NEUTRALITY IN MEDIATION: A STUDY OF MEDIATOR PERCEPTIONS

SUSAN DOUGLAS*

Neutrality is arguably no longer an uncontested founding principle for the practice of mediation since both academic studies and practice reflections have found it to be absent in practice. The aim of the research reported here was to explore meaningful constructions of the concept of neutrality through an examination of the actual experience of mediators. The central question was: how do mediators make sense of neutrality in practice? The most important finding is the emphasis placed by participants on the principle of party self-determination in their attempts to deal with the dilemmas of neutrality. This finding is important because it points to the development of an alternative conception of neutrality, one that abandons neutrality in an absolute sense, but reframes its meaning in relation to that of party self-determination. An alternative discourse for understanding mediator neutrality based on this finding and incorporating a postmodern construction of power is advanced in this paper.

I   INTRODUCTION

Neutrality has been identified as a foundational concept in mediation.[1] Its importance is reflected in both definitions of mediation and accounts of practice. Accepted definitions identify mediation as a structured process of dispute resolution facilitated by a neutral

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1   H Astor, 'Rethinking Neutrality: A Theory to Inform Practice - Part 1' (2000) 11 *Australian Dispute Resolution Journal* 73, 73; H Astor, 'Rethinking Neutrality: A Theory to Inform Practice - Part 2' (2000) 11 *Australian Dispute Resolution Journal* 145,146.This two part examination of neutrality in mediation combines with two further pieces by the same author, one extending her thesis on the place of neutrality in mediation and the other examining theoretical approaches to power in mediation, to produce a significant body of work, which has informed and shaped my own thesis, as advanced in this paper. Those additional works are: H Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social and Legal Studies* 22; H Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16 *Australian Dispute Resolution Journal* 30.

third party.[2] Mediators' accounts of their practice emphasise the neutral stance of their intervention as third parties.[3] Over time, however, empirical studies[4] and critiques of practice[5] have drawn attention to mediators' lack of neutrality in any absolute sense. In the light of this apparent inconsistency between the rhetoric and actuality of practice, there has been a range of responses in the literature about what to do with, or about, neutrality. Responses range from calls to simply abandon neutrality as an integral component of mediation practice;[6] calls to reframe its significance as no longer a core tenet of practice or to reframe it as a question of ethics;[7] and calls to replace it with alternative legitimating principles.[8] Most recently references to neutrality have been largely omitted from documents detailing the new National Mediation Accreditation System.[9] Yet, as results of this study will show, the mediators who participated in this project evidenced a clear adoption of neutrality as a principle guiding their practice.

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[2]   See, for example, the definitions in: H Astor and C Chinkin, *Dispute Resolution in Australia*, (Butterworths, 2nd ed, 2002) 83; L Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 2nd ed, 2005) 4; but see descriptions of mediation central to the National Mediator Accreditation System operative from 1 January 2008 in Australian Mediation Association, *Australian National Mediator Standards: Approval Standards* (2007) cl 2 <http://www.ama.asn.au/Final_Approval_Standards_200907.pdf> at 4 June 2008; Australian Mediation Association, *Australian National Mediation Standards: Practice Standards* (2007) cl 2 < http://www.ama.asn.au/Final_%20Practice_Standards_200907.pdf> at 4 June 2008. In addition however, note the standard articulated in relation to *impartiality* and ethical practice at cl 5 of the Practice Standards; and the standard articulated in relation to competence requiring ethical understanding in relation to *neutrality and impartiality* at cl 7(c)(iv) of the Practice Standards.

[3]   For example, see O Cohen, N Dattner and A Luxenburg, 'The Limits of the Mediator's Neutrality' (1999) 16(4) *Mediation Quarterly* 341,341-42.

[4]   S Cobb and J Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16(1) *Law and Social Inquiry* 35; S Cobb and J Rifkin, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 11 *Studies in Law, Politics and Society* 69; D Greatbach and R Dingwell, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' (1989) 23(4) *Law and Society Review* 613, L Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?' (2001) 10(4) *Social and Legal Studies* 505. These articles represent reports of empirical studies which evidence the point made in the text and do not need pin point referencing.

[5]   See, for example, Astor, 'Rethinking Neutrality', above n 1; Astor, 'Mediator Neutrality', above n 1; G Kurien, 'Critique of the Myths of Mediation' (1995) 6 *Australian Dispute Resolution Journal* 43; R McKay, 'Ethical Considerations in Alternative Dispute Resolution' (1989) 45(1) *The Arbitration Journal* 15; R Field, 'Neutrality and Power: Myths and Reality' (2000) 3(1) *The ADR Bulletin* 16; R Field, 'The Theory and Practice of Neutrality in Mediation' (2003) 22(1) *The Arbitrator and Mediator* 79; B Mayer, *Beyond Neutrality* (Jossey Bass, 2004).

[6]   D Dyck, 'The Mediator as Nonviolent Advocate: Revisiting the Question of Mediator Neutrality' (2000) 18(2) *Mediation Quarterly* 129, 143; D Gorrie, 'Mediator Neutrality: High Ideal or Scared Cow?' in T Fisher (ed), *Conference Proceedings, Famcon '95* (1995) 30,36.; see D Bagshaw 'Self-reflexivity and the Reflective Question: Broadening Perspectives in Mediation' (2005) 25(2) The Arbitrator and Mediator 1, 2; D Bagshaw, 'Language, Power and Mediation' (2003) 14 *Australian Dispute Resolution Journal* 130, 140 -141..

[7]   Mayer, above n 5; Field, 'The Theory and Practice', above n 5, in which the author proposes an ethical foundation for practice.

[8]   Astor, 'Rethinking Neutrality', above n 1, in which the author argues for maximising party control and later develops this argument to incorporate a more comprehensive set of principles; in Astor, 'Mediator Neutrality', above n 1; K Douglas and R Field, 'Looking for Answers to the Mediation Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13(2) *Murdoch University E Law Journal* 177, in which the authors argue that therapeutic jurisprudence can provide a legitimate foundation for mediation without reliance on the concept of neutrality. See also Mulcahy, above n 4, in which the author proposes that neutrality should be replaced with an ethic of partiality.

[9]   Australian Mediation Association, above n 2.

