ADR Bulletin
ADR Bulletin

Volume 12 | Number 3 Article 2

12-1-2010

ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process

Cameron Green

Recommended Citation
Green, Cameron (2010) "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process," *ADR Bulletin*: Vol. 12: No. 3, Article 2.
Available at: http://epublications.bond.edu.au/adr/vol12/iss3/2

This Article is brought to you by ePublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

ADR Bulletin of Bond University DRC

Critical issues in ADR

ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process

Cameron Green

Introduction

All Australian jurisdictions have legislated for mandatory referral of proceedings to mediation despite persuasive arguments against mandated participation. While the advantages of mediation are well recognised — particularly with respect to efficiency and cost cutting — it has been argued that, by definition, ADR processes such as mediation should be an 'alternative' to litigation, rather than merely an alternative within the wider litigation process.[1]

The increasingly close link between the courts and ADR procedures represents a challenge to the ideas comprehended by the rule of law and raises a question of potential conflict between the courts and the parties to the dispute.[2] Given that the courts have a vested interest in cases settling, can justice really be achieved for parties when the facilitator of such justice is using mediation as a case management tool to unclog civil lists?[3]

While mediation is a useful tool for courts and parties to a dispute, mandating such a process will not be appropriate in all circumstances.[4] Doing so takes away the fundamental concepts of voluntariness and participant control that distinguish mediation from litigation — the very things that are attributed to the success of mediation in a vast number of cases.[5]

Suitability of mediation

There are varying opinions about what types of disputes are, and are not, suitable for mediation. It has been suggested that mediation will only be suitable where it is likely to result in a settlement — and not appropriate where certain factors exist which may be contrary to that goal. For example, a matter is unlikely to be suitable where parties are not committed to having the conflict resolved and there is evidence that they will not participate in good faith. Similarly, it is inappropriate to mediate if parties have ulterior motives for attending mediation and where there is a significant power imbalance so that the disputing parties do not have an equal ability to bargain.[6]

Despite numerous different indicators of suitability, the concept of power in dispute resolution is a recurring theme. Generally, mediation will only be suitable where there is a rough equality between the parties.[7] Inequalities can result from differences in financial power, intelligence or physical or emotional control.[8] Power is a crucial factor to consider in mediation because a third party decision maker, such as a judge, is absent from the process. Where a strong disparity exists, one party may force the mediation in a direction where any agreement reached largely reflects their own needs and interests.[9]

Where different levels of sophistication exist between parties, it is arguable that litigation is more appropriate than mediation because of the safeguards that exist in the judicial system.[10] Such safeguards do not exist in mediation and the stronger party may unfairly benefit as a result. On the other hand, some believe that any

Published by ePublications@bond, 2010

power imbalance will be equalised by the mediation process.[11] This may be the case where a disparity in wealth exists. Here, mediation may be more appropriate because it is arguably a more affordable, and therefore more accessible, process. Reducing the cost of resolving a dispute may reduce the inequality because the wealthier litigant holds less of an advantage.[12] However, where other non-financial power imbalances exist, the mediation process itself is unlikely to be enough.

Where mediation is attempted in situations deemed unsuitable, such as where there is a significant power difference, this will affect the likelihood of an agreement being reached.[13] Alternatively, if an agreement is reached, it may be unfair to one of the parties. In the case of the latter, the author agrees with the view that an agreement should never be reached at the expense of fairness.[14]

While the general effectiveness of mediation is not disputed, it is clear that it should not be attempted in every scenario. Litigation remains a necessary intervention in many cases that are deemed unsuitable for mediation. The decision whether mediation or litigation is appropriate should not be made until there has been a careful analysis of the causes of the issues in dispute.[15] Despite not always being an appropriate solution, there has been an increase in the use of mediation — a trend which appears to be almost certainly linked to the growing idea that mediation should be used for case management purposes.[16]

Mandating a voluntary process

The place of ADR in Australia was firmly established by the creation of NADRAC in 1995.[17] Today all Australian jurisdictions have legislation providing for ADR processes including the referral of proceedings to ADR without the need for party consent.[18] This is despite the widely expressed view that voluntariness is a defining characteristic necessary for the success of any ADR process.[19]

