Mediator Neutrality: A Model for Understanding Practice

Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

Faculty of Arts and Social Sciences
University of the Sunshine Coast

Susan Douglas
BA BSW (Hons) LLB Grad Cert Ed
Barrister and Solicitor (Vic)

August 2009
Abstract

Mediator neutrality continues to be a highly debated and contested concept for mediation practice. This thesis proposes a model for the practice of neutrality in mediation that is drawn from an empirical study of mediators’ understanding of the concept, and a review and reconstruction of scholarly definitions and descriptions.

The empirical component of the study consists of in depth interviews with mediators from two community based mediation services. The main findings of the fieldwork are firstly, that mediators do adopt neutrality as a core principle of practice; secondly, that mediators make sense of neutrality by understanding it in relation to party self determination; and thirdly, that mediators extend the meaning of neutrality, as commonly understood, by creatively employing a range of legal and therapeutic and or community themes.

The model advanced considers these empirical findings against a backdrop of contested meaning attributed to neutrality, and against critiques of the ability of mediators to deliver any promise of neutrality in practice. From a review of current thinking in mediation, the model rejects the process and content or outcome distinction as a core principle of theory and practice, replacing it with a focus on the relationship between mediator and parties. It reconstructs the concept of neutrality in relation to that of party self determination mediated by a post-modern conception of power (drawing on the work of Foucault). It then draws on social theory and legal principle to articulate a reconstruction of neutrality as depicting an “other focus” in
practice, consistent with a relationship of trust as between mediator and parties. From extensive review and analysis neutrality is reconstructed as depicting the boundaries of mediators’ acceptable exercise of power.
Declaration of originality

The work submitted in this thesis is original, except as acknowledged in the text. The material herein has not been submitted, either in whole or in part, for a degree at this or any other university.

Susan Douglas
August 2009
Acknowledgements

My thesis is about the relationship of trust between mediator and parties and the essential “other focus” of the mediator’s role. I have relied upon a similar relationship with my supervisors, Dr Lucinda Aberdeen and Dr Phillip Ablett. As well as providing the necessary scholarly direction and support, Lucinda and Phillip have been untiringly generous in their encouragement and affirmation of my efforts. I cannot thank them enough.

I extend my thanks to Prof. Hilary Astor, whose interest in my project was a valuable source of encouragement and whose scholarly endeavours provide an important context for my own.

The qualitative data for this thesis was gathered from interviews with mediators. I thank those participants for their generous co-operation in making this project possible.

Finally, I want to thank my sister, Kathy Douglas, whose unfailing friendship and help have been a welcome and reassuring source of support.
# Table of Contents

Abstract

Declaration of Originality

Acknowledgements

Introduction

## Chapter 1: The Meaning and Significance of Neutrality in Mediation

1.0 Introduction

1.1 Neutrality as a defining and legitimising feature of mediation

   1.1.1 Neutrality and definitions of mediation
   
   1.1.2 The legitimising function of neutrality for mediation

1.2 An absence of neutrality in practice? Empirical research

1.3 The meaning of neutrality: problems of definition

1.4 The meaning and the dilemmas of neutrality in practice

   1.4.1 Neutrality as impartiality

      1.4.1.1 A narrow definition of impartiality: the conflict rule
      
      1.4.1.2 Impartiality in a wide sense

   1.4.2 Neutrality as even-handedness

   1.4.3 Neutrality and the process and content or outcome distinction

1.5 On meaning and what neutrality is not

   1.5.1 A neutral mediator is not directive
   
   1.5.2 A neutral mediator does not give advice
   
   1.5.3 A neutral mediator does not exercise power and influence

1.6 Summary and implications


Chapter 2: Responses to the Dilemmas of Neutrality in Mediation

2.0 Introduction
2.1 Impartiality and the impact of the mediator
2.2 Even-handedness and questions of fairness
2.3 Theories of neutrality
2.4 Placing neutrality in context: models of mediation
   2.4.1 A range of mediation models
   2.4.2 Problem-solving models
   2.4.3 The transformative model
   2.4.4 Narrative models
      2.4.4.1 The narrative model
      2.4.4.2 The “story telling” model
2.5 Summary and implications

Chapter 3: Issues of Methodology. Mediator Neutrality and Researcher Objectivity

3.0 Introduction
3.1 Mediator neutrality, researcher objectivity and reflexivity
   3.1.1 Researcher objectivity
   3.1.2 Subjectivity, alternative paradigms and reflexivity
      3.1.2.1 Interpretive paradigms
      3.1.2.2 Postmodernism
      3.1.2.3 Critical inquiry
   3.1.3 Limits of reflexivity
3.2 A choice of (alternative) paradigm: a reflexive account
3.3 Theory building
   3.3.1 Explanation or description: How, what or why?
   3.3.2 Explanation or understanding?
   3.3.3 Theory as interpretation
3.4 Summary and implications
### Chapter 4: Research Design

153

#### 4.0 Introduction

153

- **4.0.1 Preliminary observations**

154

#### 4.1 Justification for a qualitative approach

155

- **4.1.1 Seeing from the point of view of those studied**

156
- **4.1.2 Putting meaning in context**

157
- **4.1.3 Use of a case study design**

159
- **4.1.4 Generating theory from data**

161

#### 4.2 A case study design and interview strategy

163

- **4.2.1 Selection of data**
  - **4.2.1.1 Instrumental and collective case studies**
  - **4.2.1.2 The case studies**
  - **4.2.1.3 Theoretical sampling and saturation**

163

- **4.2.2 Collection of data (unstructured interviews)**
  - **4.2.2.1 Crafting instruments and protocols**
  - **4.2.2.2 Ethical considerations**
  - **4.2.2.3 Abandoned design options**
  - **4.2.2.4 Entering the field**

173

#### 4.3 A grounded theory analysis

181

- **4.3.1 Features of a grounded theory approach**

182
- **4.3.2 Core components of analysis**
  - **4.3.2.1 Open coding**
  - **4.3.2.2 Selective coding**

185

187

#### 4.4 Summary

188

### Chapter 5: Results

191

#### 5.0 Introduction

191

#### 5.1 Categories of meaning elicited

191

- **5.1.1 Open coding**

192
- **5.1.2 Selective coding**

194

  - **5.1.2.1 Selective coding by number of source**

196
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1.2.2 Selective coding by number of references</td>
<td>197</td>
</tr>
<tr>
<td>5.2 Themes in the construction of meaningful practice</td>
<td>203</td>
</tr>
<tr>
<td>5.2.1 Neutrality: possibilities and definitions</td>
<td>204</td>
</tr>
<tr>
<td>5.2.2 Neutrality as impartiality</td>
<td>209</td>
</tr>
<tr>
<td>5.2.3 Neutrality as even-handedness</td>
<td>221</td>
</tr>
<tr>
<td>5.2.4 The distinction between process and content or outcome</td>
<td>232</td>
</tr>
<tr>
<td>5.2.5 Client focus and ownership: party self-determination</td>
<td>237</td>
</tr>
<tr>
<td>5.2.6 The role of the mediator</td>
<td>240</td>
</tr>
<tr>
<td>5.2.7 The case studies compared</td>
<td>245</td>
</tr>
<tr>
<td>5.3 Summary and implications</td>
<td>248</td>
</tr>
<tr>
<td>Chapter 6: Towards a Reconstructed Neutrality</td>
<td>256</td>
</tr>
<tr>
<td>6.0 Introduction</td>
<td>255</td>
</tr>
<tr>
<td>6.1 Reconstructing the concept of neutrality</td>
<td>256</td>
</tr>
<tr>
<td>6.1.1 Neutrality and self-determination</td>
<td>257</td>
</tr>
<tr>
<td>6.1.2 Grounding neutrality and self-determination in “relationship”</td>
<td>260</td>
</tr>
<tr>
<td>6.1.3 From process and content or outcome to mediator power</td>
<td>266</td>
</tr>
<tr>
<td>6.1.4 Mediator neutrality, party self-determination and a postmodern idea of power</td>
<td>269</td>
</tr>
<tr>
<td>6.2 A model for practicing neutrality: neutrality as an “other focus”</td>
<td>272</td>
</tr>
<tr>
<td>6.2.1 A systems analysis</td>
<td>273</td>
</tr>
<tr>
<td>6.2.2 Neutrality as impartiality: a reconstruction</td>
<td>277</td>
</tr>
<tr>
<td>6.2.2.1 Impartiality and the bias rule</td>
<td>278</td>
</tr>
<tr>
<td>6.2.2.2 Impartiality and fiduciary relationships</td>
<td>281</td>
</tr>
<tr>
<td>6.2.2.3 Impartiality and therapeutic relationships</td>
<td>286</td>
</tr>
<tr>
<td>6.2.2.4 Neutrality and a relationship of trust</td>
<td>294</td>
</tr>
<tr>
<td>6.2.3 Neutrality as even-handedness: a reconstruction</td>
<td>298</td>
</tr>
<tr>
<td>6.2.3.1 Even-handedness and fairness</td>
<td>298</td>
</tr>
<tr>
<td>6.2.3.2 Even-handedness and professional intervention</td>
<td>303</td>
</tr>
</tbody>
</table>
INTRODUCTION