A central theme identified in the debate about neutrality, is the essentially binary construction of the question: are mediators neutral – or not?[10] As a product of a system of binary or dualistic thinking, the framing of the question permits only two possibilities – either mediators are neutral, or they are not neutral, with no intermediate possibility. Neutrality then becomes an absolute truth, experienced as such, or simply not experienced. Such binary or dualistic thinking permeates our use of language and provides a dominant frame of reference for our understanding of many social processes. Understanding based upon dualistic conceptions is challenged by postmodern perspectives.[11] Dualism is said to limit our understanding because it 'fails to recognise that reality consists of intermediate degrees, flexible borders, and ever-changing vistas'.[12] From a postmodern perspective, use of a binary logic, risks limiting creative understanding of neutrality in mediation. The results of this study present a challenge to that binary logic.

The purpose of this study was to investigate the possibilities of alternative constructions of neutrality by asking mediators directly about their understanding of the concept and how it informs their practice. The central question for the study was:

• How do mediators make sense of neutrality in practice?

Associated questions were:

• What range of meanings do mediators associate with the concept of neutrality? and
• How do mediators translate the meanings they ascribe to neutrality into practice?

A further aim of the study was to gather empirical data in an Australian context; and to thereby extend the body of empirical research available from similar[13] and earlier studies conducted by Cobb and Rifkin,[14] in the United States, and Mulcahy,[15] in Britain.

II   METHODOLOGY

A qualitative research design was chosen in order to answer the research questions as posed. Consistent with a qualitative and broadly interpretivist approach, in depth interviews were chosen to access the actual or 'lived experience'[16] of mediators. The sampling frame was purposive. A small sample of interviews was chosen in order to elicit the nuances of meaning the mediators associated with neutrality. The sample

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[10]   Astor, 'Rethinking Neutrality', above n 1.
[11]   Bagshaw, 'Language, Power and Mediation' above n 6; M Del Collins, 'Transcending Dualistic Thinking in Conflict Resolution' (2005) *Negotiation Journal* 263.
[12]   Del Collins, above n 11, 264.
[13]   Each of the overseas studies referred to, utilised a series of in depth interviews with mediators within research strategies featuring mixed data collection methods.
[14]   Cobb and Rikin, above n 4.
[15]   Mulcahy, above n 4.
[16]   An expression associated with the work of Wilhelm Dilthey (1833-1911) and used to distinguish interpretivist and qualitative research from positivist and quantitative traditions; see D Hamilton, 'Traditions, Preferences, and Postures in Applied Qualitative Research' in N Denzin and Y Lincoln (eds), *Handbook of Qualitative Research* (2000) 60, 64.

reported here is limited to one mediation service using a case study methodology.[17] The sample consisted of interviews with ten mediators drawn from the Dispute Resolution Centre, Department of Justice, Brisbane, a government funded and administered community mediation service.[18]

The model utilised by the mediation service was described by the (then) training officer as a: 'facilitative, interest-based, twelve step, co mediation' model, distinguished from evaluative and conciliation models.[19] The types of disputes dealt with by the service are broad ranging. They include neighbourhood disputes, family law matters, commercial matters, workplace disputes, environmental disputes and indigenous matters. The service also undertakes court ordered mediations.[20]

The sample of mediators was determined using a process of self-selection. Each panel member received a letter of invitation to participate in the study. Ten members of the panel, numbering over 100, responded with a willingness to participate. Of the 10 participants, three were female and seven male. Their ages ranged from 33 to 54 and their length of experience in mediation ranged from 2 to 12 years. Seven of the participants reported having post-secondary educational qualifications. Two of those were reported to be in Law, one in Social Work, one in Engineering, one in Arts Education, one in Commerce and one in Real Estate. Nine of the 10 participants were employed as mediators on a casual basis with the service. One of those nine had also been employed as an intake officer with the service and the tenth had served both training and management functions with the service over a 10 year period. Six participants in the sample worked concurrently as mediators with other service providers.

The interviews were conducted using an unstructured format and the length of each interview was 50 minutes on average. Full transcripts of the interviews were produced and the participants' accounts were subjected to a thematic analysis using a manual coding system. Categories of meaning were generated from the interview data and cross-referenced across the 10 interviews. The interview design and subsequent data analysis proceeded from a constructionist perspective.[21] Accordingly the investigation

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[17]   The case study reported here forms part of a larger PhD project encompassing a further case study of the Family Dispute Resolution Service (formerly Family Mediation Service), Lifeline Community Care, Sunshine Coast. For a discussion of the general principles of the case study methodology employed see K Eisenhardt, 'Building Theories from Case Study Research' (1989) 14(4) *Academy of Management Review* 532.

[18]   Department of Justice and Attorney-General, *Dispute Resolution Centres* <www.justice.qld.gov.au/475.htm> at 11 June 2008. Data collected for this first case study, (and as part of a larger project encompassing a second case study (see above n 17)), was collected in 2002. Data collected for the second case study was gathered in 2007 and affirms the central findings of the initial study, namely, the clear adoption of neutrality as a guiding principle for practice and construction of that principle in relation to that of party self-determination.

[19]   Hence, the model used would be categorised as facilitative according to the typology of four mediation models, as articulated by Boulle, above n 2.

[20]   Only two of the sample of mediators had conducted court ordered mediations. Participants referred most frequently to examples from their practice with neighbourhood and family disputes although examples from all categories listed were mentioned.

[21]   'What constructionism claims is that meanings are constructed by human beings as they engage with the world they are interpreting,' per M Crotty, *The Foundations of Social Research* (Allen Unwin, 1998) 73.

focused on the process of meaning creation that participants used to construct their understanding of neutrality and was not intended to elicit any causal analysis.[22]

The results of the study are aimed to contribute to theory generation rather than theory testing. In other words, the study was not designed to establish the meaning of neutrality and to generalise findings to a wider population. Rather, the study was designed to collect data that could be used to generate theory about neutrality. In aiming to generate theory, the fluid, changing nature of meaning and of theory itself was recognised and the possibility of multiple perspectives, consistent with a postmodern sensibility, was acknowledged. In order to think beyond existing conceptions of neutrality the results of the study were examined in the light of broader debate within mediation, particularly in relation to questions of power in mediation. The results are placed in this wider context in the final discussion section. Although the results are not statistically generalisable beyond the sample and its features, particularly the use of a facilitative model of practice, they are used as a catalyst for thinking about neutrality as it applies in a wider context of varying models.