Hilary Astor and Christine Chinkin suggest that mandatory mediation is an oxymoron — that, by its very nature, it is a consensual process that relies on the willingness of the parties to the dispute. It provides parties with self-empowerment. Any compulsion or encouragement to attend mediation will compromise — possibly destroy — its consensual character.[20]

This view is widely supported, with others believing that mandating such a process removes the fundamental 'willingness factor' and the importance of the 'alternative' in the ADR label.[21]

While Astor and Chinkin say that mandatory schemes contradict definitional arguments, NADRAC's view is that legislating for compulsory participation can support the growth of ADR processes such as mediation.[24] However, what is meant by the growth of mediation? Is it a reference to the use of mediation by courts and tribunals or an indication of its success? There is a question as to whether mandating mediation encourages participation or simply attendance.[25] Certainly, one could suggest that the increase in mandatory schemes would see a corresponding growth in the number of attendees in those processes.

... is there any point to mediation unless attendees are active participants? While it may be possible to increase the rate of attendance through compulsion, it is not generally possible to make attendees participate. Even if a party compelled to attend does participate, they may not cooperate or participate in good faith.

However, is there any point to mediation unless attendees are active participants? While it may be possible to increase the rate of attendance through compulsion, it is not generally possible to make attendees participate. Even if a party compelled to attend does participate, they may not cooperate or participate in good faith.[26] In those circumstances, it is arguable that the party is not a participant but rather an attendee that renders the process unsuccessful. Such a party may do nothing more than increase costs and delay.[27]

David Spencer says that parties who attend ADR voluntarily usually do so because they are willing to settle their dispute. He suggests that the non-adversarial climate which is created when parties attend voluntarily is important to resolving the dispute.[28] Conversely, when parties are coerced to participate by a court or tribunal they

Voluntariness has traditionally been one of the defining characteristics of mediation and this is lost if the parties do not enter of their own volition or the process is institutionalised.[22] This position must be considered against NADRAC's definition which states that mediation:[23]

> may be undertaken voluntary, under a court order, or subject to an existing contractual agreement.

While the NADRAC definition includes voluntary participation, it does not suggest that mediation is limited to being a voluntary process. To the contrary, NADRAC expressly contemplates compulsory party attendance by court order.

NADRAC's definition has been drafted in broad terms. Arguably, this was a deliberate decision given the varying nature of mediation. As such, despite NADRAC being the peak ADR body in Australia, the author does not place significant authoritative weight on NADRAC's definition for the purposes of conducting a theoretical analysis on this point.

may not be so willing to explore or consider possible solutions.[29] This is consistent with research suggesting that parties are more satisfied when they are involved and have control of the process and outcome.[30] Spencer's view is also supported by the fact that settlement rates are generally higher when mediation is attended voluntarily rather than by coercion.[31]

In analysing the establishment of the New South Wales mandatory ADR scheme,[32] Spencer suggests that the Parliament may have failed to consider fundamental elements of ADR such as voluntariness. Rather, it was preoccupied with institutional efficiency and cost savings.[33] Astor and Chinkin believe that such arguments in favour of mandatory mediation are not specific to it but are general benefits of ADR — cost savings, increased party control and the fact that it may induce cases to settle earlier than they otherwise would.[34] Similarly, Richard Ingleby suggests that arguments in favour of compulsory mediation may not be accurate because they are based on data regarding voluntary mediation, not mandated mediation.[35]

Astor and Chinkin argue that unless courts are granted this power and implement it, the take-up rate for mediation will be low.[36] That is, if the process is voluntary, parties may not attend if their dispute is not seen to be suitable for mediation. This would have an immediate impact of reducing the participation rate. However, given that those matters are unlikely to result in a settlement,[37] it is arguable that a lower participation rate is not necessarily a negative.

