interested to take the opportunity to update a survey conducted in 1984 by Howells and Cathro (1986), who reviewed the attitudes of parties attending employment mediations. It is crucial to be aware of that the 1980s were a different employment relations environment. Employment legislation and structures in the was centralised, most parties being represented by either an employer's central body or a union. People involved in "industrial relations", as the area was then known, were predominately male. The first female mediator was appointed in 1984. Since then, the legislation and the institutions providing dispute resolution services have been through many changes as discussed in chapter 2. The emphasis on the nature of the services provided has also changed.

I wanted to relate the findings of the 1984 survey (Howells & Cathro, 1986) to the attitudes of parties attending facilitation since 2004. Questionnaires are a tool widely used in quantitative research today. They tend to be structured, using closed questions, with little opportunity for participants to qualify their responses (Baker, 2003). A questionnaire can be a suitable methodology for an interpretative study, however. Selecting a significantly large and unbiased sample to survey is not as critical as in a positivist methodology, the aim being to gain insight from participants in the cases studied, no matter how many cases are available (Collis & Hussey, 2009). A survey questionnaire was an effective mechanism for me to obtain information from participants involved in facilitation applications, because closed questions could be asked, allowing a direct comparison with the 1986 survey findings. The survey also allowed for comparisons to be made with different party's recollections of their mediation and facilitation experiences, providing me with a basis for comparison of facilitation with mediation.

The survey questions I developed (Appendix 2) were loosely based on Howells and Cathro's (1986) work, but they were updated to reflect today's social norms. For example, in their research, Howells and Cathro (1986) included age, sex, marital status, religion, political affiliation and fitness as factors that might be important to a mediator. These criteria are now classed as discriminatory under New Zealand's Human Rights Act 1993 (s 21), and these factors would not be relevant in 2017 at any rate. Therefore, I decided these questions were not appropriate, and should not be included in a 2017 survey.

Because of the tight confidentiality measures surrounding mediation experiences, research in this area is considered difficult, resulting in little research being undertaken to date (Walker, 2009). I was hoping to be able to overcome this barrier in the current project. I believed this was achievable, because the names of the participants I was hoping to interview were available in the Authority decisions on the public record. In addition, the survey I was intending to undertake was billed as strictly confidential.

The first application for facilitation was heard in late 2004, 13 years ago, and from my personal knowledge, I was aware that several people had moved on from the positions they were holding at that time. I considered using a representative sample to survey, but the total numbers of cases and participants were small. Furthermore, I anticipated difficulty in contacting some representatives, and the possibility that not every person would want to participate in the survey. I also wanted to survey a cross-section of union and employer participants. Yet, I had no control over who might reply. These factors meant I decided to send questionnaires to every representative named in the Authority decisions. I also asked them to forward the survey if they were aware of others who might be willing to participate. In this way, I hoped to receive sufficient responses to give the survey credibility. The same questionnaire was sent to all participants, regardless of whether they were an applicant or respondent to the proceedings.

I searched all the reported cases and prepared a list of potential participants. From this list, I emailed all the advocates and lawyers I was able to obtain contact details for. Several potential interviewees had changed positions or retired. I sent questionnaires by email to all of those I was able to trace. In total, 31 surveys were distributed, 18 to employer advocates or lawyers, and 13 to union representatives. The lower number of union representative surveyed

came about because the same union advocates represented parties in more cases than the employers' advocates.

My survey asked respondents to identify whether they were representing employers or employees. I believed this question was important to ensure that any data gathered could be analysed in a meaningful way. If I received responses from one group only, the data would lack validity if I presented it as representing the views of all participants, without noting it was potentially biased towards one group of industrial relations actors. I received 21 replies to my emailed survey. Of these, 15 were completed and could be used in the analysis; six surveys came from union advocates, and nine surveys were returned from employer advocates.

Analysing the data.

The 1986 Howells and Cathro data was collected using mathematical grids. This was an appropriate method to use at the time, because of the number of responses and the desire to analyse these in detail, according to various factors such as regional differences. The changes in collective bargaining provisions made since that time, and the small sample covered by the current study, meant that "number crunching" was not necessary. Because the survey questions were primarily closed questions, I used a manual spreadsheet for analysis.

Interviews with Participants

Overview.

In this section, I outline why interviews were chosen as the preferred data collection method, how the process of interviewing participants was devised, and how I dealt with the issues involved in writing appropriate questions. I also explain how I selected certain cases for further investigation.

Accepted methods for collecting the qualitative data include interviews, protocol analysis, repertory grid techniques, diary methods, observations, focus groups, grounded theory, case studies and critical incident techniques (Nachmias & Nachmias, 2000). I quickly discarded a number of these techniques. I discarded direct observations because of the difficulty with timing. While it may have been possible to gain permission to sit in on a facilitation case,

in doing so, I would have been dependent on a collective bargaining dispute that meets the criteria for referral to facilitation being heard by an Authority member. These cases do not regularly take place. I discarded focus group scenarios because of the confidentiality inherent in facilitation and mediation processes and because of the different philosophical backgrounds of the parties. The validity of any focus group data collected may have be influenced by one dominant party or how participants wished to be viewed, rather than being data that reflected their true opinions (Hussey & Collins 1997). Diary methods, where participants record relevant information, are forward-focused, but the events I was researching were usually of short duration and had already occurred. I therefore chose to conduct interviews. The interview method has a flexible dynamic and is focused on gaining rich contextual information (Nachmias & Nachmias, 2000).

The nature of the research questions I posed, and the issues which arose from them, largely determined the interview approach adopted. I anticipated that the participants would feel happier if they were given the opportunity to talk freely. This view was balanced with the knowledge that some structure to the interview questions would be required to organise responses received. I therefore selected the semi-structured interview technique as the principle data collection method. While unstructured interviews can be used to gain in-depth, authentic knowledge about a specific incident (Collis & Hussey, 2009; Flanagan, 1954), they can be time-consuming and can result in the collection of much irrelevant data. I felt that using semi-structured interviews, the favourite "digging tool" of social researchers, provided a better focus (Taylor & Bogdan, 1998), and was in line with the interpretive approach I intended. I used probing questions, which allowed me to gain further insights from the participants (Nachmias & Nachmias, 2000; Robson, 1995). In contrast to the quantitative interviews based on structured questions and rating scales, the qualitative questions I used allowed the participants' personal views to be shared (Marshall & Rossman, 1995). I used a critical, real-life incident — the mediation or facilitation process itself — to provide a focus for the interviews, and to discourage participants from talking about hypothetical situations or other experiences.

I sought to interview a range of participants based on the cases I had selected. I wanted to increase the validity of the data gathered by using data triangulation across interviews. I therefore interviewed the mediator, facilitator, union representative and employer

representative in each of the cases, when they all responded positively. This proved to be impossible in every case, however, so I was forced to select participants to represent each group. I was able to increase confidence in data validity because I also used a survey as another source of data. There was a crossover between one provider of the system and the authors of the system. In total, I conducted 17 interviews, mainly face-to-face in the interviewee's office, but some took place in other meeting venues and one by telephone.

The interviews were conducted in 2016, almost twelve years since the introduction of the current facilitation process in New Zealand. Selective recollections through the passing of this time could have had an impact on the responses. However, the interviews were intended to understand the process, not the actual matters in dispute. Because I wanted to understand how the processes were working, not institutional views about the appropriateness of the legislation, I asked interview participants to speak about their own experiences and perspectives and not as an organisational representative expressing organisational views. I explained that I sought generalised views of the system, and not perceptions on case outcomes, or other cases participants might have been involved in. What was of most value for me was to ascertain perceptions of the facilitation and mediation processes, including, where appropriate, the qualities that the mediator or facilitator brought to the table to resolve the issues between the parties. I therefore used a critical incident technique. This method, based on the participants recollect of key facts, helps interviewees focus on their own experience of an event rather than hypothetical situations or other people's experiences (Collis & Hussey, 2009, p148). To focus the parties on their experiences I ask them to discuss their experience of mediation or facilitation

Selection of cases for interview. When selecting cases for further investigation, the first issue to consider was my independence. In my role as the previous Chief Mediator at the, I was responsible for the quality of mediation services, and on occasion, I provided mediation services to the more complex and public disputes. In conducting the current research, therefore, true independence was an issue. To address this issue, I disregarded any cases in which I had supplied mediation services. Of course, this exclusion reduced the number of potential cases for study. Next, I sought to cover a representative cross-section of matters. Wherever possible, I selected cases across different industries. To obtain a full understanding of the different mediator and facilitator styles, I selected cases that had been facilitated by different Authority members. Finally, I interviewed a cross-section of representatives to reduce any potential conflicts of interest that may have arisen from my working role in the mediation service. As the same representatives and organisations appeared in many cases, I selected cases that gave me the maximum number of representatives to interview. Accessibility was also important. The representatives on the pleadings needed to be New Zealand-based and contactable.

Selection of individuals for interview. A criticism of semi-structured interviews is informant bias, with participants providing a socially acceptable answer rather than an honest one (Hussey & Hussey, 1997; Mason, 2000). I was concerned about the validity of previous research, when mediators were asked to self-report on their perceptions of the process they were using (see Morris, 2015). I believed that this method could have led to a tendency to describe process and style in ways that promoted self-knowledge. Therefore, I decided on a construct that would, hopefully, reduce bias arising from self-interest. I hoped that by interviewing all those involved, the mediator, adjudicator, and both parties, I would have a basis for a less biased reflection on particular cases.

Research into the nature of memory indicates that all people will remember less detail over time, and that the details they remember will relate to what they think was important during the period (Misztal, 2003). Such memories are rehearsed, and those that align with key interests will be retained (Misztal, 2003). In the case of participants who were more familiar with the system, the mediators and facilitators, procedural familiarity could have compensated for loss of detail over time, a common flaw in retrospective research (Misztal, 2003). However,

I reasoned that the parties' experiences were likely to be one-off, significant events in their working lives, and therefore, their impressions of the system were unlikely to have significantly diminished (Galanter, 1974).

Confidentiality. I wanted the persons I interviewed to be confident in speaking openly and freely to me. They work in a discrete area of law and need to maintain working relationships within that area. For example, if an advocate I interviewed wanted to make critical comments about a mediator or facilitator, they may have thought that expressing such opinions could have affected future cases they brought before that individual. Therefore, they may have been unwilling to express their true opinions. It was therefore critical that participants trusted me to protect their confidentiality. There was also a personal need for me to maintain trust and integrity within the industry, as at the time, I intended to continue to work in the field. My solution was to assure participants verbally and in writing that their identity would be protected. Because only a small number of cases have been to facilitation, and an even smaller number of people have been involved in the facilitation process, reassurance was critical. Identifying the case could easily have led others involved in the field to subsequently identify participants, because practitioners know each other very well. Therefore, in writing my research findings, I was extremely careful to write in a manner that would not allow case identification by the reader.

Access to interviewees. I considered Authority decisions and the issues that arose from them first, before interviews. Thereafter, the dataset relating to the opinions of system users involved a more sociological approach. Four categories of people were selected for interview: mediators, adjudicators, representatives and parties.

Negotiating access is a recurrent problem in studies about employment disputes and grievances (Bemells & Feloy, 1996; Walker, 2009). Except for the research carried out by Howells and Cathro (1986), New Zealand employment dispute resolution research has tended to focus on more readily available, archival data available from unions or employers (Lewin, 1987, 2004, 2005), or on public records of formal proceedings (McAndrew, 1999, 2000a, 2000b, 2001, 2002).

Accessing adjudicators and mediators in other countries has also proven to be difficult for some researchers. For example, in work undertaken in Britain, Employment Tribunal adjudicators were reluctant to get involved (Dickens, Jones, Weekes, & Hart, 1985; Earnshaw, Goodman, Harrison, & Marchington, 1998), and domestic mediators have often been restricted in what they could write about by statutory confidentiality provisions (Employment Relations Act 2000, s 148). In stark contrast, I found that Authority members, mediators, employers, employees and their representatives have all been willing to assist me.

First-hand knowledge may have reduced barriers, because I have worked in this area for many years and am known by all the people I interviewed and surveyed. Yet, I wanted to ensure I approached the research in a professional and appropriate manner. Some mediator employers did show some reluctance to allow their employees to be interviewed. I was aware of some of the reasons behind this reluctance, which were related to inappropriate identification and reporting of individual's opinions, and what was considered to be bias on the part of some researchers towards State-provided mediation services. As the Mediation Service's Chief Mediator at the time, I had worked hard to ensure that researchers were given access to mediators to change such negative perceptions. Because I was acutely aware of these concerns, I was determined that my data would be collected and reported in an appropriate manner.

The mediators I selected for interview were either current or former employees of the MBIE, from which I obtained the necessary permissions to interview. The Authority members were statutory officers and had freedom to participate in research if they wished to.

How the interviews were organised. Interview times were established with individuals. Face-to-face interviews were undertaken whenever possible, but because of timeframes and difficulties with scheduling, some interviews were conducted by telephone. I supplied an outline of the questions and information relating to my research to interviewees prior to meeting with them. I took hand-written notes of the interviews. The notes taken were given to the interviewee to review and confirm. This is a process I also use in other investigatory work, and I find it to be more conducive to making interviewees feel comfortable in talking openly and freely.

Interview questions. The legal requirements to be granted facilitation assistance (Employment Relations Act 2000, s 50) meant the participants in the face-to-face interviews had participated in both mediation and facilitation processes. I therefore asked common, semi-structured questions about both processes. Slightly different questions were asked to determine the reasons why parties had chosen to attend facilitation, and to determine the factors that made facilitation successful when mediation was not. The questions were divided into two categories: background questions about the participant's role and the nature of the organisation they were representing; and semi-structured, open questions relating to their experiences of the two processes undertaken. The questions I asked at interviews are presented at Appendix 3.

Data analysis. The quantity of data gathered and how they are used in the interpretivist paradigm can be challenging (Morse, 1994). Reducing data to manageable forms by focusing, discarding and reorganising, so that final conclusions can be drawn and verified, is one method to achieving validity (Miles & Huberman, 1994). Line-by-line, or thematic coding, of interview notes are both valid options (Miles & Huberman, 1994). The extent to which the analysis is structured depends on the extent to which the collection of data was structured. Marshall and Rossman (1995) have stated that data collection and analysis must be conducted as a simultaneous process. Furthermore, the application of a systematic process of organising and understanding data can enable a narrative regarding specific phenomena to develop (Hussey & Hussy, 1997). My collection of data was structured around dispute resolution processes. This allowed me to commence coding the data as I collected it, to establish a set of codes after my initial interview, and to review coding allocations as I collected more data. Naïve inquiry was precluded because of my background in the field (Cresswell 2007). I searched for significant statements, language and discourse, structured meaning units and descriptions (Creswell, 2007). I then performed a content analysis of the interview notes to search for common themes. These themes were clustered into cross-case patterns as per Eisenhardt (1989) methodology.

There is a danger of losing important pieces of information and understanding if theme analysis is undertaken too early (Creswell, 2007; Creswell & Plano-Clark, 2011; Hussey & Hussey, 1997; Robson, 1995). I addressed this possibility by returning to the previous data when analysing later interviews. The small number of interviews conducted, 17 in total, made this process possible.

Interviews with Authors of the 2004 Amendments

Introduction. While facilitation and mediation are concepts used in numerous countries, facilitation in collective bargaining appears to be unique to New Zealand (see chapters 1 and 2). I could find no reference to a similar system operating outside New Zealand. My purpose was to find out where the system originated and how it was introduced into New Zealand legislation. A request to the MBIE, under the New Zealand Official Information Act 1982, provided me with Cabinet papers from the time when facilitation was introduced. The papers were heavily censored and provided no information on the origin of the system or the reason for its introduction. I therefore decided to interview people I thought might be able to add meaningful revelations to the story.

Selection of individuals for interview. I approached policy analysts at the MBIE to see if they could recall the origins of the 2004 legislation. Unfortunately, they were unable to do so. I therefore determined that I should interview the Minister of Labour, the Honourable Margaret Wilson, and the then Chief of the Authority, James Wilson. I personally knew James Wilson, and when approached, he was happy to be interviewed. My thesis supervisor helped me contact Professor Wilson, and she was also very happy to be involved. contact Professor Wilson, and she was also very happy to be involved and information obtained from her interview is reported in chapter 7.

Confidentiality. These two interviewees were selected because of the position they held at the time employment facilitation was introduced. Because of their limited number and my desire to attribute their comments to their positions, I was unable to provide them the same confidentiality that I had extended to other interviewees. I therefore provided them with a draft of the comments I would be making in my thesis to ensure that I had recorded their views accurately and that they felt comfortable with how they would be quoted.

Method. I used the same process for these two interviews as I conducted with the facilitation participant interviews. As with facilitation participants, I believed that the designers of the facilitation system would feel happier if they were given the opportunity to talk freely. I also anticipated that this process would provide richer, deeper information.

Addressing Potential Bias and Ethics Issues

Research involves collecting data from people. Research ethics requires researchers to protect their participants from harm. Care needs to be taken to protect them from harm not only when the data is being collected, but also when the findings are presented to external parties and the conclusions are drawn (Vanderstoep & Johnston, 2009).

During my long involvement in collective bargaining, I have been a provider of mediation assistance to employers and unions, and a relationship therefore exists between the participants in the current study and me. Because of this involvement, the question of potential bias arises. My ability to set aside personal opinions and assumptions is based on my years as a mediator and adjudicator, and my role as Chief Mediator at the time I commenced this research. However, a scholarly assumption made about interpretive research is that it is value-laden and that biases are present (Collins & Hussey, 2009). I was an insider observer, as opposed to an outsider to the system. An insider observer is one who has complete membership with the group being studied, which I had. Because of this relationship an insider has, I could gain the trust of participants, and an understanding of the participants' perspective, which assisted me in eliciting and analysing research data. However, the status I gained as an insider observer was not without issues. Developing too much rapport with research participants and becoming a non-observing participant (Hammersley & Atkinson, 1995) because of over-familiarisation with the setting meant that making assumptions about what I was observing, without necessarily seeking clarification for the rationale underpinning actions, was always a danger (Gerrish, McManus, & Ashworth, 1997).

Strategies can be used to minimise the effect of being an insider. These include:

- overt recognition of the relationship that already exists between the participants and the researcher;

- critically examining researcher assumptions and actions in relation to data collection;
- actively reflecting during analysis through personal journaling, such as noting researcher reactions to people and events;
- examining feelings when undertaking participant observation and interviews; and
- providing reasons for decisions.

By way of this thesis, it is clear that I have been promulgating the facilitation and mediation support available in New Zealand. I have also been advertising what processes are undertaken and what processes the parties find helpful. However, I am considering the parties' views, not my opinion of what works or not. The opinions I am reflecting are those of the individuals I am interviewing or surveying. This doesn't mean that my personal biases cannot have influenced my reflections, but I have taken several steps to avoid or limit such personal biases. The process I used to select these individuals ensures that I did not base selection on individuals who would reinforce any biases I might hold. The process used for interview selection to interview all the participants in a facilitation process, leaving no one out. Because the outcome of facilitations is confidential, and while I was likely to be advised during my interview that the collective bargaining issues had been resolved, I had no other knowledge about what occurred in either the mediation or facilitation. The random selection across various industries, with no prior knowledge of the processes undertaken in each case selected, ensured independence as far as was possible. As mentioned previously, I also decided to not include any cases in which I had been the mediator, as I was too close to them.

To address ethical issues, I followed the Auckland University of Technology (AUT) code of ethical conduct, which is managed by the AUT Ethics Committee (AUTEC). Prior to commencing my research journey, I obtained their approval to gather data from the individuals interviewed and surveyed. I became aware through my then employment that MBIE also has a little used ethic approval process when commenced my investigation. I applied for and was granted ethics approval from MBIE prior to interviewing any of the mediators.

Combining Data

This thesis does not address the perennial question of "why". It is designed to describe events that have occurred, and how they relate to existing literature and to parties' expectations. For each stage of the research project, I used a different data gathering process. To a large extent, the data collected related to the research sub-questions, but in the end, the data were combined to present overall findings. Having coded the data in the manner I did made the bringing together a simple process. To synthesise data, I turned to a quasi-judicial method used by Bromley (1986). This method allowed me to identify issues, what evidence might exist and how I could make sense of the data (Collis & Hussey, 2009).

Chapter Conclusion

The current research seeks to address the lack of empirical research into dispute resolution processes for collective bargaining in New Zealand. To capture the diverse views of the parties involved, I undertook an interpretive study. I used a mixed-methods approach to collect data and combined the data to paint a picture reflecting reality, the views of the parties and the processes. Chapter 5 will address the question of who seeks facilitation, what pattern have emerged in facilitation applications, and the ways in which the Authority and the Employment Court interpret the legislation when considering applications.

Chapter 5: Facilitation Applications

> The Act favours collective bargaining and collective agreements over individual employment agreements in relevant circumstances. Indeed, the legislation now requires that collective bargaining is to lead to collective agreements unless there is a genuine reason, based on reasonable grounds, not to. To achieve this objective, the Act provides a number of mechanisms to enable bargaining to progress to settlement. The facilitated bargaining regime at issue in this case is one of these schemes. (Colgan, 2012, para. 32)

Overview

Chapter 5 builds on chapter 2. Herein, I explore the background to facilitation in New Zealand. The goals of this chapter are to address the history of facilitation in New Zealand; to understand how the provision of section 50 of the Employment Relations Act has been interpreted; to outline the criteria that has been used and to reflect on the motivations for seeking facilitation. To do this;

- I firstly outline the history of facilitation in New Zealand by reviewing the requests made to the Authority for facilitation assistance
- I review the way the way the Authority and the Employment Court have interpreted the provisions of section 50 of the Employment Relations Act 2000 by providing an overview of requests made to the Authority for facilitation. I describe the way the Authority has interpreted the provisions of section 50 and how interpretations have been made according to case criteria. To do this I focus on the cases that established the precedent of how the Act would be interpreted.
- I then outline in detail case criteria, how the facilitation process was applied in collective bargaining and discuss the two cases that have landed in the Employment Court.
- Next, I reflect on why parties file for facilitation assistance. The reasons parties seek facilitation are explained.

Facilitation was first introduced through legislation in 2004, as a mechanism to assist parties experiencing difficulties during collective bargaining (Colgan, 2012). First, I provide an overview of requests made to the Authority for facilitation and describe the way the Authority has interpreted the provisions of section 50 of the Employment Relations Act 2000. I describe how interpretations have been made according to case categories. I then outline in detail case criteria, how the facilitation process was applied in collective bargaining and discuss the two cases that landed in the Employment Court. Next, I reflect on why parties file for facilitation assistance. The reasons parties seek facilitation are explained. Chapter 5 also provides discussion about the difficulties encountered in researching facilitation. Finally, the conclusions reached about facilitation cases are discussed. I make suggestions about trends and their underlying causes, drawing on evidence from the findings. Based on my findings, the following synopsis has emerged:

- The use of facilitation is in line with the Governments expectations.
- Facilitation is commonly used by unions with less industrial muscle.
- When an employer is the applicant, they are likely to be concerned about the effect industrial action is having on their business.
- Parties use facilitation to elevate the dispute.
- Once a party has entered into the process, it is difficult opting out.
- The entry criteria are set at a high level, meaning conflict must be escalated.
- The high entry level does not support collective bargaining; therefore, it does not meet legislative intentions to promote collective bargaining.
- Shifts in legislation over time have meant there is less support for collective bargaining then originally intended by the Labour Government.

This synopsis is supported by my review of all applications for facilitation assistance made since the inception of the facilitation system. Chapter 5 concludes with suggestions for further research.

Background. Facilitation is not a widely used process. In the 14 years, since 2004 that the facilitation provision has been in existence, the Authority has received about 60 applications, with most of these being granted. In my interview with her, the Former Attorney General, Minister Wilson, explained she did not intend facilitation to be widely used. She was seeking to find a new way of addressing those cases where the parties had reached a deadlock in their bargaining and anticipated only a few applications for facilitation being made.

Applications for Facilitation Assistance. Appendix 1 is a summary of all the applications for facilitation heard by the Authority and the Employment Court. The cases cover both large and small employers and span any industries. The majority concern collective bargaining with large companies involved in the transport, manufacturing (primarily meat processing) and service industries. The facilitation process is depicted in Figure 9 below.

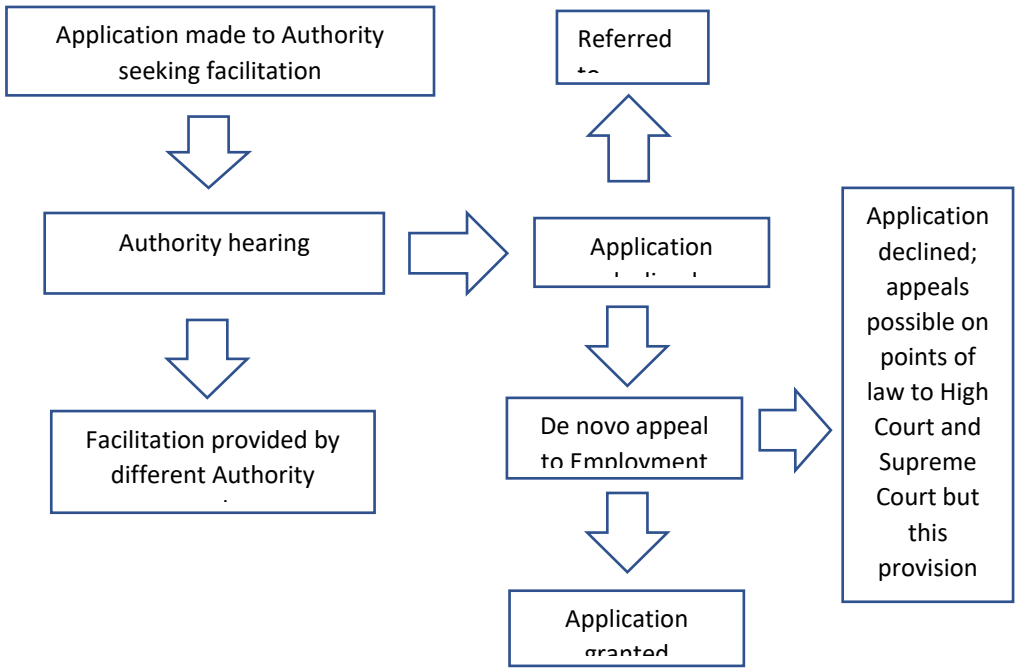

FIGURE 8. THE NEW ZEALAND EMPLOYMENT RELATIONS AUTHORITY (AUTHORITY) FACILITATION APPLICATION PROCESS AS IT STANDS TODAY.

Parties who use facilitated bargaining.

Applications for facilitation must be made by the parties to the collective, i.e., the employer or the union. A single union is more likely to be involved in many more collectives than a single employer because of the way collective bargaining is currently structured in New Zealand, with most collectives being single employer–single union agreements. It is not surprising, therefore, that a union requests facilitation on more occasions than an employer. Union collective bargaining responsibilities cover many collectives, in contrast to an employer, who may only have one or two. For example, the Service and Food Workers Union, a union covering low-paid workers primarily in the service industry, is the major requester for facilitation services, with 10 applications to date. Second is the Meat Workers Union, with six applications.

When the collective is a multi-employer collective, the parties are the individual employers, not an association on behalf of the employers, meaning no applications can be made by employers' associations. This does not mean that employers have not embraced facilitation services. They appear to have accepted the service by either not opposing the facilitation request, or by seeking facilitation themselves. Air New Zealand and its wholly own subsidiaries, for example, have attended facilitation on seven occasions. Three facilitation applications were made by them, the balance by a union. There is only one example of an employer seeking to overturn an Authority determination to grant facilitation (*McCain Foods NZ Ltd v Service and Food Workers Union*, 2009).

The Employment Relations Act 2000 assumes that an imbalance of power in employment relationships promotes collective bargaining. However, the trend in the past two decades has been a decline in collective bargaining. Employers and unions have different interests; employers at a very basic level want profits, growth and survival (Geare & Edgar, 2007), and unions want the advancement of their members' conditions by way of collectivisation. The inevitable conflict between the two interests often manifests itself in an economic struggle over the terms of a collective employment agreement. While unions seek to maximise bargaining gains, minimum movement from the status quo collective is usually in the best interest of employers. Unions may garner substantial power in their ability to withdraw the use of their workers' labour, but long-term industrial action comes at a financial cost to their membership. It also can result in a power shift towards employers if the employer can withstand

a strike. In New Zealand, where unionism is not compulsory, and most employees are covered by individual employment agreements, this situation is a reality in most workplaces. Considering the resultant pressures on unions, it is understandable that union requests for facilitation are almost double those made by employers. In the pulp and paper and printing industries, and for aviation cabin crew and pilots, the employer has been the initiator. However, overall, the union is predominately the initiator.

Interestingly, the health and education sectors, major employers of unionised staff, have been involved in several high-profile industrial actions since 2004, but have experienced few facilitation cases. Despite several publicly aired difficulties in reaching agreements in health sector collective bargaining, there has been only one request for facilitation in the core health sector (*Auckland District Health Board & Ors v New Zealand Public Service Association Inc*, 2016). The employers, three Auckland-based district health boards, Auckland, Counties Manukau and Waitemata, applied for and were granted facilitation assistance in April 2016. The union, the PSA, did not oppose their application. The remaining health sector applications were made by unions representing members employed by organisations primarily supplying supported accommodation services to the health sector.

At the time facilitation was introduced, one of the largest health sector unions, the New Zealand Resident Medical Officers Association (NZRDA), became involved in acrimonious industrial action. A provision introducing codes of good faith for the health sector was made in the Employment Relations Amendment Act (n 2) 2004 to address the Government's concerns about patient safety. Bargaining between the union and employer continued to be acrimonious, however, with industrial action taking place in subsequent years. Whether the Minister saw facilitation as something that might assist these parties is not clear. The level of industrial action that needs to take place before facilitation is granted is set at a high level, but based on the Employment Court's view of facilitation "as a mechanism to enable bargaining to progress to settlement", (*McCain Foods NZ Ltd v Service and Food Workers Union*, 2009, [para 32]), it is reasonable to assume a request for assistance would have been granted if either the employers or the union made such an application.

A similar pattern emerges in the education sector, with only two cases, both in the tertiary education sector, initiated by the Tertiary Education Union (TEU). In the first case, the TEU and the University of Auckland attended eight bargaining meetings and three mediations before the union filed for facilitation. The university opposed the application, and the parties decided to return to mediation. In the following 6 months, four further mediation hearings were held. When these were unsuccessful, the union re-filed for facilitation. The university did not oppose this application, and facilitation was granted based on overall extensive efforts, including mediation, being made to resolve difficulties (*Tertiary Education Union v Vice Chancellor University of Auckland*, *2011).* The second case involved the TEU and NorthTec. After six bargaining meetings and two attempts at mediation, the union and NorthTec acknowledged that they were having serious difficulties in concluding a collective agreement. The Authority agreed and granted facilitation under section 50C(1)(b) of the Employment Relations Act 2000 (*The New Zealand Tertiary Education Union Inc v The Chief Executive of Northland Polytechnic*, *2016)*.