III   RESULTS

The meanings participants associated with neutrality reflect those articulated in the academic literature, but also extend those meanings in creative, practice oriented ways. Neutrality, as depicted in the mediation literature, does not have a clear and unequivocal meaning. However, two generally accepted synonyms are discernible – neutrality as impartiality[23] and neutrality as even-handedness.[24] Further, the idea of neutrality is closely linked to the distinction made between the process of mediation and its content and outcome.[25] Hence, mediators are said to be neutral as to content and outcome, but not process.[26] Participants in the study demonstrated an awareness of these themes and a further awareness of difficulties in translating them into practice. In attempting to make sense of neutrality in practice, participants emphasised that the focus of their attention was on the parties as owners of the dispute and its resolution. Participants further emphasised the nature of their practice as client centered, that is, as framed and directed by the needs of the parties. By moving between ideas of mediator neutrality and notions associated with party self-determination, participants extended and reframed their understanding beyond accepted definitions. These four themes in mediators' constructions of the meaning of neutrality are reported and examined below, namely: neutrality as impartiality; as even-handedness; as related to the distinction between process and content; and in relation to mediators' ideas about party self-determination.[27]

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[22]   I am distinguishing the design here from a quantitative approach, which typically attempts a causal or correlative analysis between dependent and independent variables and is closely associated with a positivist research paradigm. For a comprehensive discussion see A Bryman, *Quantity and Quality in Social Research* (Unwin Hyman, 1988).

[23]   Astor, 'Rethinking Neutrality', above n 1; Astor and Chinkin, above n 2; Boulle, above n 2; Cobb and Rifkin, 'Practice and Paradox' above n 4; Field, 'Neutrality and Power', above n 5.

[24]   Boulle, above n 2; Field, 'Neutrality and Power', above n 5.

[25]   Boulle, above n 2.

[26]   Cohen, Dattner and Luxenberg, above n 3; J M Haynes, 'Mediation and Therapy: An Alternative View' (1992) 10(1) *Mediation Quarterly* 21; T F Marshall, 'The Power of Mediation' (1990) 8(6) *Mediation Quarterly* 115.

[27]   Individual responses of the 10 participants are identified by numbers 1-10.

Extracts from the interviews are reported as data used to ground the analysis, consistent with the 'thick description' characteristic of a qualitative approach.[28]

A   *Neutrality as Impartiality*

Impartiality has been identified as a generally recognised synonym for neutrality.[29] Neutrality as impartiality is said to invoke 'a stronghold against bias',[30] and to act as 'an antidote against bias'.[31] According to the literature, bias may occur as a result of a party or parties being known to the mediator, or may occur where the mediator has a vested interest in the outcome of a dispute.[32] Bias is also said to occur where the mediator develops an actual or apparent preference for or against one party or a particular outcome during a mediation session.[33]

Some participants explicitly referred to neutrality as meaning impartiality, while others referred instead to the associated meanings of bias and vested interest. Of these two associated meanings, reference was more often and more clearly made to the idea of vested interest rather than that of bias. Explicit reference to the term bias was infrequent, but reference was extensively made to the potential intrusion of personal reaction or preference. Participants closely associated having no vested interest in an outcome with the idea that the parties own the dispute and its solution. This connection is illustrated in one mediator's explicit definition of neutrality:

> 'That the process belongs to them and the outcome is theirs and there is no vested interest from the mediators.' (03)

The connection is further illustrated in the following comments:

> I don't own the problem. I don't own the solution. There is that distancing thing…that sets the boundary for me at the outset. It's not my problem. I haven't got a vested interest in it. I have nothing in it. All I am (there) to do is to direct the flow of communication. (10)

Having some personal reaction to the parties, the nature of their dispute and possible outcomes, or exhibiting preference due to unconscious processes, has been acknowledged as inevitable in practice,[34] yet inconsistent with a theory of neutrality as impartiality.[35] Studies in family mediation have identified instances of influence toward mediators' preferred outcomes.[36] Such preferences may represent what mediators see as

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[28]   N Denzin, 'The Art and Politics of Interpretation' in N Denzin and Y Lincoln (eds), *Handbook of Qualitative Research* (2000) 500, 505.

[29]   Astor, 'Rethinking Neutrality', above n 1; Astor and Chinkin, above n 2; Boulle, above n 2; Cobb and Rifkin, 'Practice and Paradox', above n 4; Field, 'Neutrality and Power', above n 5.

[30]   J Rifkin, J Millen and S Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Mediation Quarterly* 151, 151.

[31]   Cobb and Rifkin, 'Practice and Paradox', above n 4.

[32]   Boulle, above n 2; McKay, above n 5.

[33]   Astor and Chinkin, above n 2.

[34]   Kurien, above n 5.

[35]   Cobb and Rifkin, 'Practice and Paradox', above n 4.

[36]   Greatbach and Dingwell, above n 4; M Fineman, 'Dominant Discourse, Professional Language and Legal Change in Child Custody Decision-making' (1988) 101(4) *Harvard Law Review* 727.

in the parties' best interests,[37] as opposed to their own interests, but nonetheless
represent a lack of neutrality. To avoid any subtle influence of their own interests and
preferences, mediators have been encouraged to engage in self-reflection and evaluation
in order to consciously address the potential for impact upon the process.[38] Yet, some
measure of mediator influence is acknowledged in the literature as inevitable and, at
best, restricted if not eliminated.[39]

Participants referred to a need for self awareness and also described difficulty in finding
ways to counteract personal reactions:

> If you establish if it is happening, what do you do about it? If you find yourself with your
> buttons being pushed and you can identify why that is happening, how do you manage
> that and how do you address that so you don't do something which in hindsight was really
> jeopardizing your impartiality? (09)

Limiting the intrusion of personal agendas and reactions was identified as
important in giving primacy to the needs of the parties:

> Why am I doing this? Am I doing this because it's something that I have seen going on
> and is important for the parties or is this because there is something going on inside my
> head that I want to get my jollies by doing this. This is the thing about tuning in to what
> the parties want as opposed to what the mediators believe that they want.(02)

B   *Neutrality as Even-Handedness*

Astor has drawn a distinction between a mediator's capacity to act impartially in
relation to each party; and to act impartially 'as between' the parties.[40] In the latter
sense, impartiality is equated with even-handedness, which refers to the equal treatment
of parties.[41] Treating parties equally was likened by one mediator to creating an even
(level) playing field:

> 'Language, hearing, cultural sensitivity, all of those sorts of things are addressed so that
> when the parties are at the table we have as much of an even playing field as you can.'
> (03)

A significant dilemma identified with even-handedness is that equal treatment of parties
may produce unequal outcomes.[42] Inequality of outcome may occur where the parties
enter the mediation in an unequal relationship that remains unaffected by the mediation
process, and serves to advantage one party in terms of the outcome. In order to remedy
the potential for unequal outcomes, it has been argued that mediators should attempt to
redress power imbalances as between the parties.[43] In doing so, mediators would need to
adopt strategies where parties are treated *un*equally in order to bring about equality of