Ingleby contends that it is not a bad thing just because a matter fails to settle. He questions whether mandated mediation can even achieve the goals of the parties.[38] Given that settlement rates are lower in mandated mediation, there is a persuasive argument that it may not.[39] Furthermore, mandatory participation may cause the parties to disregard their initial goals. Ingleby says that mandatory mediation forces the parties to become settlement focussed and in the process they lose sight of the merits of their case.[40]

It has also been suggested that mandatory mediation conflicts with ideas associated with the rule of law and possibly deprives — or at least delays — litigants of their constitutional right to trial.[41] There are also conflict issues to consider between the parties and the court. Voluntary participation guards against mediation being improperly used by the courts as a case management tool to simply ensure that cases are dealt with quickly.[42]

A fundamental purpose of mediation is to encourage agreement or settlement.[43] However, what if settlement is not something the parties are willing to accept — not because they refuse to participate in good faith, but because of a genuine belief that they are entitled to something more than that offered at mediation? Parties often settle on the basis that their claim is reduced by the costs of going to court rather than a belief that their claim is weak.[44] Where poorer litigants are involved, they may be compelled to settle out of financial necessity rather than choice.[45]

Owen Fiss compares settlement to plea bargaining in the criminal jurisdiction. He says that settling may mean that justice is not done because it requires the parties to accept less than some ideal. He suggests that settlement should not be encouraged because it serves society rather than the parties.[46] While the parties are not compelled to settle at mediation, they may be encouraged to do so. In some instances, parties are legally obliged to make a genuine attempt.[47] If this occurs, the consensual character of the mediation is threatened and any agreement reached may not be fair.[48] Justice will not be done if an agreement is unfair to one of the parties.[49]

By its very nature mediation is about the parties working towards a middle point. Unlike litigation, the theory is that nobody loses in mediation. Ian Hanger QC says that it is this 'every child gets a prize' mentality that sometimes makes mediation subject to abuse by participants and practitioners. He suggests that it results in cases being commenced that have little or no prospects of success.[50] If these claims are referred to mediation, it is entirely possible that an undeserving party will

Published by ePublications@bond, 2010

leave in a more advantageous position. The author agrees with Hanger's view that the only way to deal with such claims is to have them judicially determined.[51]

Despite NADRAC's wide definition, which clearly contemplates the use of court ordered mediation, there remain persuasive arguments against mandatory attendance. The definitional arguments support a voluntary process. While attendee rates are higher in mandated schemes, the evidence suggests that voluntary participation is likely to be more successful in terms of parties reaching a settlement. As such, the author is opposed to the idea that attendance in ADR processes such as mediation be mandated, particularly where the circumstances may not be considered suitable or there is a general view that any attempt at settlement will be unsuccessful.

The conflict between settlement and justice

Given that the courts are increasingly controlling, or at least supervising, the mediation process, the law has a powerful influence.[52] Olivia Rundle suggests that this creates a conflict between the private and public benefits of mediation. First, there is an emphasis on institutional efficiency by the courts to achieve high rates of settlement. Second, and vital to the judicial system, is a need to promote strict legal entitlements and for the prioritisation of justice. Rundle suggests that these purposes, while certainly in the public interest, are not necessarily consistent with the satisfaction of individual needs and interests which are central concepts in mediation. In fact, the courts may be reluctant to dispense with their usual approach involving objectivity and certainty in order to promote the flexibility required in mediation.[53]

Astor and Chinkin suggest that a significant motive behind the use of mediation by courts and tribunals is the reduction in costs and delays.[54] Fiss is of the view that when a matter that is before the courts is settled, it is met with a sense of relief by the legal system. However, he says that this is not because justice has been done — in some cases it may not have — but for the simple reason that the case has been 'moved along'.[55]

While Rundle appears to adopt a consistent view, she adds that institutional efficiency sits equally beside the delivery of justice as the primary purpose of court-connected mediation.[56] This is similar to the approach adopted by a former Chief Justice of the Supreme Court of Tasmania. In his 2004–05 annual report, Chief Justice Underwood says that court-connected mediation provides expedition and saves costs while also producing a just result for the parties.[57] However, the author finds it difficult to accept this view as both purposes may not coexist equally. If the principal purpose of mediation is to facilitate a settlement being reached at minimal cost, it is arguable that the provision of justice must be an ancillary objective. Conversely, it must be said that achieving justice is not always something that can be done quickly and cheaply.