Neutrality has been identified as a core, foundational concept for mediation practice. Its importance is reflected in both definitions of mediation and accounts of practice. Generally accepted definitions describe mediation as a structured process of dispute resolution facilitated by a neutral third party. Mediators’ accounts of their practice emphasise the neutral stance of their intervention as third parties. Over time, however, empirical studies and critiques of practice 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. These range from calls simply to abandon neutrality as an integral component of mediation practice; to retain it but reframe its meaning and significance; or to replace it with alternative legitimating principles. Despite the continuing debate about the meaning and relevance of neutrality in mediation, no convincing theoretical approach to it has yet been advanced and accepted by the community of mediation practitioners either in Australia or overseas. The aim of this study is to develop a theoretical model for the practice of mediation. The model developed draws upon an empirical study of mediators’ perceptions of the meaning of neutrality in their practice, and an interrogation of the results of that study from overlapping legal and social theory contexts.

A central theme in the debate about neutrality is the essentially binary construction of the question “are mediators neutral or not?” Such a framing of the question permits only two possibilities – either mediators are neutral, or they are not. Neutrality then
becomes an absolute truth, experienced as such, or simply not experienced. Such binary or dualistic thinking permeates our use of language and is the dominant frame of reference for our understanding of many social processes. Understanding based on dualistic conceptions is challenged by postmodern perspectives. Dualism is said to limit our understanding because it “fails to recognize that reality consists of intermediate degrees, flexible borders, and ever-changing vistas” (Del Collins, 2005, p. 264). From a postmodern perspective, use of a binary logic risks limiting creative understanding of neutrality in mediation. The results and analysis presented in this dissertation present a challenge to that binary logic. As such, the thesis represents a postmodern critique of the practice of neutrality in mediation. Specifically the thesis relies upon the construction of power advanced by Foucault.¹

The empirical component of the study was designed to investigate the possibility of alternative constructions of neutrality, by asking mediators directly about their understanding of the concept and how it informs their practice. The question posed for this empirical component was: How do mediators make sense of neutrality in practice?

The first two chapters review the current literature on neutrality in mediation. In Chapter One the importance of neutrality for practice is examined in a review of definitions of mediation; the role of neutrality in legitimising mediation as a recognised method of dispute resolution; and the meanings ascribed to neutrality in the mediation literature. The chapter identifies the variety of definitions applied to neutrality, which have resulted in inconsistency and ambiguity. Given the lack of

¹ Further references to a postmodern construction of power refer to that advanced by Foucault.
clarity about meaning in the literature, I identify and explore three themes in the meaning of neutrality – as impartiality; as even-handedness; and as related to the distinction between process and content or outcome in mediation.

Each of these three themes is associated with particular practice dilemmas in mediation. A dilemma associated with neutrality as impartiality is the impact of the personal values, preferences and preconceptions of the mediator. A dilemma associated with even-handedness is that treating the parties equally may lead to unequal, and therefore unfair, results. A dilemma associated with the idea that mediators are neutral as to the content and outcome of a dispute, though in control of the process of mediation, is the recognition that mediators do contribute to the content of a dispute and exercise considerable power in directing the outcomes of mediation.

Each of these dilemmas is examined in turn in Chapter One. In addition to exploring the meanings ascribed to neutrality I also examine the negative attributes of neutrality, in other words, what neutrality is claimed not to be. According to the literature, a neutral mediator is not directive, does not give advice and does not exercise power or influence in mediation.

From an investigation of the meanings associated with neutrality, the discussion moves, in Chapter Two, to a review of responses found in the literature to the dilemmas of neutrality. These responses have overlapped with the development of newer models in mediation. Hence, in the final section of this chapter, the discussion turns to the place of neutrality in different models of mediation, from problem-solving to narrative and transformative models.
Discussion in Chapters One and Two includes a review of empirical research that has investigated the possibility of neutrality in mediation. Of those studies examined, two overseas investigations are of particular note – a study by Cobb and Rifkin (1991a; 1991b) in the United States and one by Mulcahy (2001) in the United Kingdom. These studies are noteworthy because they address the issue of neutrality directly through empirical examinations of mediators’ views about it. My field study adopts similar features of design in order to provide a comparable study in the Australian context. Those similarities are include the use of in-depth, face-to-face interviews with mediators to collect the data and drawing on a sample of mediators from community-based mediation projects.

In Chapter Three, recognition is given to parallel questions of mediator neutrality and researcher objectivity. Here, the metaphysical assumptions that guided me in the conduct of the field study are introduced, analysed and justified. Those assumptions are given in a reflexive account and drawn from a discussion of the role of reflexivity in answering questions of researcher objectivity. The perspective I adopted is social constructonism with recognition of postmodern sensibilities. The specific assumptions that underpin the project are described. From an articulation of metaphysical assumptions, discussion turns to the theory-building aim of the project, with an analysis of and justification for a hermeneutic (interpretive) approach to theory development.

Chapter Four describes and justifies the research design of the field study. Here, I argue for a qualitative rather than a quantitative approach. The elements of design – data selection, collection and data analysis – are placed within a qualitative approach,
which is justified according to its capacity to meet the aims of seeing from the point
of view of those studied; placing meaning in context; use of a case study design; and
generating theory from the data. Aspects of Grounded Theory as advanced by Glaser
and Strauss (1967) are incorporated into the research design. Elements of the design
are faithful to that theoretical approach, namely, an iterative approach which does not
clearly separate data collection from its analysis and the theory building aim of the
fieldwork. Grounded Theory is discussed as an a strategy of analysis in order to
profile additional and or specific elements in the selection and collection of data.

A case study design (selection of data) and in-depth interview strategy (collection of
data) were chosen. In-depth interviews were chosen in order to capture the lived
experience of mediators and to elicit the nuances of meaning that participants
associate with neutrality. The sample consists of two case studies. One comprises
interviews with ten mediators drawn from the Dispute Resolution Centre, Department
of Justice, Brisbane, a government-funded and administered community mediation
service. The second case study comprises interviews with four mediators from the
Family Mediation Service, Lifeline Community Care, Maroochydore, Queensland, a
federally funded not-for-profit organisation.

The results of the field study are reported in Chapter Five. The results contribute to
theory building 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,
but rather 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 is
recognised, and the possibility of multiple perspectives, consistent with a postmodern
sensibility, is acknowledged. In order to think beyond existing conceptions of neutrality, the results of the study were examined in the light of broader debate about mediation, particularly in relation to questions of mediator power. The results are discussed in this wider context in Chapter Six. 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 to a wider variety of models.