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[37]   See Greatbach and Dingwell, above n 4, wherein influence was found to be exerted toward
        mediators' views of the interests of children; and Fineman, above n 36, wherein the author critiques
        assumptions about, and attitudes toward, shared parenting and implications for mediation outcomes.
[38]   Kurien, above n 5.
[39]   Cohen, Dattner and Luxenburg, above n 3.
[40]   Astor, 'Rethinking Neutrality', above n 1, pt 1.
[41]   Boulle, above n 2.
[42]   Astor, 'Rethinking Neutrality', above n 1; Cobb and Rifkin, 'Practice and Paradox', above n 4.
[43]   Astor, 'Rethinking Neutrality', above n 1; Cobb and Rifkin, 'Practice and Paradox', above n 4.

bargaining power. In this context, neutrality becomes synonymous with the practice of equidistance and paradoxically 'the active process by which bias is used to create symmetry!'[44]

Participants identified questions of power imbalance as issues of communication between parties, rather than of the content of the dispute. The following is an example of how power imbalances were thus identified in terms of process:

> I guess people can be at an advantage a number of different ways. One of the ones I was thinking of and sometimes this happens is that one person is a lot more articulate than the other. I think you can probably assist that person who is less articulate by a bit more paraphrasing on their behalf and that sort of thing to make sure there is a very clear understanding of what the issues are. (05)

The commentary below further indicates how participants addressed power imbalances in terms of process:

> I make a decision that one party has eighty per cent of the airtime from what I can observe. The other person may have twenty. I will try and at least, maybe not within five minutes or half an hour, but within a couple of hours at least to give the other person an opportunity to bring their percentage of speaking up. At least their opportunity to speak - equal opportunity. They might not take it. In which case I've done my job. (01)

By identifying power imbalances in terms of process and seeking to address those imbalances by process interventions, participants reinforced the distinction between process and content or outcome, integral to the facilitative model of mediation practised by the service. As a logical extension of this distinction, participants tended to exclude the possibility of intervention to address perceived power imbalances where these were more clearly a function of substantive aspects of a dispute. Yet mediators in the sample were not entirely comfortable with the process limits, however useful, placed upon their role in addressing disadvantage. Participants expressed concern and ambivalence about the need to remain neutral in circumstances where one party was evidently negotiating at a disadvantage. Their responses on this issue tended to trail off in uncertainty and dissatisfaction. The following case examples were provided by participants in their attempts to articulate the tension they experienced in adhering to the principle of neutrality in such circumstances.

A parenting dispute in which one party 'very clearly had not gotten legal advice':

> Very clearly she was negotiating to her disadvantage. Neutrality would allow, in one sense, would allow it all to happen because she is choosing it. You are raising it and she is saying, 'No I want to settle, I want it out of my hair, I don't want to focus anymore, I'm sick of this'; and these are the sorts of things the parties are saying.
> You are reality testing: 'If you got legal advice and found that there are different outcomes possible for you?' but she still is wanting [*to settle*]. I have been caught and my co-mediator too allowing it to go ahead. Making a choice about whether it goes ahead knowing there is a disadvantage, that's one that has occurred. Yes. I still struggle with it. (03)

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[44]   Cobb and Rifkin, 'Practice and Paradox', above n 4, 46.

*A commercial case study in which one party had been misled as to their legal rights by
the other:*

> It was classified as a commercial but it was a contractual dispute and there were some
> clauses mentioned in the contract that I didn't think would stand up anywhere but you are
> not allowed to offer an opinion.
> When we asked the party if they had considered legal advice, as we were able to do in
> private sessions, their response was: 'I'm not allowed because the contract forbids me
> from doing that.'
> That was a challenging one where I think in the end there was some kind of agreement
> reached. I think it was to the detriment of the party who had signed the contract but
> within the bounds of what we were told we were allowed to do there wasn't much
> we…[*response trailed off*]. (06)

C   *The Distinction between Process and Content or Outcome*

A central theme in considerations of neutrality is the distinction between process and
content in mediation. The mediator is said to be in control of the process, but neutral as
to the content or outcome.[45] This distinction is said to be a basic tenet of mediation.[46]
However, there is growing recognition that the presence and intervention of the
mediator does in fact influence both the content and outcome of the parties' dispute.[47]
The focus of critique has tended to be on the impact of mediator influence on outcomes,
to the extent that it has been argued that 'almost every process intervention made by a
mediator has an effect on substantive outcome.'[48]

One mediator in the study used the distinction between process and content to explain a
distinction between neutrality and impartiality (usually regarded as synonymous):

> Neutrality I would always attach to outcome - that there are issues about outcome and
> neutrality. The outcome is theirs and their journey to get there is theirs. Impartiality to me
> speaks more about the process and the way that the process is managed to allow the
> parties an equal footing to get to the outcome. (03)

Communicating a neutral stance on any options generated by the parties was seen as
consistent with the parties' ownership of decision-making:

> One of the things I am always mindful of at that point is that whether in a verbal or non-
> verbal sense I am not seen to be judging any of the ideas. … Quite often the slightest raise
> of the eyebrow and one of them will say, 'You don't think that's a good idea.' At that
> point it's never about giving it back to the parties and saying what I think is a good idea.
> It is not important if you believe the way for this to be resolved is that, this and this.
> That's for the parties to decide. (02)

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[45]   Astor and Chinkin, above n 2; Boulle, above n 2.

[46]   Astor and Chinkin, above n 2.

[47]   Boulle, above n 2; K Gibson, L Thompson and M H Bazerman, 'Shortcomings of Neutrality in
       Mediation: Solutions Based on Rationality' (1996) *Negotiation Journal* 69; J Winslade, G Monk and
       A Cotter, 'A Narrative Approach to the Practice of Mediation' (1998) *Negotiation Journal* 21; B
       Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12
       Australian Dispute Resolution Journal 48.

[48]   Wolski, above n 47, 249.