The conflict between the legal system and parties may extend further than the courts mandating party attendance. It is arguable that the mediation conference itself may serve the public purpose with the court-connected mediator likely to be, at least somewhat, influenced by the system's preoccupation with settlement.[58] Not only do some courts have the power to appoint the mediator,[59] mediators are often required to report back to the court on the progress of the matter.[60] Geoffrey Gibson says that such reporting obligations should be left to the parties. If not, mediators may be seen as functionaries of the court, which is not appropriate.[61] In circumstances like this, mediator neutrality — a fundamental principle of mediation — may rightly be challenged.[62]

More recently, questions have been raised about the appropriateness of the influence of the legislature and the courts on legal practitioners to direct their clients to mediation in circumstances where they would not have otherwise recommended such an option. In the 2009 case of *Brownlee v Brownlee*[63], a superior court in South Africa[64] held that practitioners who fail to send a matter to mediation at an early stage should not be considered favourably by the court and should face cost sanctions.[65] This case is likely to limit the circumstances in which parties and their lawyers unreasonably refuse to mediate despite it being an appropriate option. However, it may also lead to a situation where South African lawyers push their clients into mediation[66] in circumstances where it is not appropriate to do so.

If the principal purpose of mediation is to facilitate a settlement being reached at minimal cost, it is arguable that the provision of justice must be an ancillary objective. Conversely, it must be said that achieving justice is not always something that can be done quickly and cheaply.

In a move not dissimilar to the approach adopted in *Brownlee v Brownlee*, the Australian Parliament passed the Access to Justice (Civil Litigation Reforms) Amendment Bill in November 2009. The amendments place obligations on the parties, their legal representatives and the court with respect to maintaining efficiency.[67] Significantly, they introduced the

'overarching purpose' principle into the *Federal Court of Australia Act 1976* (Cth).[68] This principle aims to facilitate the just resolution of disputes according to the law while progressing matters as quickly, efficiently and inexpensively as possible.

When awarding costs in a civil proceeding, the court must take into account any failure to comply with the overarching purpose.[69] If a lawyer fails to comply, the court may order the lawyer to bear those costs personally, rather than recovering them from their client.[70]

While the amendments do not expressly require practitioners to recommend their clients to attend mediation, it would be difficult to argue that ADR processes were not contemplated by the Parliament in drafting the Bill. As mediation may reduce the cost and time associated with litigation, there may be sufficient grounds to expect that a failure by the parties, or their lawyers, to mediate in appropriate circumstances would result in a finding similar to that in *Brownlee v Brownlee*.

Mandatory mediation has the potential to be abused by courts which may want to expedite cases for the purpose of promoting efficiency in the legal system. This is despite the fact that the courts should facilitate settlements which promote justice and the parties' interests. As such, the author agrees with the proposition that, by its absorption into the court system, the very idea of mediation has been jeopardised.[71]

Cutting costs or just another cost in the process?

While delay, uncertainty and stress are common issues of concern, the factor of cost is probably the most commonly identified problem of litigation. But is mediation actually as quick and cheap as it is often promoted to be? Laurence Boulle says that questions remain about the effectiveness of mediation among practitioners and participants. Mediation expenses are not insignificant. Parties may incur the costs of preparation (often conducted by their lawyer), experts' reports, venue and travel expenses, and the mediator fees which can be as much as $10,000 a day.[72]

Astor and Chinkin say that there is no evidence that court-connected mediation results in overall cost savings.[73] In respect of mandated mediation, Australian research suggests that it rarely resolves cases that would otherwise have gone to trial.[74] While mediation may lead to significant savings where it produces a settlement, not all mediations — in particular, those that are mandated — result in settlement.[75] As such, the argument that mediation will likely increase the overall cost of resolving the dispute is persuasive.[76]

Sufficient consideration cannot be given to this issue without reference to the definitional argument that mediation, as with all ADR processes, should be an 'alternative' — a separate procedure distinct from litigation.[77] Geoffrey Gibson says that mediation is just another phase to be endured in the complicated and expensive litigation process. He suggests that it is something that must be done, in order to secure a trial date, so the court can be satisfied that the process has been exhausted.[78]