The results demonstrate that participants make sense of neutrality in their practice by extending existing ideas about neutrality found in the literature, and by relating those ideas to other core features of practice, particularly the principle of party self-determination. These extended meanings are used to reconstruct neutrality as a concept having meaning in relation to party self-determination mediated by a postmodern conception of power. From this reconstructed concept of neutrality, a model for the practice of mediation is developed. The model is premised on a conceptualisation of mediation as grounded in the relationship between mediator and parties, rather than in the process and content or outcome distinction. This move away from the process and content or outcome distinction is consistent with some existing critiques of both mediation and of neutrality in mediation, and reframing the mediation encounter in terms of a relationship of trust between mediator and parties is not entirely new. However, proposing that relationship as a core theoretical construct which replaces the distinction between process and content or outcome is new, and opens a new frontier for consideration of the often cited dilemmas of neutrality.
The model advanced uses the legal and therapeutic themes found in participants’ responses to explore features of legal and therapeutic professional relationships, which can be translated to the context of mediation practice. The model is developed by combining selected characteristics of these relationships and placing them in wider socio-political contexts, in order to connect micro and macro implications for practice. By reconstructing neutrality from a postmodern perspective and considering its place within overlapping contexts of mediation encounters per se, institutional developments and wider social change, the model makes a significant contribution to possible approaches to the dilemmas associated with the practice of neutrality in mediation.

- Consistent with a postmodern sensibility, the model developed is provisional. It is advanced with the expectation of critique and refinement. Its utility remains to be tested by a community of scholars and practitioners. Its particular advantages lie in offering a conception of neutrality drawn from and consistent with practice;
- A model that retains neutrality as a core principle of practice, but which also puts primary focus on the principle of party self-determination;
- A model that rests on a postmodern rather than modernist or structural perspectives, and therefore allows for a contextual and situated understanding of neutrality; and
- A model that is generic in construction and therefore can be applied to differing models of practice and content-focussed contexts.
CHAPTER ONE
THE MEANING AND SIGNIFICANCE OF NEUTRALITY IN MEDIATION

1.0 INTRODUCTION

The purpose of this and the next chapter is to review the literature that examines the concept of mediator neutrality. The first chapter explores the significance and meaning of neutrality for mediation, and identifies the problems of translating neutrality into practice. The next chapter analyses responses to those problems. The examination of the literature leads to identification of the research question posed for the empirical component of the project.

In this chapter, I first examine neutrality as a foundational feature of mediation and review empirical research that addresses the question of mediator neutrality. I then discuss the difficulties of reaching agreement on the meaning of neutrality. I consider the literature according to three identifiable themes in the meaning ascribed to neutrality: neutrality as impartiality, neutrality as even-handedness, and neutrality as closely associated with the distinction between process, and content or outcome of a dispute. Dilemmas in translating these meanings of neutrality into practice are identified and explored, and a further section on the meaning of neutrality examines what neutrality “is not”, in order to extend our understanding of what it “is”.
1.1 NEUTRALITY AS A DEFINING AND LEGITIMISING FEATURE OF MEDIATION

Neutrality is identified as integral to conceptions of mediation (Gibson, Thompson & Bazerman, 1996, p. 69; Mulcahy, 2001, p. 508) and the role of the mediator (Taylor, 1997, p. 215), and as fundamental to practice (Cohen, Dattner & Luxenburg, 1999, p. 347). It is described as a critical component (Gibson, Thompson & Bazerman, 1996, p. 71), a key concept, (Field, 2000, p. 16), a prime or central tenet (Freer, 1992, p. 173; Heisterkamp, 2006, p. 301); and as at “the heart of mediation theory and practice” (Polak, 2009, p. 89). Neutrality is said to be so crucial to the mediator’s role that mediators are commonly referred to as “neutrals” (Astor, 2007, p. 222; Gibson Thompson & Bazerman, 1996, p. 69; Mulcahy, 2001, p. 509). According to Mulcahy (2001, p. 509), for many practitioners, “the notion is so important that without the neutrality of the mediator the process can not even be called mediation.”

1.1.1 Neutrality and definitions of mediation

The significance of neutrality as a core, foundational element of practice is evident in its inclusion in definitions of mediation. Although more recent descriptions of mediation omit reference to neutrality, these omissions reflect the controversial nature of neutrality in the theory and practice of mediation, rather than its abandonment.

Accepted definitions describe mediation as a structured process of dispute resolution facilitated by a neutral third party. Two early, commonly adopted definitions appear in the early works of Folberg and Taylor, and Moore respectively. According to Folberg and Taylor (1984, p. 7), mediation
can be defined as the process by which the participants, together with the assistance of a *neutral person or persons*, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs (emphasis added).

This definition is commonly referred to in academic accounts of mediation practice (see Astor & Chinkin, 2002, p. 86; Boulle, 2005, p. 6; Field, 2000, p. 16; Gorrie, 1995, p. 30).

An early definition offered by Moore (1986, p. 6) identifies mediation as

the intervention into a dispute or negotiation by an acceptable, impartial, and *neutral* third party who has no authoritative decision making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute (emphasis added).

The National Alternative Dispute Resolution Advisory Council (hereafter NADRAC), the Australian Commonwealth government’s advisory council on alternative dispute resolution, developed its own definition in 1997, as follows:

Mediation is a process by which the parties to a dispute, with the assistance of a *neutral third party (the mediator)* identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted (NADRAC, 1997a², p. 5: emphasis added, as cited in Boulle, 2005, pp. 9-10).

In these examples, identification of the mediator as a *neutral* facilitator, in charge of a process designed to assist parties to reach resolution of their dispute, is a central component. The NADRAC definition, although advanced with the limited intention of

² No longer available on the NADRAC website
clarifying the Council’s own use of the term in the context of a developing practice (Astor and Chinkin, 2002, p. 135), has become widely accepted in the mediation industry (Boulle, 2005, p. 9). The substance of the NADRAC definition, including its reference to neutrality, is adopted by Charlton (2000, p. 5) in her mediation practice text. In a more recent text co-written by Charlton and Dewdney mediation is not defined, but the authors note “that the mediator is, and must appear to be neutral” (2004, p. 202), and that neutrality “is one of the central philosophical concepts of mediation. It underpins the practice of mediation and sets it apart from most other forms of dispute resolution” (2004, p. 202, pp. 292-3). By contrast, in the latest edition of Moore’s (2003, p. 15) text, the words “impartial and neutral” are omitted from the definition of mediation and substituted with the phrase an “acceptable third party”. Similarly, reference to neutrality has been omitted from the description of mediation found in NADRAC’s (2003, p. 9) most recent publication on dispute resolution terms, which supersedes its 1997 terminology paper. This move away from including neutrality as a definitional concept reflects uncertainty as to its meaning and application.

Views differ as to the necessity of defining mediation and therefore of prescribing any of its core features, including that of neutrality. Astor and Chinkin (2002, p. 135) argue that a rigid, prescriptive definition of mediation is undesirable given the continuing, rapid evolution of practice. At the same time, they argue that debate about definitions is important since these emphasise what the definer believes is most significant about the process. Tillett (1991a, p. 2) notes that there are many definitions of mediation and that many of these are interchangeable. He argues that existing definitions are imprecise and that without a definition of what mediation is, the
requirements for practice can not be identified, nor essential competencies described (Tillett, 2004, pp. 186-7).

Identification of requisite mediator competencies is the central task of the Australian National Mediator Accreditation System. Established in September 2007, this national system has been effective since 1 January 2008. It institutes a system of voluntary mediator accreditation, which delineates standards of practice and accreditation requirements. It is based upon Australian National Mediator Standards, comprising Practice and Approval Standards (hereafter referred to as the National Standards). According to these National Standards, mediation is described (rather than defined) as a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision (National Mediation Approval Standards, 2007, p. 4; National Mediation Practice Standards, 2007, p. 5).

Notably, no reference is made to the mediator as a neutral third party. On the face of it, this omission might suggest a rejection of neutrality as integral to the mediator’s role. However, in my view the omission is reflective of wider debate about neutrality in mediation and the absence of a convincing theoretical framework for understanding neutrality in practice. Although neutrality does not appear in the introductory descriptions of mediation in the National Standards, it is clearly referred to as a standard of practice. As a measure of competence, clause 7(c)(iv) of the Practice Standards requires that mediators have an ethical understanding of “neutrality and impartiality”. Hence while uncertainty about the role and importance of neutrality is reflected in changed descriptions of mediation, neutrality has been retained as an
important, if not essentially defining, feature of practice. Its place in mediation needs to be considered against a backdrop of a rapidly developing practice.