Whilst input into, and impact upon, the content of the dispute was not explicitly acknowledged by participants, revealing comments were made about reality testing particularly in the context of private sessions (caucuses). In that context, participants reported experiencing tension in attempting to remain neutral as to content whilst dealing with parties who were 'not being realistic':

> You need to be careful what you define that [*reality testing*] as being… That you don't start testing all your versions of reality or imposing some other community standard which may or not be applicable given the nature of the relationship between the parties. That's an issue and it's an issue that often comes up during private sessions when you are doing that reality testing with parties who are not being realistic. (02)

D   *Party Self-Determination*

Related to the distinction between process and content or outcome were very clear statements from participants about the parties' ownership of the dispute and its resolution, and hence, the parties' capacities to determine their own outcomes. When directly asked about the meaning of neutrality, one participant answered:

> I would say that it's really important not to take any ownership. It is the client's problem. It's not your problem. Therefore while you can encourage their communication you are not having any direct input into what might be appropriate for them to do to resolve that. I think sometimes as a mediator that can be quite difficult because sometimes it seems obvious to you as a mediator as to what the solution will be. But you need to be very careful that you are not directing them in a way you think it should go. There could be a number of other solutions as well that may be more appropriate for them. (02)

Having a vested interest in any outcome and hence whether the parties came to an agreement or not was identified as detracting from the parties' ownership of the dispute:

> Again getting back to the neutrality part, where if I come to a mediation session with the whole idea that it's a result orientated thing, to me I am actually owning the dispute, owning the argument as well. I have to remind myself again, this is theirs, it's not mine. Again I have got to separate myself. I have just a job to do. (10)

Participants evidenced greater affinity with principles of party ownership and client-centred practice than the principle of neutrality. It was these key ideas that most clearly enabled them to make choices about how to direct their practice and deal with the dilemmas of neutrality. The value placed on party ownership is reflective of the broader underlying ideology in mediation - the value of self-determination.[49] In statements about the philosophy of mediation, central issues for practice and perceptions as to the role of mediators, participants reported:

> To me the philosophy of mediation is to provide a process to enable people to make their own decisions. Not for you to impose decision making on them. (07)

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[49]   T Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 1000 *Yale Law Journal* 1545; A Taylor, 'Concepts of Neutrality in Family Mediation: Context, Ethics, Influence, and Transformative Process' (1997) 14(3) *Mediation Quarterly* 215; J R Coben, 'Gollum meet Smeagol: A Schizophrenic Rumination on Mediator values Beyond Self-determination and Neutrality' (2004) 5 *Cardoza Journal of Conflict Resolution* 65.

> I think it's important that it gives people the opportunity to take some sort of ownership
> of resolving their own disputes…[My] role as a mediator is to try and help them to take
> ownership and to resolve it for themselves. (06)

Justification for intervening to address power imbalances was presented in terms of the
parties' ownership of the process and the primacy of meeting the parties' needs:

> It's giving both parties the chance to hear what each other has to say. I think if you didn't
> address that behaviour then the quiet person would feel as though it's not their process:
> 'Its been happening to me all the time outside. I come here and the same thing is
> happening.' It's not equal. (08)

The primacy of meeting the parties' needs, as opposed to those of the mediator, was
emphasised in the following commentary:

> Am I about meeting the parties' needs or is this about meeting my own needs? That gets
> back to my other comment about the whole thing is about listening to what the parties'
> needs are. Not your needs as a mediator, not the process needs of the twelve-step
> mediation process. It really is about these two people; how they want to spend this time in
> a way that is productive to them; dealing with the issues the way they want to deal with
> them. (02)

The needs of the parties were identified as determinant of current practice and of the
trends in the development of the model over time:

> We are looking at all these new types of mediations we are doing and how flexible and
> how well does what we do suit the needs of the clients. We need to be looking at different
> models. What are the needs of the client? What does the mediator want to do now? Does
> the client know everything about all their options and does the mediator appreciate what
> the client's needs are and where do you find that middle ground. (09)

IV   DISCUSSION

The most important finding of this study is the emphasis placed by participants on the
principle of party self-determination in their attempts to deal with the dilemmas of
neutrality. This finding is important because it points to the development of an
alternative conception of neutrality, one that avoids a binary, or dualistic, construction.
Instead of looking to the presence or absence of neutrality, it is possible to reformulate
the concept as one that makes sense in relation to another relevant concept, that of party
self-determination. In this alternative neutrality is abandoned in an absolute sense but its
meaning is reframed *in relation to*[50] that of party self-determination. Reframed, the two
concepts are given meaning not as absolutes, but as interactive ideas that have
significance in relation to one another. The necessity of defining and realising either
principle in an absolute sense is thereby obviated. Examining the responses of
participants in the light of theoretical discussions in mediation and, in particular, in the
light of considerations of mediator power, offers an opportunity to reframe, rather than

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[50]   For a description of Foucault's concept of *power* as relational rather than possessive see B Epstein,
       'Why Post-structuralism is a Dead End for Progressive Thought' (1995) 25(2) *Socialist Review* 83;
       and for discussion and critique of the work of Foucault see S Best and D Kellner, *Postmodern
       Theory: Critical Interrogations* (MacMillan, 1991) 34 -75.

completely abandon, the concept of neutrality for practice. Based on the study's findings the following arguments are developed in this section:

- That the meaning of neutrality can be constructed in relation to that of self-determination;
- That a relational understanding of the concepts of neutrality and self-determination can be grounded in the relationship between the mediator/s and the parties;
- That in the context of the relationship between mediator/s and parties, the distinction between process and content in mediation is inadequate in determining the boundaries of the mediator's role;
- That the concept of power in mediation, where drawn from a structuralist perspective, is inadequately constructed to deal with the dilemmas of power imbalance between the parties and of the power exercised by the mediator; and
- That a postmodern idea of power can be constructed as a mediating force between neutrality (as depicting limits to the mediator/s exercise of power) and self-determination (as depicting a maximising of the parties' exercise of power).[51]

A   *Neutrality and Self-Determination*

Participants' responses echoed findings in the literature that the intrusion of some measure of mediators' values and preferences is inevitable; and that as a result neutrality in an absolute sense is not possible.[52] Limiting that intrusion was identified by participants as a dimension of neutrality as impartiality. According to the literature, and in answer to this apparent dilemma, neutrality has been painted as mythical,[53] or at best as an unachievable aspiration,[54] and mediators have been urged to communicate their value preferences to parties,[55] rather than misrepresent themselves as value neutral.[56] Participants in this study answered the dilemma by moving between ideas depicting a locus of attention on the mediator and ideas that shifted that locus to the parties. Participants described techniques of self-awareness and self-reflection, and hence a focus on themselves, as tools in limiting the impact of their personal preferences. Participants further described a dynamic process of introspection and outward attention. In shifting attention away from their personal responses, mediators described a capacity to give primary attention to the needs of the parties, the parties' attempts to move toward resolution of the dispute and the parties' ultimate authority in coming to a decision. Rather than attempting to 'be neutral' in any absolute sense, participants incorporated both an understanding of the limitations of their role, and of the primacy of the parties' role, the parties' self determination, in making sense of neutrality in practice.