In New Zealand, State school teachers are covered by collectives negotiated by one of two unions: The Post Primary Teachers Association (PPTA), or the New Zealand Education Institute (NZEI). These unions have also encountered acrimonious bargaining with the Government's agent, the Ministry of Education, but neither party has sought facilitation assistance. Determining the reason why is difficult, but several potential reasons are mooted in the "Conclusion" section of this chapter. A summary of applications by industry can be found in Table 6.

TABLE 6

APPLICATIONS FOR FACILITATION MADE TO THE EMPLOYMENT RELATIONS AUTHORITY (AUTHORITY) BY INDUSTRY

Sector	Union initiated	Employer initiated	Granted	Dismissed
Manufacturing				
Meat	6	2	5	3
Printing	0	1		1
Fishing	2	0	1	*1(i)
Food	3	0	3	0
Pulp and paper	0	3	3	0
Other	2	0	2	0
Public and local authorities	4	2	5	1
Education	2	0	2	0
Health	6	1	6	1
Retail	4	0	3	1
Transport				
Ports	1	2	3	0
Passenger	2	2	2	2
Aviation pilots	2	1	3	0
Cabin crew	0	3	3	0
Food service	4	0	2	2
Accommodation	2	0	2	0
Totals	**40**	**17**	**45**	**12**

Note. *Granted on appeal to the Employment Court.

It could be argued facilitation has had a rocky start, with the first facilitation case being declined. The application brought by the employer, PMP Print Limited and PMP Digital Limited, claimed breaches of good faith had occurred during bargaining and sought reference to facilitation under section 50E, relying on sections 50C(1)(a), (b) and (c) of the Employment Relations Act 2000. The union, which had coverage of 120 employees, most of the employer's workforce, opposed the application.

Bargaining had been initiated by the union on May 3rd, 2004, but the parties did not meet to commence bargaining until September 30th, 2004, when they met for 1 hour. A further five meetings of approximately 2 hours duration each were held between October 6th and November 25th, 2004. An offer for settlement by the company was rejected by the union membership, as was a proposal to attend mediation, and a successful ballot was held for strike action on December 1st, 2004. Industrial action, an overtime ban and refusal to do paperwork, was implemented. The company argued the paperwork ban was critical to the business and could add costs of tens of thousands of dollars in the event of overruns. Following the filing of the application for facilitation, the parties attended an unsuccessful mediation on December 10th, 2004, and industrial action started again on December 14th, 2004. This action included a 24-hour stoppage. Disagreements arose between the parties over access for union organisers and the company's alleged use of strike breakers.

In her decision, the Authority member referred to the purpose of facilitation, which is to provide support for parties having "serious difficulties" in concluding a collective agreement and stated that facilitation was not for parties having "ordinary difficulties". Rather than being of the view that facilitation could be of assistance, she wanted to be satisfied that one or more of the grounds in the legislation had been meet. In her decision, she noted these grounds and used phrases such as "serious and sustained, unduly protracted, extensive efforts (including mediation) have failed", "protracted and acrimonious" and "affect the public interest substantially" [para 32]. In declining the application, she concluded bargaining was a robust process, strikes were lawful, they had not been protracted and there were no breaches of good faith.

Service and Food Workers Union v Air New Zealand.

Background. The second case heard the following month was brought by a union. This time, it was successfully argued that facilitation support should be provided. The case, *Service & Food Workers Union Inc v Air New Zealand Ltd* [19 January 2005] AA 11/05, is discussed in the following paragraphs. This case largely determined the way the new facilitation provisions would be interpreted. The reasoning used in this case was later used as a benchmark for other applications made.

The case arose when the Service and Food Workers Union was unable to secure the same or a more advantageous collective agreement as the Engineers Union, who had coverage for the same membership base. The parties had commenced bargaining together for a multi-union collective agreement, but then changed the bargaining arrangements to bargain separately. The ability for more than one union to have coverage in a workplace is one of the difficulties in collective bargaining. Once one union has settled, pressure is put on the second union to obtain an equal or more favourable deal. Backdating is one of the issues that can create this problem, as some employers have costing provisions or strongly held policies that do not allow for terms and conditions to be backdated, meaning the members of the first union to settle receive an advantage by way of earlier applied increases.

The *Service and Food Workers Union v Air New Zealand* (2005) case was heard in January 2005. The Union relied on three of the four possible alternate grounds under s. 50 (1) to argue their case, s. (1)(b),(c), and (d). The Authority, in this decision, established the way facilitation provisions were to be interpreted, stating that, in considering the matters, they were not required to attribute blame. Instead, the Authority "must recognise what does exist rather than become too concerned with why that is so, and in doing that must accept the reference to facilitation as being the appropriate remedy for the situation" [para 10].

It needs to be noted that at this first stage of the facilitation application, the Authority member was merely deciding if facilitation assistance should be granted. During the facilitation process itself, another member would concern themselves with the reasons the parties were unable to resolve the collective.

The grounds for facilitation being granted. The Authority, found there is no requirement for all three elements to be present before a breach of good faith is declared, however, because each element stands alone [para. 9]. Since then, several applications have claimed long and unduly protracted bargaining and extensive efforts to resolve the issue; they argue this explanation satisfies the requirement of "extensive efforts." Strike or lockout action on its own, however, is not usually sufficient, as these actions are considered to be legitimate tools for use in bargaining. The strike or lockout needs to be lengthy to qualify.

The Service and Food Union's unduly protracted efforts to resolve argument, s.50(1)(b), was dismissed even though the parties had been in bargaining for 8 months, with 22 days of bargaining, 7 of which had been with the assistance of a mediator. There had also been various other meetings, considerable correspondence and other communication between the parties. The explanation given for dismissing this claim was that, while the bargaining had been protracted, a degree of the prolonged bargaining could be attributed to the bargaining arrangements commencing with a multi-union claim [para. 40].

Duty of good faith. As discussed in chapter 1, good faith is an underlying principle of the Employment Relations Act 2000. The Service and Food Workers Union claimed in their application that there had been a breach of the duty of good faith. The Authority determined that three elements must be present before this ground can be used to initiate facilitation. There must be:

- a breach of the duty of good faith as set out in section 4 of the Employment Relations Act 2000 in the course of bargaining; and
- the breach of good faith must be serious and sustained; and
- the breach of good faith must have undermined the collective bargaining the party or parties were currently engaging in.

In this case, the Authority found there was no beach of good faith s.50(1)(d).

A review of all the applications made shows that unions often claim breaches of the duty of good faith, but this claim is not so prevalent in cases brought by employers.

In considering the s.50(1)(c), acrimonious strike submission, The Authority member referred to the *Concise Oxford Dictionary* meaning of "acrimonious" as "bitter in manner or temper", [para 28] and he acknowledged that few employers and employees who become directly involved in a strike (or lockout) will not be bitter or resentful about the situation. He stipulated that to meet the threshold in the legislation, a display of bitterness by words or conduct was required, not merely the experiencing of feelings of acrimony [para. 28]. In this case, there had been issues between the parties because of the industrial action, and there were strong feelings between members of the different unions.

During the course of the bargaining that led to the facilitation application being made, three personal grievances cases had been brought to the Authority by the union claiming unjustified disciplinary action against members covered by the collective. These cases concerned the company taking disciplinary action against union members because of their actions during strikes [para 33-37]. The company had advised the Service and Food Workers Union that striking members would have travel privileges withdrawn for the duration of the strike. They published a notice to staff stating, "Air New Zealand [is] not prepared to enter into negotiations with a gun held to its head in the form of a strike notice." [para 29]. This statement was repeated on a radio programme in which a further comment was made that the union was holding Air New Zealand and its customers to ransom. The facilitation application was filed in early January 2005, at a time when the public was travelling during the Christmas break.

The Authority did accept that there had been extensive efforts, including mediation, made by the parties to resolve the bargaining difficulties [para. 41], and used the acrimonious strikes or lockout provision to grant the application on that ground.

This interpretation of the criteria also set a precedent for how the legislation was to be interpreted by Authority members. A review of all cases since that time shows that the Authority has been consistent in the way they apply the criteria since then. Most applications for facilitation have been approved.

The facilitation. Once facilitation had been granted to provide facilitation assistance *Service and Food Workers Union v Air New Zealand* [2005], the case was referred to another Authority Member to provide facilitation services. The Authority Member concerned advised during my interview with him that he was present at the meeting, held in Wellington, when the suggestion arose for the implementation of a facilitation process. In conducting the first ever facilitation process, he formulated guidance notes about the way the Authority would provide facilitation services. In short, he decided the format would be left to each member to determine on a case-by-case basis. This decision established the basis for the current system, whereby Authority members use a wide range of processes (see Chapter 6 for more detail).

The Use of Facilitation to Extend Collective Bargaining Coverage

Introduction. The Employment Relations Act 2004 Amendment was promoted as an amendment to support collective bargaining, which had failed to gain substantive ground for workers since the passing of the original Act. While State sector coverage remained relatively stable, collective coverage virtually collapsed in the private sector between 2000 and 2004 (Rasmussen, 2009). There are several reasons for the decline in private sector collective bargaining, which can also explain the lack of growth in collective coverage:

- Employer resistance or lack of support undermined private sector collectives because the employers allowed free-loading (passing on of union-negotiated deals to employees covered by independent employment agreements).
- During this time, there was a representation gap, or no unions in private sector workplaces.
- A large number of small businesses created resource, or capacity, issues for unions, who were not able to serve all of their members (DOL, 2009a).

Extending coverage into new areas by way of Greenfield collective bargaining, whereby a union initiates bargaining for a collective in an area where they have not previously had coverage, is a way of addressing this issue. It was reported during my interviews that these collectives are often difficult to achieve because the new employer is not familiar with working

to a collective agreement. They believe they look after their workers already, so they should have no reason to need a union. Surveys undertaken also confirm that most employers have a clear preference for individualised bargaining and would only consider collective bargaining if it was an advantage to their business (Foster, McAndrew, Murrie, & Laird, 2006; Rasmussen, 2009; Waldegrave et al., 2003). Indeed, compulsory unionism is not a feature of the current New Zealand industrial relations landscape. Thus, there are difficulties in organising, with employers being able to opt out of multi-employer bargaining (Employment Relations Act 2000 s 44(a)). Many workers outside the State sector (aka public service) are employed in small workplaces, with 97% of New Zealand business enterprises having fewer than 20 employees (MBIE, 2017a). There are many worksites without collective employment agreements, and when a union attempts to implement a new collective, they often face insurmountable difficulties.

The preference in workplaces for individualism over collectivism gained momentum in the 1990s and was supported in New Zealand by the Employment Contracts Act 1991. The Employment Relations Act 2000 supported a return to collectivism, however, but it has not been successful to any great degree. Any push to expand collective coverage into new areas is often rebuffed by employers, and unions with their limited resources and limited membership in the new areas have little ability to negotiate collective agreements. Facilitation is one process they can use to gain a foothold, but the criteria to be accepted for a facilitation hearing are too high for a union with low membership numbers on a worksite.

During a facilitation process, Authority members can make recommendations as to the contents of a collective. To do this, serious and sustained breaches of good faith need to be evident. There is no other ability for the Authority to force parties to enter into a collective employment contract, meaning Greenfield collectives are rare. Attempts to achieve Greenfield collectives have been the subject of two facilitation cases in total. These are discussed in the following sections.

Unite Union v Gateway Motel. Unite Union, a relatively new union in 2007 with most of its membership in the low-paid service industry, sought facilitation for their members working at the Gateway Motel Limited. In the case of *Unite Union v Gateway Motel Ltd* [2007] (AA 263/07), they alleged Gateway Motel had breached their bargaining agreement. A bargaining agreement is a document that must be agreed between the parties prior to commencing bargaining; it sets out the bargaining process arrangements. The union also alleged breach of good faith obligations. The parties had attended two bargaining sessions and two mediations and had exchanged correspondence. The union had undertaken industrial action by way of a strike and a lockout. The union had about 15 members in that particular workplace, which was said to be 100% coverage. The collective agreement covered employees engaged in housekeeping, the kitchen and the restaurant. They had been undertaking strike action, and by their membership numbers, they had the power to cause the employer problems. The employer, in response, had disciplined workers because of union activity, locked workers out, and allegedly brought in replacement labour. In this case, facilitation was not opposed by the employer and was granted according to sections 50C(1)(a), (b) and (c) Employment Relations Act (2000).

The Employment Court judgement on Greenfield bargaining. In a second case decided in 2009, the Service and Food Workers Union applied for facilitation support for a Greenfield collective agreement within McCain Foods (*Service & Food Workers Union Nga Ringa Tota Inc v McCain Foods (NZ) Ltd* [2009] WC 5/09). The application, granted by the Authority member, was opposed by the company, who lodged a de novo appeal to the Employment Court. De novo hearings are a feature of New Zealand employment law. A party who wishes to challenge a determination of the Authority may do so by making an election to seek a full hearing of "the entire matter" by way of what is referred to as a de novo hearing. The McCain Foods case is the only Greenfield bargaining facilitation case to be referred to the Employment Court. Being the first application to the Court seeking to overturn a reference to facilitation, it set a precedent for interpreting legislative provisions.

The Court noted that it was required to determine the meaning of the legislative text by considering the legislative purpose. They referred to the overall purpose of the Act and its intentions for bargaining. They stated that

> the Act favours collective bargaining and collective agreements over individual employment agreements in relevant circumstances. Indeed, the legislation now requires that collective bargaining is to lead to collective agreements unless there is a genuine reason, based on reasonable grounds, not to. [para. 32]

Since this judgement was issued, the Act's collective bargaining provisions have been changed to make them less supportive of collective bargaining. The Authority may now determine, because of difficulties in concluding bargaining, that bargaining has therefore concluded (Employment Relations Act 2000, s 50K).

At the time, however, the Employment Court acknowledged that the Authority and the Court had no role in setting terms and conditions of employment. Instead, the Court judgement said that the Act recognised parties to collective bargaining (unions and employers) should reach their own solutions and settle their own agreements without interference, or even assistance, from outside agencies. They acknowledged that there were some circumstances when this was not possible, and in those cases, a range of measures, beginning with the benign and concluding with the arguably draconian, could come into play [para. 44]. It appears from comments made

in the Employment Court decision that in this case, the company did not want a collective agreement, and was not concerned about strike action because union membership numbers where low. The company did acknowledge it was bound to bargain with the union for a collective agreement. They said they wanted a collective agreement that mirrored individual agreements in place for staff doing similar work. But Chief Judge Colgan, said he had significant doubts as to whether this could really be said to be a collective agreement, and he noted that the law requires more than a commitment to bargaining [para 69].

In this case, the Service and Food Workers Union was not effectively able to use industrial action as a tool in pursuit of a collective agreement. The union has ruled out strike action because of the relatively few members it has at the plant as a proportion of the total workforce and what it considers to be the easy availability of replacement labour to the company [para 44].

The Court decision outlined the requirements for a reference to facilitation. The Court stipulated that facilitation needed "a combination of temporal and activity elements" [para 68]. The judgement stipulated that there must have been unduly protracted bargaining (the temporal element) and extensive efforts must have been made in the bargaining (the "activity" requirement) that had both failed to resolve difficulties, thus precluding a collective agreement. The Court also stated that one constituent of extensive efforts must have been mediation assistance. All elements of must have been present before the grounds under section 50C(1)(b) of the Act could be evoked.

The Employment Court judge found that the bargaining over the previous 34 months had not only been protracted, but it had been unduly protracted. Extensive efforts, including mediation on no fewer than four (of the 10) bargaining meetings held, went significantly towards constituting "extensive efforts" under section 50C(1)(b)(ii). The judge therefore concluded the Authority should accept a reference for facilitation of the bargaining.

Other Employment Court Judgements

The only other case that has been the subject of a de novo hearing at the Employment Court was an appeal made by the Service and Food Workers Union against an Authority decision

declining an application for facilitation (*Service and Food Workers Union v Sanford Limited 2012).* The Court, in overturning the Authority decision, said, "The Authority should not be astute to find reasons to refuse a reference to facilitation where common sense assessment indicates its desirability" [para. 64]. The judge noted that mediated bargaining had occupied only 4 hours on one occasion. He commented, "It is regrettable, in my view, that in this case the Authority does not appear to have directed further mediation under section 159(1)(b) of the Act in accordance with the spirit of the collective bargaining philosophies of the Act" [para. 22]. The challenge was allowed, and the Authority was directed to accept a reference to facilitation, but they were instructed to delay implementation of that order for 1 calendar month. The delay was to allow for further urgent, mediated collective bargaining which was to take place within the calendar month. Because there is no public record of a collective employment contract between McCain Foods and the Service and Food Workers Union, and because of confidentiality provisions, it is unclear if facilitation was subsequently required. Thus, the final outcome remains unknown.

The application of statutory tests.

The Employment Court has confirmed that each case must be decided on its merits via application of statutory tests to the relevant facts. Section 50C(1)(b) of the Act is the predominate provision used today. In 2012, the Employment Court undertook research of the 21 recorded cases in which the Authority has accepted referrals for facilitation in collective bargaining under this provision. The Court research found the following:

- The period from initiation of bargaining to the Authority's investigation ranged from 9–54 months, with the average period being 19.6 months, and the median being 19.5 months.
- The numbers of bargaining meetings ranged from 2–46 months, with the average number being 15 months, and the median being 8 months.
- In all cases, the parties had bargained with the assistance of a mediator at least once. The number of mediator-assisted bargaining sessions ranged from 2–16 months, with the average being 5 months, and the median being 3 months [para 46].

My research confirms that the Employment Court and the Authority are consistent in their application of the facts to the statutory tests. Extensive efforts, including mediation, must

have been made by the parties to reach agreement on a collective prior to facilitation being granted. The process is described by the Minister of Labour who who introduced it, as a process to use when all else has failed. Her strong belief is that parties should work together in good faith to address their issues, and she anticipates few cases should proceed to facilitation. However, in industrial relations history, facilitation is still a relatively new process, and one that parties have little awareness of. There have been very few facilitation cases to date, parties only making application when they believe they have exhausted all other options.

Applications Declined

Overview. While most applications for facilitation have been granted, there are a few cases where applications have been declined. However, facilitation has been granted in all the cases that have been heard by the Employment Court, and all except five applications have been granted by the Authority. In one case, the applicant party withdrew their application. All the five disallowed applications were made by a union, and the grounds for not allowing them given by the Authority were:

- they had not reached the level of serious difficulty envisaged in the legislation;
- the parties had not encountered serious difficulties; or
- that negotiations were not unduly protracted, and efforts to reach resolution not extensive. [1]

The applications that have been declined confirmed that if a party (in all instances the employer party) to the facilitation application indicates "there is room for further negotiation", the request shall be declined. Requesting facilitation before exhausting all other options is unlikely to result in facilitation being granted (as in the case of the *NZ Meat Workers & Related Trades Union v Crusader Meats NZ Ltd* [2007] AA 157/07). This is an understandable interpretation of

[1]See for example *NZ Professional Drivers and Transport Employees Association Inc v Transportation Auckland Corporation Ltd* [15 September 2011] NZERA Auckland 400; and *The Service & Food Workers Union Nga Ringa Tota Inc v Sanford Ltd* [29 August 2012] NZERA Christchurch 184.

legislation that has an underlying principle of reducing the need for judicial intervention and promoting mediation as the primary problem-solving mechanism (Employment Relations Act 2000, ss 3(a)(v) and (vi)).

Facilitation and subsequent problems. In the one case that was withdrawn by the applicant party, facilitation had been sought as a backup process in the event that mediation was unsuccessful. The Authority was clear that "a facilitation application could not be made on a contingent basis, to be activated should circumstances develop to reach threshold in the Employment Relations Act 2000, section 50" (*Service and Food Workers Union v Air New Zealand* [2007] AA 375/07).

The union had been successful in earlier applications for facilitation with the employer, Air New Zealand, and perhaps saw the option of facilitation for low-paid workers as a good alternative to taking industrial action. Their action in seeking facilitation may also have put pressure on the employer to bargain in a meaningful fashion or risk the possibility of facilitation and a public recommendation being made. Another potential issue for the union was the dual union coverage of this workforce. This is unlikely to be a problem now, as the two unions involved, the Service and Food Workers and Engineering, Printing and Manufacturing Union (EPMU) have recently amalgamated to form a new union, E tū (Rutherford, 2015).

Mediation as an alternative to facilitation. Both the Authority and the Employment Court have a duty to consider mediation as a means of resolving a matter (Employment Relations Act 2000, ss 159 and 188). This is something they consider when an application for facilitation is before them, and they are likely to direct this to occur if they believe the parties have requested facilitation at too early a stage in the bargaining process (Figure 10). If mediation is not successful, the parties can reapply for facilitation (as in the case of the *Service & Food Workers Union Inc v Spotless Services (NZ) Ltd* [2005] WA 71/05). For example, the Court directed the Authority to delay facilitation to allow mediation to take place in the *Service and Food Workers v Stanford* case (see the "Other Employment Court Judgements" section).

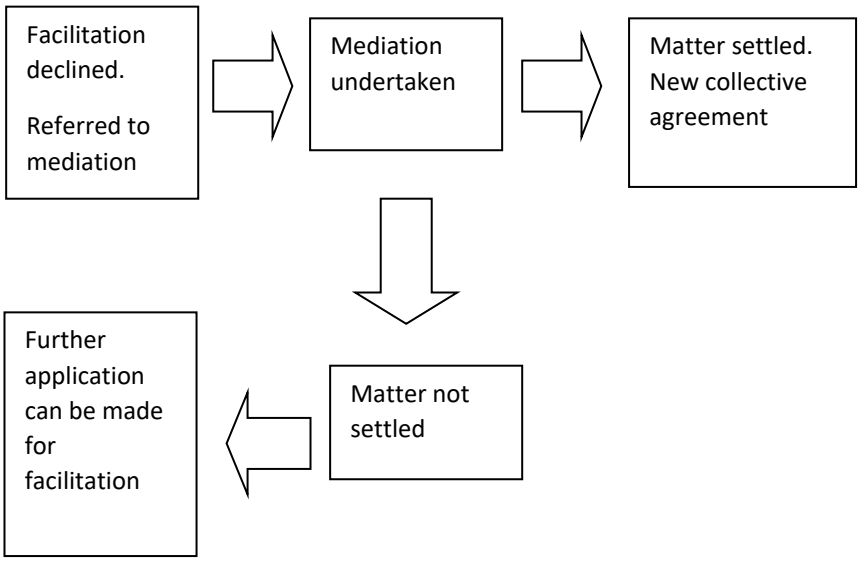

FIGURE 9. THE EMPLOYMENT RELATIONS AUTHORITY (AUTHORITY) SYSTEM FOR REFERRING PARTIES BACK TO MEDIATION.

Facilitation and other legal actions. The Authority has advised parties of the opportunity to apply for facilitation when they have been considering other claims under the Employment Relations Act 2000. In the recent case of *Meat and Related Trades Workers union of Aotearoa Inc v Taylor Preston Ltd* [2017] (WN WC 8/09), the union claimed the employer was in breach of their legal obligations because they paid non-union workers more than union workers. The company said they simply wanted union members to accept same-pay rates as non-union staff, but through the collective employment agreement. Negotiations had broken down with the union, ending bargaining. The Authority found that promotion of collective bargaining did not require the employer to conclude the bargaining with the Union *before* bargaining with staff on individual employment agreements, and dismissed the application, stating, "it was difficult to see how the issues could be resolved". The Authority judged the best way forward as a return to bargaining.

This is an example of a problem that arises under the Employment Relations Act 2000, in section 3(a)(iv), which has the objective of protecting the integrity of individual choice. Effectively, this means employees are free to join any union they wish to, or as an alternative, they can choose to be covered by an individual employment agreement. It creates a situation whereby employees undertaking the same work can belong to different unions, leading to members swapping unions and accusations of member poaching. Over the years, unions belonging to central bodies have reached agreements on member poaching, but not all unions belong to such bodies.

The Authority role in setting terms. It is clear in the Act that the only role the Authority has in setting terms and conditions of employment is by way of an accepted claim under the facilitation provisions in section 50. This was confirmed when the Authority considered whether facilitation was appropriate in a case the PSA brought, which was viewed by the Authority as an attempt to force it to fix terms and conditions. The PSA sought a declaration as to whether 15 meat inspectors employed at AFFCO's Horotiu site could be required to work in a rebuilt plant where they would have to share facilities with AFFCO staff. At the time, the parties were in bargaining, and the union wanted separate facilities to be included as an express term of any renewed collective agreement. The Authority saw this application as a request to have them act as arbiter in settling new terms. Because the bargaining had not reached the level of difficulty contemplated in facilitation bargaining provisions, the Authority determined they could not assist further with the application (*Asure New Zealand Ltd v New Zealand Public Service Association and Ors* [2005] AA 371/05).

During my interviews with employer representatives, I was advised that one of the pressures they face in facilitation is the possibility of the Authority fixing the terms of the collective employment agreement. They are sometimes faced with an application from unions for the Authority to take this action based on a submission that the company has breached good faith. However, the Authority has never accepted this request. Good faith in collective bargaining is outlined in a code of good faith promulgated under section 35 of the Employment Relations Act 2000. It includes a number of requirements concerning the agreement of a bargaining process agreement, bargaining timeframes, the requirement for the parties to act in a way that will assist in concluding a collective agreement (Employment Relations Act 2000, s 35). The Act's wording notes, "Where there are serious difficulties in concluding a collective agreement", a party may apply to the Authority for facilitation (s 35).

Applications Declined

Overview. While most applications for facilitation have been granted, there are a few cases where applications have been declined. However, facilitation has been granted in all the cases that have been heard by the Employment Court, and all except five applications have been granted by the Authority. In one case, the applicant party withdrew their application. All the five disallowed applications were made by a union, and the grounds for not allowing them given by the Authority were:

- they had not reached the level of serious difficulty envisaged in the legislation;
- the parties had not encountered serious difficulties; or
- that negotiations were not unduly protracted, and efforts to reach resolution not extensive. [2]

The applications that have been declined confirmed that if a party (in all instances the employer party) to the facilitation application indicates "there is room for further negotiation", the request shall be declined. Requesting facilitation before exhausting all other options is unlikely to result in facilitation being granted (as in the case of the *NZ Meat Workers & Related Trades Union v Crusader Meats NZ Ltd* [2007] AA 157/07). This is an understandable interpretation of legislation that has an underlying principle of reducing the need for judicial intervention and promoting mediation as the primary problem-solving mechanism (Employment Relations Act 2000, ss 3(a)(v) and (vi)).

dence of the difficulties they have encountered in bargaining. Even if this is compelling, the parties may not have reached the end of the support available to assist them to achieve a collective. An underlying principle of the Employment Relations Act 2000 is to reduce the need for judicial intervention (s 3(a)(iv)). The Act recognises that employment relationships are more likely to be successful if problems are resolved promptly by the parties themselves (s 143). It is therefore understandable that the Authority member hearing the application would be loath to fix terms for a collective.

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[2]See for example *NZ Professional Drivers and Transport Employees Association Inc v Transportation Auckland Corporation Ltd* [15 September 2011] NZERA Auckland 400; and *The Service & Food Workers Union Nga Ringa Tota Inc v Sanford Ltd* [29 August 2012] NZERA Christchurch 184.

Reasons for Requesting Facilitation

In this section, I explain the reasons facilitation has historically been sought, and the difficulties encountered in researching facilitation. I reach some conclusions from reading the cases and my interviews with participants. There are, of course, many reasons why a party might seek or oppose facilitation. For example, there are advantages in facilitation over unassisted bargaining, or mediated bargaining (Table 7). Apart from a different, independent person being involved, a facilitator has more power than a mediator, and facilitation is a more formal and structured process. In addition, the requirement to properly consider a facilitator's recommendation before responding to it is an important advantage of facilitation. The facilitator can make non-binding recommendations to the parties about their bargaining process and/or the collective terms. The facilitator may publicise recommendations he or she has made. Depending upon a variety of circumstances, including the nature of the industry, the locality, and the parties' sensitivity to positive or adverse publicity, such recommendations may have a coercive effect on either or both of the parties to modify their positions in bargaining (as in the case of the *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Limited* [2012] NZEmpC 168 CRC 32/12 [para. 48]).

TABLE 7

DIFFERENCES BETWEEN MEDIATION AND FACILITATION PROCESSES IN NEW ZEALAND

Process component	Mediation	Facilitation
Process conducted in private	Yes	Yes
Recommendation for resolution made public	No	Maybe*
Participation voluntary	Yes	No
Outcome by mutual agreement	Yes	No
Outcome may be imposed	No	Yes
Must consider recommendations made	No	Yes

Note. *The facilitator providing facilitation assistance may decide to make the recommendation public, otherwise it remains confidential.

Facilitation is not as widely used or understood as mediation. Mediation support for collective bargaining has been a feature of New Zealand collective bargaining for over 100 years, while facilitation is relatively new. The uncertainty of the process and the lack of control over the outcome may create barriers for parties wishing to apply for facilitation assistance, unless they feel there are no other options are available. The publicly available reasons facilitation is sought are based on the criteria set out in the legislation, usually sections 50C(b) and (c) of the Employment Relations Act 2000. The reasons behind a union or employer's decision to seek facilitation, rather than taking other steps to resolve the dispute, are not usually made public. Their action in doing so, however, escalates the dispute to an initial public hearing, and opens the parties to the possibility of a public recommendation.

As noted in Chapter 3, there is little research on the facilitation process. The outcome is a lack of empirical and theoretical understanding as to why parties seek facilitation. Parties wanting to resolve interest-based disputes and who are willing to compromise in their desire to settle is the most widely accepted reason (Carnevale & Pruitt, 1992; Martinez-Pecino, et al., 2008; Wall & Lynn, 1993; Wall, et al., 2001). There are, however, other reasons why facilitation

is requested. A review of all the cases indicates several firm trends, and a degree of speculation about the reasons behind these trends is permissible. For example, union applications are double those made by employers, and unions covering lower-paid, less organised workers are more likely to request facilitation then the stronger professional unions. Because union membership in New Zealand is voluntary, unions often do not have a large membership base in a workplace. When a union does not represent most workers, or the essential workers, a strike is likely to have little effect. Ability to fund a strike is also an issue. When union membership consists of low-paid workers, such as the Service and Food Workers Union, the use of facilitation is likely to be considered a good opportunity to get the employer back to the bargaining table, rather than low-paid workers being further penalised by their income being stopped during a strike. However, in this case, they are moving from a position of self-determination (the overall objective of the Act) to one where the process and outcome are placed in the hands of an independent third party.

Despite having independent goals, the literature suggests that both employers and unions can often expect to gain more by reaching a settlement than if no settlement is reached (Carrell & Heavrin, 2008). As discussed in Chapter 3, an Authority member has the power to assist this process by making recommendations or decisions about the form of a collective. This is seen by employers as adding to the pressure for them to enter meaningful bargaining and by unions as an opportunity to increase bargaining scope. In a market where individualism is an increasing threat to collectivism, Peetz (1998) has suggested that instrumentality, the perceived ability of unions to deliver benefits, is often a key influence on union membership decisions. That is, union membership must offer more attractive terms than individual employment agreements. Considering the free market for union membership, it is important for unions to gain maximum advantages for their membership. To achieve a settlement between two fixed positions, an Authority member is likely to suggest that both parties move their position, resulting in the employer increasing their offer. Both parties are legally obliged to consider any recommendation made, and if they do not resolve the issues, they may have a public recommendation made about the terms of their collective.