Prior to enunciation of the National Standards and since the publication of the NADRAC definition in 1997, the contexts in which mediation is practiced have expanded rapidly. In particular, the mediation industry has become increasingly institutionalised as a court-connected process and been increasingly used as a mandatory component of case management systems (Astor & Chinkin, 2002, pp. 237-6; Boulle, 2005, pp. 323-5, pp. 374-7; French, 2007, pp. 213-21). Institutionalisation has seen the introduction of varying formal definitions of mediation in Australian statutes and rules of court (Boulle, 2005, p. 7-10). Considerable variation is summarised by Boulle (1996, p. 6):

Some rely on the Folberg and Taylor definition referred to above. Some operate at a higher level of generality, and some are very specific and unequivocal on debatable aspects of the process, for example the degree of intervention permitted the mediator. Some refer to a framework for mediation and allow for an official to give directions as to how it will operate, and others reflect the priorities of their promoters in relation to the speedy management of cases within the litigation process.

The description of mediation contained in the National Standards is framed to encompass a diverse range of practices (see National Approval Standards, cl. 1(4)). In the further context of ongoing theoretical development and critical review, the absence of neutrality in the NADRAC description avoids dissonance with emergent and emerging discourses. However, despite this authoritative description definitions advanced by scholars in the field contain repeated references to neutrality as a core
feature. The following examples illustrate the view that neutrality remains an integral feature of the process.

According to Bush and Folger (2005, p. 8),

across the mediation field, mediation is generally understood as an informal process in which a neutral third party with no power to impose a solution helps the disputing parties try to reach a mutually acceptable settlement (emphasis added).

According to Astor and Chinkin (2002, p. 135),

the term mediation is usually invoked to describe a structured process involving a third party who is impartial as between the parties and who strives to remain as neutral as possible...(emphasis added)

In the context of industrial disputes, Macken and Gregory (1995, pp. 38-9) describe mediation as

essentially the conducting of negotiations in the presence of and under the control of a neutral third party. The mediator’s role includes suggesting possible compromises, assisting the parties to identify issues between them, options for resolution, and, if called upon to do so by the parties, providing an opinion as to the likely outcome of the dispute if it were to proceed to a formal hearing (emphasis added).

1.1.2 The legitimising function of neutrality for mediation

The importance of neutrality for mediation is also demonstrated by its function as a legitimising feature of mediation. Neutrality establishes mediation as a recognised and accepted form of dispute resolution within western democratic processes (Astor, 2000, p. 73; Astor, 2007, pp. 221-2; Astor and Chinkin 2002, p. 146; Boulle, 2005, p. 31; Field, 2000, p. 16; Mulcahy, 2001, p. 508). Astor (2000a, p. 74) describes
neutrality as the theoretical cornerstone for the legitimacy of mediation. Boulle (2005, p. 31) describes neutrality in mediation as mirroring the ideology of judicial neutrality. The fact that mediators subscribe to neutrality as a legitimising feature of mediation is demonstrated in a study of mediator tactics conducted by Kolb (1985, pp. 23-5), who found that, in the absence of formal authority, mediators foster impressions of neutrality as a source of legitimacy.

Astor (2000a, pp. 73-4) argues that neutrality is more crucial to mediation than adjudication given that the former occurs in private, agreements reached there are non-reviewable and those agreements may disregard any applicable law. According to Astor (2007, p. 224), mediators control the process of mediation, but their processual control is also not constrained by legal rules of procedure or evidence. Mediators can not depend on law for the legitimacy of mediation. They depend instead on two characteristics of mediation: mediator neutrality and consensual decision-making by the parties (emphasis added).

According to Mulcahy (2001, p. 508), since mediation is an alternative to adjudication, neutrality has a comparatively less important role to play in legitimising the process. She argues nonetheless that there remains an expectation that mediators, like judges, will distance themselves from the parties’ conflicting views as to a “fairer or more just vision of life”.

Like judges, and according to western traditions, mediators are typically characterised as outsider-neutrals, persons with no connection to the dispute or disputants, as opposed to insider-partials, facilitators with an intimate knowledge of parties to a dispute (Dyck, 2000, pp. 130-3; Gadlin & Pino, 1997, p. 18). This is not generally or
necessarily the case in non-western cultures. In the case of mediation among indigenous Australians, for example, the “best” mediator may be a person connected to the parties and dispute (Kelly, 2008, pp. 202-3). In other cultures, sources of authority other than neutrality may be most relevant (Behrendt, 1995; Honeyman, Goh & Kelly, 2004). However, within western liberal democracies, neutrality is attributed to both judges and mediators. Despite this commonality, the role of judge and mediator and the processes of mediation and adjudication are otherwise distinguished. Unlike judges, mediators have no role in interpreting and applying the law (or any other pre-existing body of principle) in order to come to a decision. Nor do mediators have any power to impose a judgment in order to resolve a dispute. Nonetheless, the idea of intervention by a neutral third party is central to western liberal ideas of fairness and justice (Astor, 2007, p. 221; Mulcahy, 2001, p. 506).

Increased institutionalised use of mediation has challenged both the idea of neutrality as a defining feature of mediation and other claimed core characteristics, such as the voluntary nature of the process and its confidentiality (Boulle, 2005, pp. 33-5; Wolski, 1997; Dewdney, 2009). An illustration of shifts in perception of core elements of mediation as the process becomes increasingly part of, rather than an alternative to, institutional legal practice is demonstrated by recent changes to the Family Law Act 1975 (Cth) in the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).\(^3\) Significant changes to the Act include the introduction of mandatory family dispute resolution before proceedings begin, and the requirement that a certificate be issued by a family dispute practitioner as evidence of each party’s “genuine effort” to

---

\(^3\) These changes were proposed but not enacted at the time the data collection for this study was conducted.
resolve their differences before proceedings are commenced. Family dispute resolution is defined under s. 10F as a process (other than a judicial process):

a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and

b) in which the practitioner is independent of all the parties involved in the process (emphasis added).

“Genuine effort” is not defined in the Act.

Altobelli (2006, p. 144) describes the Act’s definition of family dispute resolution as “remarkably broad”. He notes that it can encompass a widely diverse range of processes but fails to provide clear, workable distinctions between varying models of mediation. He notes and approves, however, that “the core element of independence of the dispute resolution provider remains”. Astor (2007, p. 223) identifies mediators’ independence (from governments) as one meaning ascribed to neutrality in mediation. In a recent critique of changes to the Family Law Act, Cooper and Field (2008, p. 159) identify independence and neutrality as interchangeable concepts. As mediation has moved from a voluntary to a mandatory process in family law matters, the neutrality of the mediator (now family dispute resolution practitioner) has been more clearly prescribed. At the same time, a new paradox has emerged. Altobelli (2006, p. 149) argues that the neutrality of family dispute resolution practitioners is challenged by the requirement that they provide certification of parties’ “genuine effort” to resolve their differences. His position is affirmed by Astor (2008, p. 3) in her recent examination of the meaning of “genuine effort” (see also Charlton, 2009; Polak, 2009). In a probing critique, Altobelli (2006, p. 149) asserts that

the perception of neutrality is threatened because of the quasi-adjudicative role thrust upon practitioners in the specific context of the certificates referred to
The perception of independence is threatened because of the transformation of the mediator’s role into a quasi-agent of the State. Surely, no truly neutral, independent facilitator of the dispute of parents would choose such a gatekeeper role. Only time will tell, but there is a risk that public confidence in family dispute resolution may be undermined by certificates either too readily issued, or too easily refused.