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[51]   Similarity here with Astor's principle of maximising party control (see Astor, 'Rethinking Neutrality', above n 1; Astor, 'Mediator Neutrality', above n 1) is acknowledged and further referenced in subsequent discussion.

[52]   S E Bernard et al, 'The Neutral Mediator: Value Dilemmas in Divorce Mediation' (1984) *Mediation Quarterly* 61; T Fisher, 'Advice by Any Other Name…' (2000) 19(2) *Conflict Resolution Journal* 197; Gorrie, above n 6.

[53]   Boulle, above n 2; Coben, above n 49; Marshall, above n 26.

[54]   Mulcahy, above n 4.

[55]   Bernard et al, above n 52; Cohen, Dattner and Luxenberg, above n 3; Dyck, above n 6; Mulcahy, above n 4.

[56]   Field, 'Neutrality and Power', above n 5.

Party self-determination has been identified as a primary objective of mediation.[57] As a core value for practice, self-determination has been acknowledged over time in the Australian literature, although it has arguably received greater prominence in the American context.[58] It is now clearly identified as a principle guiding practice according to the National Mediation Accreditation System. In the new Practice Standards, mediation is described as: 'essentially a process that maximizes the self determination of the participants.'[59] A legal concept with similar meaning in the context of Alternative Dispute Resolution is consensuality. Astor references this principle in constructing her argument for replacing neutrality with the principle of maximising party control.[60] In a recent work depicting mediation as an emergent profession, Field has argued that 'it is self-determination that grounds every model of mediation, from the facilitative to the transformative, and even to the evaluative…it remains fundamental to any mediation process that it is the parties who determine the consensual resolution of their own dispute.'[61] Like neutrality, party self-determination is not unequivocally defined[62] and it has been associated with a range of meaning.[63] Clearly since mediators' interventions, whether in terms of process or content, influence the course of a dispute, party self-determination in an absolute sense is not possible. Furthermore, if it were, only one of the two parties could be able to be absolutely self-determining. In fact, absolute self-determination in any given *social* context is a contradiction in terms and in mediation the parties are clearly influenced both by the input of the mediator/s and by each other.

B   *Grounding Neutrality and Self-Determination in 'Relationship': Moving away from the Process or Content/Outcome Distinction*

In mediation, party self-determination only makes sense where it is seen 'in context', that is, in the context of a *relationship* between the mediator/s and the parties and between the parties themselves. Participants in this study identified the parties as self-determining, vis a vis the mediator/s, to the extent that the focus of attention, energy and effort in mediation was on the parties' dispute and their attempts to resolve it, and not the personal agendas, experiences and predilections of the mediator/s. 'Being impartial' meant more than not having a vested interest, or personal view that impacted on the process, it also meant actively engaging in a process of facilitating the parties' chosen outcomes. Hence, the mediators constructed their understanding of impartiality as not merely about them (their lack of vested interest or personal view) but also about the parties (the parties' chosen outcomes). Drawing on this understanding we can begin to construct a meaning of neutrality in relation to that of self-determination rather than as an absolutist concept. Rather than conceptualising neutrality as an attribute of the mediator and self-determination as an attribute of the parties, we can ground both

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[57]   Coben, above n 49.

[58]   In the Australian context see Boulle, above n 2; D Bagshaw, 'Mediating Family Disputes in Statutory Settings' (1995) 48(4) *Australian Social Work* 4. In the American context see, for example, Coben, above n 49.

[59]   Australian Mediation Association, 'Practice Standards', above n 2, cl 2(6).

[60]   Astor, 'Rethinking Neutrality', above n 1; Astor, 'Mediator Neutrality', above n 1.

[61]   R Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18 *Australian Dispute Resolution Journal* 178, 181.

[62]   Coben, above n 49.

[63]   Ibid; N Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2000) 6 *Harvard Negotiation Law Review* 1.

concepts in the relationship between mediator/s and parties, and give both concepts meaning in the context of that relationship.

The interaction between mediators and parties has three relationship dimensions – the mediator/s relationship towards each (or both) parties; the mediators' relationship as between parties; and the parties' relationship towards each other. Particular focus has been given in the literature to the relationship of the mediator/s, as between the parties in the idea of neutrality as even-handedness.[64] The dilemma of even-handedness (that it could lead to unequal outcomes) focuses attention on the fact and dynamic of the parties' relationship with each other. The problem of neutrality in this context is identified as the problem of redressing imbalances of power as between the parties.[65] Redressing power imbalances focuses attention on the activity of the mediator in relation to both parties (although the objective would be to influence the relationship between them). The results indicate that in this complex web of relationships and where issues of power were raised, mediators found reliance on the distinction between process and content unclear and unsatisfactory in guiding their interventions.

In the face of perceived power imbalances, mediators in the study attempted to construct their role as limited to process interventions, but experienced considerable uncertainty and tension in adapting to that limitation. Participants were uncomfortable and dissatisfied with outcomes where one party's potential autonomy was limited by inadequate knowledge, misinformation or apparent gender and cultural difference. Participants expressed uncertainty and confusion where their interventions, though focused on the needs of the parties, met competing demands from the parties. The process/content or outcome distinction provided a way forward, but not one with which participants were ultimately satisfied. The inadequacy of the distinction between process and content in grounding the concept of neutrality was also evidenced by mediators' use of private sessions and reality testing to intrude upon the content of a dispute.

The distinction between process and content is a useful analytical tool in as far as it abstracts aspects of mediation for examination and provides an analytical framework for practice. It is not unlike the distinction drawn between the substantive and procedural aspects of a legal action. Limits of its usefulness occur where it is adopted inflexibly as an accurate, static reflection of mediation practice. What actually occurs is the intertwining of all aspects of process and content in one whole, which we break down for analysis. Practitioners will have experienced the ebb and flow of mediation as it occurs. They will consequently have experienced the interweaving and synthesis of process and content as a session plays out and ultimately reaches an outcome.

Participants in the sample stressed the need for greater flexibility in applying the facilitative model adopted by their service. Moving from an emphasis on the process/content distinction, as structuring the dynamics of mediation, to an emphasis on the relationships between players offers potential scope for more flexible understanding and practice. This is argued as possible where the role of a neutral mediator is reframed away from delineation in terms of process as opposed to content, and constructed

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[64]   Boulle, above n 2.
[65]   Field, 'Neutrality and Power', above n 5.

instead in terms of a mediator's proper exercise of power. This argument is developed
below.