Unlike the provisions of earlier legislation, there is no prohibition on parties taking industrial action during mediation or facilitation processes. In fact, lengthy or acrimonious

strikes and lockouts are one of the circumstances required for facilitation to be granted. Under the Act, strikes and lockouts are lawful when the parties are in collective bargaining (s 23), or when the strike or lockout is on the grounds of health and safety (s 84), meaning that when a collective agreement is in place, strikes and lockouts are in most cases illegal. In the cases where the employer has made the application, it is easy to conclude they did so because they either wanted to prevent strike action taking place or to stop the strike action. Where a union's membership has been locked out, a similar conclusion could be reached.

Facilitation and dispute elevation. During my interviews, parties spoke of using facilitation to elevate the dispute (P2, P3, P6, P8). This confirms the findings of McAndrew (2012), set out in chapter 3, where he found facilitation elevated the seriousness of the dispute. In fact, the power of the Authority member to issue and publicise recommendations focuses parties' attention on working towards a resolution (McAndrew, 2012). Parties are mindful of the audiences that can be influenced by recommendations, and of the potential benefits and harms in publicity (McAndrew, 2012).

Attitudes towards facilitation. While it has not been a widely used process, facilitation cases demonstrate that once one of the parties decides it may be a way of progressing bargaining, there is little, if any, opposition from the other party. When a party seeks facilitation support, there appears to be a common understanding that a different kind of help is required to resolve the bargaining issues. Most applications seeking a referral to facilitation have been brought by unions, and employers, in response, have not opposed the applications. The one exception is a case (*McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2009] WC 5/09) in which the employer did not want a collective bargaining agreement in their workplace at all.

Reflection on Facilitation Trends

In the previous parts of chapter 5, I provide a background on facilitation, review the circumstances under which facilitation has been granted and reflect on why parties file for facilitation assistance. In the subsequent sections, I develop several propositions and draw on cases and theory to conclude with proposals for further research.

Propositions. Seven key facts from my research suggest the use of facilitation is in line with the Government's expectations:

- Parties use facilitation to elevate the dispute.
- Facilitation is used by unions with less industrial muscle.
- When an employer is the applicant, they are likely to be concerned about the effect industrial action is having on their business.
- Once a party is in the process, it is difficult to opt out.
- The entry criteria are set at a high level, meaning conflict has to be escalated.
- Escalation of conflict is difficult in Greenfield collectives; therefore, they do not meet the legislative intentions to promote collective bargaining.
- Shifts in legislation over time have meant there is less support for collective bargaining than originally intended by the Labour Government.

Governments expectations of facilitation. In line with the former Attorney General's views, expressed during my interview with her, (Hon. M. Wilson, personal communication, April 26th, 2017). parties should determine the outcome of their own disputes, but assistance might be needed on rare occasions. The cases that have been considered by the Authority have largely been argued based on lengthy and protracted industrial action. The Employment Court and the Authority have demonstrated support for the facilitation process by granting most applications made. In the cases that have not been granted, the Authority has determined that there is room for further negotiation, or that the parties have not exhausted all other options. A reference back to mediation is their preferred option in these cases. There have been two appeals to the Employment Court, and in both cases, a reference to facilitation has been supported. The way parties are using facilitation is therefore in line with the Government's intentions. That is, it is used as a "circuit breaker" when all other options, such as mediation, have been exhausted.

Elevating the dispute. Reviewing the cases does not provide an answer to why parties request facilitation. All that is clear is that, to meet the criteria for facilitation, the parties need to be experiencing more than just "ordinary difficulties". In all the applications made, some form of industrial action had taken place. Industrial action can be explained from several different perspectives (Rasmussen, 2009). Because the aim of collective bargaining is to improve the economic position of the union members, it is appropriate to apply an economic perspective to social action theory. The action can be said to be an expression of self-interest, as employees strive to protect themselves against inflationary threats to their wages, the workers involved being largely determined by the bargaining power at their disposal.

If an economic perspective is adopted, the economic outcome of facilitation is obviously important. By this, I mean that if collective action resulting in a loss in income is taken by workers to pursue an increase in their collective, then to retain their membership, the union needs to ensure that a positive economic outcome is delivered. They need to find a mechanism to break the deadlock and return to the negotiating table, because paradoxically, negotiations are normally necessary to break a strike. Timing is important. Employees have economic interests, and under the New Zealand system of employment, if the cost of remaining a union

member undertaking industrial action becomes prohibitive for an individual, they can resign from the union and accept an individual agreement. There is also the possibility of company management negotiating with a new union to cover the work, as was the case of the Ports of Auckland strike in 2007. Discussions ideally need to resume prior to either of these scenarios occurring. Elevating the dispute by using facilitation is a mechanism that can be used to achieve this delicate balancing act, because once an application is made, both the parties are brought into the system. Even if the facts do not reach the threshold for granting facilitation, the Authority member hearing the application can direct the parties to mediation, thereby providing a platform for further discussions.

When applying for facilitation, the parties risk the public promulgation of a recommendation by the Authority member. This may be more perception than reality, because recommendations made by members to date have mainly been kept confidential. Indeed, escalating the dispute has usually assisted in breaking the deadlock without publicity. McAndrew (2012) reported that parties have used the recommendations as a base for further bargaining. This theme also emerged during my interviews (P1, P3, P5, P7). Using facilitation removed the danger of union members becoming disgruntled, and potentially also removes the economic pressures of strike action from employers and employees. Interviews I conducted indicated that the facilitation process was a positive circuit breaker encouraging further negotiation (P1,P2,P3,P5,P7).

Facilitation for weaker unions. Where an applicant party was coming from a position of weakness, mostly union applicants, the application was usually made out of desperation — there was nothing else left to do (P2). The application was seen in more strategic terms, as an opportunity for validation of position (P2). Applicants for facilitation were almost always consciously playing to an audience. The making of an application was seen as demonstrating variously to employees, union members, employees not in the union, senior management, shareholders or public funders, or less often the media or the public, that the applicant was making every effort to resolve the dispute. Sometimes it was seen as a move to attract the attention of senior figures in the opposing organisation (P3). And in seeking validation in the facilitator's recommendations, the applicant was conscious of watching audiences. Respondent parties usually did not oppose applications for facilitation based on the same reasons.

The privacy surrounding the second stage of the facilitation process creates difficulties in researching the real reasons parties seek facilitation. Therefore, some assumptions need to be made beyond the arguments parties framed by the legal criteria. Previous research has not attempted to address this question

A total of 41 applications for facilitation have been made by unions, and only 18 applications have been made by employers. The table of users demonstrates unions with lower-paid workers are more inclined to request facilitation. The industrially strong unions have not accessed facilitation with the same enthusiasm. Despite public difficulties in agreeing the terms of collectives in health and education, there have been very few applications from these sectors. The reason no applications have been made by these unions could relate to power. The unions in these sectors are generally well organised, have good resources and cover the workplace well. This may lead them towards a radical model of conflict, with a focus based on the distribution of power in the workplace, rather than a traditional collective bargaining pluralist model, in which parties are dependent on the other for mutual survival (Rasmussen, 2009). For example, the unions representing teachers, the NZEI and PPTA, are both strong unions with high membership numbers. Their ability to take industrial action is greater than other unions with lower coverage in the workplace and, because their membership density is high, industrial action is potentially more effective. Preferring to use their industrial muscle rather than entering a facilitation process is therefore understandable. Industrial action can gain publicity for causes,

thereby creating issues for the employer.[3] The question is why the employer does not file for facilitation. If they did, it is very likely it would be granted, and this is a question for future research.

In the education area, the Government's agent, the Ministry of Education, could initiate an application, but they have also chosen not to use facilitation. Again, it is difficult to accurately determine why. Unlike several other OECD countries, the Government in New Zealand has traditionally had close contact with and control over health and education employers, while strategically maintaining a distance when it comes to bargaining disputes. The bargaining mandate for health and education is determined by central Government funding provisions. By this I mean the sectors need to live within what over recent years has been a diminishing budget. Their bargaining parameters are based on the need to fit any movements within a costed percentage increase. There is no such restriction on a facilitator's recommendation, which might explain employer abstinence from facilitation. Using facilitation could result in a facilitator making a public recommendation outside the financial parameters available, creating an embarrassing situation for the Government. Disputes in these areas can also be high profile and complex (Greenwood, 2016). The added pressure on the Government from parents of students and health system users to resolve conflicts in these areas is also likely to be a factor that encourages the employer to seek a resolution without resorting to facilitation.

Health and education wages form a large part of Government funding for these sectors. There is often a substantial flow-on effect when these large collectives are settled, with for example a teacher's settlement flowing through to the early childcare sector, or to nurses, or to the aged care sector. It may be the Government is reluctant to forgo the power they hold over bargaining, and is more prepared to accept strike action in these cases. A recent example of the Government's concern to keep control of a potential fiscal blow-out in wages occurred in the aged care sector. A pay equity application was made to the Court of Appeal, who held that in female-dominated work, the Equal Pay Act 1972 required equal pay for work of equal value, not simply the same pay for the same work *(Terranova Homes & Care Limited v Service and Food*

[3]See news coverage of a strike by Auckland train drivers in pursuit of a new collective employment agreement, at https://i.stuff.co.nz/auckland/99570684/tens-of-thousands-likely-to-be-affected-by-fridays-auckland-rail-strike.

Workers Union Nga Ringa Tota Incorporated [2014] NZCA 516). This decision was a change to the way the Act has been understood to apply in the past, and potentially created a large fiscal problem for the Government, the major funder of aged care services. It also created the prospect that further court cases would be initiated by the unions.

Rather than relying on the Courts to address pay equity matters, the former recent National Government established a working party to determine pay equity principles. The working party report recommended that if parties reached an impasse on pay rates that they used mediation and facilitation support (State Services Commission, 2016). The working party also noted the high threshold for facilitation and recommended that access be improved for pay equity cases by applying less restrictive entry criteria (State Services Commission, 2016). No pay equity cases have been referred to facilitation to date, but if they are, the working party has established some principles Authority members must follow if they are required to make a recommendation. This approach to pay equity has been disputed by the incoming Labour-led Government, however, so its continued existence is in doubt.

The one area in which independent arbitration is available is for the setting of salaries for the Police. The process, final offer arbitration, is supported by tight criteria in the Police Act 2008 to assist the arbitrator to determine the appropriate rate. Unfortunately, there are no such criteria for Authority members to follow. The uncertainty caused by a lack of exact criteria may contribute to the lack of applications from the Government sector. Criteria for setting State sector terms and conditions of employment, in stark contrast, have been a feature of other legislation (State Services Conditions of Employment Act 1977 s 10). Whether the facilitation process would be more widely used by the State sector if salary criteria were included in legislation is an area warranting further research.

Employer applicants and industrial action. When an employer is the facilitation applicant, they are likely to be concerned about the effect industrial action is having on their business. The first employer to seek facilitation assistance (PMP Print) presented arguments about the potential cost of their workers' industrial action. Union density meant they were unlikely to be able to cover the duties of the striking workers. A strike at the Ports of Auckland in 2013 resulted in a similarly lengthy, employer-initiated facilitation process, and the three applications made in the pulp and paper industry were also made by employers. Both port and paper industries have a high level of union density, and collective agreements ensure that employees are well paid. The unions involved could potentially implement lengthy and crippling industrial action in pursuit of better terms and conditions. However, employers in some industries appear to be unwilling to use the process, i.e., there are no applications from employers in the retail sector. The three applications in that sector were made by unions. It is assumed that low union coverage and low-paid workers in the retail sector put pressure on the union to find a circuit breaker to resolve the collective stalemate. Using facilitation is a mechanism that removes the need for a financially unstable union membership to forgo income via strikes.

Overall, case reviews and the interviews I conducted leads me to believe the party seeking facilitation is doing so because of what they perceive as an inability to make progress towards settlement by other means. Where facilitation is requested, it can be easily concluded that, in the case of union applications, unions lack power to take industrial action, and in the case of employer applications, the effect of ongoing industrial action has made the business model unsustainable.

Opting out of facilitation. When an application is accepted by the Authority, the parties lose exclusive control over the bargaining process. Control is passed over to the facilitator, who has the power to establish a process and to make recommendations. Unlike other determinations an Authority member may make, no guidance or criteria are available to assist them in the process. Once in the process, regardless of how uncomfortable a party feels about the direction the facilitator is moving in, it is difficult for them to opt out. Withdrawing allows the Authority to make public statements, or in the worst case, to set the terms of the collective in the absence of the party that has opted out. This is in stark contrast to mediation, where one of the underlying principles is voluntary participation.

Entry criteria preclude early intervention. Facilitation at the Authority is the pinnacle for collective bargaining difficulties. To be granted facilitation, parties must convince the Authority they are genuinely at an impasse (Employment Relations Act 2000, s 50A), and either: 1) their bargaining has been unduly protracted and they have made extensive efforts, including mediation to resolve the issues (s 50C(1)(i)); or 2) there have been protracted or acrimonious strikes or lockouts (s 50C(1)(ii)).

In other OECD countries, facilitated bargaining is available early in a dispute, but this process and the institutional hierarchy in those countries is different. The facilitation process in New Zealand takes away the parties' power of self-determination, but paradoxically, is the ultimate support available for collective bargaining. By this I mean it is difficult for parties to change their minds without negative consequences, such as adverse publicity. The relationship between the parties and the facilitator is therefore potentially fraught — the relationship changes from being supportive to one where a party finds they are in a potentially unpalatable process with no power to change it.

Prior to most applications being made, the relationship between the parties has broken down. The obvious question is whether the breakdown could have been avoided by earlier provision of the Authority facilitation service. My proposition is industrial disputes have a life of their own. The parties sometimes need to go the distance to allow their constituents to feel their cause has been pursued vigorously. Timing is important, and having the final process made

available too early in the dispute cycle is likely to be unproductive. The way parties are using facilitation is in line with the Government's intentions when it was introduced, however while facilitation remains the final step in the dispute resolution process, consideration needs to be given to other processes. The early provision of a mechanism, rather that the traditional mediation provided by MBIE mediators, such as facilitated bargaining in Ireland, or a fact-finding process as used in North America could avoid the parties' relationships breaking down.

Facilitation and Greenfield collectives. While the number of applications for facilitation is in line with legislative intentions, the Employment Relations Act 2000 also provides for the promotion of collective bargaining. Despite this intention, collective bargaining has reduced under the Act. Herein, I propose that there is a conflict between the two provisions of the Act. The extension of collective bargaining obviously requires Greenfield agreements. Escalating industrial action is difficult for a union without high density in a workplace, and in the case of Greenfield bargaining, density is likely to be low. An extension of collective coverage has therefore not occurred (Blumenfeld & Kiely, 2017). Despite being granted facilitation assistance, the two Greenfield union applicantions to date have been unsuccessful in obtaining a collective. The Act therefore does not support Greenfield collectives; therefore, it does not meet legislative intentions to promote collective bargaining. In fact, National Government-led shifts in legislation over time have meant there is less support for collective bargaining then originally intended by the Labour Government (ERA 2000, s 50K).

The National Government, the author of the much-maligned Employment Contracts Act 1991, did not replace the Employment Relations Act 2000 when they came back into power, instead choosing to make amendments to the legislation (Foster & Rasmussen, 2017). The objective of the Act "to build productive employment relationships by the promotion of collective bargaining" remains, but changes have been made to reduce support for collective bargaining. The good faith requirement for collective bargaining in section 33 has been amended to state that good faith does not require a collective agreement to be concluded. A new section, 95A, makes provision for wage deductions during partial strikes, and employers can opt out of bargaining in multi-employer agreements. The Authority's lack of authority to enforce a collective unless there is a serious breach of good faith, which is not now defined by a

refusal to negotiate a collective employment agreement, means unless agreement is reached on a voluntary basis, collective coverage is unlikely to grow.

In summary, the institutional changes put in place by the Labour Government to support collective bargaining have not been successful in doing so. Numbers of workers covered by collective agreements in the private sector remain low (Blumenfeld & Kiely, 2017). Greenfield bargaining has therefore been unsuccessful in extending coverage to new areas. It is difficult to see how the objective of the Act "to promote collective bargaining" is more than just words.

Proposals for Further Research

It is acknowledged that the introduction of facilitation has not led to an increase in collective agreements, but the outcome of facilitation support and the effect that it has had on wage movements has not been measured. Have unions with greater industrial muscle achieved better conditions then those who have needed to resort to facilitation? This research highlights the issues, but it is clearly necessary to pursue further research — for example, additional interviews of union and employer representatives — to establish more firmly why certain trends and approaches prevail.

Despite acrimonious disputes in the core State sector, applications for facilitation have not been made. Unlike the Police Act 2008, under which the decision-maker is given criteria to assist in determining pay rates for police staff, there are no set criteria in the legislation to guide Authority recommendation for pay scales in other Government departments. Potentially, this lack of black-and-white criteria is a barrier to applications being made. Prior to 1988, special provisions were in place for State Sector establishing State sector pay and conditions. The criteria based on a comparison being made with similar jobs in the private sector were swept away with the introduction of the State Sector Act 1988. If guidelines were established for Authority members, the result may be that core Government employers and unions would make more use of the process.

Chapter Conclusion

In chapter 5, I reviewed the history of facilitation applications, outlined the criteria used to interpret section 50 of the Employment Relations Act 2000 and reflect on the motivation behind applications for facilitation assistance, why facilitation has been embraced by some sectors and not others.

Facilitation is not as widely used or understood as mediation, but the use of facilitation is in line with the Government's expectations. The uncertainty of the process may inhibit parties from applying for facilitation assistance unless they feel there are no other options available. Once a party is in the process it is difficult for them to opt out, as the Authority can set the terms of a collective agreement they will be bound to in their absence.

The high entry criteria for facilitation mean conflict must be escalated before parties can access facilitative support. This has been acknowledged as a concern in one area, pay equity claims, and recommendations have been made to the Government to amended legislation to allow easier access. The high bar set creates an issue for Greenfield bargaining, making it difficult for unions endeavouring to expand collective bargaining, thereby defeating legislative intentions to promote collectivism by providing a mechanism for its expansion to new areas. The shifts in philosophy since 2008 have also led to a reduction in support for collective bargaining. Despite this the facilitation process in the Employment Relations Act 2000 does provide an additional mechanism to support bargaining where parties encounter serious difficulties and the case data shows it has been an effective mechanism in some disputes. The public reasons facilitation is sought are based on the criteria, which are not necessarily the real reason behind a union or employer's decision to seek help. I posit that there are a variety of reasons why parties to a collective agreement seek facilitation. It is sometimes used as a strategic tool to force further bargaining, but the primary reasons given are to prevent of stop a strike or lockout, or to introduce a different tool to shift a party from what has become an impasse. Facilitation is used when parties need a mechanism to break a deadlock, and the other traditional tools, such as strikes and lockouts, will be or have proven to be ineffective. The cost of strike action on lower-paid workers is also likely to be a factor. It appears that the party that has the highest stake in settling the dispute is the one who initiates the facilitation application.

Determining why some parties do not seek facilitation despite publicly aired difficulties in reaching agreement on collective agreements is more difficult, but it seems that industrial action is preferred to facilitation by parties with industrial muscle and accepted by employers who do not wish to lose control of bargaining outcomes. These propositions relate to the first stage of the process and are largely arrived at by reviewing the cases. In chapter six I explore the personal characteristics of the neutrals.

Chapter 6: Mediator and Facilitator Attributes

> "A good mediator is trustworthy, helpful, friendly, intelligent, funny, knowledgeable about the substantive issues in question, and so on. The most critical trait is that the mediator be acceptable to the parties and have their trust" (Katz & Kochan, 2007, p. 291). Nothing is a substitute for experience, which assists in gaining acceptance (Katz & Kochan, 2007). A facilitator is a self-reflective, process person who has a variety of technical skills and knowledge, together with a variety of experiences to assist groups of people to journey together to reach their goals (Hogan, 2002).

Overview

In this chapter, I explore the ideal personal attributes mediators and facilitators require for the effective management of employment collective bargaining disputes. I undertake this analysis from the parties' perspectives, and I use my empirical research to expand an original survey undertaken by Howells and Cathro (1986). Core attributes — confidence, self-esteem, trust, creativity, patience and persistence, self-control, dignity and respect, values, neutrality impartiality, belief in change, knowledge of subject matter, passion for the role and intellectual attributes — are discussed.

The personal skills required for conflict resolution derive from emotional intelligence, and specifically, emotional self-awareness and self-regulation (Schreier, 2002). While the literature is generally in agreement that well-designed training programmes provide a foundation for mediator development (Moore, 2003), Tillett (1999) suggests that in making appointment decisions, organisations should look for mediators who already possess appropriate personal qualities. The personal attributes a mediator or facilitator brings to the dispute are sometimes referred to as their "presence" (Murray, 2012). Presence is what they bring into the room; it is who they "are", rather than what they do.

In reviewing the personal attributes of mediators and facilitators, I have divided traits into personality attributes and intellectual attributes. This division allows a more relevant comparison to be made against the facilitator attributes seen to be essential by other scholars.

This division is in line with Cilliers' (2000) desired attributes of self-actualisation and knowledge. Bowling and Hoffman (2003) explained that a mediator's physical presence, and his or her personal qualities, have direct influence on the mediation process. Mediators are inevitably engaged in creating a relationship with the parties and, notwithstanding impartiality, the mediator's personal qualities influence the parties' ability to negotiate successfully (Bowling & Hoffman, 2003).

Parties I surveyed rated the importance of mediator and facilitator characteristics. During subsequent interviews, I asked parties if these expectations had been met, and if their own expectations differed from their survey responses in any way. I found 100% consistency between the survey and interview responses. The survey determined that honesty, integrity and trust were the highest desired characteristics for both a mediator and facilitator. The highest rating given for desired intelligence and knowledge attributes for both mediators and facilitators was a knowledge of employment legislation, but the need to have this knowledge was rated much lower for mediators than for facilitators. The formality of the Authority process and the ability for facilitators to become decision makers led to some differences in other rankings. For example, the parties wanted mediators to demonstrate tact and persuasiveness, and originality of ideas. In contrast, they wanted facilitators to have a cooperative attitude. These were attributes the parties acknowledged mediators displayed. Whether the facilitator was seen as "cooperative" related to the parties' feeling of satisfaction about the facilitation outcome. Where the outcome was not one they supported, they judged the Authority member to be less cooperative, or even to "castigate the union, rather than deal with the issues". Rankings from surveys and interviews are displayed in Table 8.

TABLE 8

REQUIRED ATTRIBUTES FOR FACILITATORS AND MEDIATORS

Attributes	*1986 survey	2016 survey: mediators	2016 survey: facilitators	Literature
Confidence; firmness of action	Neutral	Neutral, but interviewees linked to experience and knowledge	Important	Required attribute for facilitator (Gregory, 2002; Heron, 1999; Thomas & Pyser, 2008) Required attribute for mediator (Boulle, et al., 2008)
Self-esteem	Neutral	Less important	Important	Required attribute for facilitator (Gregory, 2002)
Trustworthiness	High importance	Highest importance	High importance	Required attribute for facilitator (Gregory, 2002; Heron, 1999) Required attribute for mediator (Boulle, et al., 2008; Davis & Gadlin, 1988; Gold, 1981; Roche, 2015; Salem, 2003)
Creativity	Surveyed as originality of ideas held little importance	High Importance	Not important	Required attribute for mediator (Boulle, et al., 2008; Goldberg, 2005, 2007; Ury & Fisher, 1981)

Patience and persistence	Important	Important	Facilitators control the process, not so important	Required attribute for facilitator (Gregory, 2002; Heron, 1999) Required attribute for mediator (Boulle, et al., 2008; Goldberg, 2005)
Self-control; dignity	Important	Not so important	Important	Required attribute for facilitator (Gregory, 2002)
Neutrality	High Importance	Important	Most Important	Required attribute for mediator (Roche, 2015)
Knowledge of subject	Mid-range importance. Knowledge of collective bargaining and labour law rated highest	Not important. Knowledge of dispute important but can be learnt	Law degree and employment law knowledge important	Not important for facilitators' learning (Gregory, 2002; Heron, 1999; Thomas & Pyser, 2008) Important for facilitated mediation (Roche, 2015) Debate about importance for mediators (Boulle, et al., 2008)
Intellectual attributes	Medium importance	Medium importance	Important	Required attribute for facilitator (Murray, 2012)

Note. *Howells and Cathro (1986).

Confidence. While my questionnaire did not seek parties' views on the importance of confidence, it did cover personality traits related to confidence. Survey results revealed firmness of action was important for facilitators, but it received a neutral rating for mediators. During the interview stage, a requirement to have confidence in the both the mediator and facilitator was expressed in different ways. One respondent (P1) said, "When we seek mediation or facilitation for a problem in collective bargaining, we want a person who is experienced and knows what they are doing. Another (P5) stated, "While we cannot choose our facilitator, we like to be able to choose our mediator to ensure they have the experience and skills required".

A confident facilitator is someone who is able to learn because they are not too threatened by learning something Heron (1999). Confidence also allows mediators and facilitators to rise to challenges, an essential attribute for a competent facilitator (Murray, 2012). At interview, mediators and facilitators described themselves as being confident people, able to manage a process that sometimes requires firmness of action. This opinion was confirmed by the parties I interviewed. They said:

- "The mediator's persistence gave us confidence that the matter would be resolved" (P6).
- "The facilitation process was managed in a manner that allowed us to put our position firmly on the table" (P4).

In the questionnaire responses, modesty was not seen as an important trait for either mediators or facilitators.

Self-esteem. Gregory (2002) considered self-esteem to be an important trait for facilitators. Esteem is intertwined with the position held by both mediators and facilitators (Gregory, 2002). This was reflected in the way facilitation was approached by those I questioned. Because of the nature of the office, facilitators are statutory officers appointed by the Government, while mediators are employees. Concordantly, more importance was placed on the esteem of facilitators by parties who participated in the current study. Parties reported their behaviours in facilitation were more considered then in mediation. "The facilitator has the power to make a decision" was a constant theme from both union and employer representatives. Reference was made to a facilitator's other role as an investigator of employment grievances, and the need to be fully prepared for the hearing. One party said, "We use legal representatives when we are defending a personal grievance case; we thought it important to get legal advice as to how we presented at facilitation" (P7).

Trust. Honesty, integrity and trust are traits considered by the parties who participated in this study to be the most important for both mediators and facilitators. This result was not unexpected, as practicing mediators have reported that without the trust of the parties, the mediator is ineffective (Gold, 1981; Salem, 2003), and when trust levels are high, parties are less defensive and are more willing to share information with other parties at the table and in private sessions with the mediator (Davis & Gadlin, 1988).

Mediators interviewed spoke of building trust and rapport. A number spoke of the previous experience they had had in mediating, with interviewed parties suggesting that the credibility they had developed over the years was a factor in building both rapport and trust. All the parties interviewed said these attributes were present in the mediator who provided the mediation services being reviewed. Comment was made by interviewees that they knew and trusted the mediator from their previous dealings with the mediation service. They went into the voluntary mediation feeling confident of the process because of this.

This feeling of confidence and trust was not so widely felt about Authority members providing facilitation, however. Facilitation was a new experience for many, and they had had fewer, if any, dealings with the Authority. A feeling of nervousness and uncertainty prior to the

facilitation was expressed by some interviewees. They felt that the process required a higher level of preparation and planning than the mediation process. They felt the need to impress the Authority member and to act appropriately during the process. The informality of mediation and comfort felt by a well-understood process was replaced by a feeling of uncertainty and nervous anticipation.

Trust and confidence were gained by some during the facilitation process, whereas others felt the Authority member providing the facilitation services had "an agenda". The levels of apprehension or trust were not dependent on whether the party was the applicant or respondent. In some instances, this perception was because of the employer background of the Authority facilitator and the outcome requiring compromise on the party's strongly held position. In other cases where concern was expressed, it was because of the style of questioning used by the facilitator. The facilitation process in one case required the parties to question their position when independent witnesses were used by the Authority to provide evidence on the health and safety issues being argued. One union respondent (P3) believed most Authority members were biased. This interviewee supported an arbitration system being put in place, but voiced the opinion that it should be a separate institution that would be more focused on the principles of the legislation framework and correction of the inherent imbalance of power.

Creativity. Trust is linked to building rapport, which assists in developing a relationship of understanding (Goldberg, 2005, 2007), but trust on its own is not enough for a mediator; they also need to be able to generate novel or creative solutions (Goldberg, 2007). The development of creative ideas was rated by parties participating in the current research as a requirement for mediators, but not facilitators. Mediators I interviewed also saw the need for creativity. Examples were given of novel solutions floated by mediators to resolve disputes. One mediator said, "Working across different industries and disputes gives me information about solutions found in other areas that I can suggest to parties as a possible resolution to their dispute" (P9).

Patience and persistence. Goldberg (2005) suggested patience and tenacity encourage settlement in mediation, even after one or both parties were convinced that settlement was impossible. Indeed, parties I interviewed expressed a higher expectation of patience and persistence in mediators over facilitators. The mediation process undertaken by the parties interviewed was lengthier than the facilitation process. Mediators were said to work "long and hard" to try to resolve the dispute. In contrast, participants said Authority facilitators were more directive in setting timeframes for the process, whereas mediators gave parties flexibility to control the timing to some extent. For example, the mediator's willingness to adjourn the process to allow the parties to obtain new instructions or information was seen as a sign of patience. The mediation process on occasions was spread over months. The parties worked separately between mediation sessions and came back to the formal mediation process when they thought it would be productive. In contrast, facilitation timing was at the direction of the Authority facilitator, with a more intense process taking place within a shorter timeframe.

Self-control, dignity and respect. Murray (2012) determined that self-discipline was an essential trait for facilitators. Self-control, dignity and respect were rated by respondents to my survey as a higher expectation for Authority facilitators than for mediators. The informality of mediation allowed for more freedom in expression by all participants, including the mediator. The formality of the Authority process, and the powers of facilitators, gave them a status in the minds of the parties interviewed that was not viewed as important for mediators, who were regarded more as "one of us". While being "one of us", or having empathy, was not rated as an expectation by employers for either facilitators or mediators and achieved one of the lowest rankings by union participants, parties interviewed expected the mediator to be able to understand their position and to have established a relationship that allowed for full and frank discussions. A more familiar process and previous relationships with mediators led to this expectation. Challenging the mediator's views without fear of repercussion within a safe environment was seen to be acceptable, and indeed, something parties were not afraid to do when they believed this action necessary. One party said, "We were able to vent our frustrations with the way the mediation was going in private session with the mediator. This was more constructive then our doing so across the table" (P7).