This recent reconstruction of the mediator’s role in family disputes calls to mind an early critique of informal justice advanced by Abel (1981). According to Abel (1981, 261), in an almost prophetic argument, the drawback of informal legal institutions is that

they cannot effectively manage conflict and remain informal. If they take the latter course they will atrophy, like the conciliation services attached to family courts. If they choose the former they will have to become more openly coercive; but this will generate opposition and compel the liberal state to respond by adopting formal procedures...

A different institutional trend is evident in the emergence of mediation as a profession. The Australian National System of Accreditation Standards heralds the emergence of a mediation profession in Australia (see Field, 2006). Mediation as a practice has already established itself with its own developing theoretical framework. Its emergence as a profession in Australia means a shift away from its status as an occupation with continued reliance upon established theory and practice in law and the social and behavioural sciences. Mediation in Australia is poised to become a unique professional identity which, though grounded in its socio-legal roots, will stretch beyond those roots to an evolving practice. Neutrality’s function as a legitimising feature of mediation has greater resonance now for mediation’s emergent
professional status than any analogy with adjudicative processes. The question of neutrality is now one of the professional stance of mediators towards parties, rather than a feature held in common with adjudication. With the movement toward a professional identity comes an impetus to construct a professional objectivity (neutrality) unique to mediation practice.

1.2 AN ABSENCE OF NEUTRALITY IN PRACTICE?

EMPIRICAL RESEARCH

Despite the central claims of neutrality in western discussions of adjudication and mediation, scholars have identified neutrality as a theoretically flawed and empirically problematic concept (Astor, 2007, p. 222; Mulcahy, 2001, p. 506). Furthermore, despite the importance of neutrality as a defining and legitimising feature of mediation, empirical research and scholarly critiques have pointed to its absence in practice. Empirical research is limited by the private and confidential nature of the process, and given the nature of the process as a response to situations of significant conflict parties can be reluctant to allow access for the purposes of research. However, a number of studies point to an absence of mediator neutrality in their findings. A sample of those studies is reviewed below.

Two studies of neutrality in community mediation, one conducted in the United States by Cobb and Rifkin (1991a; 1991b), and another in the United Kingdom by Mulcahy (2001), illustrate the difficulties of putting neutrality into practice. Both studies emphasise those difficulties to the extent of concluding that neutrality operates as an ideology rather than a reality and as such ought to be abandoned. Cobb and Rifkin (1991a, p. 41) applied discourse analysis to interviews with fifteen mediators from six

---

4 See Chapter Four below for a description of the author’s experience of difficulty in this regard.
community mediation programs. They describe neutrality as “a discursive practice that actually functions to obscure the workings of power in mediation, and forces mediators to deny their role in the construction and transformation of conflicts. They found that fourteen of the fifteen participants identified neutrality as an absence of strong opinion, value, feeling or agenda, which carried an unrealistic expectation to monitor closely their interactions, and both conscious and unconscious psychological processes. Their findings also show the inherent contradiction in mediators’ attempts to treat parties unequally in order to facilitate equality of outcome (Cobb & Rifkin, 1991a, p. 43-6). Further, they found that the structure of storytelling in the mediation process serves to marginalise one party relative to the other. The authors conclude that the process itself contributes to the marginalization of one disputant (the second disputant to tell the story), setting an accusation/justification sequence in place that perpetuates adversarial interactions and reconstitutes one story as dominant. Agreements are written on the semantic moral grounds of the dominant story; the material consequences of this marginalization mirror the marginalization in the discourse in the session” (Cobb & Rifkin, 1991a, p. 60).

Mulcahy conducted a study of community mediation in the UK, which included interviews with fifteen mediators. Mediators in this study felt constrained by the expectation of a pure or absolute neutrality, yet retained the principle as a reference point for “out of role” interventions. Participants reported frustration with the received view that neutrality was central to effective practice. They adopted a more common sense approach by acknowledging the inevitability of having personal views and preferences. They described stepping out of role in the course of a mediation session in which they had clear and strong personal responses to the parties and or potential outcomes. Mediators acknowledged that such personal reactions were common. They
further stepped out of role by placing disputes in a wider political context and acting outside mediation in order to advocate on behalf of individuals or lobby for change on behalf of disadvantaged groups. Mediators in Mulcahy’s study adopted a reflexive practice in which they used debriefing between co-mediators to discuss how their personal assessments of the issues had affected management of the process and generation of suitable options. Mulcahy (2001, p. 512) argues that, in the light of empirical evidence, the principle of neutrality is problematic only if it is considered possible. According to her, “problems arise when the strategies adopted by mediators are at odds with the rhetoric of party control, espoused by them.” She argues that instead of espousing neutrality, mediators should be more explicit about the values they bring to mediation and that with this altered approach, space is created for development of an ethic of partiality (Mulcahy, 2001, pp. 522-3).

Other studies of family mediation in the UK question the reality of mediator neutrality by revealing patterns of bias in mediators’ interactions with parties. Greatbach and Dingwell’s (1989, 1993) study examined the strategies used by a mediator (in one case study) that either enhanced or reduced the parties’ control of the decision-making process. The authors employed a detailed, conversational analysis of audio recordings, which revealed that the mediator worked from her own conceptions of desirable and undesirable outcomes, and employed strategies to achieve the former. The strategies employed were not overtly directive but rather consisted of selective use of communication skills to steer parties in the direction favoured by the mediator. The authors describe this approach as “selective facilitation”, in which the mediator differentially creates opportunities to talk through her favoured option. Formally, according to the authors, the mediator could lay claim to neutrality by relating her
conversational turns to acceptable communication strategies. However, the pattern of preference towards a favoured outcome called into question any claim to substantive neutrality. While maintaining that the conduct of the mediator in such circumstances was not intrinsically unethical, Greatbach and Dingwell (1989, p. 638) assert that the results “demonstrate the scope for mediators to encourage some outcomes and to resist others while continuing to present themselves as neutral”.

Piper (1993) undertook a study of family mediations in order to investigate the process by which mediators attempt to bring parties to agreement. The study was conducted within a statutory context which characterised mediation as a process allowing separating parents to find ways to meeting their children’s needs. Within that context, parental responsibility – characterised by parental co-operation and control – were placed “above all other factors necessary for the welfare of the child” (Piper, 1993, p. 187). Piper found that mediators moved parties towards their own conceptions of appropriate parental responsibility by constructing the problem between parties and its solution according to their own views. The “accepted” problem, according to the findings, was rarely a negotiated compromise of parental views but rather wholly or partially produced by mediator constructions. Similarly, solutions were found by “mediator-articulated compromise” often the result of direct mediator interventions (Piper, 1993, p. 190). Piper notes that the information, or facts, supplied by parties were interpreted by mediators according to their own pre-existing, normative view of the problem and its solution. She concludes that, despite the view that parties are responsible for the content and outcome of mediation while mediators are responsible for its conduct, “neither content and control of the process nor process and outcome can easily be separated…”(Piper, 1993, p. 188).
Despite this research, neutrality continues to be seen as an integral component of mediation. At the same time, it is a controversial concept subject to “constant analysis, debate and redefinition” (Astor, 2000a, p. 74). According to Gadlin and Pino (1997, p.17) it is an idea challenged in almost every area of contemporary thought. Nonetheless, neutrality is considered central to the western concept of law, which Grillo (1991, p. 1547) argues is based on a patriarchal paradigm characterised by hierarchy, linear reasoning, the resolution of disputes through application of abstract legal principles, and the idea of the reasonable person. Its fundamental aspiration is objectivity, and to that end it separates public from private, form from substance, and process from policy.

Although neutrality is a dominant, accepted theme in liberal legal theory, the neutral application of law claimed by judges has also been repeatedly challenged (Minow, 1991-2; Mulcahy, 2001, pp. 506-7). Critical jurisprudence pointedly calls attention to the non-neutral, political processes inherent in the making of law, its interpretation and its implementation (Bottomley & Bronitt, 2006, pp. 186-275; Leiboff & Thomas, 2004, pp. 251-91). Feminist methodology seeks to unearth the gender implications of superficially neutral legal standards (Graycar & Morgan, 2002, pp. 56-84; Levit & Verchick, 2006, pp. 45-56). Similarly, scholarly examinations of neutrality in mediation have argued in particular that, despite claims of neutrality, mediators are manifestly not neutral.