C   *From Process or Content/Outcome to Considerations of Mediator Power*

The distinction between process and content or outcome frames the role of the mediator
in the problem-solving, facilitative model of mediation adopted by the service under
study. 'The problem-solving model, while seldom going by that precise name, and
seldom acknowledging or exposing its ideological roots, is the dominant model in the
mediation field.'[66] The distinction between process and content or outcome, upon which
this model relies, represents another binary construction that, while attempting to render
the phenomenon of mediation meaningful, restricts our understanding because it
becomes a limiting lens through which the practice is viewed. Interventions are
conceived as either matters of process or content. Neutrality is preserved where
intervention is consistent with control of the process and does not intrude into content or
substantive outcome. In this way, the rhetoric of process as distinct from content or
outcome, like the rhetoric of neutrality, 'obfuscates the practice of neutrality in
mediation'.[67] Arguably the same limiting logic would apply to a construction of party
self-determination as infringed where mediators intrude into the content of a dispute.
Grounding of this principle in the process/content distinction is evident in cl 2(5) of the
new Practice Standards which states that: 'The principle of self determination requires
that mediation processes be non-directive as to content.'[68]

Alternative models of mediation, including narrative[69] and transformative models,[70]
eschew the distinction between process and content, acknowledging instead the impact
of the mediator on content and outcome, and choosing to ground their approaches in a
social constructionist ontology. Cobb describes this shift as 'second-generation'
mediation practice and argues that: 'once we adopt an interactionist or social
constructionist perspective, the mandate to separate content from process dissolves, as
mediators recognize the inevitability of their impact on the content of the dispute.'[71]
While the *fact* of mediator impact on content and outcome is acknowledged in newer
models of mediation, questions still remain as to the legitimate *scope* of that impact.
Questions as to the legitimate scope of the impact of the mediator raise issues as to the
proper exercise of mediator power and/or authority (legitimised power).

Participants in the study made explicit reference to power in relation to the issue of
balancing power between the parties. Participants' recognition of their own power was
notably more implicit than explicit. Implicitly they referenced their own power in
relation to both parties by acknowledging their capacity to influence the course of the

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[66]   D J Della Noce, R A Baruch Bush and J P Folger, 'Clarifying the Theoretical Underpinnings of
        Mediation: Implications for Practice and Policy' (2002) 3 *Pepperdine Dispute Resolution Journal* 39,
        49.
[67]   Cobb and Rifkin, 'Practice and Paradox', above n 4, 39.
[68]   Australian Mediation Association, 'Practice Standards', above n 2.
[69]   J Winslade and G Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey-Bass,
        2000)
[70]   Della Noce, Baruch Bush and Folger, above n 66.
[71]   S Cobb, 'Dialogue and the Practice of Law and Spiritual Values: Creating Scared Space: Toward a
        Second-Generation Dispute Resolution Practice' (2001) 28 *Fordham Urban Law Journal* 1017,
        1029.

mediation, to intrude upon content, to take ownership of the dispute and to facilitate the parties' self-determination, whether these interventions were viewed positively or negatively.

Some discussion of mediator power in the literature has mirrored that of neutrality in referencing the process versus content and outcome distinction. Mediators are said to 'assert power in controlling the process but deny power in relation to the content' and to be 'neutral as to the outcome-the product of the content.'[72] The relative power of the parties has been examined with the process/content distinction in mind, with one suggestion that mediators' practice in 'process(ing) behavior, by its timing and content, can be a deliberate effort to shape the agreement by changing the parties' relative power.'[73] Questions as to the limits of a mediator's authority posed by party self-determination have been raised,[74] as have questions of a fair use of mediator power given its potentially limiting impact on party autonomy.[75]

Analyses of power in mediation have tended to rest upon an idea of power as something measurable and inherently coercive. Such a view of power is consistent with structuralist perspectives of social processes.[76] According to a structuralist approach, people are said to have more or less power, power can be exercised over people and power adheres in social structures producing inequalities of power.[77] These structuralist analyses, whilst instructive about sources of mediator power, have tended to reinforce limiting features of the distinction between process and content or outcome. Nonetheless, a focus on understanding mediator power has offered a useful and important avenue in reframing the neutrality debate.

The possibility of neutrality in an absolute sense is consistent with structuralist but not postmodern approaches to power.[78] Alternative visions of neutrality may be possible by taking into account alternative conceptions of power based on postmodern perspectives. Postmodernism sees power not 'as a tool wielded by one person against another, but as a more complex, shifting and nuanced concept…Power, like neutrality, is contextual and contingent…Power varies with the context in which it operates and with changes in that context.'[79] Power, according to this approach, is 'fluid, elusive and changing'.[80] It can be employed as a force to create positive or negative results; it can be properly used or abused. Power is localised and may exhibit points of intensity where it 'congeals'[81] to manifest strongly and may give rise to points of resistance.[82] How might these ideas of power inform our understanding of neutrality?

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[72] Haynes, above n 26, 23.
[73] Bernard et al, above n 52, 62.
[74] Fisher, above n 52.
[75] J Boskey, 'The Proper Role of the Mediator: Rational Assessment, Not Pressure' (1994) *Negotiation Journal* 367.
[76] Astor, 'Some Contemporary Theories of Power in Mediation', above n 1; Astor and Chinkin, above n 2; B Mayer, 'The Dynamics of Power in Mediation' (1987) 16 *Mediation Quarterly* 75.
[77] Astor and Chinkin, above n 2.
[78] D Bagshaw, 'The Three M's – Mediation, Postmodernism, and the New Millenium' (2001) 18(3) *Mediation Quarterly* 205.
[79] Astor and Chinkin, above n 2, 148-9.
[80] Ibid 148.
[81] A term coined by Astor, 'Some Contemporary Theories of Power in Mediation', above n 1.
[82] Ibid.

D   *Neutrality Re-Framed*

The results of this study suggest that power can be constructed as a concept that has meaning in relation to concepts of mediator neutrality and party self-determination and, at the same time, as an idea that gives those latter concepts meaning in relation to each other. A discourse[83] for beginning to map the interrelationship of these *three* concepts is offered.