Values. Facilitation is not value-neutral (Hunter, et al., 2007). The inherent values of the individual, the collective wisdom of the group, cooperation, choice and consensus are all key values influencing facilitation (Hunter, et al., 2007). The importance of related concepts such as justice (Zaheer, McEvily, & Perrone, 1998) and impartial management (Poitras & Renaud, 1997) in dispute resolution is widely accepted. With the exception of one union advocate, all interviewees who participated in the current study believed that facilitators acted in an impartial manner. One employer representative linked impartiality to their feeling that they received "a fair hearing" (P6). Indeed, fairness is a concept that is widely considered to be a key ingredient in good conflict resolution systems (Lipsky & Seeber, 2003).

Neutrality and impartiality. Mediation is a structured process in which an impartial third party, a mediator, facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute (Boulle et al., 2008; Esquibel, 2000). Neutrality and impartiality are regarded as having different meanings, neutrality being a mediator's interest in, or prior knowledge of, the outcome of the mediation; impartiality is seen as fairness in conducting the proceedings (Albin, 1993; Kishore, 2006). Current National Alternative Dispute Resolution Advisory Council (NADRAC, 1997) guidelines support this interpretation.

Both unions and employers in the current study saw neutrality as slightly more important for facilitators than mediators. One study participant stated, "The mediator's role is to help resolve the issues between us, they present arguments for doing this that might seem to support the other party's position" (P4). One union interviewee felt that the facilitator was not neutral in that they had an interest in the outcome. The union representative said, "The facilitator did not listen to our argument. They had their mind made up prior to the hearing and favoured the employers position". Mediators interviewed saw themselves as being neutral, with no interest in the outcome. One mediator stated, "The outcome is not important to me, I try and resolve the issues, but at the end of the day, it is their decision whether to settle or not". Another mediator concurred: "When I go home at night, I act the same regardless of the outcome" (P10). One mediator (P 11) believed the parties all wanted to resolve the issues, and

regardless of whether it was in facilitation, mediation or another forum, they would all do so "one day".

While neutrality and impartiality are regarded as having different meanings, there was some overlap in parties' minds. Neutrality was measured in part by the process provided. The Government Centre for Dispute Resolution best practice (2016) guidelines support the overlap to a degree: "Disputes are managed and resolved in accordance with applicable law and natural justice. All dispute resolution functions are, and are seen to be, carried out in an objective and unbiased way." One union respondent felt the facilitation process itself was "not fair" as it did not address the inherent power imbalance between employers and unions. This inherent power imbalance is referred to in the Employment Relations Act 2000, where it is acknowledged that there is inherent inequality of power in employment relationships that requires redress to build productive employment relationships (s 3(a)(ii)).

Settlement targets are reinforced by a component of the mediator's job performance being assessed on settlement numbers (MBIE 2018). The mediator's "neutrality" or "impartiality" is therefore brought into question by a mediation bias in favour of "settlement", the mediator seeking to find a "just" solution (Augsburger, 1992; Weckstein, 1997). However, mediators I interviewed did not see settlement numbers being used as a KPI to be a conflict. One mediator stated, "It is my overall settlement rate that is important, and I am always in the ball park". Another's view was that "It is accepted some collectives do not settle in mediation. This is for a variety of reasons and beyond my control". Not all parties interviewed were aware that mediators had settlement targets. When made aware of them, they did not see settlement targets as affecting mediator neutrality. One party stated, "We can stop the mediation if we feel the mediator is being biased." Another was just as adamant. "It is our settlement, we need to agree".

Belief in change. Murray (2012) described belief in change as an essential component of a facilitator working in the restorative justice area. Mediators I interviewed described their belief as being more about "resolving an issue". This was supported by one employer representative, who commented that the mediator's confidence in the matter settling was a factor that encouraged them to continue bargaining. Parties did not see the need for Authority facilitators to have a belief in change, either. Doing so was seen as an indication of bias that was not, in the parties' views, helpful. This was in line with parties rating neutrality as an essential trait for a facilitator to display.

Knowledge of subject matter. In general, interviews appreciated a mediator with knowledge of collective bargaining. They wanted mediators to be active in assisting the parties to find a solution to the dispute, including convincing the other party to be more open to altering their position. In addition, facilitators were expected to have knowledge of employment legislation. While the survey respondents rated knowledge of industry and business problems as not important for either mediators or facilitators, the parties interviewed wanted both roles to understand their position and the market they were operating in. For example, an understanding of the funding model, ability to recoup increases in outgoings and other business issues were important subjects for facilitators and mediators to comprehend. It was not considered necessary for them to have the understanding prior to mediation or facilitation, but they needed to have good listening skills and to quickly absorb such knowledge. With one exception, mediators and facilitators were said to have done this. There was a feeling that in some cases, facilitators were less mindful of the parties' concerns then were mediators. One interviewee felt that mediators would have the skills and resources to investigate to find out what the truth was, and what it was not.

Other scholars have suggested that trust can be the built on reputation or the possession of appropriate certification, such as a law degree (Doney, Cannon, & Mullen, 1998). In my survey, I asked direct questions on qualifications and work experience. Qualifications were rated as more important for facilitators; life experience and employment background were rated low for both mediators and facilitators. Despite this result, parties interviewed wanted

mediators to be knowledgeable in employment disputes and to have strong employment experience. All Authority members interviewed had a law degree, and mediators I interviewed had a mixture of qualifications. All interviewees had extensive experience in employment disputes.

The parties interviewed wanted to have some input into who the mediator was. They preferred to use a mediator with knowledge of the industry, someone they had worked with previously and whom they respected. Choice of mediator is not something provided for, but parties interviewed said there was some consistency about the mediator allocated by the MBIE to their dispute. In contrast, an Authority member appointed to provide facilitation services cannot be same person who agreed for facilitation to be granted. Apart from this limitation, there are no restrictions as to who might conduct the facilitation. The Chief of the Authority appoints the member, and he or she does this according to who is available and qualified. In contrast to Murray's (2012) findings regarding restoration justice facilitators, a connection as a human being with the participants was not considered important for employment facilitators. Except for one union respondent, it was also considered unnecessary for mediators to be "one of us".

In summary, becoming an effective facilitator requires more than having knowledge and attending training programmes (Gregory, 2002; Heron, 1999, Murray, 2012). Facilitators and mediators need charisma to empower people (Heron, 1999). Passion for the role was not something parties I interviewed thought was a necessary attribute However, one mediator described their passion for collective bargaining as "being privileged" to be able to have a job they loved doing.

Intellectual attributes. Intellectual attributes, such as being insightful, analytical and visionary, are considered important attributes for facilitators (Murray, 2012). The parties' mediators and Authority facilitators I interviewed rated these attributes as being necessary for mediators but did not consider being visionary important for facilitators. Instead, the facilitator needed to listen to, understand and analyse the arguments being made, and study participants wanted both mediators and facilitators to display originality of thought. Being creative and thinking outside of the box were both accepted attributes for mediators (Fisher, et al., 1991). These skills were endorsed by parties participating in the current study, particularly for mediators. Mediators acknowledged the skill as "something I always do".

The ability to practice active, open-minded listening is essential for both mediators and facilitators, with mediators being credited by study participants as being better at this skill then facilitators were. One respondent said, "The Authority loses its power if it does not take time to listen. The mediators understand that better". Mediators and facilitators both saw listening as essential, with mediators saying this skill was needed to enable them to hear underlying issues and to craft a proposal for settlement. Keeping parties talking to allow this to happen was something mediators encouraged. One mediator stated, "As long as the parties are at the table talking, there is a possibility of settlement".

Comparison to the 1986 Survey

Introduction

In their 1986 work, Howells and Cathro were seeking to establish the factors that led to a mediator being accepted by both parties. They acknowledged that their work was subjective, but believed it was at least an indication of how parties felt about the essential traits of a mediator (Howells & Cathro, 1986). As the study was aimed at finding the ideal mediator, they used four categories to determine the importance of each of the traits to the users: "very important", "important", "doubtful importance" and "not important". The 1986 survey was undertaken in a different industrial environment than today's, with different third-party intervention structures. Unions held a stronger place in collective bargaining, conciliators provided collective bargaining support (interest disputes), while mediators provided support for interpretation (rights disputes). Both worked exclusively in disputes between unions and employers.

In 1986, union membership and collective bargaining coverage were both higher than today. Howells and Cathro (1986) had the advantage of a large research group. They decided the geographical spread of responses was important, with the most useful way of reporting being to divide the country into North Island and South Island respondents based on where the returned questionnaire was mailed from (Howells & Cathro, 1986). They found that there was a remarkable agreement between subgroups (North Island, South Island, union and employer) on the desirable attributes of a mediator. To report their findings, Howells and Cathro (1986) used a frequency distribution, expressed as the percentage of total responses in each of the four categories. They used a mathematical formula to report the percentage of users who had classified the trait as very important. While there were some significant differences in the percentage responses to some traits, the level of agreement on the "very important" traits category was high. This agreement applied across all regions (Howells & Cathro, 1986). The authors concluded that the evidence they had collected pointed towards strong agreement in New Zealand between the partisan groups in how they ranked the most desirable attributes in mediators (Howells & Cathro, 1986).

Howells and Cathro (1986) also found that a mediator's personality traits were more important than their education, experience and personal data. In their survey, respondents gave

lukewarm support for previous management, Government, labour and specialised industrial experience, and gave no weight to personal data (age, sex, marital status, nationality, religion, political affiliation and physical fitness). Howells and Cathro (1986) concluded that this pointed to a fixed stereotype of the mediator. The low ranking given to the need for formal qualifications was attributed to the mediator's profession not requiring the high level of education associated with other professional groups (Howells & Cathro, 1986). The authors suggested that mediation did not have an academic tradition and that there were no institutional procedures in recruiting new members. Their evidence pointed towards formal education not being considered a prerequisite for a successful mediator (Howells & Cathro, 1986). There was unanimous agreement that the critical variables ranked as "very important" were honesty, trust, fairness and general reliability (Howells & Cathro, 1986).

The 2016 survey. Unlike facilitation, to which to parties are directed, mediation is a voluntary process. The Chief of the Authority appoints a member to assist the parties. In contrast, parties attend mediation by agreement and can decide to use either an MBIE, or a private mediator. Howells and Cathro (1986) thought that the level of agreement on personal variables considered to be vital in a mediator probably determined how acceptable they were to the parties. Mediation is a subtle process, with mediation techniques being highly individualistic. The requirement for and skills of the mediator in building relationships with the parties to gain acceptability is still important today, with personality traits being rated higher than education or background traits by participants in my 2016 survey, an iteration of Howells and Cathro's original (1986) work.

The 2016 survey has yielded other findings that agree with Howells and Cathro's (1986) conclusions, in that there is still remarkable agreement between all the parties surveyed about attributes they desired in a mediator. Similarly, while there are differences between the attributes parties desire in a mediator and those they prefer for a facilitator, there is strong agreement on attributes they see as desirable in a facilitator. Academic study is an option for current mediators, and today, the MBIE preference is for mediators to hold a qualification. Both employers and unions participating in the current 2016 survey felt it important for facilitators to

have a qualification, and one respondent specifically said this should be a legal qualification. Whether this response was somewhat influenced by the facilitator's wider role as an Authority member is not clear, as the question asked did not raise this possibility.

There was more agreement on the traits required by a mediator. Personality traits remained the most important traits, with both employers and unions agreeing on the need for a mediator to display honesty, integrity and trust. The survey I conducted was of a much smaller number of system users than Howells and Cathro's (1986) work. This smaller sample, together with a tendency for collective bargaining to be undertaken only by larger companies and national unions today, meant that breaking findings down on a regional basis was not practical, because most cases going to facilitation involve national unions and employer parties.

Chapter Conclusion

Good facilitators are seen to bring a number of skills and personal attributes to the room (Heron, 1999). Murray (2012) suggested that for restorative justice facilitators in New Zealand, personal attributes included confidence, belief in change, values, ethical issues, self-discipline, being insightful, respectful, visionary, passionate, spiritual, analytical, and unafraid of challenges. Being empathetic and having a sense of responsibility were also crucial. There were all key components of the ideal, competent facilitator.

Not all these traits align well with the role of an employment facilitator or mediator today. Belief in change in the restorative justice sense relates to the need for offenders to make significant changes in their attitudes and actions, and for offenders to move from a position of causing harm by their offending to wanting to repair the harm they have done (Murray, 2012). In employment disputes, one or both parties need to move from a position as part of negotiations. This action cannot be regarded as a significant shift in their attitude. Being spiritual, caring and empathetic were not considered important mediator or facilitator attributes by unions and employers who completed the questionnaire or were interviewed in 2016. One mediator interviewed felt empathy was sometimes required in an individual mediation, but that the "cut and thrust" of collective bargaining was more about negotiating a position than parties' feelings.

Unlike the facilitator described by Hunter (1999), the parties I questioned, and indeed the Employment Relations Act 2000 (s 50), expected an Authority member to provide a process in which they state their opinion on the merits of the parties' arguments. The parties expected someone who would help them conclude a collective agreement, something they had been unable to achieve with the assistance of a mediator. The parties' expectations described somebody who was in a judiciary type position, a person who could make decisions, rather than creating conditions for individuals to choose, think and direct their own learning and development (Gregory, 2002). However, Authority facilitators do provide a process, with the objective of keeping the group on track to fulfil its tasks, but rather than empowering the group, they take power, determine the process used, and in most cases, suggest the outcome. While parties are not always happy with the recommendations made, they accept the facilitation process because the facilitator plays an active role to push them towards settlement they would not otherwise reach. The processes and strategies both facilitators and mediators use to support collective bargaining are discussed in Chapter 7.

Chapter 7: Mediation and Facilitation of Collective Disputes

Overview

Building on previous chapters, in chapter 7, I address the lack of current academic interest in the New Zealand collective bargaining system. My aim is to synthesise several aspects that govern collective bargaining dispute resolutions.

First, I discuss the origins of facilitation as described by the then Minister of Labour who was responsible for introducing facilitation, Professor Margaret Wilson, and the Chief of the Authority at the time it was introduced, Mr. James Wilson. Next, I identify the main differences between mediation and facilitation. My primary focus is statutory differences between the processes. I then outline the knowledge and expectations parties have of the dispute resolution system, and I explore tensions between their expectations and the intentions of Employment Relations Act 2000. The role of a mediator and facilitator in collective bargaining is explained. Chapter 7 concludes by identifying the Government's expectations of facilitation and the conflicts between the process and the intentions of the Act.

Several themes that have emerged from my research are:

- The New Zealand process of providing facilitation after the parties have exhausted other forms of dispute resolution assistance is unique.
- There is little understanding of the process by users of the system.
- There are important differences in the roles of mediator and facilitator.
- There is tension between the intentions of the Employment Relations Act 2000 and the parties' expectations of the facilitation process.

These themes are developed from the parties' and providers' reports of their experiences in using or providing mediation and/or facilitation, and from the questionnaire I distributed to parties who had used facilitation.

The Facilitation Process

The origins of facilitation.

In the course of my research, I was unable to find descriptions of any similar systems for supporting collective bargaining when it becomes intractable anywhere in the world. Facilitated assistance in collective bargaining is available in other countries, but this is provided as early assistance, often before the dispute has arisen. The domestic papers I obtained under the Official Information Act 1982 shed no light on the origins of facilitation, and McAndrew's (2012) research does not answer this question. This author compares the fact-finding process used in parts of the North American public sector to New Zealand's version of facilitation and concludes there is no evidence to link these processes (McAndrew, 2012).

Underlying principles of the Act.

The concept of facilitation was introduced into the Employment Relations Act in 2004. The 2004 amendments followed a review to determine if the 2000 legislation was meeting its objectives. The Minister who was responsible, Hon Margaret Wilson, described the underlying principles she was endeavouring to follow when she introduced the 2000 Act. She considered the institutional framework in place at the time did not meet the needs of the parties. At interview, she stated, "everyone hated the Tribunal" (Hon. M. Wilson, personal communication, April 26th, 2017). She wanted to introduce a new legal framework and strongly believed in the principle of mediation, but also accepted that not every case was suitable for mediation. Her support for mediation can be seen from the dominant position it is accorded in the Act, with both the Employment Court and the Authority being required to consider whether a matter should be referred to mediation prior to hearing the case (Employment Relations Act 2000, ss 159 & 188).

She wanted to find a better way to address industrial disputes and to reduce costs to parties by implementing a system that would support them to resolve their own disputes. "Most industrial disputes are human disputes, and the parties, with assistance, could resolve them, with just those needing to set a precedent going to Court" (Hon. M. Wilson, personal communication, April 26th, 2017). The changes implemented in the 1990s by the Employment

Contracts Act 1991 had seen the dispute resolvers of the past replaced by lawyers. She felt a need to be innovative in finding a new way to resolve disputes, a way that was not as adversarial and legalistic as the Tribunal system, and one that addressed inherent costs and delays. Despite opposition to change from Tribunal members, employers and legal practitioners, an inquisitorial system was implemented under her directives. In implementing the change, she understood that lawyers would be reluctant to change the way they had been operating, but in her mind, there was more than one way to resolve disputes. Change was needed (Hon. M. Wilson, personal communication, April 26th 2017).

The Minister's objective. Following a 2002 review conducted by the DOL, then Minister the Honourable Margaret Wilson worked with Government officials to find a process to support collective bargaining. Employers had not demonstrated the support for collective bargaining the Government had hoped for when the 2000 legislation was implemented, and it was seen that changes were needed to address genuine deadlocks in collective bargaining. The Minister wanted to find a process that would be supported by both employers and unions and that did not involve arbitration. In looking for a way to address the issues, she stated, "We tried to be imaginative about solving old problems with new ways that would not cause harm" (Hon. M. Wilson, personal communication, April 26th 2017). The new system was required to be flexible and to meet the needs of the parties, unlike arbitration, which was a straight-jacketed process. Officials were assigned the task of finding a new process, and the then Minister of Labour credits them with working hard to do so.

The genesis of facilitation . James Wilson, the Chief of the Authority when facilitation was introduced, stated at interview that he believed the concept of facilitation came from a brain-storming session with officials who had been directed to find a means of reducing industrial action (J. Wilson, personal communication, June 22nd 2016). This memory fits with the Minister's description of her need to find a new way of solving old problems that did not involve arbitration. As there is no evidence to the contrary, it appears that facilitation is a uniquely designed New Zealand solution that gives unions and employers another level of support for collective bargaining problems. Facilitation appeared to address Ministerial requirements by providing for compulsory arbitration only in cases where parties had demonstrated bad faith. No other options were made available.

The mediator's role in facilitation. Scholars often describe facilitated mediation processes in which mediators provide support early in the process (Roche, et al., 2014). The importance of mediators was highlighted at interview by James Wilson. Wilson stated, "When the legislation was introduced, thought was given to the Chief of the Authority being able to appoint a person other than an Authority member to conduct the process" (J. Wilson, personal communication, June 22nd 2016). The example he gave was a senior mediator being directed to provide facilitation services. However, the Act stipulates an Authority member as being the only person able to conduct the process (s 50). Like mediators, Authority facilitators have been given the power to determine the process undertaken (Employment Relations Act 2000, ss 50E & 147). Facilitators do not act as an investigatory body and cannot use their powers to investigate, but the nature and content of the facilitation process is theirs to determine, and its nature and content cannot be questioned as being inappropriate (Employment Relations Act 2000, s 50E(4)).

Mediation verses facilitation Under the Act

Legislative framework. No research quantifying differences between mediation and facilitation in the New Zealand context exists. Herein, I address that gap by reviewing the legislative framework and those differences. The legislation itself is very broad and does not describe either process, however. Mediators and facilitators determine the process provided (Employment Relations Act 2000, ss 147(1) & 50E(1)(b)), and their choices cannot be challenged (Employment Relations Act 2000, ss 147 & s50E(4)). The legislation makes an important distinction between the intake processes for mediation and facilitation, however. Parties access mediation by applying to the MBIE for mediation assistance. Applications are online: https://www.employment.govt.nz/resolving-problems/steps-to-resolve/mediation. Because parties need to demonstrate they have meet the criteria in section 50E of the Act to be granted facilitation assistance, but do not need to meet criteria to access mediation, this distinction makes facilitation a more formal judicial process.

The other major distinction lies in confidentiality provisions. Collective bargaining mediation, unlike other employment mediation, has not been granted confidential status in law (Employment Relations Act, s 148(5)). The first stage of the facilitation process, the hearing of the application for facilitation assistance, is public, while the second stage, facilitation assistance, unlike other Authority process, is conducted in private (s 50E(1)(a)). To add to the confusion, the second stage of the process the parties are entering into may become public because there is provision for the facilitator to make public comments about recommendations for settlement (s 50H(2)).

Another distinctive feature of collective bargaining mediation is that parties do not have the power to reach an agreement on their own. Section 51 of the Employment Relations Act 2000 requires a union member ratification process to take place prior to a collective being signed, but this process is not required in the event a facilitator fixes the terms and condition of a collective (Employment Relations Act 2000, s 50J(5)(a)).

Parties' knowledge. When Howells and Cathro conducted their 1984 research, they found, despite the Industrial Mediation Service having been in existence since 1972, that the community at large had little or no understanding of the functions of a mediator. This was explained to some extent by the private nature of mediation, but what concerned them was that the process was not understood by some of those intimately involved in labour management (Howells & Cathro, 1986).

The current structure for resolving collective bargaining disputes has been in existence since 2004. All respondents to my 2016 survey, and all interviewees, had a good understanding of the mediation process. This was not unexpected as they were all experienced advocates or lawyers who had had more than one experience of mediation. Because facilitation is a relatively new process in the history of employment dispute resolution in New Zealand, parties did not always have a good understanding of the process, however. They did not have a preconceived idea of what to expect during the process. Facilitation was approached with more anxiety than was mediation. Parties I interviewed carried a feeling of uncertainty about what might happen in facilitation. Notes from my interviews also suggested that there is more consistency in the process used by mediators, and that the mediation process has a greater relationship to mediation as described in the literature. The parties participating in the current research expected the mediator to supply a process similar to mediation as defined in the literature, such as a settlement or evaluative process.

Scholars believe knowledge of the system is important (Howells & Cathro, 1986). If mediation is not understood, it may not be endorsed as a "social good", and this vote of no confidence could affect the mediator's acceptability. Some respondents to the Howells and Cathro (1986) survey believed that "the Labour Department's top brass instructed mediators on the line that a decision should take, and that mediation is merely an appendage of the State system used and manipulated by politicians" (p. 43). The current structure, whereby mediators are public servants whose continued employment is subject to them meeting KPIs set by their employer, who in turn report to the Minister, could add to concerns that mediators are Government puppets. In fact, in the current survey, some parties did see this as an important issue. The concern expressed by union advocates was understandable when the National Government, and employer friendly, right-wing organisations, were in power, but since I have

conducted the interviews, the Government has changed. Regardless of the party in power, however, this concern can be adequately addressed:

- Mediators belong to professional organisations requiring them to maintain their independence; and
- The Employment Relations Act 2000 makes special mention of mediator independence in section 153.

Two respondents, one union and one employer representative, did not have knowledge of the facilitation process prior to attending. One explained this was because the process was very new when they attended, and as a new process, it was not entirely clear to anyone. A total of 10 respondents (three union and seven employer representatives) stated that they did not believe the process was understood. One interviewee said that the process had been explained, but its newness meant a degree of unfamiliarity, nonetheless. None of the respondents believed the process was understood by the public. In addition, parties preparing for facilitation reported that they were unaware of process details or flow. They found it confusing. Preparing to be part of a process without knowing what that process was likely to require was a challenge. One Authority member said the facilitation process was discussed with the parties prior to commencing.

Parties' expectations. Scholars have argued that unfavourable outcomes reached by fair processes generate higher distributive justice ratings than favourable outcomes reached by unfair processes (Amsler, 2014; Blancero, Del Campo, & Marron 2010). The decision-maker's impartiality makes parties feel they have more control over the process (Ewing, 1989), resulting in a greater feeling of fairness and acceptance of the outcome (Folger, 1986). For the State-provided employment dispute resolution system to be accepted, parties need to have confidence in the processes provided. Two confidence-building expectations were identified by 2016 interviewees: fairness and having the opportunity to be heard. The two items were intertwined, with fairness judged on whether participants felt heard. Parties rated the need for fairness in facilitation as more important than in mediation. This important requirement was not always met, however. One union respondent felt that the facilitation they attended was not fair because "the facilitator did not take the time to listen". He had a feeling of not being respected. This contrasted with mediations he had attended, where he felt the mediator "understood the need to listen."

Weighing strongly on parties' minds was the ability of the Authority to make a public recommendation about outcomes (Employment Relations Act, s 50H). Once a matter was accepted for facilitation, parties expressed a belief that they needed to impress the Authority facilitator. The parties I interviewed "lawyered up" to assist their cause. Lawyers were involved in the process with disregard to the experience of the union or employer advocate. The potential power of the Authority was re-enforced by the Authority members I interviewed. All except one Authority member regarded making recommendations for settlement as a part of the facilitation process. A facilitator's role is to assist parties to resolve their collective bargaining difficulties. The Authority Members interviewed saw their role as being one in which they assisted parties to resolve collective bargaining difficulties, and they used a variety of means to do this. Preserving relationships was only mentioned as important by one Authority respondent.

In contrast, one mediator explained that they worked hard to keep parties in the room, because if the parties were still talking, settlement was still possible. Being respectful, listening to concerns, giving the parties confidence that progress towards settlement was being made, and providing an environment where parties felt comfortable and empowered were top

priorities for another respondent mediator. In a similar intake process to that used in facilitated mediation in Ireland (Roche, 2015), New Zealand-based mediators I interviewed typically began by agreeing ground rules, but in contrast, they did not necessarily clarify agendas, timescales or the modus operandi they would follow in working with the parties. Such difference may be explained by the different contractual relationships. Facilitative mediators in Ireland are contracted by the parties, and mediators in New Zealand are appointed by the State (Roche, 2015).

Interestingly, parties expressed views similar to facilitators' views about settlement being more important than their ongoing relationship. All union and employer advocates interviewed agreed the outcome they were seeking was to achieve a collective employment agreement. The differences between their positions related to the content of that collective.

Desired Outcomes

Unlike views expressed by participants in the current work, some scholars have said that the outcome of successful mediation is a successful, ongoing relationship (Winslade & Monk, 2008). The reality is that settling the collective was rated higher by everyone I interviewed. However, one employer representative spoke of the damage the relationship suffered because of what they saw as inappropriate actions and comments during bargaining. Another expressed satisfaction with the mediation process provided but reported that the emotional intensity of the bargaining and the strong feelings expressed across the table influenced relationships. This interviewee stated, "The feelings do not go away with the collective being settled".

In contrast to the 2000 Act's focus on building relationships (s 3), certainty rather than relationship was the key reason for respondents wanting the collective to settle. While interest-based bargaining has been promoted in recent times, collective bargaining is traditionally a power-based dispute over rights, based on competing objectives (Budd & Colvin, 2014; Roche et al., 2014). A relationship between the parties was acknowledged as being to the long-term interest of both parties, but the immediate need for both unions and employers was to agree. Certainty was rated in different ways, however. These ways included financial factors for both employers and union members: "Once the collective is settled, we establish what our labour

costs will be for the term of the agreement. We try to make that three years," said one interviewee. Another commented, "The collective sets the terms and conditions for our members; once it is settled, they know what their income will be". Certainty that there would be no industrial action was a factor for employers, because participation in a strike, except on the grounds of health and safety, is illegal while there is a collective agreement binding the parties. Certainty over resource allocation was an issue for both sides. One interviewee said, "The resources needed in bargaining are huge. Our members' other needs do not stop during bargaining. We are stretched in trying to meet those needs."

Where there were multiple unions covering the same workplaces, certainty also created stability in union membership, as a ban on jumping from one union and collective to another is a component of settling a collective. Mediators accepted that settlement, not relationship, was the prime driver for parties. While saying their process was flexible, mediators reported themselves as using an evaluative or settlement type of mediation in collective bargaining. This contrasted to the mediation style Morris (2015) reported employment mediators as using, but the mediators interviewed as part of his research primarily provided mediation for *individual* disputes, and this may have influenced his findings.

Mediators and parties reported that achieving resolution could be based on altering collective timeframes. Suggesting time-based compromise was a common approach reported by mediators participating in this study as well. Reference was made to a 2005 bargaining round when the Engineers Union was seeking a 5% pay increase across the board. When employers were unwilling or unable to meet this demand, mediators suggested that the effective term of some agreements be increased to ensure that the settlement reflected the 5% increase, but the term agreed was lengthier, thereby reducing employer costs by amortising it. The parties' described purpose for attending mediation, the generation of a mutually acceptable settlement, is in line with motivations described by Kressel et al. (1994). The desire to achieve this outcome was supported by the style of mediation employment mediators reported as using. The purpose of the mediation, to get a collective agreement, was established by mediators I interviewed at the outset.

The Mediator's Role

> The objective of the mediator is to help the parties negotiate more effectively. The mediator does not solve the problem or impose a solution. He or she helps the disputing parties to develop the solution themselves and then agree to it. Thus, the mediator takes control of the process, but not the outcome. The intent is to improve the parties' skills so [that] they will be able to negotiate more effectively. (Lewicki, 1996, p. 185)

Collective conflicts between employers and employees have been broadly categorised as either conflicts of interest, for example, the negotiation of a collective agreement; or rights conflicts, for example, disputes over the meaning of the agreement (Lewin 2014). Some authors have suggested collective bargaining mediation falls into the category of an interest-based conflict, with conflict involving disputes over preferences and rules, i.e., the terms of a collective agreement, making such disputes more amenable to mediation (Martinez-Pecino, et al., 2008). This is as opposed to rights-based conflicts, wherein parties are locked into rigid positions based on what they believe to be "right", and there is little to trade (Messing, 1993). Rights-based issues are described as strictly legal rights contingent on resources, circumstances and precedent legislation; these issues are open to interpretation (Mahoney & Klass, 2014).

Interest-based disputes are different from parties' actual interests. Interests are the underpinning, or underlying, concerns of parties, the drivers of conflict (Devinatz & Budd, 1997; Roche, et al., 2014). Interest-based dispute processes attempt to discover and address these interests as part of resolving the conflict (Cutcher-Gershenfeld, 2014). In contrast, rights-based processes for resolving disputes are based on rules or principles set down in contracts, or other relevant documentation (Roche & Teague, 2014; Ury & Fisher, 1981). Martinez-Pecino et al. (2008) stated that interest-based disputes are more amendable to mediation, a position taken by some interviewees who relied on mediators to get to the bottom of the problems they experienced. During interviews, parties spoke of the value they placed on mediator's roles in collective bargaining. Value was not linked to whether the matter was resolved, but was linked to the difference a mediator made by being involved in the process. Study participants referred to progress made in bargaining and changes in dynamics. Five key themes emerged. Respondents valued mediators because they:

- provided a forum in which confidentiality was managed;
- reduced areas in dispute;
- were subject knowledge experts;
- enhanced and encouraged communication; and
- reduced tension in the room.

These five key themes are addressed in the following sections.