In the light of broader critique, neutrality in mediation has been dubbed merely an aspiration, or ideal, incapable of practical realisation (Astor, 2000a, p. 80; Mulcahy, 2001, p. 513). Neutrality has been so criticised that some commentators refer to it as a pervasive and misleading myth, arguing that it is neither possible nor desirable
Boulle, 2005, p. 31; Della Noce, 1999, p. 272; Field, 2000, p.16; Folger & Jones, 1994b, p.225; Grillo, 1991, p. 1587; Marshall, 1990, p. 118; Tillett, 1991a, p.11). In the words of Freer, (1992, p. 177), “for certain it is that neutrality, both as theory and practice, is a slippery slope full of tensions and contradictions”. Yet mediators continue to claim that they are neutral (Field, 2000, p. 16; Astor & Chinkin, 2002, pp. 149, 156) and to see value in the claim (Astor, 2007, p. 236). The following section examines what mediators mean by their claim to neutrality.

1.3 THE MEANING OF NEUTRALITY: PROBLEMS OF DEFINITION

A review of the mediation literature reveals that neutrality does not have a clear and unequivocal meaning. There is no agreement among mediator practitioners and academics on how to define it (Astor 2007, p. 223). According to Gibson, Thompson and Bazerman (1996, p. 69) neutrality is an idea largely based on intuition rather than rationality and logic, and whilst intuitively appealing, is also ambiguous. According to Boulle (2005, p. 34), not only can neutrality have more than one meaning, but also not all mediators are neutral in all senses.

Cohen, Dattner and Luxenburg (1999, p. 341) describe neutrality as “a sort of umbrella term that embraces a number of concepts”. They describe several “parts or aspects” of the meaning of neutrality that reflect traditional legal notions and more general attitudes of openness to, and respect for, parties. Neutrality is described as fairness, justice and appropriateness; an interest in how parties are tied together in deadlock rather than circumstances of blame or cause and effect; and as including “a sense of respect, as well acceptance of naive curiosity, fascination, and even
admiration, for the clients and their perceived problem” (Cohen, Dattner & Luxenburg, 1999, p. 342).

Gadlin and Pino (1997, p. 18) describe “being neutral” as not taking sides, having no personal stake in an outcome, being impartial, free from conflicts of interest, independent, non-partisan, open-minded and unbiased. Mulcahy (2001, p. 506) refers to the Shorter Oxford Dictionary (1973) and defines neutrality as being inclined neither way in the hearing of arguments, and as indifference, or the absence of decided views, feelings or expressions about an issue. Boulle (2005, pp. 34-5) characterises neutrality as a multi-dimensional concept. Exploring this characteri and drawing on Boulle’s analysis Field (2000, p. 16; 2003, p. 81) identifies neutrality as a lack of prior knowledge of the dispute and or the parties, a lack of bias towards either one of the parties, an absence of judgement about the dispute or interest in its outcome, and the idea that the mediator is fair and even-handed in dealing with the parties. Gorrie (1995, p. 30) defines neutrality as an attitude or stance of non-alignment, distance or aloofness. He describes the neutral characteristics of a person or thing as colourless, not well-defined or nebulous, and as lacking influence or effectiveness.

According to Taylor (1997, pp. 216, 220) neutrality has “shades of meaning” because it is “extremely context sensitive”. In a discussion of family mediation, Taylor identifies four context specific factors that influence the meaning attributed to neutrality: the model of mediation employed, the practitioner’s view of her role, the types of disputes mediated, the setting in which mediation is conducted and the professional origin of the mediator. She considers, in particular, the impact of hybrid
processes of mediation developed from a fusion of law and therapy. She considers the influence of legal conceptions and concludes that although neutrality has aspects similar to fairness, justice, and appropriateness, as well as impartiality and lack of bias, it is not the same as those concepts…Because neutrality is a concept with several parts, not a singularity, it is important to seek those parts (Taylor, 1997, p. 217).

Boulle (2005, pp. 32-6) proposes three distinctions useful in understanding neutrality’s complexity. He identifies neutrality as disinterestedness, independence and impartiality. Disinterestedness means that a mediator will be neutral in the sense of having no interest in the outcome of the mediation. Independence means that he or she will be neutral in the sense of having no prior relationship with the parties. Impartiality means that a mediator will conduct the process fairly, even-handedly and without bias towards either party. Boulle (2005, pp. 32-3) argues that neutrality as disinterestedness and independence are not absolute requirements, and that their existence depends upon context and circumstances. He argues that only neutrality as impartiality would normally be considered a defining feature of mediation.

Astor (2007, pp. 222-3) identifies several characteristics of neutrality, one of which is impartiality, which she identifies as interchangeable in meaning with neutrality. She defines impartiality as meaning that “the mediator is not partisan and that she or he will treat the parties equally, not favouring one over the other”. Cooks and Hale (1994, p. 62) also note that neutrality and impartiality are often treated as synonymous. Other commentators, however, have distinguished between neutrality and impartiality. Moore (2003, p. 53) defines impartiality as the attitude of the mediator as unbiased and lacking preference, and neutrality as the mediator’s
behaviour towards, or relationship with, the parties. Cooks and Hale (1994, p. 63) identify neutrality as a lack of prior relationship with the parties, or vested interest in an outcome, and impartiality as freedom from favouritism or bias in either word or action. The National Practice Standards imply a distinction, with the requirement that mediators have an ethical understanding of “neutrality and impartiality” under clause 7(c)(iv).

According to Taylor (1997, p. 218) neutrality has traditionally been seen as a lack of real or perceived bias, while impartiality represents an obligation to do “exactly equal to and for each disputant”. Other commentators link equal treatment of the parties to both neutrality and impartiality. Rock (2006, p. 354), for example, argues that the “traditional understanding of mediator neutrality seems to be best understood as impartiality, or as treating the parties equally.” In the first edition of his comprehensive text on mediation, Boulle distinguishes neutrality and impartiality. He argues that impartiality is a core component of mediation while neutrality is not. He asserts that impartiality is fundamental

in the sense that its absence would fundamentally undermine the nature of the process. It is inconceivable that the parties could waive the requirement that the mediator act fairly. Neutrality, however, is a less absolute requirement and could be waived without prejudicing the integrity of the mediation process, for example in relation to a mediator’s prior contact with one of the parties or his or her previous knowledge about the dispute (Boulle, 1996, p. 20).

It is evident that just as mediation is difficult to define, the concept of neutrality is elusive. Not because it lacks definitions but because the definitions offered are too many and varied to establish clarity. This is a difficult problem for a concept supposedly integral to mediation practice. Broad, inclusive definitions can be found,
offering fertile opportunity for consideration but insufficient direction for practice. Attempts have been made to identify aspects of neutrality in order to further understanding, and considerable attention has been paid to placing neutrality and its common synonym, impartiality, into a logical relationship. Despite these attempts, however, it is evident that no consensus as to meaning has been reached. While existing definitions go beyond a general, intuitive sense of what neutrality might mean, there remains insufficient clarity for a concept that is claimed to be central to and crucial for mediation practice.

1.4 THE MEANING AND THE DILEMMAS OF NEUTRALITY IN PRACTICE

As is evident from the preceding discussion the mediation literature does not provide a clear and unequivocal definition of neutrality, yet varying shades of meaning are suggested by commentators. For present purposes, these shades of meaning can be grouped according to three themes. The first equates neutrality with impartiality, the second equates it with even-handedness, and the third sees neutrality as a function of the process and content or outcome distinction, which has underwritten established mediation practice. According to this theme, mediators are said to be neutral as to content and outcome but in charge of the process.

This approach to identifying the meaning of neutrality avoids distinguishing between neutrality and impartiality. Instead, it recognises neutrality as the central idea, with three thematic meanings ascribed to it. These three themes have been chosen because they recur in the literature and are useful in their respective association with particular dilemmas (discussed below) faced by practitioners attempting to put neutrality into practice. In an effort to make sense of existing conceptions of neutrality and to
highlight the difficulties of putting those conceptions into practice, a further section examines what neutrality “is not”.