Drawing upon a postmodern construction of power, mediation can be constructed as an interaction between players - mediators and parties.[84] Within the frame of the mediation, players exist in relation to one another. Their characters are products of contexts outside mediation from which they derive aspects of their identities and the play of the mediation itself, with the nature of the dispute signaling the central plot. Within the setting of the mediation, the mediator/s exercise power in relation to the parties, individually and collectively. Each party exercises power in relation to the other party and the mediator/s. The sources of that power may be analytically quite different. The mediator/s will access and exhibit forms of legitimised power derived from their standing as mediators and their location within wider organisational and societal structures. The parties may access and exhibit similar forms or differing forms of power. Power will be held by the mediators' in relation to the parties. Power may be held by one party in relation to the other or one party in relation to the mediator/s. In a postmodern sense however power will not locate in any fixed sense, but rather exist in motion and consist in aspects of the players' capacities to interact. In the course of a mediation session power may be said to harden, or crystallise, around one player in relation to another and later subside, melting into the play of interweaving characters. Neutrality can be constructed to depict limits to the mediators' exercise of power. Self-determination can be constructed to depict optimal exercise of the parties' exercise of power, individually and collectively. The limits imposed by neutrality and party self-determination will be contextual and situated in character. Importantly the limits of mediator power will incorporate self-imposed limits consistent with ideas about the legitimate scope of mediator influence given a commitment to party self-determinism.

The advantages of this discourse are that:

1. It grounds the concepts of neutrality and party self-determination in the relationships between players – the mediators and parties.
2. It offers an idea of power as connecting the interplay of neutrality and self-determination in the sub-text of the mediation.
3. It adopts a post-modern idea of power as fluid and changing and enables ideas of neutrality and party self-determination to be constructed as fluid and changing.

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[83]   'Discourse' is used here in a Foucauldian sense of 'not merely bodies of ideas, ideologies, or other symbolic formulations, but (are) also working attitudes, modes of address, terms of reference, and courses of action suffused into social practices' per J Gubrium and J Holstein, 'Analyzing Interpretive Practice' in N Denzin and Y Lincoln (eds), *Strategies of Qualitative Inquiry* (2003), 214, 224.

[84]   A postmodern construction of power, following Foucault (see Best and Kellner, above n 50; Astor, 'Some Contemporary Theories of Power in Mediation', above n 1; and Bagshaw, 'Language, Power and Mediation' above n 6,), is combined in this discourse with a narrative framing of the interaction between players in a mediation session. For a consideration of a narrative or story telling approach to mediation see Winslade and Monk, above n 69.

4. It sees neutrality and party self-determination not as absolutes but as open concepts, the character of which will be determined by the intersection of a number of contexts in any given mediation session.
5. It offers a generic conceptualisation that identifies neutrality and party self-determination as core concepts for practice.
6. It offers a generic conceptualisation that enables characteristics of neutrality and party self-determination to be developed according to key indicators common across differing models for practice; and to vary across key indicators of differing models.

An important idea in this discourse is that a neutral mediator will be one who exercises power within acceptable, legitimised boundaries determined by intersecting contexts of mediation values and philosophy, standards of professional conduct, differing models of mediation, differing statutory purposes, differing organisational goals and cultures and the situated values and understandings of a given mediator. Furthermore, a proper exercise of mediator power will be congruent with optimising the parties' self-determination, while an improper exercise of power will detract from or limit that potential. Existing ideas about neutrality, as impartiality and as even-handedness, could be incorporated within the scope of the proper exercise of mediator power, which would however be more broadly constructed. For example, the impact of a mediator's bias towards a particular outcome could be reframed as one instance of an improper exercise of power given that it would be inconsistent with the parties' self-determination. At the same time, the impact of a mediator's personal values could represent a proper exercise of mediator power where those values are consistent with party self-determination; for example a value placed on diversity. Even-handedness, or treating the parties equally, would represent, as a general rule, a proper exercise of mediator power as an approach that facilitates the self-determination of each party. At the same time, where the behaviour of one party was assessed as impeding the self-determination of the other party, treating the parties unequally in order to remove that impediment would also represent a proper exercise of mediator power. Neutrality in these instances, and as represented by a proper exercise of power, avoids the absolutism of previous conceptions. Reframing the limitations of existing ideas about neutrality, in terms of issues of power, enables a more flexible and open examination of appropriate practice responses.

Revised practice responses need not be limited by the process/content or outcome distinction. That distinction could remain a useful analytical tool and a significant consideration in developing practice strategies, but not the sole consideration. For example, a proper exercise of mediator power in a family mediation context could legitimately intrude into areas of substantive content where the best interests of the child are at issue.[85] More broadly, mediator power could be constructed as properly exercised when intruding upon content where mediation occurs within a clear regulatory context. Providing information about legislative standards and assisting in generating options consistent with those standards need not represent a lack of neutrality, if neutrality is not constructed as an absolutist concept, but rather represents a proper exercise of mediator power. Moreover, a proper exercise of mediator power in a regulatory context would be consistent with limits imposed on party self-determination (on the power exercised by parties) according to recognised community standards. Particular practice models,

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[85]   See Greatbach and Dingwell, above n 4.

contexts and organisational cultures may also identify the provision of expert information and advice from the mediator as consistent with a proper exercise of mediator power and the self-determination of parties.[86]

Two aspects of a construction of neutrality in relation to party self-determination and mediated by a postmodern idea of power require further investigation, namely:

1. Detail of the acceptable boundaries of mediator intervention, in other words, the proper limits of a mediator's exercise of power (incorporating but moving beyond the process and content or outcome distinction); as congruent with
2. Ways of ensuring and optimising parties' self-determination (including existing and future strategies).

Investigation of these aspects would aim to articulate those constructions common across models and contexts and would enable varied constructions across differing models and contexts.

V   CONCLUSION

The mediators in this study were clearly attempting to make sense of the concept of neutrality in their practice. Despite expressing measures of uncertainty and dissatisfaction with the translation of existing conceptions of neutrality into practice, participants evidenced a clear adoption of neutrality as a working principle. Despite an appreciation of the dilemmas enunciated in the literature and actually encountered in practice, participants evidenced a creative capacity to construct meaningful connections between well established ideas associated with neutrality and another core concept, that of party self-determination. The results of this study point to the potential to retain neutrality as a central principle for practice, with the challenge of reconstructing its meaning away from a pure or absolute sense and toward a construction which sees its meaning in relation to that of party self-determination mediated by a post-modern conception of power. Steps toward that reconstruction have been advanced here.

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[86]   This argument is consistent with the focus on party self determination evident in the new National Mediator Accreditation System, but extends that system's conceptual basis to include a reconstruction of neutrality, see Australian Mediation Association, 'Practice Standards', above n 2, cl 2(2) which states: 'Some mediation processes may involve participants seeking expert information from a mediator which will not infringe upon participant self determination.' See also cl 2(7) of the Practice Standards and cl 2(4) Australian Mediation Association, 'Approval Standards', above n 2, in which reference is made to processes where a mediator may be called upon, to give expert information and advice in order to enhance the decision-making of parties.