Managing confidentiality. One of the underlying principles of mediation is that it is a confidential process (Boulle, et al., 2008). Maintaining confidentiality in all documentation prepared for mediation and protecting verbal statements made is reinforced by the Employment Relations Act 2000, section 148. However, confidentiality does not sit comfortably with collective bargaining, which, by its very nature, is conducted by a representative group on behalf of their constituents. Because of this, a very important distinction between collective bargaining mediation and other mediation is the need for information to be shared outside the mediation process with union members. The confidentiality provisions of the Act thus do not apply to a mediation provided to resolve collective terms and conditions of employment (s 148(5)).

Mediators I interviewed acknowledged clarity on this issue was often required by parties. They described the process used for raising this issue and in reaching agreement on how confidentiality would be managed in collective bargaining. To provide a forum in which the parties felt empowered to have open and frank discussions, confidentiality usually became a feature of the mediation. "We agree there will be a cone of silence over our discussions", said one mediator. Another stated, "It is sometime agreed that any matters relating to company sensitive information or individual employees is confidential; everything else is open discussion". Because of the need to disclose information outside of discussions, protocols for communications made outside the room were also established early in the piece.

Reducing areas in dispute. If a dispute cannot be resolved in mediation, narrowing the areas in dispute means fewer matters need to be presented to the Authority, and expensive process. Mediation often achieves this goal, reducing hearing time and legal costs. Reality testing, and testing whether a proposed solution is viable before it is put on the table as a formal offer, are both tools MBIE mediators I interviewed reported using. When mediators made suggestions for settlement and reality tested to help parties clarify issues, their actions were appreciated by the parties. Such actions encouraged de-escalation and narrowed the matters in dispute: "The mediator told the union they were unlikely to achieve what they were seeking. This helped our negotiations." But parties felt this needed to be managed carefully to avoid perceptions of bias. One party noted that for reality testing to be effective, mediator insight and credibility were required.

While perceived mediator neutrality is a basic building block for mediator effectiveness (Mareschal, 2005), it is complicated by a mediator needing to maintain an unbiased relationship with both parties while having to temporarily align with each party to encourage forthrightness (McDermott, Obar, Jose, & Bowers, 2000). Respondents felt reality testing was destructive if a party perceived that the mediator was expressing bias against their position. In these instances, reality testing compromised mediator neutrality and the mediation process. Parties interviewed said perceived mediator bias caused a loss of confidence in the process. Mediators reported strategies they used when they perceived this loss of confidence had occurred during the mediation process.

The mediator as the subject knowledge expert. The credibility of the mediator increases confidence and encourages concessions. When present, interviewees found it to be significant in influencing how disputants viewed mediator recommendations, thus impacting settlement rates (Bowling & Hoffman, 2003; Kydd, 2003). In New Zealand, mediators can gain accreditation through AMINZ and/or the Resolution Institute. The accreditation process undertaken by both bodies reviews mediation skills, not subject knowledge. All MBIE mediators interviewed said their subject knowledge, in this case employment law knowledge, was gained in previous roles. The MBIE appointed their most experienced employment mediators to provide collective bargaining assistance, and as expected, the mediators interviewed reported having knowledge of collective agreements, industrial relations institutions and systems, case law in collective disputes and the enabling legislation. Interviewees said working across collective disputes gave them knowledge of industries, precedents, and the "going rate", the percentage movement taking place in wages and allowances in other collectives.

Under current legislation, there is no requirement for mediators to gain knowledge of an industry; however, parties stated that they sought the services of mediators they trusted and felt had good working knowledge of their industry. When allocating mediators, the MBIE also seemed to be aware of the advantages of subject knowledge, and in contrast to the strategy they used in other types of mediation, allowed mediators to work with the same parties or within industries. Mediators spoke of the need to get up to speed quickly with industry jargon to gain acceptance and credibility. One said, "I mediate lots of collectives. The difficulty is gaining a knowledge of the industry, particularly the jargon used. I need to do this to show I understand and [to] gain credibility. The second time I am involved is always easier." Clearly, mediator experience was important to MBIE service users. Parties felt that experienced mediators were more active, bringing new ideas for resolution to the table. Mediators explained they worked across many collective bargaining disputes, and this variety enabled them to suggest creative negotiation ideas and analogies, without breaching the confidentiality of former disputants.

Enhancing communication. Enabling communication was one key outcome parties sought when they attended mediation. Parties needed to communicate to find a solution to their problem, but they were unable to communicate without a third-party neutral to help them engage constructively. One mediator claimed that some advocates, fearful of conflict across the table — and concerned about the effect on relationships with others in the room — avoided conversations with the opposing advocate. The negative games played created barriers to resolution. The mediator concerned in this case said they balanced this avoidance without the risk of negative impacts by using different strategies, such as separating the parties into different breakout rooms and moving between the parties. Parties interviewed also described ways in which mediators controlled the process to provide an appropriate environment for discussions to take place. They said mediators balanced discussions by controlling interruptions, calling breaks when required, acting as the conduit between parties and using their knowledge and skills to keep discussions from stalling.

Parties reported the different skills mediators used to enhance communications were, in their experience:

- Active listening. One party explained, "The mediator got us to clarify exactly what our claim meant, the delegate explained the problem and what we were seeking to fix it". Another party said, "We found the mediator's control of interruptions when positions were being explained helpful". A third respondent stated, "Negotiating without a mediator present was hopeless. The discussions went nowhere. They did not listen to our concerns; they just wanted to tell us theirs. They kept talking about their need to make money; they did not hear our members needed to be able to pay their bills".

- Reframing. "When we had difficulties in getting the union to hear what we were saying, the mediator explained our position," one employer advocate explained. "They did not listen to us; the mediator told them what we wanted," stated another participant. "The mediator summarised what we were trying to say so everybody could understand," commented a third interviewee.

- Appropriate timing of breaks. "When things got tense, the mediator suggested a break," was a theme expressed by participants. "The mediator let the discussion go on until it

became destructive," stated one interviewee. Another said, "When it felt like we were going around in circles with no progress being made, we had a break to reassess our positions".

Reducing tension in the room. During interviews, mediators and parties said that reducing tension in the room was an important mediator contribution. The tension present was not only across the table, but also occurred within the different bargaining teams, individuals bringing their own agendas to the bargaining table. One example given of tension was the feeling between representatives on the employer's side when a Chief Executive's duty to the Board was to return a strong result for the shareholders, while a local manager felt a responsibility to ensure that the workers he needed to deal with every day were well rewarded for the work they undertook. Similarly, on the union side, tensions arose when a delegate pushed their own agenda, creating barriers to dispute settlement. Mediators gave examples of managers on the employer's side of the table working on a day-to-day basis with union members finding difficulties with the position being taken by their organisation. Other mediators talked about union delegates wanting to push their own agenda, which was not part of the union's strategy.

Decentralisation of bargaining, supported by the Employment Relations Act 2000, creates new negotiation problems. Interviewees considered the inexperience of advocates to be a large contributor to tension. Unlike the years prior to 1990, when bargaining was conducted centrally by experienced advocates and assessors, today, employers and their workers, represented by a less experienced advocate, are more likely to be the ones at the table. A more personal dimension is created, whereby the employees and the employer's representative at the table become involved in negotiating terms and conditions of employment, bargaining hard for what they believe is the best outcome. While the advocates reported acceptance of some negative comments made across the table, the parties they were representing were described as "not always having such an open mind on this matter". Of particular concern were personal comments made about a company and their senior executive.

Interviewees also expressed concern that discussions were being controlled by advocates with agendas, rather than the parties.

One MBIE mediator with many years of collective bargaining experience reflected on the difference between bargaining with experienced union and employer advocates, who were used to the cut and thrust of collective bargaining and did not take comments made personally, and current advocates. "Unlike the 1980s, the people in the room are not always experienced and can take comments made personally". They commented that this led to breakdowns in communication, or to refusals to continue bargaining. Another MBIE mediator commented, "The personalities of the past are no longer at the table".

In recent years, rather than responding to union claims, employers have filed their own claims, often seeking to reduce terms and conditions of employment. Filing these claims that sought to address "sacred" issues have contributed to tension. "The claim (for flexible working hours) was the start of a process to 'casualise' the industry," said one union interviewee. An employer interviewee rebutted, "They don't understand the reality of the industry. We need all the flexibility we have," in response to a claim for more restrictions on hours of work.

The use of a facilitated mediation, and moving the focus of the discussions away from a positional framework to discussing the underlying interests of the parties, were two common tension-reducing techniques used by mediators. They described other techniques, such as reframing claims into interests, calling for breaks, using humour and shuttle negotiations.

The Facilitator's role

The facilitator's role is to lead the group in drawing out answers building a vision and developing plans that motive everybody to achieve agreed upon goals — in short — to win ... The facilitator functions much like the conductor of a symphony, orchestrating and bringing forth the talents and contributions of others. The facilitator is also a communicator … The facilitator fosters communication and understanding between the units. (Spencer, 1989, pp. 11–12)

Parties I interviewed believed facilitators contributed to collective bargaining dispute resolution, but they did not see the role as Spencer (1989) did, indicating that titles do not necessary reflect tasks required. The key themes emerging were that Authority facilitators should:

- focus the parties' minds on resolution;
- reduce areas in dispute; and
- control the process, including communication.

The role of the facilitator as a person who could make public their views on the collective, or determine the contents of the collective, was acknowledged.

Parties said Authority facilitators worked with them to reduce the matters in dispute by getting them to reflect on their positions. One party stated, "[Facilitator X] pushed us towards the union claim. They did this by making suggestions for settlement". Another said, "Prior to the facilitation, we needed to determine the outstanding issues, those that were important and those we did not need to address." A third party commented, "The facilitator kept making suggestions, and we took these as what might be a public recommendation so listened carefully to them. They kept pushing us to adjust our position". A general theme emerged that facilitators pushed harder for resolution than mediators. One facilitator explained that when they commenced the facilitation process, their sole objective was getting the parties to agree, rather than making a public recommendation. Agreement was not always reached in facilitation, however, and when Authority members made recommendations, they were not always accepted. But parties reported, "The recommendation made was used for further negotiations that led to a settlement."

The ability for the Authority Member to make public recommendations weighed heavily on the minds of both union representatives and employer parties. Once an application for facilitation had been granted, the process required parties to either take part or risk a public recommendation being made without their input. This placed pressure on parties to attend and contribute to the process. Keeping the Authority facilitator on side was important. One interviewee said, "Because of their ability to make a recommendation, we wanted to impress

the Authority member." Another stated, "It was important that they understood our position." A third respondent commented, "We did not want to upset the Authority".

Expanding the audience to include stakeholders outside the bargaining team, i.e., senior management, shareholders, union members and public funders in an attempt to change bargaining parameters has been suggested as a strategic reason for seeking facilitation (McAndrew, 2012). One employer party I interviewed suggested bringing others into the dispute, too, because facilitation had changed the dynamics of bargaining, and on occasions, the interviewee felt the process provided additional resources that could be used to resolve the dispute. Indeed, the success of facilitation was not necessarily measured by settlement. Using the process as a forum for the recommencement of negotiations, during which guidance was provided by way of facilitator's recommendations, was seen as very helpful. A process that gave parties a reason to stop industrial action was seen as a positive contribution by study participants.

Chapter Conclusion

Mediation verses facilitation in New Zealand.

Some similarities can be found between a mediator's and a facilitator's role in collective bargaining. Their prime responsibility is to assist the parties to negotiate a collective agreement, and understandably, to reduce areas in dispute. Mediators take this step at an earlier stage of the dispute by providing a "safe" forum before the dispute has become entrenched. Employment facilitators, in contrast, only became involved once the dispute had become entrenched. It could be argued that this key difference has limited their choice of negotiation models, but herein, I discuss respective roles, not the models used. Models are discussed in chapter 8.

Enhancing and encouraging communication is also common to both roles. Both roles encourage communication by providing a fair process for discussion and negotiation. The major difference between the two is the confidentiality of the processes: the Authority can publicise views on the dispute and can arbitrate the terms for a collective. The reasons why mediation of collective bargaining disputes is not confidential are clear. But the reason for parties being restricted by confidentiality during Authority facilitations, while the facilitator is free to make

any public announcements they wish, is more difficult to explain. In saying this, the facilitator's role is to push settlement, and the possibility of public announcements effectively puts pressure on parties to settle.

The requirement to file a formal application to be granted facilitation, and the gravitas of a "hearing", contrasts starkly with mediation's informal processes. However, regardless of the process, current study participants found both processes to be helpful. Matters in dispute were narrowed, negotiations were given some rigour, and communications that eventually led to settlement were undertaken.

Government expectations. Since the inception of the Employment Relations Act 2000, several amendments have been made to it (Rasmussen & Greenwood, 2014), but the facilitation process has remained in situ, as has mediation. Since 2008, there has been no opportunity for Parliamentary debate on the relevant clauses. The only guidance on the current Government's expectations comes from the wording of the legislation, the MBIE Website, and MBIE employment documents. Neither mediators nor facilitators can be challenged on the processes they provide (Employment Relations Act, ss s147(1) & 50E(b)). There is therefore no case law on the processes provided, and to date, limited research on applied processes has been undertaken.

The then Minister of Labour, the Honourable Margaret Wilson, believes that the least successful aspect of the Employment Relations Act 2000 was its failed promotion of collective bargaining. Unions still exist, and collective agreements are negotiated, but in her view, there are issues with multi-employer agreements and freeloading (Hon. M. Wilson, personal communication, April 26th 2017). Furthermore, she believes that in time, resolutions will be sought though a different statutory framework. Freeloading arises when employers wish to give their union member employees and non-union member employees the same terms and condition of employment, now possible under current legislation. Also, the law is not well equipped to respond to increasing demands from low-paid workers, and the move to contracting out is used as a means of avoiding the responsibilities of employment (Wilson, 2014).

The newly elected Labour Coalition Government has proposed introducing fair pay agreements that set employment conditions across an industry (Labour Party, 2017; see http://www.labour.org.nz/workplacerelations). These agreements would be based on the employment standards that apply in that industry and appear to be like the national award system that applied in New Zealand prior to 1991. In February 2018, the Labour Coalition announced that a tripartite working group would try to develop the principles and details of the agreements over the coming 12 months, but it is unclear the contribution, if any, these changes will make towards the promotion of collective bargaining and union membership.

Conflicts with legislation. Whether the introduction of a facilitation process supports the objectives of the Employment Relations Act 2000 is questionable. The Act is based on the promotion of good-faith relationships. The parties I interviewed were all firmly committed to the principle of settlement rather than a relationship. This is understandable, considering the late stage of the dispute at which facilitation is granted. In most cases, acrimonious strikes or lockouts have already occurred. Once a collective agreement has been agreed, however, strikes and lockouts are no longer legal. Resolution of the collective disagreement is therefore paramount to ensure industrial peace. These factors were more important to the parties interviewed than was rebuilding a relationship. Thus, I believe the Act's object of supporting productive employment relationships is not supported by the institutional structure and processes currently in place. I suspect that providing a flexible facilitation, or similar, process prior to relationships being damaged by serious and sustained industrial action would be more productive.

It must be acknowledged, however, that the legislation encourages parties to establish relationships, to work together and to enter into collective agreements. In keeping with the tone of the legislation, protecting the integrity of individual choice rather than using stronger processes, such as compulsory arbitration, the Act is a "soft touch", only providing for very limited arbitration when serious and sustained breach of duty of good faith arises (s 50J). The dispute resolution system of facilitation has been in place since 2004. Since then, it has been successful in providing support for parties to conclude collective agreements, but it has not

supported collective bargaining. And it fails to provide intervention early enough in a dispute to support productive employment relationships.

Chapter 8: Models

Chapter 8 covers the models used by mediators and facilitator in collective bargaining. Models being the style of process used. In this chapter, I focus on the models used in bargaining disputes. Chapter 9 addresses the strategies mediators and facilitators use within the model selected and the factors that lead to resolution.

Throughout the chapter, I raise questions for further research. The issues discussed are as follows.

- There is no standard model for facilitation. The Authority member providing facilitation determines how it will be conducted, and the model selected does not always fit comfortably with models described in international facilitation literature.
- In contrast to prescriptions outlined in international literature, the facilitation process in New Zealand is not limited to mediation and is provided when the parties to the dispute have become intractable, rather than being provided early in the bargaining process.
- Mediators use a narrower range of models in collective bargaining than Authority members acting as facilitators.

Models Used

Facilitator models. The Employment Relations Authority facilitators I interviewed used a variety of models to conduct their work. The model chosen is usually the one best suited for the circumstances. Three models emerged from McAndrew's (2012) research: 1) an (advisory) adjudication model; 2) a mediation model; and 3) a conciliation model. These models sit within the "classic triad" of dispute resolution activities, conciliation, mediation and arbitration. Arbitration being a widely understood model in which the third-party neutral is given the power to decide the outcome, while in usual mediation and conciliation models, the parties retain that power. McAndrew (2012) made a distinction between mediation and conciliation based on conciliation having a more active management of the substance of negotiations by the neutral than would ordinarily be the case in mediation, which he argued tends to be more directly aimed at settlement through compromise. The work undertaken by McAndrew (2012) and the interviews I conducted revealed that Authority members exercise the freedom they are given in the legislation. They consequently use a wide range of models in conducting facilitation meetings.

My interviews established that facilitators in New Zealand used five facilitation models, including two not previously discussed: a problem-solving technique and a process based on final-offer arbitration. While other models used by facilitators demonstrate a resemblance to mediation, (advisory) adjudication; problem-solving and final-offer arbitration are not reported as being used by mediators in this country. The problem-solving process has a strong resemblance to facilitated mediation as described by Irish author Roche (2015). Facilitated mediation is an emerging and significant innovation in Ireland. It turns gentle dispute resolution assistance into active involvement of a neutral third party close to the outset of negotiations to avoid deadlock. However, in New Zealand facilitation is not available until later in the process, when deadlocks are clearly entrenched.

McAndrew (2014) has reported that when a mediation model is unsuccessful, New Zealand facilitators turn to mediation–arbitration. This model is used in many jurisdictions (Brown, 2014). McAndrew (2014) acknowledged the disadvantages in mixing methods, but

overall, felt that the advantages of combining mediation and arbitration outweighed difficulties. A mediation–arbitration process can negatively influence parties' willingness to be open with the neutral, however. The potential of the neutral ultimately deciding the outcome can have a chilling effect on parties' willingness to divulge as they position themselves for the arbitration phase (McAndrew, 2014). Consequently, combining methods may be less effective than pure mediation.

Table 9 shows the main components of facilitation models as employed by the Employment Relations Authority

TABLE 9

EMPLOYMENT RELATIONS AUTHORITY (AUTHORITY) FACILITATION MODELS

Model	Components
Mediation	Facilitator works with the parties to assist them to reach their own solution using traditional mediation techniques
Mediation–arbitration	Facilitator works with parties to assist them to reach their own solution. When this is not possible, the facilitator makes a recommendation for a new collective agreement. This process may use expert witnesses to either assist the parties' understanding and help them reach a decision, or to provide information to assist the facilitator to make a recommendation
Final-offer arbitration	If agreement cannot be reached, parties put forward their best offer for settlement. The facilitator decides which version to recommend.
Joint problem-solving facilitation, or facilitated bargaining	The facilitator uses a range of techniques to encourage the parties to resolve the issues by using facilitative, joint-problem solving techniques and interest-based bargaining

Choosing the model. Rodgers (1989) described an effective facilitator as someone who can provide an environment that allows parties some self-determination. In contrast, there is little self-determination in Authority facilitation. The models, timing and content are set by one person, the facilitator. During the interview, one Authority member said that they did discuss timing with the parties and allowed parties to present the issues from their own perspective. "I read the file, organise a call with the representatives and develop a plan. The claims are not included in the application, so at the time I receive the file, I do not know what the issues are". However, one party who participated in the process felt the lack of freedom in facilitation. This participant stated, "We had pre-facilitation conference calls with the Authority member to set up the facilitation process and to discuss any preliminary matters". But this initial input was as far as the parties were allowed to go.

A Facilitator's previous roles, knowledge and skills appear to have a strong relationship to their choice of facilitation model, in line with previous research findings (Roche, 2015). Facilitators with strong legal backgrounds were more inclined to use an investigatory model, on occasions making use of expert witnesses, starting statements with these words: "Evidence was given by …". In contrast, those with backgrounds in industrial relations described a model more akin to self-determination and mediation. Industrial relations facilitators said about the parties, "They exchanged offers with a little pushing on my behalf for them to be realistic". In addition, the facilitator reported making suggestions as to the terms and conditions that might be included in a collective was part and parcel in some meetings. One facilitator said, "I outlined a proposal for settlement as both parties seemed to want someone else to make the first move". A party echoed this sentiment, observing, "The Authority member put emphasis on finding agreements on as many issues as possible, reducing the number of issues between us. We spent a lot of time and energy doing this. It still left a few matters outstanding and a recommendation was made on these." In facilitations where joint problem-solving was adopted, the principles guiding the facilitation were derived from the formal study of dispute resolution and facilitation undertaken by the facilitator. Formal training in facilitation does not form part of an Authority Members education. Training or education in this area could result in Authority Members providing a wider range of facilitation models.

Final-offer arbitration. One facilitator I interviewed selected final-offer arbitration as a way of working. After exploring the issues in joint sessions, the parties were required to put forward their best offer for settlement, and the reasons why this position should be accepted. Once this process had been completed, the facilitator gave a recommendation as to the position they believed should be accepted. This was done in private sessions behind closed doors. The recommendation was not binding, but it did put pressure on the parties to accept, because they were aware that making the recommendation public was a very real possibility. At interview, the facilitator explained that they had decided to use this model to bridge the gap between the parties' positions but hoped that the parties would be able to reach agreement without the need for the recommendation.

During the facilitation process, the mediator who had been working on the issues prior to facilitation was also used to bring parties closer together. The final decision, as might have been expected, was not received with the same enthusiasm by both parties. The reality was, however, that both were aware of the process being used, and both had the opportunity to change their position to give them a better chance of their offer being the one that was chosen. Neither party asked for this process. The decision to use final-offer arbitration was made by the Authority member in line with section 50E(4) of the Act, and neither party could challenge that decision. I was advised that the collective agreed to was different from the final offer chosen by the Facilitator, but the process did push the parties towards settlement. In line with these results, McAndrew (2012) saw final-offer arbitration as "a unique and evolving process that provides the certainty of an arbitrated outcome if required, but incorporates features designed to maximize the prospects for a negotiated agreement" (p. 499).

McAndrews comment was made in relation to the provisions in the Policing Act 2008 to determine collective arrangements for Police terms and conditions of employment when the parties themselves fail to do so. There are two major differences between the final-offer arbitration process used by Authority members and Police bargaining, where final offers are part of the bargaining process. In Police bargaining, the decision maker is involved in the bargaining process as an observer from the time the parties request mediation assistance, whereas an Authority facilitator becomes involved late in the dispute, when attempts to mediate a solution have been exhausted. The Police arbitrator also uses criteria established in the Police Act 2008

to assist them. The objective of the Police arbitrator's early involvement is for them to obtain an in-depth understanding of the matters in dispute. However, they are excluded from mediation during the negotiation phase. The Authority facilitator does not have the same opportunity in final-offer arbitration, placing pressure on them to inquire fully on the matters in dispute in a truncated process. An inquisitorial protocol is part of their role outside collective bargaining, but none of the facilitators interviewed raised concerns about the timing of their involvement.

I was only given one example of final-offer arbitration. In other jurisdictions, where facilitators are willing to act as arbitrators, they reported doing so when this option had been agreed to prior to facilitation, or when during the facilitation process, both parties had asked them to arbitrate (Roche, 2015). In contrast, in New Zealand, the facilitator, not the parties, determined the model and whether they would arbitrate the dispute. But self-determination of outcome is promoted in the Employment Relations Act 2000 (s 50A) creating tension between the objectives of the ERA 2000 and the powers given to the facilitators in sections 50H and 50J to determine the process and, in the event of serious and sustained breaches of good faith, make determinations fixing the provisions of the collective agreement being bargained for. While facilitators can express a view on the collective agreement, they believe the parties should conclude their own bargaining, as per section 50H(1)(b). It is understandable with this provision that emphasis is placed on self-determination. No criteria or case law precedents are available for arbitration, and therefore, facilitators in New Zealand are reluctant to provide an arbitration process.

Facilitated bargaining. One Authority member describes their role as "facilitating the parties to work together to resolve their differences". The member had completed four facilitations over the past few years and had used a slightly different model for each. Their objective for facilitation was achieving an agreement. They believed that establishing a relationship was important, and the model used was designed for relationship building. It has some similarities to "joint problem-solving" or "facilitated bargaining" techniques. They described their use of this process as successful and stated, "There has never been the need to make a recommendation when this process is used". They acknowledged that parties found it challenging on occasions, because the lawyers involved were used to a process where they tightly controlled what the parties said during a hearing. Yet, the Authority member, using this process encouraged parties to speak without their comments being filtered by lawyers. Lawyers feature widely in collective bargaining disputes. They have only done so since the ECA 1991, see chapter 2. Their role in joint problem-solving processes where the parties are tasked with working together to resolve bargaining issues is questionable.

The Authority member's facilitation process commenced with initial phone calls to both the representatives to obtain information about the dispute. They believed that it was important to speak to both the advocates and the wider bargaining team. Following the initial phone calls, they decided on a facilitation model. During the interview, they described working with a white board, brainstorming and open questioning. The objective was always to engage every person in the room. They said, "I put them into groups to come up with ideas, these are just ideas. I focus on the good things that have happened during bargaining and the issues that are outstanding". To gain an understanding of the issues, they sometimes mixed groups across tables, with representatives being asked to work from the other party's perspective. This was challenging to some representatives, who were used to managing from their side of the table only. However, the process used fits the model described by Gregory (2002), in that the facilitator works on "dragging out the wisdom already lying dormant in the psyche of the group" (Gregory, 2002, p. 80).

Rules were set by this Authority member before the first session. These rules were designed to encourage input from everyone involved in the process. The protocol supported the idea that all contributions were valuable, and that there were no "silly or wrong ideas".

Parties were kept in the same room with the facilitator "going around and around seeking ideas." At interview, the Authority member said, "Everyone needs to participate in the process and the solution. There are no expectations about how the process might work".

The Authority member acknowledged flexibility was required, and on one occasion when the parties were not comfortable with the use of the role-play model, a more traditional way of resolving the dispute was implemented.

Positive relationships are important features of workplaces (Cutcher-Gershenfeld, 2014; Eaton & Kochan, 2014; Employment Relations Act, 2000; Roche, 2014). Early resolution by joint problem solving is more likely to be long lasting than filing grievances with legal causes of action (Greenwood 2016 p. 228). Using facilitation to start rebuilding relationships is a positive step. Encouraging the parties to use interest-based bargaining and joint problem-solving techniques, rather than emphasising differences by using arbitration-type processes, as modelled by the interviewee facilitator who described the process in depth, fits with the intentions of the ERA 2000 and current dispute resolution thinking, (Greenwood, 2016)

Mediation models. "If one accepts that the best agreements and solutions are those negotiated by the parties by themselves, then mediation easily represents the alternative dispute resolution option of choice" (ILO, 2011, p. 109). Note that in mediation, the model used is dependent on the style of mediation provided. Herein, I compare the findings from my research to the literature published in this area. The literature published in New Zealand primarily considers personal grievance disputes, not collective bargaining, but no distinction is made in the enabling legislation for the mediation support provided for different types of disputes. The feedback received during my interviews and surveys acknowledged the high skills mediators bring to their role. It was also recognised that some cases cannot be resolved in mediation. This was particularly important to union parties, who are in competition with other unions for members. Any delay in settling the collective can bleed membership to individual employment agreements or competing unions.

Collective bargaining models. The Employment Relations Act 2000 does not describe a mediation "process", but McAndrew and Risak (2013) argued that mediation styles under the Employment Relations Act 2000 feature "an effort at least at proactive, remedial mediation, despite a continuing preponderant demand for evaluative, 'divorce' orientated mediation" (p. 1). Their research was based on personal grievance mediations, not collective bargaining.

However, it does need to be noted that while employment mediators work across the range of employment disputes, the predominant mediation service provided is for personal grievances or interest-based disputes. In research undertaken by Morris (2015), MBIE mediators described mediator training as focused on a facilitative model, while they actually used a mixture of all models, with facilitative methods predominating. Because collective bargaining is not the predominant mediation arena and not all mediators work in this field, it is assumed that mediator's responses in this research are slanted towards mediation of individual disputes, not collective bargaining. Unfortunately, since the establishment of the MBIE mediation service in 2000, there has been no research undertaken into the styles used in collective bargaining.

Mediators involved in collective bargaining confirmed the findings of Morris (2015) that they use a variety of models, but they emphasised evaluative settlement. During my interviews one mediator said, "Collective bargaining is all about compromise, one party moves and then the other". Another stated, "I use risk assessment, questioning what might happen if the matter doesn't settle". Another mediator commented, "If strike action is taking place my questions relate to how long they can withstand the action". One interviewee said, "I bring a knowledge to the table gained from years of collective bargaining". Summing up their roles, one MBIE member noted, "We are more inclined to provide a [collective] mediator with a knowledge of the industry then we do in other mediations".

A mediator who would actively move the negotiation toward a settlement was preferred by parties I interviewed. This preference was tempered with a suggestion that it was the other party that the mediator should be attempting to move from an unacceptable position. While parties wanted mediators to push for a settlement, they understood that on occasions, this would mean the mediator might place pressure on them.

Mediators' self-description of their process has been questioned in other research (Ross, Fischer, Baker, & Buchholz, 1997), but the bargaining parties I interviewed confirmed the mediators' self-assessment and were happy that the mediator was actively involved in pushing everyone towards a settlement. Concurrence between users and providers leads me to conclude that the model of mediation provided in collective bargaining is predominantly settlement focussed, because:

- the mediator provided parties with specialist or other expert information and advice; and
- the mediator focuses on parties' positions and assisting them to settle the dispute through compromise and bargaining.

With very few exceptions, parties want to achieve a resolution and are prepared to move their offers during mediation to achieve a settlement. Indeed, it was not uncommon to hear that when parties anticipated problems, they sometimes held back their best offer to allow for further negotiation when a third party could assist. Indeed, parties with an existing business relationship fit into the "litigated money claim" category (Fisher, 2010), and it is therefore not surprising that they should seek a mediator with a settlement-focused ideology.

Collective bargaining is an expensive exercise for parties. Senior management are required to attend bargaining sessions, removing them from their usual day-to-day management activities. Unions have limited resources and a need to provide member services across a wide spectrum of disputes. Thus, the parties I interviewed expressed a desire for a highly experienced mediator's help. Some said that a collective employment agreement based on their position would be the appropriate outcome, and they wanted the mediator to sell this to the other party. They wanted a mediator who could "energetically reason with, persuade, badger, and wear down the (other) parties" (Fisher, 2010, p. 20).