1.4.1 Neutrality as impartiality

One aspect of the role of the mediator is to be neutral in the sense of being impartial – as noted, a generally accepted synonym for neutrality (Astor, 2000a, pp. 76-77; 2007, p. 222; Astor & Chinkin, 2002, p. 150; Boulle, 2005, pp. 32-33; Rock, 2006, pp. 354-5). In the study by Cobb and Rifkin (1991a, p. 42) discussed above, the authors found that in fourteen out of fifteen interviews, mediators consistently referred to impartiality as defining neutrality. Neutrality as impartiality invokes “a stronghold against bias” (Rifkin, Millen & Cobb, 1991, p. 151) or “an antidote against bias” (Cobb & Rifkin, 1991a, p. 35). McKay (1989, p. 23) argues that “basic to the concept of the mediation process is the notion of a neutral mediator untainted by interest or bias on behalf or against any party”. Bias raises the potential for a conflict of interest wherein the mediator’s interest/s may conflict with those of the parties, individually or collectively.

Two meanings of impartiality, narrowly and widely defined, are isolated below in order to explore the varied meanings associated with the term. According to a narrow definition, impartiality is freedom from conflict of interest; according to a wide definition, impartiality is equated with the absence of bias due to the personal values, preconceptions and preferences of the mediator. This distinction is reflected in the two problem areas associated with impartiality as identified by Bush (1992, pp.10-1). According to Bush, an existing or developing relationship with a party may place the mediator’s impartiality at risk. He identifies a second ‘quite different’ problem arising
from a mediator’s personal reaction to parties during mediation which may give rise to a lack of impartiality.

**1.4.1.1 A narrow definition of impartiality: the conflict rule**

Narrowly defined, impartiality is associated with freedom from bias as a precondition of the mediator’s interaction with the parties. In this sense it is equated with a lack of pre-existing knowledge of or association with the parties and their dispute, and of any vested interest in the outcome of the dispute. The National Practice Standards distinguishes between freedom from conflicts of interest and impartiality, in clause 7(3)(c). Mediators are required to demonstrate ethical understanding of the avoidance of conflicts of interest (under paragraph (i)) and neutrality and impartiality (under paragraph (iv)). As argued here, a narrow definition of impartiality equates with clause 7(3)(c)(i), while a wide definition is considered in relation to clause 7(3)(c)(iv).

The impartiality required of the mediator in a narrow sense coincides with Boulle’s (2005, pp. 32-3) definitions of disinterestedness and independence, as described above. Whilst disinterestedness and independence are frequently achievable, they are requirements that can be waived by the parties (Boulle, 2005, p. 32-3; McKay, 1989, p. 23). Having prior knowledge of the parties or the dispute would normally oblige the mediator to stand aside. However, where actual or potential bias is disclosed to the parties, they are afforded an option to give informed consent to proceed (McKay, 1989, p. 23).

Impartiality in this narrow sense is related to the bias rule in adjudication, examined by Field (1999) and said to require, in the context of mediation, that the “mediator
should not be influenced by financial or personal connection with the disputants, or be aware of prejudicial information about either (or both) of the parties” (Astor 2007, p. 24). Furthermore, a narrow definition of impartiality places it, by analogy, within established legal rules about conflicts of interest. The general law conflict rule requires avoidance of actual or potential conflicts of interest, qualified by principles of disclosure and consent from the affected party (Hospital Products Ltd v. United States Surgical Corp. (1984); Phipps v. Boardman [1967]). The National Mediator Practice Standards reflect the general law conflict rule and its qualifications. Clause 5 (1) states that

…a mediator will disclose actual and potential grounds of bias and conflicts of interest. The participants shall be free to retain the mediator by informed waiver of the conflict of interest. However, if in the view of the mediator, a bias or conflict of interest impairs their impartiality, the mediator will withdraw regardless of the express agreement of the participants.

The National Practice Standards acknowledge that actual and potential conflicts of interest are “best” identified prior to mediation. They also acknowledge that a “mediator should identify and disclose any potential grounds of bias or conflict of interest that emerge at any time in the process” (cl. 5(1)). Generally speaking, however, conflicts of interest are expected to be identified prior to mediation because they are defined as arising from prior knowledge of or association with the parties and or pre-existing vested interests. As Honeyman (1985, pp. 142-3) notes, as long as disclosure rules are conscientiously applied, conflicts of interest do not threaten “to cause widespread or enduring resistance to the use of mediation as a process”. During the course of mediation, it is impartiality in a wide sense that becomes of particular concern.
1.4.1.2 Impartiality in a wide sense

In a narrow sense, impartiality focuses on identifiable interests of the mediator that are or might be in conflict with those of the parties. In a wider sense, impartiality means the absence of bias due to the more subtle impact of a mediator’s personal values, preferences and preconceptions. In order to maintain impartiality in this wider sense, the mediator is expected to guard against the impact on content and outcomes of personal views, assumptions, reactions and preferences (Taylor, 1997, p. 226; Bush, 1989, p. 265 fn 32). It is in this sense that the dilemma of putting impartiality into practice has arisen. The problem is that impartiality in a wide sense requires that the mediator has no impact on the mediation beyond orchestrating the process – a requirement challenged by the reality of practice.

Gorrie provides a list of potential influences that mediators can have. According to Gorrie (1995, pp. 34-5), the very presence of the mediator and his/her personal characteristics influence the process. Parties’ perceptions of the mediator as an expert, at least in matters of conflict resolution, also influence the process, and the personal and professional values of the mediator have an impact. He argues that mediators subtly advocate their own views by working against agreements that they consider to be unfair, inappropriate or abusive. He also argues that mediators use their control of the process (for example, during the phase of “reality testing”) subtly to direct outcomes according to their own preferences (Gorrie, 1995, p. 34). The personal views of the mediator may reflect objectively determined principles or the more individualised responses of the mediator. The mediator’s personal preferences may also be consciously or unconsciously held and yet in both instances affect the mediation.
The studies of family mediation discussed earlier provide evidence of mediator bias due to mediators’ predetermined and ostensibly principled approaches to the issues in dispute. Those studies reveal how mediators may influence outcomes according to their own preferences, at the expense of parties’ self-determined agreements (Davis, 1988; Greatbach & Dingwell 1989; 1993; Fineman 1988; Piper, 1993). Such preferences may represent what mediators see as in the parties’ best interests (for example, a preference for shared parenting in family matters) as opposed to their own interests, but nonetheless represent a lack of impartiality in a wide sense. Mediators’ preferences may be a product of the professional, educational and or experiential backgrounds of mediators. As Fisher (2001, p. 201) points out, mediators’ backgrounds are likely to influence their conduct in mediation despite their backgrounds having no bearing on the credentials of the mediator.

Mediators may also exhibit bias because of more personal, unpredictable and intuitive predispositions. They may, for example, fall into the trap of aligning themselves with one of the parties because they see that party as “more reasonable, more prepared, more logical, more sincere, more emotional…more cooperative, or more skilled in bargaining. In almost every case, there will be one client who seems easier to work with, more likable, less problematic, less damaged” (Taylor, 1997, p. 226). They may also be personally affected by parties’ issues or personalities and align themselves with the party with whom they identify or feel some affinity (Taylor, 1997, p. 226). Mediators’ personal, unpredictable and intuitive predispositions may be unconscious rather than conscious, such that mediators may often be unaware of their own biases and the impact of them on the process (Fisher, 2001, p. 201). Furthermore, as well as
reacting unconsciously to parties and their circumstances, mediators may project their own “situation, intentions, thoughts, and feelings onto the clients, which can tip neutrality in favour of the client who seems more like the mediator” (Taylor, 1997, p. 226).