International research generally reflects the Australian position that court-connected mediation does not generally result in cost savings.[79] One Canadian study found that mediation may end up being more expensive than litigation irrespective of whether it produces a settlement.[80] Interestingly, another Canadian study found the opposite. It showed that mandatory mediation led to higher settlement rates and a reduction in delay and cost.[81] It is arguable that the finding in the latter study relates to the majority of cases observed. It is difficult to accept that there would be a significant reduction in cost and delay in those cases that failed to settle, given that they would have had to proceed with the litigation process. In those cases, it is likely that mediation would have added an additional layer to the overall cost of the dispute.[82]

Boulle acknowledges that mediation will probably reduce costs where a settlement is produced. However, he also says that cost savings are possible even where a settlement is not reached.[83] This is likely to be the case where mediation has assisted the parties to narrow the issues in dispute. While

Published by ePublications@bond, 2010

litigation is still required, time and cost savings will result from the reduction in allegations pleaded that must be dealt with by the court.

The obvious risk for parties attending mediation is that significant expense may be incurred despite a settlement not being reached. Apart from the cost issue, if mediation is unsuccessful, parties are not likely to have been significantly disadvantaged by the process.[84] They are still free to continue with litigation or pursue other alternatives.[85]

The research on whether cost savings flow from mediation is conflicting. Generally though, it would appear that court-connected mediation may not reduce costs, particularly in cases that do not settle. While there are compelling arguments that savings occur where mediation results in a settlement, this is not clear. Given the research suggesting that non-suitable matters are unlikely to result in a settlement and that mandatory mediation is less effective than voluntary processes, the author is of the view that mandatory mediation is not appropriate and is likely to lead to negative cost consequences for disputing parties.

Conclusion

While mediation is generally considered a flexible alternative to litigation, in reality this is not always the case. When disputing parties are coerced to attend mediation by courts and tribunals, its consensual nature is jeopardised.

Despite the importance of voluntariness and the fact that mediation is clearly not suitable in all circumstances, it remains the case that all Australian jurisdictions allow courts to mandate party attendance. At least in the case of Western Australia, parties may even be compelled to make a genuine effort to cooperate with each other.[86] In circumstances where non-suitable matters are mediated, there is persuasive evidence that it is unlikely to result in a successful outcome. This is also likely to be the case for mandated mediation generally, as opposed to mediation attended voluntarily by the parties. While the rate of attendance may continue to increase in mandatory schemes, it cannot be said that there is a direct correlation between attendance and participation. In many cases where attendance is forced, the parties may not participate in good faith, thereby causing the mediation to fail.

There is a clear disconnect between the courts and the parties when it comes mandatory mediation. Courts are primarily concerned with institutional efficiency while parties are interested in satisfying their own needs and goals. Given that the parties may not always be able to achieve what they want quickly or cheaply through a process like mediation (which does not aim to explore legal rights and positions), it is difficult to accept that mandating attendance will always promote justice. It may be that the only way justice is done in some cases is for the matter to be determined by the courts.

While it may be the case that litigation is almost always an expensive process, there is little evidence to suggest that mediation may be any more cost-effective. Particularly where a settlement is not reached, attending mediation will likely cost the parties more overall.

The obvious risk with mandating any process is that the elements of discretion and flexibility are removed and it becomes rigid in its application. Despite the obvious advantages of mediation generally, it will not always be suitable as a dispute resolution process. As such, attempting it in every case may be a waste of time, money and other resources — both public and private.

Endnotes

1. Ingleby R, 'Court sponsored mediation: The case against mandatory participation' (1993) 56 *The Modern Law Review* 441 at 445; Boulle L, 'Extending the courts' shadow over ADR' (2001) 3(1) *ADR Bulletin* 117 at 118.

2. Ingleby, above note 1.

3. Hanger I, 'Has mediation made the courts irrelevant?' (2002) 5(6) *ADR Bulletin* 101 at 103; NADRAC, *Legislating for ADR: A Guide for Government Policy-makers and Legal Drafters* 2006 p 44.

4. NADRAC, above note 3 at p 38.

5. Spencer D, 'Court given power to order ADR in civil actions' (2000) 38(9) *Law Society Journal* 71 at 72; NADRAC, above note 3.