Some commentators have been surprised by the emphasis employment mediators place on settlement rather than problem-solving because, while settlement plays an important role in MBIE mediation, this model is not stressed in policy documents (McAndrew & Risak, 2013). However, no angst about the emphasis on settlement was expressed in the interviews I conducted. Respondents were all reasonably experienced, and the process provided was one

they expected the mediator to deliver. According to my research, mediators themselves were open to using mixed model approaches, however some of the processes used by facilitators, such as arbitration or calling witnesses, were not available to them. Facilitative models, underlying interests and freedom for parties to come up with their own solutions were descriptions given by mediators of how they sometimes worked to achieve collectives. They favoured a mixed-model mediation process, demonstrating flexibility in adapting processes to meet parties' needs and the stage of the dispute. Their approaches align them with the eclectic model recommended by Morris (2015). However, the danger is that in allowing the mediator to determine the model, the mediator also prioritises the focus of the mediation, i.e. settlement, regardless of parties' wishes (Morris, 2015). While it could be argued this is also the case in facilitation, the difference is mediation is seen as a self-determinative process, whereas the facilitators role is to "assist the parties to concluding a collective agreement" (ERA 2000, s.50).

The mediators delivering collective bargaining mediations are the most experienced of MBIE's employment mediators. In my view, they work across a range of disputes and should be able to determine an appropriate mediation model for the parties. Most importantly, the parties I interviewed expressed satisfaction with the process delivered, refuting Morris' (2015) concerns. The fact that not all collective bargaining disputes settle in mediation is arguably not such a negative outcome. First, ostensible failure demonstrates mediation is a voluntary process; the parties taking part in mediations have the ability, knowledge and experience to determine the important issues for them and whether the mediator's focus on settlement is appropriate. Second, the mediation process is a way towards settlement later, much like the sale of a house after auction. Mediators can facilitate later settlement, because their process has narrowed the matters in dispute. Third, as mediation is a voluntary process, the parties are free to not participate if they do not like the process the mediator provides.

The process undertaken relates to the model of mediation. A settlement model of mediation, where the mediator focuses on compromise and bargaining, would usually mean the process is directed towards negotiation, with the mediator shuttling messages between rooms. A narrative model, where the mediator focuses on parties' stories and externalising problems,

leads to the creation of a more positive, combined story, and usually means the mediator spends the majority of their time in joint session, with the parties taking a leading role in the discussions.

Flexibility and active listening were important to parties, however. One stated, "The mediator was flexible. If we were concerned about how the mediation was proceeding, we felt comfortable to raise the issue and believed the mediator heard the message we were giving" (P8). Another concurred: "Facilitation loses its power if the facilitator does not take the time to listen. The mediator understands that better naturally, but it is just as important in facilitation" (P4).

Application of the Resolution Institute model. The Resolution Institute mediation process, a proactive remedial model, is use by practice leaders to measure performance standards and is commonly used by mediators in New Zealand. It has an introductory phase, an exploration of problem stage, and a negotiation and resolution stage (Figure 11).

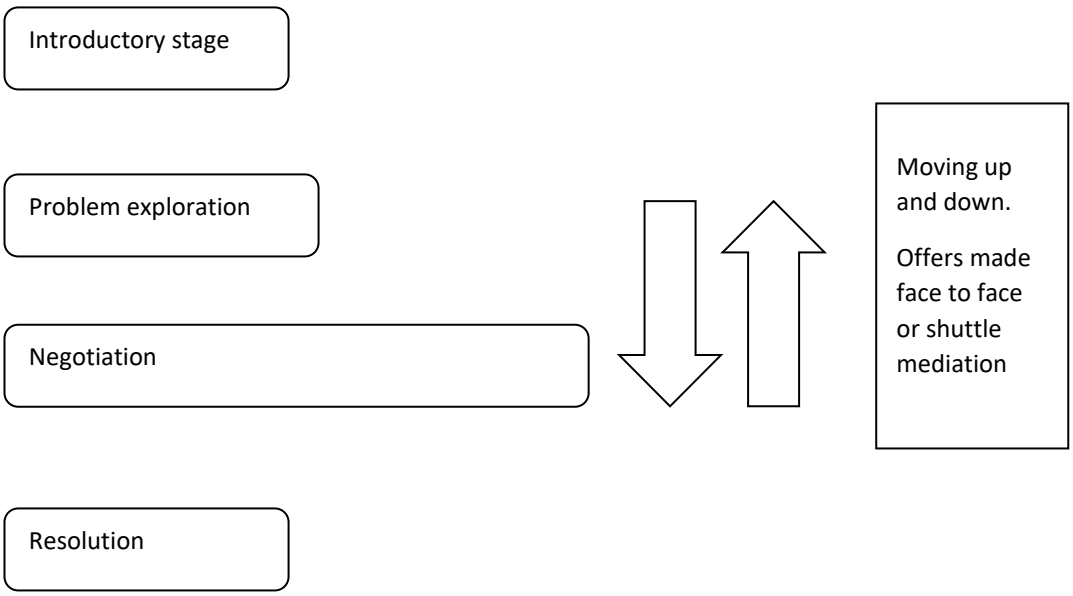

FIGURE 10. THE THEORETICAL STAGES OF THE RESOLUTION INSTITUTE MEDIATION PROCESS.

The mediation process was described as moving up and down the model, with a need to go back to explore new issues as they arose. Private and joint sessions were used in a flexible manner according to the matter being discussed and the parties' relationship. Mediators described themselves as managing the process, making decisions about timing, when to work in joint session or separately. They had regard for the parties' needs, however, in every decision they made. Said one mediator, "If I am asked to pass an offer to the other party, I generally do so" (P11). Another concurred, stating, "Prior to passing an offer, I explore with the party, asking if this is the best way of getting the message across" (P12). An astute mediator reasoned, "My passing offers can take the heat out of the situation. I am flexible about doing this" (P10). One experienced mediator stated, "I am cautious to ensure I have the parties' permission before I present an offer to the other side" (P9).

Mediators saw themselves as only "very loosely" using the Resolution Institute model for collective bargaining. They concurred, "You do what you feel you need to do at the time" (P9). To my study participants, mediation was an intuitive process, rather than a structured process. One MBIE mediator (P10) described this. They said, "We may be discussing a wage increase, but this links into a claim relating to work–life balance, and maybe, work rosters. The employer needs to provide a service over set hours, so while we are talking about each item as a claim initially, they all fit together into a discussion that means we go back to opening up and exploring all the issues, when we had reached a preliminary agreement on one claim" (P10) Another MBIE mediator (P12) agreed, saying, "The process I use is to keep all matters on the table until everything is agreed".

Interest-based vs. traditional bargaining. An interest-based model of bargaining varies from traditional bargaining in that it moves bargaining from a process of domination to a process of integration (Graham, 1995). The parties bring their previous history to the table. If that has been positional, it is likely to be the way they want to continue bargaining. Mediators I interviewed reported themselves as needing to change attitudes to bargaining, and they used a combination of interest-based and traditional bargaining techniques to do so. "I try and find the underlying interests, but sometimes they just want an old fashioned stoush" (P10). Another said, "I do whatever I think will work at the time, if it doesn't work, I try something different" (P9). Sensitive to parties' natural self-interest, one mediator conceded, "I work on finding the underlying interests. This allows for a broader range of settlement options" (P12). One experienced mediator said, "The objective is to get them working together to find a solution, but sometimes you need to allow venting before this occurs" (P10).

Interest-based bargaining literature sometimes refers to strategies and organisational changes required, including training prior to bargaining (Kochan, et al., 2008). Training of parties prior to entering into the dispute resolution system is not a feature of MBIE mediations, nor does it feature in Authority facilitations, however. Parties requesting either of these processes do so after their own attempts at bargaining have broken down. For the collective to be agreed, communication needs to be re-established. This creates an extra task for the mediator or facilitator. Balancing the needs for parties to agree their own solutions and the timing of support for them to do so is important to ensure relationships are not destroyed beyond repair. Providing an interest-based process early in the dispute for parties 'trained' in this style of working is likely to assist in keeping communications open.

Actions mediators and facilitators took within models to assist resolution

Shuttle mediation. Shuttle mediation, a process whereby the mediator passes messages from room to room, was a common approach reported by both employer and union parties. In carrying out this function, there was an expectation that the mediator would "sell" a position to the other party. Shuttle mediation was a tool used to reduce tension. It was also used when the party wanted an offer to be fully considered in private before a response was received. Finally, shuttling was used to test the acceptance of an offer, or when the party making the offer did not want the other advocate to use the offer to create unnecessary drama. One employer party stated, "We asked the mediator to present the offer to avoid the histrionics we had seen from the union advocate in previous discussions" (P8). Another said, "We wanted the mediator to float the offer to see if it would run before, we got into the detail. Them [sic] doing this without us in the room was the best way to manage the situation" (P6). One advised, "It was better for the mediator to present the offer than for us having to sit and listen to tirade of abuse designed to rev up the troops" (P8).

Interestingly, one employer party explained that they were the advocate, and in that role, they were representing the employer's position. If the union upset the employer by abusing them and their well-considered offers, it would have been difficult to get the employer to continue negotiating. Their preference was therefore to use the mediator to respond to claims and to pass offers between the rooms (P7).

The timing of mediation support . Mediators were described as flexible about when mediation support was provided. Breaks were taken when one or other of the parties needed to get further instructions or to do costings. The timing of mediation support was an important factor in whether parties settled. Parties had to be ready to engage in finding solutions, and the mediator needed to allow time for this to happen, i.e., employers sometimes needed to undertake further budget exercise, wait for other collectives to settle or for an outside party to make funding decisions. Mediators accepted adjournments were sometime a necessary part of the process but did not like adjourning for long periods. One mediator stated, "Parties sometimes ask for adjournments to allow for proposals to be costed. This can be very frustrating for both me and the other party". Another said, "When these [adjournment] requests are made, unless the other side strongly objects, there is not much we can do about it" (P11). Frustrations were with scheduling and capacity. A mediator in high demand said, "My diary is filled up by the support staff. While collective bargaining gets priority if there is strike action involved, getting another day can be difficult as other mediations need to be moved" (P10).

Time spent together in each process. Inexperienced facilitators primarily work with joint sessions (Heron, 1999), and facilitative mediators in Ireland try to "maximise the joint and minimise the separate sessions" (Roche, 2015, p. 301). In contrast, the time spent in joint meetings in facilitations was, in most parties' recollection, about the same time they spent in joint meetings under the mediation process: 50% of their time was spent in joint meetings, and 50% caucusing in separate meetings. In some mediations, the ratio increased to 75%:25%. This was somewhat surprising, as facilitators in New Zealand, in carrying out their usual investigatory process, are charged with establishing the facts and making decisions according to the merits of the case (Employment Relations Act 2000, s 157(1)). They therefore must comply with the rules of natural justice (s 157(2)(a)) and provide a transparent and fair process. This means they should spend the total hearing in joint session.

Clearly, transparency is easiest to deliver when any interaction with the parties is held in joint session. In line with natural justice, a basic rule of arbitration is that both parties should be privy to all the information given to the arbitrator (Brown, 2014). When mediation and

arbitration are provided as part of the same dispute, they are usually provided by separate neutrals (Brown, 2014). Talking separately to parties when the process could potentially move on to arbitration could be a barrier to the delivery of natural justice by a solo neutral party. In separate sessions, the neutral could end up in possession of information from one party that could influence their findings, without the other party being aware of the information or able to counter it.

During a mediation process, I found that the tendency is for the parties to present their case and then move into caucus, with the mediator working between the parties to find a solution. This style of mediating is, in my experience, a common way of mediating collective bargaining disputes. Offers for settlement are passed between the rooms by the mediator or are developed in separate rooms with the mediator's assistance and are then presented across the table in joint session. Mediators reported following a structured process using a range of strategies within that process, beginning with the parties together while confidentiality and privilege rules were established. Opening positions were then exchanged across the table before moving into shuttle negotiation. Participants reported that joint sessions were used when appropriate, or when requested by one of the parties.

I also surveyed parties to determine how bargaining positions were exchanged. Their responses showed that positional exchange was not an extensive part of either the mediation or facilitation processes. In fact, such exchanges were less likely to occur in a facilitation setting than in mediation. The only respondent who said most of the facilitation process was conducted by exchanges across the table noted succinctly, "only just". Reflecting on the process, one respondent added, "The facilitation process consisted of more negotiation and making submissions than the mediation process" (P2).

My findings demonstrate that in working through the process, there are more similarities between facilitation and mediation than may be envisaged from the enabling legislation. By this, I mean that facilitation is set up as a more formal process, but the facilitators, in delivering that process, provide similar steps to mediation. Positions are exchanged between the parties, and / or the third-party neutral and one or other of the parties. Both processes used caucusing when required.

Involvement in making settlement suggestions. Collective bargaining is usually on the settlement end of the mediation model scale, with mediators involved in collective bargaining being more likely to make suggestions (Martinez-Pecino et al., 2008). Making suggestions for settlement is not seen as part of a facilitator's role definition, because a facilitator is "a process guide who works with a group to help it achieve its self-defining purpose" (Hunter, 1999, p. 118). Respondents were asked whether suggestions for settlement were made by mediators and facilitators. One respondent did not answer the mediation component of this question. However, my survey showed that making suggestions for settlement options is a part of the process undertaken by all Authority members involved in the cases surveyed. Mediators also intervened when they felt it was appropriate.

In summary, mediators and facilitators saw their prime role as supporting parties to settle the collective. The interventions they made were designed to do this. Mediation and facilitation literature promote self-determination and differences of role, but the focus on settlement and the interventions use by employment mediators and facilitators were very similar. This similarity does not mirror international or scholarly viewpoints, but it does meet parties' needs.

Caucusing. Caucusing (private sessions), are a widely used, sometimes controversial parts of the mediation process, with some literature suggesting caucuses give the mediator too much power at the expense of the parties (Boulle, et al., 2008; Sharpe, 2009; Hoffman, 2011). However, talking to the parties separately is a valuable tool recognised in the Resolution Institute model of mediation, and caucusing is used extensively by MBIE mediators (Geigerman, 2012; Hoffman, 2011; Stipanowich, 2016). The interviews I conducted with mediators demonstrated that caucusing was used extensively in collective bargaining by study participants, allowing the mediator to build a relationship with parties that cannot be built in joint sessions. The method also provided a private setting for mediators to develop a deeper and more personal understanding of the parties' needs and interests. Mediators spoke of using caucusing to find out the real issues: "It is an opportunity to dig deeper to find what the issues sitting behind the dispute are".

Caucusing was also a helpful process used to overcome impediments to settlement and to negotiate uncomfortable, sometimes personal issues, such as:

- communication barriers,
- unrealistic expectations,
- emotional barriers,
- intra-party conflict, and
- fear of losing face.

The real strengths of caucusing were reality testing, when mediators explored in private sessions the changing of bargaining positions or the reality of a strike or lock-out on the parties, and used private space as a tool to reduce emotion. Employment mediators did not have to seek permission from parties to caucus. It was accepted by study participants as a normal part of the mediation process and was an option parties themselves also requested.

Chapter Conclusion

In chapter 8, I have reviewed the models used by MBIE employment mediators and Authority facilitators. I have found both used flexible models in collective bargaining. Mediators used different techniques and skills; in general, the model of mediation provided in collective bargaining was evaluative, or settlement focussed. My findings are in line with those of McAndrew (2012). However, my research has established that facilitators are more flexible in the choice of models than earlier research has imagined. Facilitators have the freedom to determine the process they provide. Strictly speaking, the New Zealand facilitation model has not been defined as "facilitation" in the literature.

Models available in literature describing facilitation have been adapted and expanded by Authority member to include unique dispute resolution processes. In doing so, facilitators in New Zealand have moved away from the commonly accepted concepts. The enabling legislation, the Employment Relations Act 2000, gives them the freedom to do this. The additional tools they have used have been accepted by bargaining parties. In contrast, mediators' processes are limited to traditional models. The legislative provisions allow for more approaches than are used by New Zealand mediators. Why they limit their process so narrowly is unclear and a matter for further research.

McAndrew (2012) found a conciliation type model was of most assistance to facilitations. However, since his research was undertaken, independent Authority facilitators have extended the models they use to include joint problem-solving and a model like that used in New Zealand Police collective negotiations, final-offer arbitration. This model was one legislated for in police collective negotiations, but it was not extended to other collective bargaining. Further questions need to be asked about whether a process 100% reliant on the provider's decisions, which now include final-offer arbitration as a precedent, is appropriate. Indeed, apart from one Authority member's decision to arbitrate, there is no arbitration system for collective bargaining in New Zealand.

In New Zealand, mediators also determine the model used. Mediators can make a final, binding decision and can make recommendations for settlement (s 149A of the Act). There is no bar to these processes being used for collective bargaining disputes. I can find no evidence of section 150 ever being used, but section 149A was invoked by a mediator on one occasion.

However, final-offer arbitration and mediation–arbitration are not processing that have been used in collective bargaining mediation. Mediators have no ability to call expert witnesses or to commit their employer to any expenses that may be incurred in doing so. Therefore, arbitration-style resolution mechanisms do not sit comfortably in a mediation process, especially when they have no power to untie the purse strings to pay for experts.

A mediator may assist the parties to resolve a problem at an early stage (ERA 2000 s 47(2)(ac)), but this provision has been limited to individual cases, not collective bargaining. While a mediator could use facilitated bargaining early in a dispute to support collective bargaining, there are several barriers they would need to overcome. Unlike the Authority member who can direct the parties, a mediator would need to get the agreement of the parties. Using problem solving in collective bargaining can be a lengthy process, training in a new style of working is usually necessary and good facilitation skills are needed. Mediators carry a high workload, and unlike Authority members, do not manage their own diary.

Importantly, the question of mediators being resourced to provide early facilitated bargaining, as in other countries, needs addressing. Providing this service at an early stage, in contrast to only providing it once the dispute has become intractable, would appear to be more cost effective and more in line with the objectives of the Employment Relations Act 2000. The new Government has signalled changes to collective bargaining. Considering not only the structure of bargaining outcomes but also how the outcomes are achieved, i.e., what support is available to the parties, is an important consideration. Attention to bargaining models and the resourcing and support needed to change focus from positional to interest-based bargaining should form part of the new Government's deliberations including the training needs of Authority members, mediators and participants.

Chapter 9: Strategies

Chapter 8 discussed models of mediation and facilitation this chapter considered the strategies and techniques used by mediators and facilitators within the model used. It concludes by considering the factors that led to resolution of the dispute and then compared facilitation provided by the Authority with the literature review in Chapter 3.

Mediation strategies. Mediation literature reports several strategies mediators have developed to assist parties to reach agreements. Strategies used by mediators are important as they influence the final outcomes of the process (Martinez-Pecino, et al., 2008). The themes that emerged in the current research revolved around how:

- strategies used by MBIE mediators assisted parties in collective bargaining; and
- strategies fit with the parties' expectations of a mediator's role and processes used.

As discussed in chapter 3, I have categorised strategies into three groups. These groups have been chosen because they have received strong empirical support (Lim & Carnevale, 1990). In brief, categories are assertive–substantive, neutral and trust–reflexive in nature.

Assertive–substantive strategies. Mediators reported using assertive strategies to move parties off fixed positions. Where they were used, these methods were directed at getting the parties to reflect on the bargaining and the advantages of resolving the dispute. Strategies of this nature used by research participants are presented in Table 11.

TABLE 10

EXAMPLES OF ASSERTIVE–SUBSTANTIVE MEDIATION STRATEGIES

Strategy	Examples given
Evaluating	Reality testing the claims being made or rejected
Directing	Suggesting settlement options
Pressing	Discussing the effects of not settling the collective, i.e., ongoing industrial action or the effects of delays in collective implementation

Trust strategies. All the mediators I interviewed agreed that "Without trust, there is no point in mediation". A mediator's reputation was seen to be of upmost importance. "Without it, you may as well give up," one participant (P10) cautioned. Trust, rapport and reputation were seen to intertwine. Participants felt these qualities were fundamental to building a solid foundation for the mediation process. The trust mediators built with the parties early in the mediation process allowed for full and frank discussions about unrealistic positions and likely outcomes.

Humour was used as a means of establishing rapport and lightened tense situations. Comment was made that humour had to be used appropriately, and usually only after good rapport had been established. Being the Devil's advocate was a strategy reported by one mediator as a way of avoiding partiality claims. They said they explained to the parties they were was going to play the Devil's advocate prior to hard-questioning them about their position (P1).

Most mediators used a variety of techniques to develop trust and demonstrate experience (Table 12). One experienced mediator commented, "Experience helps you determine the issues the parties will die in the ditch for, and those that will quickly disappear as the bargaining progresses. The issues sometimes stem from the union or employers overarching principles or what they need 'to achieve this year" (P12). Mediators participating in this study used the rapport built during the mediation to make suggestions for settlement and to challenge entrenched positions. Mediators talked of moving between assertive and trust strategies. They

floated ideas, reframed positions and looked for common interests. Strategies used were fluid, and were based on their ability to constantly read the situation to access what was working and what was having a negative effect. When one strategy did not seem to be working, they changed to another.

TABLE 11

EXAMPLES OF TRUST STRATEGIES USED BY MEDIATOR PARTICIPANTS

Strategy	Examples given
Facilitating	Establishing an environment where the parties could talk freely across the table. The without-prejudice environment was often agreed to for collective bargaining
Problem solving	Assisting parties to establish the interests behind claims, and then to develop resolutions based on the interest rather than the claim
Trust caucusing	Caucusing was used by mediators to build and to rebuild trust. Humour was used to achieve this, where appropriate

Neutral contextual strategies. Mediators reported using limited examples of neutral contextual strategies (Table 13). These included establishing priorities on the list of issues to discuss and simplifying the agenda. There was a lack of consensus between mediators, however. Some said they formalised an agenda when they felt it necessary, and others said they would "never" list agenda items, as it created a perception that they would all need to be addressed during the mediation sessions, which may not in fact be necessary. Parties said they did not want mediators to use neutral contextual strategies; they wanted a mediator to be actively involved in assisting them resolve the dispute.

TABLE 12

EXAMPLES OF NEUTRAL CONTEXTUAL STRATEGIES USED BY MEDIATOR PARTICIPANTS

Strategy	Examples given
Minimum input by mediator	Establishing priorities for discussion to address claims that are easy to resolve before moving on to the harder issues

Discussion. The MBIE mediators' strategies are in line with previously published research findings on processes used in various contexts (Martinez-Pecino, et al., 2008; Morris, 2015), i.e., research participants moved through different strategies according to the stage they were in and the parties' reactions. The prime strategies they reported using were a mixture of substantive and reflective interventions. Prior to determining the strategy, they established their legitimacy and built trust with the parties. The factors they relied on included their previous dealings with parties, their reputation as a mediator and initial intake discussions. Reflective strategies were used as a foundation for movement to substantive strategies, i.e., building rapport before suggesting potential terms of settlement, with a move back to a reflective strategy to rebuild rapport if it was damaged. Substantive strategies were also part of the mix. Neutral (contextual) strategies were used less frequently. Mediators thought these neutral strategies were more helpful in individual mediations, rather than collective bargaining disputes.

The parties saw the preferred role of the mediator as one that incorporated both substantive and reflective strategies. They wanted a mediator who was active in the dispute. They wanted someone to actively facilitate a problem-solving process and to suggest novel solutions. A mediator using contextual strategies only would be unlikely to assist them in this regard.

Settlement of the dispute was important, and a mediator who would actively move the negotiation toward a settlement was preferred. This preference was tempered with a suggestion that it was the other party that the mediator should be attempting to move from an

unacceptable position. While parties wanted mediators to use substantive strategies, they understood that on occasion, this would mean the mediator would ask them to shift their own position.

Authority member strategies. Facilitators, like mediators, adopt strategies for moving group dynamics towards resolution. Scholars define two different categories of facilitators, authoritative and facilitative; strategies that a facilitator may use are dependent on whether the operate in the authoritative or facilitative zone (Heron, 1999). The facilitation process is one where the parties are in what is called a "learning environment" (Heron, 1999). Heron's description of facilitation is appropriate for use in my research, because it is well-respected and widely accepted by others in the field (Gregory, 2002; Hogan, 2002; Hunter, et al., 2007; Thomas & Pyser, 2008).

In Heron's (1999) hierarchical category, the facilitator strategy is to take responsibility for and oversees all major decisions. They take control by directing the learning process, exercise power over it, and lead the group from the "front seat". The ERA 2000's description of the facilitation and the way employment facilitators operate allows professionals in the role to challenge resistance, and to interpret and manage groups' feelings and emotions. It differs from Heron's (1999) hierarchical category in that the facilitator does not think on behalf of the group or decide the objectives. Except for very limited powers to set the terms of a collective agreement, which have *never* been used by the Authority, parties are free to accept or reject a facilitator's recommendation. Heron's (1999) cooperative category, with a focus on sharing power and self-determination, sits more comfortably alongside New Zealand's mediation process, in which self-determination and power sharing concepts are embedded. In contrast, New Zealand's facilitation process is one in which the Authority member has the power to make decisions. In fact, Heron's (1999) cooperative category not align with current mediation processes, either. While its focus is on negotiated outcomes, in line with self-determination concepts, parties devising the learning process by themselves is not a feature in New Zealand.

Assertive–substantive strategies. An authoritative facilitator is prescriptive, informative and confronting, and gives information to instruct and guide, thereby challenging the other person (Heron, 1999). This description aligns with the views of parties who participated in the current research. Indeed, Authority facilitators control the process, challenge, critique, and cajole in the interests of either settlement, or some level of acceptance, and to manage behaviours and expectations (McAndrew, 2012).

TABLE 13

EMPLOYMENT RELATIONS AUTHORITY (AUTHORITY MEMBERS' ASSERTIVE–SUBSTANTIVE STRATEGIES

Authoritative component	Authority member actions
Prescriptive	Controlling the process Determining settlement options
Informative	Suggesting outcomes
Confronting	Discussing the effects of not settling the collective, i.e., the possibility of a public recommendation
Challenging	Reality testing the claims being made or rejected

The strategies used by authoritative facilitators are primarily assertive–substantive strategies — interventions that deal directly with the issues, and contrast with neutral or trust strategies common to mediation (Table 14). Evaluating positions, directing and pushing participants are features of bolder facilitator strategists. Implementing these types of strategies can be too confrontational, however, and it is important that confrontation is always done in a respectful and affirmative manner, while being firm in addressing the issue and the behaviour (Murray, 2012).

Parties I interviewed reported Authority facilitators as being "very much in control". One said, "The Authority determined what was going to occur; they were in control of the process" (P4). Another agreed, claiming "There was no negotiating over this matter. They determined how the process would be run" (P8). Furthermore, "There was no opportunity for us to argue. We did not want to create an issue, so we just went along with what they asked" (P7). The Authority facilitators saw their role as a settlement broker, so they made suggestions and pushed parties. Like mediators, they did this by making suggestions for settlement.

Establishing rules of engagement is a process followed by the Authority in their investigatory work. They determine the process that will be followed and deal with disputants who do not comply with that process. Confronting a party was not a concern to facilitators I spoke with, and parties expected Authority members to address poor behaviour. It is understandable that Authority facilitators, because of the nature of their primary role in investigatory work, will make determinations for or against litigants and will accept confrontation as part of their role. Facilitators participating in the current study were not afraid to declare their views on the dispute and possible outcomes. Their actions are in line with the legislation, which provides for Authority members to exercise control over the process, and potentially, the outcome.

Preventive strategies. In contrast to the authoritative, facilitative processes draw ideas, solutions and self-confidence from the other person, helping him or her to reach his or her own solutions (Heron, 1999). In a way, this type of facilitation can be seen as prevention of conflict. The preventative strategies Heron (1999) described do not align with strategies used by Authority members, however. Trust or reflective strategies — interventions designed to gain the acceptance of the disputants — were not practiced by Authority facilitators I interviewed. Legislation legitimises Authority members whether they have the trust of the parties or not. Thus, Authority members used more direct strategies. (Table 14). One participant I interviewed reported feeling that the facilitator was biased towards the other party, but said that once in the system, they were powerless to question the bias for fear of retaliation.

Heron's (1999) description the facilitative style is clearly not a description that fits with the New Zealand model. While Authority members were seen to work with the parties to draw out ideas for settlement, the environment was competitive rather than catalytic or supportive. Parties said they accepted this style of operating because of the *status* of the Authority. They wanted someone to be firm and directive. The one facilitator who reported using a cathartic, supportive style, which they described as a "facilitation model", did obtain agreed outcomes, but on occasions, encountered resistance to the chosen process. When this occurred, they reverted to a more traditional, fact-finding method.

Comparison of strategies. A facilitator in New Zealand employment disputes is in clear control of both the process and the outcome, and this puts them in a different category to a mediator, who has no authority to determine the outcome or to direct the parties to the dispute. However, there is some similarity between the strategies used by mediators and facilitators. One process identified by McAndrew (2012) as being used by Authority members during facilitation is also a mediation process (McAndrew, 2012). Assertive strategies — interventions that deal directly with the issues, are used by professionals filling both roles, but the need to use trust or reflective strategies is limited to mediators. Mediator's strategies align more closely with collective bargaining mediation literature (Martinez-et al., 2008) than facilitator's strategies fit in with descriptions I found in the literature (Heron, 1999; Hunter et al., 2007).

Unlike mediators, Authority facilitators enter the dispute by force and can make decisions about the terms and conditions of the collective. By nature of their role, they do not build rapport with the parties. The parties consider them to be in a judicial type position, and it is accepted that they maintain independence and aloofness. The rapport the mediators use to ask hard questions is therefore not present in Authority facilitations. Parties interpret negative statements made by Authority members to mean the facilitator has taken the other side. Union representatives I interviewed were particularly concerned about reality testing when the facilitator was seen to be favouring the employer's position. They saw this as undermining, bias, or the facilitator not being in touch with reality.

Different expectations of parties on mediators and facilitators shaped roles. Parties expected effective mediators to make evaluative comments, for example. The mediator's action was something "an effective mediator did" regardless of whether the dispute was individual or collective. The action was regarded and accepted as part of the process, a chance for the parties to reflect on their position. The mediator was not in the position of making decisions; their evaluative comments were "just their opinion", and when parties disagreed, they felt comfortable in telling the mediator they had "got it wrong". Parties I interviewed did not feel the same with a facilitator, however. Facilitators were perceived as having a different role. One participant said flatly, "They make decisions". Parties did not wish to get offside with Authority representatives and thereby risk a public recommendation being issued. Because this potential threat existed, parties did not feel the same ability to freely discuss and debate the issue, as they

did in mediation. There was a strong feeling that they needed to keep "on side" with the Authority member and arguing with them would not be in their best interest. Yet, debating issues with mediators was considered part of the cut and thrust of bargaining.

Factors that led to resolution. Mediation is the prime problem-solving process, but despite experienced mediators becoming involved in collective bargaining in New Zealand, some cases cannot be resolved. I distributed a questionnaire (Appendix 2) and conducted interviews (Appendix 3) to find out why. Parties were asked to rank the most common factors affecting dispute resolution from 1 to 10, with 10 being the factor they felt most affected outcomes. McAndrew's (2012) research suggested several factors, including status and the facilitator's ability to make a public recommendation. His finding was that an Authority member's ability to make a report and recommendation to influence specific audiences was a prime factor encouraging settlement. This finding was confirmed by my investigations. Appendix 4 shows the responses I received for the survey undertaken.

Facilitator status. Under the Employment Relations Act 2000, the roles of mediator and adjudicator were separated. Prior to 2000, mediators and adjudicators were appointed to the Employment Tribunal as statutory officers by the Governor General, on recommendation of the Minister of Labour. Adjudicators (Authority members) continued to be appointed as *statutory officers*, but since 2000, mediators have been appointed as *employees* of the DOL (now known as the MBIE), and as such, they are public servants subject to all the rights and responsibilities that come with being an employee.

The change in appointment processes and a reduction in remuneration received by mediators, compared to remuneration received by Authority facilitators, is regarded as a reduction in the status of mediators by many within the field. I wanted to determine whether perceived status was an important component of bargaining dispute outcomes. I found that, overall, respondents rated the status of facilitators as very important. A need to please the facilitator, the introduction of legal representation, and the perception that the dispute had been elevated to a "higher level" were clear indications of the increased status of the new-look

facilitator. This result was in line with the findings of McAndrew (2012). Thus, the reduction in status of mediators could be a contributing factor to matters not being settled in mediation.

While I did not ask the question directly, the facilitator's status could also be enhanced by the two-stage facilitation process. The dispute must be elevated to a "statutory appointed judicial officer" for determination *before* facilitation assistance is provided by another "statutory appointed judicial officer", thereby reinforcing the status of Authority members via legally weighted importance. The parties are required to "file" papers to allow facilitation to occur, in contrast to making a simple online request for mediation. The judicial process of "filing papers" is also likely to elevate the status of facilitation over mediation.

Facilitator knowledge. A law degree is a requirement for appointment to an Authority position, but not for a mediator's position. Employers who participated in the current research felt the facilitator's knowledge made a large contribution to resolution, but union representatives did not think knowledge mattered as much. Neither group rated it the highest contributor to settlement, however.

Facilitator's process. Only one respondent saw the facilitation process as making the *most* contribution to settlement. The rest rated process and timing of the intervention as being the biggest factors across both mediation and facilitation. However, the facilitation process was found by employers to contribute more to a settlement being achieved than mediation did, with six out of nine respondents ranking process as 6/10, while only two out of the six union respondents accorded process the same ranking.

Facilitation timing. The timing of the facilitation process was the most consistent reason given by employers and unions for their collectives settling. The timing of the process in the life of the collective, dispute fatigue, the need to resolve the issues and to prevent threatened or ongoing industrial action, were all reasons given for resolution. This result was not unexpected, because the parties had generally been through a lengthy period of negotiation, and strike or lockout action, before they attended facilitation. Lengthy disputes had clear resource and reputational implications for both employer and union groups, and this put pressure on them to settle.

Public recommendations. While it is unusual for facilitators to make public recommendations for settlement, in 2009, an Authority member did make one of his recommendations public (NZ Bus, 2009; McAndrew, 2012). The ability for them to do this was cited as a reason for settlement by both employer and union parties. McAndrew (2012) also identified that this possibility was an incentive for settlement. The fear of the determination being made public was an added incentive for one employer party I interviewed. The potential public exposure is certainly a factor in many parties' minds. One respondent commented, "Maybe the other party felt off guard, and a strong recommendation by the facilitator swayed them to accept the position".

One response I received noted that there are two distinctive categories for facilitation: those in which parties respect the facilitator and fear a disadvantageous recommendation, and those where parties do not respect and hold no fear. Unlike earlier times, when parties could to some extent influence the mediator or conciliator assigned to them, the selection of the Authority member is made by the Chief of the Authority without reference to the parties.

Other factors . Two responses to the questionnaire stated that matters were not resolved at facilitation. In one case, they went back to mediation, and in the other case, the facilitator issued a determination that was not accepted by the parties. The party that returned to mediation, where the matter was finally settled, noted, "Mediation [was] much more successful this time. Facilitation is just a pinch point in negotiation" (P2). Facilitation provided a mechanism to recommence communication between the parties. Providing a forum for communication is an underestimated essential requirement of resolving collective disputes.

A range of factors outside the facilitator's control were suggested as contributing towards a resolution: resource limitations, industrial action and lack of certainty. Parties acknowledged that both mediators and facilitators could, on occasion, convey their interests and positions to the other party with more credibility and persuasion than they could. McAndrew (2012) suggested that the difference in facilitation is the addition of the facilitator's own assessment of an issue during the conciliation or recommendation-shaping phases of the process, which provides a reality check for one or both parties. Mediators also provides reality checks and allows the mediator to make recommendations, but the manner and process under which they do so does not create a threat of potentially damaging public release of information.

Authority facilitation verses the literature. As discussed in chapter 3, three different strands of facilitation literature are relevant to this research. Herein, I compare information gathered from interviews and questionnaires with the existing literature (Table 10). I find that the role of a facilitator as described does not always align with the reality of facilitation as it stands under the Employment Relations Act 2000.

TABLE 14

FACILITATION IN THEORY AND REALITY

Component	Literature	Authority facilitators
Level of conflict Schwarz (2002)	Mediators work with people in conflict, whereas facilitators only work with people who are not in conflict	Facilitators only handle cases where there is a high level of conflict, where a mediator's extensive efforts were not able to resolve the issues
Management of the process Hunter et al. (2007)	Facilitation starts from the premise that "every person has an equal right to speak and participate in dialogue and decision making". It is a process that fully involves the participants as equal partners, the facilitator working with them to achieve an agreed outcome. If an outcome cannot be agreed, a facilitator has no power to determine one	Under the Employment Relations Act 2000, the parties do not have an equal right to speak. The Authority member determines the process, including who has the right to speak. While the parties can participate in reaching a voluntary decision, the sole decider of the outcome in the event they are unable to do this is the facilitator
The purpose of facilitation Hunter et al. (2007)	The facilitator is a person who guides parties towards achieving a purpose that they have defined	The Authority facilitator guides parties towards a resolution only to the extent that they are able to be guided. When this is not possible, the facilitator can make recommendations and give directions

Sharing of power Gregory (2002)	"The art of facilitation is in drawing out the wisdom already embedded and lying dormant in the psyche of the learner". In effective facilitation, the facilitator intentionally shares power with the participants, rather than having power over them in an autocratic way	The facilitator is clearly the holder of the power in the tripartite relationship. They determine the process. Neither party can challenge the nature, content or the manner in which the facilitation was provided. Facilitators get involved in group deliberations
Hunter, Bailey and Taylor (1999)	Power and control issues lie at the heart of facilitation. Facilitation is about releasing group wisdom, and to do this requires every person in the group to be fully empowered and participating. Personal power and sharing power with others is essential for a powerful group	
McCain and Tobey (2007)	Facilitators do not involve themselves in group deliberations	

Abbreviation. Authority, Employment Relations Authority (New Zealand).

The literature defines a facilitator as someone who creates conditions for individuals to choose, think and direct their own learning and development (Gregory, 2002). A facilitator is a person who intervenes to protect the group process and keep the group on track to fulfil its tasks, empowering the group by the impact of their way of being and behaving (Hunter, 1999). Facilitators work with the group to assist it to achieve its self-defining purpose, skilfully helping them to understand their common objectives and how they will achieve these objectives; a facilitator does not take sides in any argument (Hunter, 1999). As Table 10 shows, an Authority facilitator is involved in high levels of dispute. In contrast to "learning" facilitators, they hold the power, control the process and potentially dictate the outcome.

Chapter Conclusion

In this chapter I have reviewed the strategies used by mediators and facilitators. Strategies are important because they can influence the outcome of the process.

The strategies used by mediators, supported by literature reviews are assertive–substantive, neutral and trust–reflexive. Mediators used different strategies to manage different stages of the mediation: assertive strategies to move parties off fixed positions and trust strategies to build a foundation for the mediation process and to get acceptance. Neutral strategies were used less frequently and not all mediators reported using them.

Facilitators also use strategies. The strategy used is dependent on whether the operate in the authoritative or facilitative zone (Heron, 1999).

There is some commonality between the strategies used by mediators and facilitators, however the use of trust strategies is limited to mediators. This can be explained by the different ways mediators and facilitators enter a dispute and the power they have been given under the Employment Relations Act 2000.

This chapter also considered factors that lead to resolution and found that the status of the third-party neutral is a very important factor in the resolution of disputes. The elevation of the

status of facilitators compared to the reduction in the status of mediators may be a reason for matters not being resolved in mediation. The filing of papers, requirement to formally request facilitation, and a two stage process make facilitation a more judicial type process. Timing of the intervention rather than the process used was regarded as the largest contributor to settlement. The potential public exposure is also a factor in many participants' minds when they attend facilitation.

The facilitation process under the Employment Relations Act 2000 does not sit comfortably with the facilitation literature. The title facilitator bears little resemblance to the role undertaken. In contrast to the literature, when a facilitator becomes involved in collective bargaining, they are working in an area of high conflict. They control the process and the participants parties may not get an equal opportunity to speak. The facilitator is the holder of the power, determining the process making recommendations, giving directions and determining outcomes when required.

Chapter 10: Conclusion

Overview of the previous chapters

This concluding chapter provides an overview of this thesis and recaps how the research contributes to existing empirical knowledge of employment mediation and facilitation in Aotearoa, New Zealand. The primary aim of this study was to gain a deeper understanding of collective bargaining dispute resolution processes provided by the MBIE employment mediation service and the Employment Relations Authority (Authority) under the Employment Relations Act 2000. The key research questions focus on the differences and similarities between the processes provided and how they relate in practice. What are the differences and similarities between these processes, and how do they relate and work in practice, and how can findings provide a foundation for future research?

In the first part of this chapter, I provide an overview of the thesis and review findings before moving on to question the changes in dispute resolution processes in New Zealand over recent years. Finally, I raise a fundamental question: should dispute resolution processes be aimed to correct power imbalances and to provide early dispute resolution?

Chapter 1 introduced an understanding of facilitation, and my own industrial relations journey. A history of New Zealand's industrial relations systems, from the introduction of the Industrial Conciliation and Arbitration Act 1894, until today, was chapter 2's theme. I examined ideological changes leading to policy, legislative shifts from collectivism to individualism, and a subsequent attempt in 2000 to reintroduce collectivism. The innovative steps taken in 2000 to provide a system of dispute resolution based on good faith, parties taking control of their own disputes and support for collective bargaining were not seen by the Government as delivering the expected outcomes. As part of further support mechanisms, facilitation was therefore introduced in 2004. Facilitation was a process uniquely designed to garner the support of both employers and unions.

In chapter 3, I reviewed New Zealand and international mediation and facilitation literature, conceptualising the processes in order to apply concepts and theories to the comparison of the New Zealand facilitation system with mediation and facilitation research here and overseas. I provided a basis for reviewing the New Zealand system against international benchmarks, provoking questions about the changes needed to restore the New Zealand system to its world-leading position. The literature review led to important findings: the facilitation process as it stands is broader than imagined. With one strong exception, I found that the academic literature I reviewed bore little resemblance to facilitation as determined by the Authority. Facilitated mediation as described by Roche (2015) has a closer relationship to the working New Zealand model, the difference being the timing of the assistance provided.

Chapter four outlined the methodological approach I took in conducting the current research. I explained that to capture diverse views of the parties involved, an interpretive study had been undertaken. I used mixed methods of data collection and combined data to paint a picture that seeks to reflect a reality based on the views of the parties and their evaluation of the processes.

In chapter 5, I examined facilitation in-depth. I reviewed all the applications made for facilitation, and I found that some groups were less likely to use facilitation than others. Unions representing low-paid workers were the highest users, while despite experiencing high levels of disputes in their sectors, Central Government, Health and Education had made only one application between them. These findings provoked the following question: why is facilitation embraced by some sectors and not others? The applications suggested there was a tendency for unions to be more active in seeking facilitation than employers. Subsequently, this in turn generated a further question: is this because of the bargaining power imbalance between the parties?

Chapter 6 showcased the results of my survey (a written questionnaire), and I explored the ideal personal attributes mediators and facilitators require for effective management of collective bargaining disputes. Essentially, chapter 6 was built on the research undertaken by Howells and Cathro (1986). In replicating their survey, my questions related to the following personal attributes: confidence, self-esteem, trust, creativity, patience and persistence, self-control, dignity and respect, values, neutrality and impartiality, belief in change, knowledge of

subject matter, passion for the role and intellectual attributes. Despite all the social and institutional changes since 1986, I found that parties continue to see the most important attributes as honesty, integrity and trust. These attributes were seen as highly desirable for both mediators and facilitators. There are differences in the ratings given to other attributes; personality traits were rated higher for the mediators providing a process incorporating voluntariness and self-determination. In contrast, intellectual traits were rated higher for facilitators, perhaps because the process is less voluntary.

The discretionary process provided by the Authority member, once facilitation was granted, was the focus of chapter 7. I discussed the origins of facilitation, confirmed parties have little understanding of the process, and began a process of discovering the difference between mediation and facilitation by exploring the parties' and Government's expectations of processes and the contributions mediators and facilitators make to collective bargaining. Examination of processes determined by the facilitator (the Authority member) contributed significant findings to this research project. Chapter 8 identified models used by mediators and facilitators while chapter 9 focus is on strategies and tactics not identified in any previous research. I examined the differences between the processes and the styles used to deliver facilitation. I also asked and answered questions about the parties' and Government's expectations of employment dispute resolution processes, and whether expectation are currently being met.

The importance of the recent, October 2017 change in Government has overshadowed this work. The timing of this thesis has prevented deeper exploration of the changes that are likely to be made to collective bargaining in the wake of the election. However, the promise of restored and improved bargaining rights for all workers, extending bargaining rights to independent contractors, and introducing industry-based fair pay agreements are important issues needing an appropriate institutional framework to ensure effectiveness.

As identified in chapters 5, 6, 7, 8 and 9, I have identified questions for further research. The questions relate to a deeper understanding of the effect of facilitation on collective bargaining outcomes, and on how to provide real support for collective bargaining. It is important to reiterate that the focus of this research project is on process and procedural dimensions, rather than outcomes of substantive agreements. My project has not included a

review of facilitation outcomes, such as whether or not a collective was agreed in the end, or whether parties were satisfied with the terms and conditions agreed. However, I acknowledge that the introduction of facilitation has not led to an increase in collective agreements. The outcomes of facilitation support and the effect that it has had on wage increases is yet to be evaluated and should be the focus of future research.

Key Findings

Facilitation research.

As identified in chapter 3, very little research on the New Zealand employment facilitation process has been conducted to date. It is a specifically designed process not found in other OECD countries. The Labour-led Government, in introducing facilitation, was not bound by precedents in other jurisdictions, and was prepared to be innovative in developing a uniquely New Zealand structure for collective bargaining. The then Minister of Labour endeavoured to find a process that would be supported by both employers and unions. She believed that a system imposing arbitration would not be palatable to employers. Arbitration was, however, not ruled out by the facilitation process. As identified in chapter 7, an Authority member acting as a facilitator had complete freedom to determine the process, and on one occasion, the member chose to use an arbitration process. One key finding identified was that parties were aware of this possibility, and that their awareness of the arbitration option influenced their behaviour during the facilitation.

Applicants for facilitation. Facilitation is not a widely used process. In chapter 1, I outlined the two-staged facilitation process upheld by the Authority, the Government's nominated facilitator. As noted, a key element of the process is the requirement to have an application for facilitation assistance accepted by the Authority in the first place. This first stage is public, and in theory, should be easy to research, because Authority decisions are public documents. The specified criteria parties must meet, however, has caused parties to involve legal representation in their facilitation applications. Herein, the interviews I conducted determined that parties argued the case for facilitation based on legal parameters, rather than their underlying interests (chapter 5). Their real interests or strategic reasons were therefore difficult to determine.

The philosophy of the Employment Relations Act 2000 was based on good faith and self-determination. Parties in an employment relationship were expected to work together to resolve differences. The facilitation process was reserved for parties who had encountered serious difficulties in agreeing a collective. Either party could seek facilitation, and my research demonstrated that both unions and employers have applied to use the process. However, unions were more inclined to apply than employers, and those without strong industrial power appeared to use the process more frequently. It is possible to surmise that unions representing lower-paid workers were more likely to use facilitation. This position was supported by a similar finding that, under the Industrial Conciliation and Amendment Act 1894, stronger unions appeared to reject State institutional support on the basis that they could achieve more through their own resources. Similarly, today's employers in essential industries, and those in traditionally high-union-density workplaces, who would face difficulties continuing services during a strike, have sought facilitation. It is also possible to conclude that the system meets its intended use of being a last resort, because only 60 applications for facilitation have been heard since 2004.

Facilitator and mediator attributes. The parties' perspectives on the most important attributes for mediators (and facilitators) were honesty, integrity and trust. Questionnaire responses were consistent with personality traits valued since 1986. Personality traits were rated very important for mediators, who provided a process incorporating voluntariness and self-determination. In contrast, intellectual traits were rated higher by respondents for facilitators, the degree of control exercised makes intelligence highly desirable. The question of neutrality was ranked as an important attribute for both mediators and facilitators.

The effect of facilitation on collective bargaining. Facilitation's role in greenfield bargaining has not been previously explored. To enter into facilitation, conflict between parties must be virtually unsolvable. Because of the high entry criteria, the extension of collective bargaining by way of Greenfield collectives is not encouraged. Recommendations have been made to the Government to amend the legislation to allow easier access by applying less restrictive entry criteria. Such a shift might make facilitation of Greenfield collectives a reality. Proposed changes might also address shifts in legislation that occurred from 2008 that have reduced support for collective bargaining. However, even the proactive steps taken by the Labour Government in 2004 failed to increase union or collective bargaining coverage.

Processes used. Facilitators use a variety of processes to assist parties in collective bargaining disputes, including both imposed determinative and self-determinative processes. In contrast to McAndrew's (2012) findings, I believe facilitation has been a very flexible process. McAndrew (2012) concluded that Authority members were restricted to three models; an (advisory) adjudication, mediation and conciliation. Facilitated bargaining (joint problem-solving) and final-offer arbitration were not processes considered by McAndrew (2012), but I believe they add an element of flexibility.

Except for the facilitated bargaining process used by one Authority member, the range of facilitation processes does not align with the commonly accepted definition of facilitation. In contrast to processes described in the literature, Authority members define and control the process, and they make recommendations. The level of control exercised is not seen in the literature as appropriate to a facilitator.

Parties' relationships with the facilitator are impacted by the facilitator's ability to make public recommendations and to determine the contents of a collective employment agreement (Employment Relations Act, 2000, ss 50H & J). Thus, in New Zealand, it is common to use legal representation, and I found it has been common for parties to attempt to get the facilitator "on side". This finding has raised questions of about whether it is appropriate for parties to attempt to disrupt facilitator neutrality, and whether attempts to persuade facilitators are rife because they are empowered to make decisions, whereas mediators are less likely to be targets of persuasion attempts because they cannot make decisions. Indeed, my findings suggest there may be a link between the determinative nature of the facilitation process and participants questioning potential facilitator bias. Such questioning did not affect the mediation process.

The absence of claims of mediator bias may also be due to the nature of the process itself, especially where mediators have provided a self-determining agenda. Future research into differences between parties' perceptions of mediator neutrality could yield interesting answers, especially when totally self-determinative processes are used versus processes in which parties may ask for a mediator's recommendations.

Unlike mediation, parties I interviewed did not understand facilitation. This is not surprising, as the parties normally conclude — with a few exceptions — their own collective employment arrangement, without the need for third-party assistance. Because the Authority member can make recommendations about outcomes, this together with the judicial nature of the hearings, adds to the pressure on parties to settle. Whether the pressure applied leads to better bargaining outcomes is unclear, as is the effect of adversarial litigation on the parties' relationship. Both questions are important to the design of any new dispute resolution process and should therefore be the subject of further research.

Resources and the future. The range of processes provided by mediators is more limited than those provided by the Authority. It is unclear why mediators limit their processes so much. There are several possible explanations, such as the limited resources available for mediation and the pressure placed on mediators to deliver a high number of mediated outcomes. In addition, factors such as the lack of mediators experienced in collective bargaining may be a barrier to expanding the practice more widely.

The change in Government in October 2017 signals changes in collective bargaining policy. The employment relations policy contained in the Labour Party's manifesto seeks to support collective bargaining by:

- restoring and improving bargaining rights for all workers;
- extending bargaining rights to dependent contractors; and
- introducing industry-based fair pay agreements (Foster & Rasmussen, 2017).

Expanding collective bargaining is likely to require expanded third-party support. Therefore, the questions for further research related to these changes are:

- Would a wider range of mediation services provide better support for collective bargaining?
- If so, what services would better support bargaining?
- How and by whom should they be provided?
- What training and development would be required to provide extra services?

Answering these questions may provide a framework for the additional resources and institutional structure required to implement the Labour Party's wishes.

Knowledge about facilitation . This research sought to determine applicants' and respondents' knowledge of the employment dispute resolution system and their expectations of mediators and Authority members (see research questions in chapter one.)

- A key finding of this research is a large mismatch between experiences and expectations. Parties preparing for facilitation were unaware of the process the Authority member planned on using, and they found the ambiguity about process confusing. Preparing to be part of a process without knowing what it would require was a challenge. For example, a mediation–arbitration process would require different people at the table than those required for a joint problem-solving process. In addition, mediation–arbitration might require legal representation to argue precedent. I therefore recommend providing preliminary coaching for, and prior knowledge of, the specific process the Authority member intends to use, prior to the hearing. Providing information, and potentially preliminary coaching, prior to a facilitation process is likely to result in a more efficient process. It may also result in more robust outcomes because parties will come prepared.

Collective bargaining facilitation is a small part of the Authority's role. Members' prime responsibility is to make determinations about personal grievances and disadvantage claims. To be appointed as a member practitioner, job applicants are required to hold legal qualifications. Their backgrounds are varied, and some have had little employment law experience. It can be argued that when adjudicating grievance and disadvantage claims, employment law experience is not important because a facilitator's role is to apply case law to sets of facts, and legal and on-the-job practice teach this skill.

However, the role of a collective bargaining facilitator in New Zealand is broader. It is more akin to a mediator's role in assisting parties to reach a collective agreement. There are no legal facts to apply. At one end of the spectrum, facilitators report working with the parties to help them problem solve in a traditional facultative style. At the other end, they arbitrate an outcome. If problem-solving processes are being used, strong facilitation skills and training are required. When providing arbitration processes, training and knowledge of collective bargaining precedents and the application and effect of employment conditions is essential. One Authority

member I interviewed uses facilitation skills and knowledge gathered in academic study. Thus, it seems that providing training to other Authority members undertaking facilitation is likely to be of benefit.

The New Zealand-style facilitation process appears to be more akin to mediation, underpinned by New Zealand practitioners commonly used facilitative approach to mediation. A question arises as to whether the facilitation process should be amalgamated with the mediation service. Making the move could potentially compromise some of the advantages facilitation has in reaching settlements, e.g., the judicial status of facilitators. But the advantage in merging the two disciplines would be a seamless dispute resolution process provided by personnel experienced in collective bargaining. If arbitration remained part of a facilitation process, and if facilitators were sited in the mediation service, tension between the self-determination of mediation and the arbitrator's role may be of concern. However, as discussed in chapter 3, dispute resolution processes in other parts of the world provide for a mixing of the two and indeed the New Zealand system also did prior to 2000.

Empirical contribution

This thesis extends the exploration of facilitation as a process for collective bargaining and dispute resolution by applying empirical findings to existing literature identifying tensions between policy, process and practise. The core challenge in analysing the New Zealand experience of facilitation is the use of facilitation to describe a practice that is not called facilitation anywhere else. In chapter 3, I defined the key concepts embedded in the processes of mediation and facilitation; voluntariness, confidentiality, party self-determination and impartiality. There were five important differences between Employment Relations Authority facilitators and the key concepts in the literature. Hunter, Thorpe, Brown and Bailey (2007) identified equal power, partnership and participation, as required dimensions of facilitation but these were not found to be part of Employment Relations Authority facilitation processes (Chapter 8). The models used by the Authority do not incorporate voluntariness, confidentiality or party self-determination (table 15). In contrast, findings from mediators suggest their

processes align closely with mediation literature. The parties enter the mediation process on a voluntary basis and are responsible for the final resolution, or terms of settlement (Thibaut & Walker, 1975; Boulle et al., 2008; Lewicki, et al., 1992; Moore, 2003, 2014). Mediators employ a variety of strategies and tactics to initiate and facilitate interactions between disputants, but their role is not to solve the problem (Lewicki, et al., 1992).

Employment Relations Authority facilitators have the freedom to determine the process they provide. Like Ireland (Roche 2015), the process provided linked to the facilitators' previous role, knowledge and skills. However, with one notable exception, a joint problem-solving model, (see chapter 7) the New Zealand facilitation model does not sit comfortably with "facilitation" in the literature. A major difference between mediation and facilitation in the Employment Relations Authority is that mediation of collective bargaining under the ERA 2000 is not a confidential process, while, except if the facilitator determines otherwise, facilitation in the Authority is confidential (Chapter 3).

Table 15 *Differences between the educational and international facilitation literature in chapter 3 and Employment Relations Authority (Authority) Facilitators*

Areas of difference	Facilitation in the literature	Facilitation in the Authority
The manner in which facilitators enter the dispute	By invitation	By application of one party
The timing of their involvement	Early in the dispute	When the parties have demonstrated "serious difficulties" in agreeing a collective.
The power to make a decision	The parties determine whether to give the facilitator the power to	The facilitator determines whether to determine the terms of the collective

	determine the terms of the collective	
Confidentiality	Confidential unless the parties determine otherwise	Confidential unless the facilitator determines otherwise
The contractual relationship with the parties	The parties to have input into the process used	The facilitator determines the process used

In researching the question proposed in chapter one, 'Is the contribution made by mediators different from contributions made by facilitators? Important differences in the roles of MBIE mediators and Authority facilitators were discovered. Their input comes at different stages of the dispute. The prime role was supporting parties to settle the collective and if we use the measure of the preventing ongoing industrial action, they have had a high level of success in doing so. Mediation and facilitation literature promote self-determination (Boulle, et al., 2008; Heron 1999; Morris, 2015), but the focus on settlement and the interventions use by employment mediators and authority facilitators were similar. The interventions designed to achieve a settlement of the dispute do not mirror international or scholarly viewpoints on the role of a facilitator, (Gregory, 2002; Heron, 1999; Hunter, 1999; McCain & Tobey, 2007; Wardale & Thorp, 2008) but were found to meet parties' needs (Chapters 6 and 8). Mediators provided parties with specialist or other expert information and advice and focused on assisting the parties to settle the dispute through compromise and bargaining (Chapter 8). Therefore, mediators and facilitators take a more active role in generating options for solution than previous theory asserts.

A significant contribution of this research is the finding of similarities between mediation and facilitation processes. For example, it was found that despite facilitation being a judicial process in which a facilitator can determine the outcome, caucusing was widely used in both processes

and the time the parties spent separated was similar (Chapter 8). There was also some similarity between the strategies used by mediators and facilitators (Carnevale & Pruitt, 1992; Wall, Dunne, & Chan-Serafin, 2011). Assertive strategies — interventions that deal directly with the issues, are used by both mediators and facilitators but trust and reflective strategies were limited to mediators. The parties accepted facilitators' position as judicial, where they maintain independence and aloofness (Chapter 9). Mediator's strategies align more closely with collective bargaining mediation literature (Martinez-et al., 2008) than literature about facilitator's strategies (Heron, 1999; Hunter et al., 2007). Therefore, this research extends theory on facilitation to include a more proactive approach to directing parties toward settlement.

The significant contribution to dispute resolution is the identification of tension between literature and practise. Facilitation can resolve problems early preventing escalation of conflict during bargaining, including strike or lockout action, which don't currently trigger the facilitation process in New Zealand, (*PMP Print Limited and Anor v NZ Amalgamated Engineering Printing and Manufacturing Union Inc*, 2006, 1 ERNZ 749). The intentions of the policy makers who drafted the amendments to the Employment Relations Act 2004, was to assist parties experiencing problems in resolving a collective employment agreement (Chapters 2, 3 and 7). In contrast to the underlying principle of the Act (ERA 2000), for a collaborative, relational problem-solving approach to ERP resolution (Greenwood 2016), collective bargaining assistance in the Authority is reserved for parties experiencing 'serious and significant difficulties' and there is a high threshold to access the process. Therefore, contrary to legislative intent for early resolution problems have to escalate to dispute before there is access to facilitation. This is in contrast with the fundamental principle of alternative dispute resolution for early facilitation of joint problem resolution before escalation to dispute.

This research informs training and development of training for facilitators and mediators (chapter 7). Formal training in facilitation does not form part of an Authority Members education and is not offered to parties attending mediation or facilitation. The importance of training and development in collaborative conflict management is highlighted in employment relationship problems (Greenwood 2016) and in interest-based bargaining (Kochan, et al., 2008). Training or

education in this area could result in Authority Members and indeed mediators providing a wider range of facilitation and mediation models to effectively meet party's needs.

Changes in Dispute Resolution Procedures

- This research sought to determine Have legislative amendments since the 1980s influenced the processes and practices of mediation?

New Zealand has been regarded as an innovator in employment dispute resolution since the introduction of a national conciliation and arbitration system in 1894. The current project has identified new gaps in knowledge in the field of dispute resolution practitioners in this country currently face. Specifically, many parties and practitioners are confused about the intersection between mediation and facilitation. The principle of self-determination is one cause of confusion. Where facilitators from the Authority are empowered to make decisions within a flexible, albeit legalistic process, parties experience ambiguity. The current system was established to put emphasis on mediation, with early assistance being reinforced through the 2010 Amendment (n24, s21) to the Employment Relations Act 2000 (section 147(2)(ac)). Mediators, when employed by the MBIE, are encouraged to provide early assistance, with their key performance indicators (KPIs) including numbers of early assistance mediations achieved. This is not the case in facilitation. The dispute must escalate before the parties can access the process, preventing early interventions such as those available in Ireland (Roche, 2015).

In all aspects of New Zealand's employment problem resolution system, mediation is emphasised as the primary dispute resolution mechanism. An innovative model, the system empowers parties to work together. There is a readily available, free institutional provision of assistance whenever support is needed. However, in recent years, the service appears to have become reactive rather than proactive. Therefore, my recommendation is that any review of the Employment Relations Act 2000 should address the conflicts between the emphasis on early resolution of disputes, and the need to escalate dispute before facilitation is provided. How to

provide flexibility and early support for parties entering collective bargaining discussions, in line with processes used in Ireland, needs addressing.

Future-focussed dispute resolution. The expansion of collective bargaining the current Labour Led coalition Government envisages is likely to require expanded third-party support. Understanding the effect different dispute resolution services have on collective bargaining outcomes would assist informed decisions during the anticipated review of the Employment Relations Act 2000. In my current research, I have not reviewed the outcomes of parties entering a facilitation process, i.e., whether a collective was agreed, and if agreed, what the satisfaction levels of the parties were. Such a study would benefit anticipated discussions.

The trends I found in overviewing the cases have also raised issues. The applications for facilitation indicate a trend in which unions with less industrial muscle have made greater use of the facilitation process than those with industrial power. With the new Government's emphasis on fair pay agreements, questions need to be asked about the relationship between facilitation and bargaining outcomes. Have unions with greater industrial muscle achieved better conditions then those who have resorted to facilitation? Has giving the facilitator the power to determine processes contributed to fair pay agreements, or would an arbitration model be more effective in addressing this concern? Answering these questions will provide direction for building the institutional structures and processes required to implement the Labour Party's current policies.