6. Boulle L, *Mediation: Principles, Process, Practice* Butterworths 1996 pp 77–79; NADRAC, above note 3 at p 47; Wade J, 'Don't waste my time on negotiation and mediation: this dispute needs a judge' (2001) 18(3) *Mediation Quarterly* 259 at 272.

7. Fiss O, 'Against settlement' (1984) 93(6) *The Yale Law Journal* 1073 cited in Davies I and Clarke G, 'Mediation: when is it not an appropriate dispute resolution process?' (1992) 2(3) ADJR 70 at 72.

8. Baylis C and Robyn C, 'Power issues in mediation' (2005) 7(8) *ADR Bulletin* 133 at 133–134.

9. Maute J, 'Mediator accountability: responding to the fairness concerns' (1990) *Journal of Dispute Resolution* 347 cited in Baylis and Robyn, above note 8 at 135.

10. Davies and Clarke, above note 7 at 73.

11. Baylis and Robyn, above note 8 at 135; Davies and Clarke, above note 7 at 70–71.

12. Fulton M, 'Commercial alternative dispute resolution' (1989) 107 cited in Davies and Clarke, above note 7 at 73; Pincus CW, 'Judge asks why old methods are still used to resolve disputes' (1988) 23(10) *Australian Law News* 11 at 11 cited in Davies and Clarke, above note 7 at 72–73.

13. Baylis and Robyn, above note 8 at 135.

14. Davies and Clarke, above note 7 at 80.

15. Wade, above note 6 at 260.

16. Vine-Hall D, 'The costs of mediation' (2009) 47(2) *Law Society Journal* 38 at 38.

17. Purnell D, 'A practitioner's reflections on developments in mediation' (2005) 7(10) *ADR Bulletin* 183 at 183.

18. Sourdin T, *Alternative Dispute Resolution* 2nd edn LawBook 2005 p 115; Boulle L, *Mediation: Principles, Process, Practice* 2nd edn LexisNexis Butterworths 2005 p 379.

19. Ingleby, above note 1 at 443.

20. Astor H and Chinkin C, *Dispute Resolution in Australia* 2nd edn LexisNexis Butterworths 2002 p 273; Davies and Clarke, above note 7 at 70.