Early assistance has never been a feature of collective bargaining disputes. The innovation of the past has been replaced with a financial model based on reactively "churning" mediations rather than proactively endeavouring to reduce disputes. The work that was previously undertaken by the Partnership Resource Centre is no longer provided through the State. Unlike other countries, parties are required to demonstrate a high level of conflict before they can access facilitation support. Organisations that are able and prepared to fund private mediators or facilitators to undertake this work do so. New Zealand is a nation of small- to medium-size enterprises, however. If collective bargaining is going to be expanded in line with the current Government's philosophy, all enterprises must be able to afford and access third-

party assistance to not only assist the negotiation of a collective agreement, but also to provide training and support in interest-based problem solving.

Policy Considerations

In line with traditional dispute resolution systems, the New Zealand system moves from low to high cost as parties progress through the various stages. Resource inputs, both financial and personal, are higher for parties attending facilitation than the resources required for mediating the same dispute. By the time they reach the standard of bargaining breakdown required to be granted facilitation, the parties, and potentially the country and its citizens, have experienced high economic and relationship costs. Why these disputes could not be resolved earlier is open to conjecture but providing more support for parties by way of facilitated bargaining is a feature of other OECD partners. The Authority provides facilitated bargaining, and its introduction at an earlier stage of the dispute by training and resourcing mediators is likely to be a constructive option from a financial perspective. The policy question revolves around whether this resource should come from the public purse or be funded by industry and unions, as the current system is.

Apart from an Authority member's decision to arbitrate on the terms of a collective employment agreement, there is no arbitration system for collective bargaining in New Zealand. Arbitration as a mechanism for resolving collective bargaining disputes was ruled out when facilitation was introduced. However, facilitation does provide for an arbitration process, and perhaps this can be regarded as arbitration by stealth. When entering a facilitation process, the parties have no knowledge or control over whether arbitration will be the outcome. The question remains: if an arbitration system is to be implemented, should it be more transparent?

Research Limitations

There has been very little recent New Zealand research on collective bargaining systems and structures. I have attempted to cover some of the gaps, but the result is that many questions still need to be answered. The Employment Relations Act has been in place since the

year 2000, and further significant amendments have been made. At the time it was conceived, it was regarded as innovative, setting in place a dispute resolution process based on the concept of good faith and with specialised institutions well-resourced to assist when needed. Despite amendments — including the facilitation option in 2004 — the burning question of the Act's fitness to meet its objectives remains. These objectives are:

- good faith;
- addressing power imbalances;
- promoting collective bargaining;
- promoting mediation; and
- protecting individual choice.

The numbers of applications for facilitation made since 2004 is as low as is the parties' understanding of the system. Unlike the Policing Act 2008, there are no criteria against which the Authority measures their recommendations. Would more applications be made if there were criteria, and indeed, would these criteria help parties to reach agreement earlier? Several reasons have been given for parties resolving their collective bargaining disputes in facilitation. Fear of the Authority's recommendations being made public is the biggest motivator. On the other hand, mediators, with the parties' permission, must make recommendations as to how matters before them might best be resolved (Employment Relations Act, 2000, s 149(A)). This provision has only been used once in a collective bargaining dispute. Should this provision be more widely suggested to parties as an option for resolving disputes? The current research has been limited to the facilitation process provided. I have not reviewed the outcomes. The effect, if any, facilitation support has had on wage movements has not been measured. Whether industrial power achieves better collective outcomes than facilitation support remains a "6 million-dollar question".

It is difficult to measure the effect of legislative changes. Some were intended to have a deterrent effect, discouraging parties from engaging in what had been problematic behaviours. Measuring behaviour that has not occurred and attributing it to legislative changes is clearly problematic, however. The 2004 amendments to the Act were also implemented to

strengthen collective bargaining. The quantitative data available on the changes in union membership numbers and numbers of collectives could be used to find out if collective bargaining has seen any positive outcomes, but there are issues in using these data to determine success or otherwise without further consideration. Union membership numbers are available, but they have remained reasonably consistent, despite increases in employee numbers across sectors. Collective agreement numbers can be accessed, but collective agreements are living, changing documents. Changes negotiated to amalgamate single employer agreements into a multi-party agreement, or vice versa, are impossible to track, and are therefore likely to corrupt available data.

Reviewing the number of strikes or lockouts is also an issue. Determining if a strike or lockout would have taken place if it were not for the legislation is impossible. They could in fact have increased because of facilitation, as protracted strikes and lockouts are one of the criteria required for facilitation to be granted (Employment Relations Act 2000, s 50C).

Final Conclusion

This research has focused on collective bargaining and the support provided when parties encounter difficulties. I have identified that parties are unaware of the facilitation process the Authority will provide prior to accessing facilitation. In determining the process, an Authority member has complete autonomy, and based on past trends, the process provided could fit into a range of dispute resolution processes, from arbitration to joint problem solving. Bar one case, facilitation processes provided in New Zealand do not align with commonly accepted definitions of the work or practices in other OECD countries.

Practices in New Zealand contrast with those described in academic literature, which refers to facilitation as a process provided *early* in a dispute. In New Zealand, parties must demonstrate that their bargaining has completely broken down before they can access the system. The international trend is a move towards facilitated bargaining early in a dispute, and in New Zealand, I am aware from my private work, some organisations fund this type of process. Providing more opportunities for early intervention would allow practitioners and researchers to measure if an early facilitated mediation process would support good faith, address power

imbalances and promote collective bargaining. Such a provision would also provide hard evidence to support changes to the collective bargaining framework in New Zealand. Because of the potential changes to collective bargaining structures proposed by the recently elected Labour-led Coalition Government, such research would be timely. The current research provides a basis for such future endeavours by reminding us of our past and by exploring the current collective bargaining employment relations framework. New Zealand has had a reputation for interesting reforms in dispute resolution. It is a moving target and there is a connection between literature/theory discussions and public policy. The links that have been found to collective bargaining theory could inform further development of public policy, intervention strategies and processes, using what I have learned as a solid base for making informed decisions about the future policy directions.

The question I have been unable to answer is why the facilitation process was given the title of 'facilitation' when there is a tension between the process provided by Employment Authority Members and the literature description of facilitation processes. The process provided can result in arbitration. The Minister who introduced facilitation wanted to find a process that was acceptable to stakeholders and it may be that the notion of reintroducing an arbitration process that had been removed from New Zealand employment legislation in the 1980s was unacceptable to employer stakeholders. This is also a matter for further research.

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Appendix 1: Facilitation Applications

Manufacturing Companies

Food

NZ Meat Workers & Related Trades Union v Crusader Meats NZ Ltd [24 May 2007] AA 157/07	Dismissed
Finegand Sub Branch of the New Zealand Meat Workers Union v Primary Producers Co-operative Society [15 April 2005] CA 53/05	Dismissed
Taylor Preston Ltd v New Zealand Meat Workers and Related Trades Union Inc [28 February 2017] WN WC 8/09	Granted
Te Kuiti Meat Processors Ltd v New Zealand Meat Workers and Related Trades Union Inc [21 October 2014] NZERA Wellington 104	Granted
New Zealand Meat Workers & Related Trades Union Inc v Affco New Zealand [01 May 2012] NZERA Wellington 51	Granted
New Zealand Meat Workers & Related Trade Union Inc v CMP Rangitikei Ltd [14 December 2011] NZERA Wellington 201	Granted
NZ Meatworkers & Related Trades Union of Workers v Crusader Meats Ltd [16 November 2007] AA 359/07	Granted
Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd [25 September 2012] NZEmpC 168	Granted on appeal
The Service & Food Workers Union Nga Ringa Tota Inc v Sanford Ltd [29 August 2012] NZERA Christchurch 184	Dismissed Appealed
The Service & Food Workers Union Nga Ringa Tota v Sealord Group Ltd [26 March 2010] CA 75/10	Granted

McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc [08 April 2009] WC 5/09	Challenge dismissed
Service and Food Workers Union Nga Ringa Tota Inc v McCain Foods (NZ) Ltd [15 December 2008] WA 168/08	Granted appealed
Northern Amalgamated Workers' Union v Southern Paprika Ltd 04 March 2011 [2011] NZERA Auckland 83	Granted

Pulp and paper.

SCA Hygiene Australasia Ltd v Independent Electrical Workers Union [02 December 2008] AA 409/08	Granted
Norske Skog Tasman Ltd v Eastern Bay of Plenty Independent Industrial Workers Union 1995 Inc [19 November 2008] AA 395/08	Granted
Norske Skog Tasman Ltd v Pulp & Paper Industry Council of the Manufacturing & Construction Workers Union [21 August 2008] AA 303/08	Granted

Printing.

PMP Print Ltd and Anor v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc [22 December 2004] CA 162/04	Dismissed

Other manufacturing.

Manufacturing & Construction Workers' Union Inc v OJI Fibre Solutions (NZ) Ltd [16 May 2016] NZERA Auckland 146	Granted

FIRST Union Inc and Anor v The New Zealand Refining Company Ltd [03 October 2014] NZERA Auckland 403	Granted

Public and local body service.

The New Zealand Public Service Association v Ministry of Social Development [23 December 2016] NZERA Wellington 161	Granted
Ashburton District Council v Southern Local Government Officers Union [26 November 2014] NZERA Christchurch 195	Granted
New Zealand Public Service Association Inc v Refugee Services Aotearoa New Zealand Inc [27 September 2012] NZERA Wellington 112	Granted
Public Service Association Inc v Accident Compensation Corporation [26 May 2011] NZERA Wellington 88	Granted
NUPE v Legal Services Agency [30 March 2006] CA 45/06	Granted
Asure New Zealand Ltd v New Zealand Public Service Association and Ors [21 September 2005] AA 371/05	Dismissed

Education.

Tertiary Education Union Inc v The Chief Executive of Northland Polytechnic [26 September 2016] NZERA Auckland 328	Granted
Tertiary Education Union v Vice Chancellor University of Auckland [01 September 2011] NZERA Auckland 379	Granted

Health.

Auckland District Health Board & Ors v New Zealand Public Service Association Inc [01 April 2016] NZERA Auckland 99	Granted
The New Zealand Public Service Association Inc v Anglican Family Care Centre Inc [06 March 2015] NZERA Christchurch 32	Granted
Service & Food Workers Union Nga Ringa Tota Inc v CCS Disability Action Nelson Marlborough Inc and Ors [18 March 2013] NZERA Wellington 25	Granted
New Zealand Nurses Organisation (Inc) v Ahipara Health and Resource Trust and Ors [09 January 2012] NZERA Wellington 1	Granted
Service and Food Workers Union Nga Ringa Tota Inc & Anor v Aubert Home of Compassion Wanganui Ltd [28 October 2010] WA 170/10	Granted
Service & Food Workers Union Nga Ringa Tota Inc v IHC and Ors [14 April 2010] WA 67/10	Granted
Service & Food Workers Union Inc v Spotless Services (NZ) Ltd [06 May 2005] WA 71/05	Dismissed

Retail.

First Union Inc v Bunnings Ltd [17 March 2016] NZERA Auckland 87	Granted
First Union Incorporated v ANZ Bank New Zealand Ltd [08 April 2015] NZERA Wellington 35	Granted
National Distribution Union v Foodstuffs South Island Ltd [10 May 2010] CA 78A/10	Granted

National Distribution Union v Foodstuffs South Island Ltd [29 March 2010] CA 78/10	Parties agreed to return to mediation

Transport.

Ports.

Ports of Auckland Ltd v Maritime Union of New Zealand [17 April 2012] NZERA Auckland 134	Granted
Ports of Auckland Ltd v Maritime Union of New Zealand [17 October 2007] AA 324/07	Granted
Rail & Maritime Transport Union Inc v Quality Marshalling (Mount Maunganui) Ltd [03 June 2011] [2011] NZERA Auckland 238	Granted

Passenger transport.

New Zealand Tramways and Public Passenger Transport Employees Union - Dunedin Inc v Invercargill Passenger Transport Ltd [10 June 2013] NZERA Christchurch 106	Dismissed
NZ Professional Drivers and Transport Employees Association Inc v Transportation Auckland Corporation Ltd [15 September 2011] NZERA Auckland 400	Dismissed
Transportation Auckland Corporation Ltd and Ors v New Zealand Tramways & Public Passenger Transport Employees Union Inc [08 October 2009] AA 357/09	Granted

Stagecoach New Zealand Ltd v The New Zealand Tramways Union and Ors [21 April 2005] AA 146/05	Granted

Aviation pilots.

New Zealand Air Line Pilots Association IUOW Inc v Virgin Australia (NZ) Employment and Crewing Ltd [24 July 2013] NZERA Auckland 315	Granted
New Zealand Air Line Pilots' Association Inc v Air Nelson Ltd [30 June 2008] AA 222/08	Granted
Mount Cook Airline Ltd v NZ Airline Pilots Assn Industrial Union of Workers [28 July 2006] CA 111/06	Granted

Aviation cabin crew.

Air New Zealand Ltd v The Flight Attendants and Related Services (NZ) Association Inc [15 July 2011] NZERA Auckland 309	Granted
Air New Zealand v Flight Attendants and Related Services Association [18 August 2010] AA 363/10	Granted
Zeal 320 Ltd v Engineering Printing and Manufacturing Union Inc [26 June 2009] AA 211/09	Granted

Aviation catering services.

Service and Food Workers Union Nga Ringa Rota v Pacific Flight Catering Ltd [14 March 2011] NZERA Auckland 99	Granted
Service & Food Workers Union Nga Ringa Tota Inc v Air New Zealand Ltd [09 May 2008] AA 172/08	Dismissed

Service and Food Workers Union v Air New Zealand Ltd [29 November 2007] AA 375/07	Dismissed
Service & Food Workers Union Inc v Air New Zealand Ltd [19 January 2005] AA 11/05	Granted

Accommodation services.

Unite Union Inc v Gateway Motel Ltd [28 August 2007] AA 263/07	Granted
Unite Inc v HMSC-AIAL Ltd [29 July 2009] AA 250/09	Granted

Appendix 2: Survey Questions

Background questions.

1. What was your role in bargaining?

Employer Union

2. What was the number of employees covered?

0–50 50–100 More than 100

3. What was the number of times you were involved in mediating a collective bargaining dispute?

1 2–5 More than 5

4. Who initiated involvement with mediation services?

The employer The union A joint approach

5. Who initiated application for facilitation?

The employer The union A joint approach

II. Questions about the mediation process.

6. Were you aware of what to expect from the process prior to mediation?

Yes No

7. In your view, is the mediation process understood by the parties to the dispute?

Yes No

8. In your view, is the mediation process understood by the general public?

Yes No

III. Questions about the facilitation process.

9. Were you aware of what to expect from the process prior to facilitation?

Yes No

10. In your view, is the facilitation process understood by the parties to the dispute?

Yes No

11. In your view, is the facilitation process understood by the general public?

Yes No

IV. Questions about similarities / differences between mediation and facilitation processes

12. What percentage of time did the parties spend together during the mediation process?

10% 25% 50% 75% 100%

13. What percentage of time did the parties spend together during the facilitation process?

10% 25% 50% 75% 100%

14. Was the majority of the mediation process conducted by positions being exchanged across the table?

Yes No

15. Was the majority of the facilitation process conducted by positions being exchanged across the table?

Yes No

16. Did the mediator make suggestions as to settlement positions?

Yes No

17. Did the facilitator make suggestions as to settlement positions?

Yes No

V. Questions about factors that led to resolution

18. On a scale of 1 to 5, 1 being the least contribution and 5 being the most contribution, what in your view contributed to the collective settling?

- The facilitator's knowledge:
- 1 2 3 4 5
- The facilitator's status:
- 1 2 3 4 5

- The facilitator's process:
- 1 2 3 4 5
- The timing of the facilitation process:
- 1 2 3 4 5
- Other factors (please also provide a brief description):
- 1 2 3 4 5

……

……

……

……

……

VI. Questions about comparisons between 2000 and 2004 provisions

19. Prior to 2004, were you involved in collective bargaining?

Yes No

20. Prior to 2004, was mediation used?

Yes No

21. Prior to 2004, was a collective ratified?

Yes No

22. Compared to bargaining after the introduction of facilitation in 2004, was the time taken to achieve a collective

Shorter Longer About the same?

23. Compared to bargaining after the introduction of facilitation in 2004, was the cost taken to achieve a collective

More Less About the same?

24. Please briefly describe, in your opinion, what, if any, has been the effect of the introduction of the facilitation process on the collective bargaining processes you have been involved in?

……
……
……
……
……

25. Has this affected, in any way, parties' willingness to bargain in good faith?

……
……
……
……
……

VII. Question about comparing 1980s research findings to today's attitudes

26. Mediator's / facilitator's personal attributes:

On a scale of 1 to 5, 5 being the most important and 1 being the least important, how important are the following traits of the mediator and the facilitator?

Trait	**Mediator**					**Facilitator**				
Personality	1	2	3	4	5	1	2	3	4	5
Sense of humour	1	2	3	4	5	1	2	3	4	5
Patience and persistence	1	2	3	4	5	1	2	3	4	5
Honesty and integrity	1	2	3	4	5	1	2	3	4	5
Trustworthiness	1	2	3	4	5	1	2	3	4	5
Cooperative attitude	1	2	3	4	5	1	2	3	4	5
To be one of us	1	2	3	4	5	1	2	3	4	5
Self-control	1	2	3	4	5	1	2	3	4	5
Dignity and respect	1	2	3	4	5	1	2	3	4	5
Tact and persuasiveness	1	2	3	4	5	1	2	3	4	5
Good listening skills	1	2	3	4	5	1	2	3	4	5
Originality of ideas	1	2	3	4	5	1	2	3	4	5
Sympathetic attitude	1	2	3	4	5	1	2	3	4	5
Fairness and impartiality	1	2	3	4	5	1	2	3	4	5
Modesty	1	2	3	4	5	1	2	3	4	5
Firmness of action	1	2	3	4	5	1	2	3	4	5
Ability to grasp ideas	1	2	3	4	5	1	2	3	4	5
Intelligence	1	2	3	4	5	1	2	3	4	5

Trait	**Mediator**					**Facilitator**				
Knowledge of employment legislation	1	2	3	4	5	1	2	3	4	5
Knowledge of the industry	1	2	3	4	5	1	2	3	4	5
Knowledge of business problems	1	2	3	4	5	1	2	3	4	5
Knowledge of psychology	1	2	3	4	5	1	2	3	4	5
Qualifications	1	2	3	4	5	1	2	3	4	5
Life experiences	1	2	3	4	5	1	2	3	4	5
Employment background	1	2	3	4	5	1	2	3	4	5

Appendix 3: Interview Questions

The questions asked during the interview process were semi structured

Questions for Mediators and Facilitators

1. Please outline your background, experience and role?

Please explain the process you use, giving examples if possible?

Questions for Employers and Unions involved in facilitation

I. Background questions.

1. What was your role in bargaining?

Employer Union

2. What was the number of employees covered?

0–50 50–100 More than 100

3. What was the number of times you were involved in mediating a collective bargaining dispute?

1 2–5 More than 5

4. Who initiated involvement with mediation services?

The employer The union A joint approach

5. Who initiated application for facilitation?

The employer The union A joint approach

II. Questions about the mediation process

5. What did you expect from the mediation service?

6. Were these expectations met?

7. If not, why not?

8. What was the process followed by the mediator(s)?

9. What is your view of why the matter did not settle in mediation?

III. Questions about the facilitation process

10. What were the strategies and intentions behind, your application for/ attendance at facilitation?

11. What did you expect from facilitation?

12. Were these expectations met?

13. If not, why not?

14. What was the process used by the facilitator?

15. What strategies did you adopt during the facilitation process?

16. What in your view was the main reason for the matter resolving / not resolving?

Appendix 4: Questionnaire Results

General

Number of employees covered			
	0-50	50-100	More than 100
Union			6
Employer			9

Collective bargaining experiences		
Union or employer	2-5 mediation experiences	5 plus mediation experiences
union	1	5
employer	4	5

Who initiated the approach to the mediation service?	
Union	5
Employer	4
Joint approach	5
The mediation service	1

Who initiated the approach to the Authority?	
Union	6
Employer	4
Joint	6

Initiation changes				
Initial initiator	consistent	Moved to employer	Moved to union	Moved to joint approach
Joint approach	3	1	2	
Employer initiated	2			1
Union Initiated	3	1		1
Mediator initiated			1	

Knowledge of the System

Advocate's knowledge of mediation and facilitation

	Mediation	Facilitation
Union	6	5
Employers	9	8

Is facilitation understood by all the parties?

	Yes	No
Union	3	3
Employers	2	7

Is facilitation understood by the public?

	Yes	No
Union	0	6
Employers	0	9

Similarities Between Mediation and Facilitation

Time parties spent together in each process

Time spent together in mediation (%, of process in joint session)	Time spent together in facilitation (%, of process in joint session)	
%		
50%	50%	9
75%	50%	1
75%	50%	4
75%	75%	1

Bargaining Across the Table

Majority of process conducted by position exchange across the table

Mediation		Facilitation	
Yes	No	Yes	No

3	12	1	14

Involvement in making settlement suggestions

***Did the mediator or facilitator suggest settlement positions?**

Mediator		Facilitator	
Yes	No	Yes	No
14	0	15	0

Note. *One respondent did not answer the mediation component of this question.

Factors that led to resolution

Contribution of facilitator's knowledge

Rating scale	Employers' ratings (1–5)	Union ratings (1–5)
1	0	0
2	0	1
3	4	4
4	5	1
5	0	0

Contribution of facilitator's status

Rating scale	Employers' ratings	Union rating
1	0	0
2	0	0
3	0	1
4	6	0
5	3	5

Contribution of facilitator's process

Rating scale	Employer's rating	Union rating
1	0	0

2	0	0
3	3	3
4	6	2
5	0	1

Timing of the process

Rating scale	Employer's rating	Union rating
1	0	0
2	1	0
3	1	0
4	0	1
5	7	5

Note. A rating of 0 = the least contribution; a rating of 5 = the most contribution.

Time and Cost to Achieve a Collective post facilitation introduction

Time taken to achieve a collective after facilitation introduction	Shorter	About the same	More
Employer responses	0	2	7
Union responses	0	1	5
Cost of achieving a collective after 2004	Less	About the same	More
Employer responses	0	3	5
Union responses	0	2	4

Education and Experience Traits

Mediator / facilitator qualifications

	Facilitator					Mediator				
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	1	0	0	2	3	1	0	2	3	0

Employer ratings	1	0	1	4	3	0	0	5	4	0
Employment background										
	Facilitator					Mediator				
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	1	0	0	2	3	1	0	2	3	0
Employer ratings	1	0	1	4	3	0	0	5	4	0
Life experience										
	Facilitator					Mediator				
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	1	3	1	1	0	1	3	1	1
Employer ratings	0	0	5	4	0	0	0	2	7	0

Knowledge

Knowledge of employment legislation										
	Facilitator					Mediator				
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	1	0	2	3	0	1	2	0	3
Employer ratings	0	0	0	1	8	0	0	1	5	3
Knowledge of industry										
	Facilitator					Mediator				
Rating choices	1	2	3	4	5	1	2	3	4	5

Union ratings	0	2	1	2	1	0	2	2	1	1
Employer ratings	0	1	3	5	0	0	1	5	3	0
					Knowledge of business problems					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	2	3	1	0	0	2	3	1	0
Employer ratings	0	0	6	3	0	0	3	5	1	0
					Knowledge of psychology					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	5	1	0	0	0	5	1	1
Employer ratings	0	0	9	0	0	0	0	8	1	0

Personality Traits

					General personality					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	6	0	0	0	0	2	6
Employer ratings	0	0	1	7	1	0	0	1	3	6
					Sense of humour					
		Facilitator						Mediator		

Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	1	0	6	1	0	0	0	3	3	6
Employer ratings	0	3	6	0	0	0	1	6	6	0
Patience and persistence										
	Facilitator							Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	3	3	0	0	0	0	6
Employer ratings	0	0	1	6	1	0	0	0	2	6
Honesty and integrity										
	Facilitator							Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	0	6	0	0	0	0	6
Employer ratings	0	0	0	2	7	0	0	0	0	9
Trustworthiness										
	Facilitator							Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	0	6	0	0	0	0	6
Employer ratings	0	0	0	2	7	0	0	0	0	9
Cooperativeness										
	Facilitator							Mediator		

Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	0	6	0	0	0	0	6
Employer ratings	0	0	2	4	3	0	0	0	3	6
					Empathy					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	2	3	0	0	1	2	3	0	0	1
Employer ratings	5	4	0	0	0	1	7	1	0	0
					Self-control					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	0	6	0	0	0		3
Employer ratings	0	0	1	1	7	0	0	3	5	1
					Dignity and respect					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	0	6	0	0	0	2	6
Employer ratings	0	0	0	2	7	0	0	0	5	6
					Tact and persuasiveness					
		Facilitator						Mediator		

Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	2	2	2	0	0	0	0	6
Employer ratings	0	0	5	4	0	0	0	0	1	8
					Listening skills					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	1	5	0	0	0	1	5
Employer ratings	0	0	0	2	7	0	0	0	1	8
					Originality of ideas					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	3	3	0	0	0	0	3	3
Employer ratings	0	3	5	1	0	0	0	0	3	6
					Sympathy					
		Facilitator						Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	1	4	1	0	0	0	5	1	0
Employer ratings	0	0	9	0	0	0	0	8	1	0
					Fairness and impartiality					
		Facilitator						Mediator		

Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	5	1	0	0	0	3	3
Employer ratings	0	0	1	0	8	0	0	0	8	1
Modesty										
	Facilitator							Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	2	3	1	0	0	2	3	1	0
Employer ratings	6	2	1	0	0	6	2	1	0	0
Firmness of action										
	Facilitator							Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	1	3	2	0	2	3	1	0
Employer ratings	0	0	0	4	5	0	0	7	2	0
Ability to grasp ideas										
	Facilitator							Mediator		
Rating choices	1	2	3	4	5	1	2	3	4	5
Union ratings	0	0	0	3	3	0	0	0	3	3
Employer ratings	0	0	0	1	8	0	0	1	2	6
Intelligence										
	Facilitator							Mediator		

Rating choices	1	2	3	4	5		1	2	3	4	5
Union ratings	0	0	1	1	2		0	0	1	3	2
Employer ratings	0	0	0	9	0		0	0	1	8	0

Trait Rankings

The variables chosen in the following tables are based on those used by Howells and Cathro (1986). Every respondent was required to rate each variable on a five-point scale from 'most important' to 'of little importance'. The major thrust of this survey, in line with that of Howells and Cathro, was to discover if parties agreed on the 'ideal' attributes of a mediator and facilitator, and if the attributes varied between mediator's, facilitators and the 1986 survey results. The tables concentrate solely on the percentage of responses in the single category, most important. These responses have clarified which traits are the most important and which are the least important in mediators and facilitators.

Trait Rankings table

	Facilitator (%)			**Mediator (%)**		
	Union	**Employer**	**Combined**	**Union**	**Employer**	**Combined**
General personality	50	11.11	26.00	100.00	66.66	80.00
Sense of humour	0	0	0	66.66	0	26.66
Patience and persistence	50.00	11.11	26.00	100.00	66.66	80.00
Honesty and integrity	100.00	77.77	86.66	100.00	100.00	100.00
Trustworthiness	100.00	77.77	86.66	100.00	100.00	100.00
Cooperativeness	0	11.11	6.66	66.66	55.55	60.00
Empathy	11.11	0	6.66	11.11	0	6.66
Self-control	100	77.77	86.66	16.66	17.77	53.33

Dignity and respect	100	77.77	86.66	66.66	66.66	53.33
Tact and persuasiveness	33.33	0	20.00	100.00	88.88	93.33
Listening skills	83.33	77.77	80.00	83.33	88.88	86.66
Originality of ideas	0	0	0	50.00	66.66	60.00
Sympathy	0	0	0	0	0	0
Fairness and impartiality	16.66	88.88	60.00	50.00	11.11	26.66
Modesty	0	0	0	0	0	0
Firmness of action	33.33	55.55	66.66	0	0	0
Ability to grasp ideas	50	88.88	73.33	50.00	66.66	60
Intelligence	33.33	0	13.33	33.33	0	13.33
Knowledge of employment legislation	50.00	88.88	73.33	50.00	33.33	60.00
Knowledge of the industry	16.66	0	6.66	16.66	0	6.66
Knowledge of business problems	0	0	0	0	0	0
Knowledge of psychology	0	0	0	0	0	0
Qualifications	50.00	33.33	60.00	0	0	0
Life experience	16.66	0	6.66	16.66	0	6.66
Employment background	33.33	0	13.33	33.33	0	13.33

Mediator traits

Personality traits	Union (%)	Employer (%)	Combined (%)
Honesty and integrity	100.00	100.00	100.00
Trustworthiness	100.00	100.00	100.00
Tact and persuasiveness	100.00	88.88	93.33
Listening skills	83.33	88.88	86.66
Patience and persistence	100.00	66.66	80.00
Originality of ideas	50.00	66.66	60.00
Cooperativeness	66.66	55.55	60.00
Ability to grasp ideas	50.00	66.66	60.00
Self-control	16.66	77.77	53.33
Dignity and respect	66.66	66.66	53.33
Fairness and impartiality	50.00	11.11	26.66
Sense of humour	66.66	0	26.66
Empathy	11.11	0	6.66
Modesty	0	0	0
Sympathy	0	0	0
Firmness of action	0	0	0
Knowledge of employment legislation	50.00	33.33	60.00
Employment background	33.33	0	13.33
Knowledge of the industry	16.66	0	6.66
Knowledge of business problems	0	0	0
Knowledge of psychology	0	0	0
Qualifications	0	0	0
Life experience	16.66	0	6.66
Intelligence	33.33	0	13.33

Facilitator Traits

Personality traits	**Union (%)**	**Employer (%)**	**Combined (%)**
Listening skills	100.00	77.77	86.66
General personality	100.00	77.77	86.66
Ability to grasp ideas	100.00	77.77	86.66
Cooperativeness	100.00	77.77	86.66
Tact and persuasiveness	50.00	11.11	26.00
Dignity and respect	83.33	77.77	80.00
Firmness of action	50.00	88.88	73.33
Empathy	16.66	88.88	60.00
Sympathy	33.33	55.55	66.66
Honesty and integrity	50.00	11.11	26.00
Self-control	33.33	0	20.00
Patience and persistence	0	11.11	6.66
Originality of ideas	11.11	0	6.66
Sense of humour	0	0	0
Trustworthiness	0	0	0
Modesty	0	0	0
Fairness and impartiality	0	0	0
Knowledge traits	33.33	0	13.33
Knowledge of employment legislation	50.00	88.88	73.33
Employment background	0	0	0
Knowledge of the industry	0	0	0
Knowledge of business problems	50.00	33.33	60.00
Knowledge of psychology	16.66	0	6.66
Qualifications	33.33	0	13.33
Life experience	16.66	0	6.66

Intelligence	33.33	0	13.33