21. David J, 'Designing a dispute resolution system' (1994) 1 CDRJ 26 cited in Spencer, above note 5 at 72; Ingleby, above note 1 at 445.
22. NADRAC, above note 3 at p 38; Ingleby, above note 1 at 443.
23. NADRAC, *What is ADR: Mediation* 2007 <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRMediation>.
24. NADRAC, above note 3 at p 38.
25. See generally Venus P, 'Court directed compulsory mediation: attendance or participation?' (2004) 15(1) ADRJ 29.
26. David, above note 21 at 34–35 cited in Spencer, above note 5 at 72; NADRAC, above note 3 at p 44; Astor and Chinkin, above note 20 at p 273.
27. NADRAC, above note 3 at p 44.
28. Spencer, above note 5 at 71–72.
29. David, above note 21 at 34–35 cited in Spencer, above note 5 at 72.
30. Purnell, above note 17 at 188; Spencer, above note 5 at 71.
31. David, above note 21 at 34–35 cited in Spencer, above note 5 at 72.
32. *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW).
33. Spencer, above note 5 at 71.
34. Astor and Chinkin, above note 20 at p 270.
35. Ingleby, above note 1 at 443.
36. Astor and Chinkin, above note 20 at p 270.
37. Boulle, above note 6 at p 77.
38. Ingleby, above note 1 at 442.
39. David, above note 21 at 34–35 cited in Spencer, above note 5 at 72.
40. Ingleby, above note 1 cited in Spencer, above note 5 at 73.
41. Ingleby, above note 1 at 443; Walker B and Bell A, 'Justice according to compulsory mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)' (2000) *Bar News* 7 cited in Astor and Chinkin, above note 20 at p 273.
42. Handley J, 'Mediation in the Commonwealth Administrative Appeals Tribunal' (1995) 6 ADRJ 5 cited in Spencer, above note 5 at 72.
43. NADRAC, above note 23; Purnell, above note 17 at 188.
44. Charlton R, 'Why parties settle: or do not' (2007) 45(11) *Law Society Journal* 42 at 42; Hanger, above note 3 at 102.
45. Dawson M, 'Non-consensual alternative dispute resolution: pros and cons' (1993) 4 ADRJ 173 cited in Spencer, above note 5 at 72.
46. Fiss, above note 7 at 1075–1086. As to a conflict between the private and public benefits of mediation, see Rundle O, 'The purpose of court-connected mediation from the legal perspective' (2007) 10(2) *ADR Bulletin* 28 at 28–29.
47. For example, in Western Australia the *District Court Rules 1996* (WA) rr 2 and 5 require the parties to make a genuine attempt at pre-trial conferences.
48. Astor and Chinkin, above note 20 cited in Spencer, above note 5.
49. Davies and Clarke, above note 7 at 80.
50. Hanger, above note 3 at 102.
51. Ibid.
52. Gibson G, 'Is mediation getting on the nose? Are the judges killing mediation?' (2005) 7(6) *ADR Bulletin* 106 at 106; Rundle, above note 46 at 29.
53. Rundle, above note 46 at 28–29.
54. Astor and Chinkin, above note 20 at p 262; Rundle, above note 46 at 28.
55. Fiss, above note 7 at 1086.
56. Rundle, above note 46 at 28–29.
57. Chief Justice Underwood, *The Chief Justice's Annual Report for the Supreme Court of Tasmania 2004-2005* Supreme Court of Tasmania 2005 at 7 cited in Rundle, above note 46 at 28–29.
58. Rundle, above note 46 at 28–29.
59. See, for example, *Supreme Court Act 1935* (SA) s 65, *District Court Act 1991* (SA) s 32(1), *Magistrates Court Act 1991* (SA) s 27(1) and *Environment, Resources and Development Court Act 1993* (SA) s 28B.
60. Gibson, above note 52.
61. Ibid.
62. Charlton R, 'Power balancing is full of surprises' (2009) 46(11) *Law Society Journal* 50 at 50; see also cl 5 of the Australian National Mediator Standards which identifies the notion of mediator impartiality: LEADR, *Australian National Mediator Standards: Practice standards: For mediators operating under the National Mediator Accreditation System* 2007 at 8.
63. [2008] 2008/25274 SGHC (Unreported, 25 August 2009).
64. South Gauteng High Court in Johannesburg, South Africa.
65. *Brownlee v Brownlee*, above note 63 cited in Brand J, 'South African High Court obliges lawyers to recommend mediation' (2009) 11(5) *ADR Bulletin* 100 at 100.
66. Brand, ibid.
67. 'Better management needed for ADR', *Lawyers Weekly* LexisNexis 15 February 2010.
68. Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth) Schedule 1; *Federal Court of Australia Act 1976* (Cth) s 73M.
69. *Federal Court of Australia Act 1976* (Cth) s 37N(4).
70. Ibid s 37N(5).
71. Gibson, above note 52.
72. Boulle, above note 18 at p 595.
73. Astor and Chinkin, above note 20 at p 262.
74. Above note 59.
75. Astor and Chinkin, above note 20 at p 262; Boulle, above note 18 at p 595; David, above note 21 at 34–35 cited in Spencer, above note 5 at 72.
76. Ingleby, above note 1 at 443; Astor and Chinkin, above note 20 at p 262.
77. Boulle, above note 1.
78. Gibson, above note 52.
79. Astor and Chinkin, above note 20 at p 262; Kakalik J et al, *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* RAND 1996 cited in Boulle, above note 18 at 594.
80. Richardson CJ, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results* Department of Justice Canada 1988 cited in Boulle, above note 18 at 594.
81. Hann R and Baar C, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) Final Report: the First 23 Months* Queen's Printer 2001 cited in Boulle, above note 18 at 594.
82. *Hill v Hill* [1997] NSWSC (Unreported, Young J, 19 March 1997) cited in Boulle, above note 18 at 595.
83. Boulle, above note 18 at 595.
84. In respect to possible cost savings where a settlement is not reached, see Boulle, above note 18.
85. Moens GA, 'Reflections on commercial dispute resolution' (2004) 7(3) ADR Bulletin 41 at 45.
86. As to the situation in Western Australia, see District Court Rules 1996 (WA) rr 2 and 5.