Mediator influence arising from unconscious processes has been acknowledged as inevitable in practice (Kurien 1995, p. 46) though inconsistent with a theory of neutrality as impartiality (Cobb & Rifkin, 1991a, p. 43). Emotions, values and agendas are acknowledged as part of human existence (Rock, 2006, p. 349), yet the traditional view of impartiality requires the exclusion of these influences by and on the part of the mediator (Cobb & Rifkin, 1991a, p. 42). A dilemma for mediation theory and practice is how to deal with the influence of the mediator, whether conscious or unconscious. The paradox inherent in this difficulty is described by Cobb and Rifkin (1991a, p. 44):

If neutrality is understood as impartiality, mediators must guard against psychological processes that may favour either disputant. Because some of the psychological processes are unconscious, mediators, in effect, must monitor unconscious processes.

1.4.2 Neutrality as even-handedness

Astor (2000a, p. 77) draws a distinction between a mediator’s capacity to act impartially towards both parties and “as between” them. In the latter sense, impartiality (neutrality) has been equated with even-handedness, which refers to the equal treatment of parties (Boulle, 2005, p. 4). Of the many shades of meaning of neutrality that Boulle (2005, p. 32) identifies, one is that the mediator is even-handed
(see also Field, 2000, p. 16; Field, 2003, p. 81). Although Astor (2007, p. 223) identifies treating the parties equally as a dimension of impartiality, this is distinct from impartiality and represents another meaning of neutrality – even-handedness.

Even-handedness appears in the National Practice Standards description of impartiality, which encompasses the absence of favouritism between the parties. According to clause 5(1):

Impartiality means freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias.

Accordingly, neutrality requires that the mediator does not favour or appear to favour one party over the other (McKay, 1989, p. 22).

An advantage of distinguishing between impartiality and even-handedness is that the problems arising from translating these ideas into practice are correspondingly distinguishable. The difficulties of impartiality have been identified above (see 1.4.1). The dilemma associated with even-handedness is that equality of treatment may produce inequality of outcome. Unequal outcomes may result where the parties enter the mediation in an unequal relationship, which remains unaffected by the mediation process. This inequality of relationship is frequently depicted as an imbalance of (bargaining) power between the parties. An imbalance of power may be attributed to the relative characteristics of the parties and any pre-existing dynamic between them, and or may be more broadly a function of their relative identities. As described by Charlton (2009, p. 12),

imbalances are often identified in terms of gender; culture; generation; one shot and repeat players; the individual and the big institution; the legally and
the non-legally aided; the inarticulate and the assertive; the wealthy and the not so wealthy; the educated professional and the less educated non-professional; the knowledgeable and the ignorant or ill advised.

Differences and disparities between parties leading to questionable outcomes in mediation have been the subject of intense scrutiny in the context of family mediation (see for example, Ellis & Wright, 1998; Field, 1996; Field & Brandon, 2007; Haynes, 1988; Haynes & Charlesworth, 1996; Kelly, 1995; Neumann, 1992; Taylor, 1991; Wade 1994a), and employment and industrial disputes (see for example, Balc, 2002; Van Gramberg, 2003; 2006). As an extreme manifestation of power imbalance, situations involving family (or domestic) violence (most often violence against women) are now widely acknowledged as inappropriate for mediation (Mack, 1995, p. 125; see also Astor, 1991; Astor, 1994; Field, 2004; Gribben, 1994; Kirkwood & McKenzie, 2008). Clause 4 of the Australian National Mediator Practice Standards requires that:

Mediators shall have completed training that assists them to recognise power imbalance and issues relating to control and intimidation and take appropriate steps to manage the mediation process accordingly.

Charlton (2009, p. 12) interprets this clause as requiring mediators to take appropriate measures to rectify any power imbalance. If, however, the requirement is read with the clause as a whole, it could be interpreted to require intervention in the more limited circumstances of ensuring “the safety of participants”. Whatever interpretation is applied, the literature does not provide clear guidelines for identifying power imbalances or intervening to address them.
Despite considerable discussion in the literature about inequalities of power, and whether and how mediators should address them (Astor, 2005, p. 31; Bayliss & Carroll, 2002, p. 285; Charlton, 2009, p. 11), uncertainty remains about how to recognise and deal with them. Charlton cautions against applying stereotypical assumptions of power imbalances, which could prove counter-productive. She describes power balancing as “tricky” (2009, p. 12). Bernard et al (1984, pp. 62-3) ask: how does the mediator decide which party is weaker and in need of assistance? What criteria make an existing imbalance of power unjust? Where an imbalance of power is perceived, on what legitimate ground can a (family) mediator dissuade parties from adopting a settlement that they are willing to accept?

According to Field (2000, p. 18) many mediators continue to struggle with the recognition that, on the one hand, to be even-handed in relation to parties who do not have equal bargaining power entrenches the disadvantage of one party, but to intervene to assist the disadvantaged party is to violate the mediator’s neutrality. Astor (2000a, p. 77) states unequivocally that treating unequal parties equally results in inequality. Recognising this, mediators abandon their neutrality with the benign intention of dealing with the relationships of power between two unequal parties. They do this by employing strategies that seek to balance power or redress imbalances of power between the parties (Astor, 2000a, p. 77; Astor & Chinkin, 2002, p. 151). A commonly advocated approach is to employ strategies aimed to empower the weaker or disadvantaged party in order to compensate for perceived inequities (Garcia, Vise & Whitaker, 2002, pp. 209-10). Generally this approach aims to produce a level playing field on which the parties have equal power. However, according to Agusti-Panareda’s (2004, p. 25) review of the negotiation literature, equality of bargaining power does not necessarily lead to more effective or fair negotiated outcomes. Moore (2003, p. 389) draws a contrary conclusion, arguing that disputes “in which parties have roughly equal power tend to be the most amenable to mediation.”

In attempting to redress power imbalances in mediation, even-handedness is transposed to a strategy identified as “equidistance” (Cobb & Rifkin; 1991a, pp. 43-6; Cohen, Dattner & Luxenbourg, 1999, p. 343; Fisher, 2001, p.1999; Rifkin, Millen & Cobb, 1991, p. 154). Equidistance is a strategy by which parties are treated unequally in order to bring about equality of bargaining power. According to Cohen, Dattner and Luxenburg (1999, p. 343 citing Kolb), “in contrast to impartiality, where neutrality is understood as the ability to suspend judgment, equidistance is the active process by
which *partiality* is used to create symmetry” (emphasis in original). Highlighting the inherent contradiction in practices where mediators claim to be neutral yet seek to redress imbalances of bargaining power, Cobb and Rifkin (1991a, p. 44) conclude that in such instances “neutrality is the active process by which bias is used to create symmetry!” A study by Garcia, Vise and Whitaker (2002) demonstrates this logic. The study involved investigation of a complaint in which the mediator acted to redress imbalances of power and was accused of bias by the party perceived to be more powerful.

According to Freer, in a critique of the work of Rifkin, Millen and Cobb (1991), there is no contradiction between impartiality and equidistance, because the latter is a tool used by mediators and is not integral to the meaning of neutrality. Freer (1992, p. 174) contends that

> while the practice of equidistance may be tortured as to contradict itself, it can not contradict impartiality, or vice versa. The definitions of these two practices are not contradictory *among* themselves, and because they are wholly separable categories, they are not by any defining feature contradictory *between* themselves.

Despite this distinction, the dilemma for mediators when they fail to deal with power imbalances between the parties is clearly stated – those imbalances will be reproduced (Astor 2007, p. 226). Being neutral in the sense of being even-handed, of treating the parties equally, in the face of power imbalances will perpetuate inequity and bring about unequal outcomes. Moreover, treating the parties unequally, using the strategy of equidistance, in order to bring about equality of bargaining power means applying bias, contradicting a pure or absolute notion of neutrality.
1.4.3 Neutrality and the process and content or outcome distinction

A third and overarching theme in neutrality is the distinction between process and content, together with outcome. Astor (2007, p. 223) notes that the most frequent meaning attributed to neutrality is that the mediator does not influence the content or outcome of the mediation. He or she is said to be in control of the process but not the content or substantive outcome (see also Astor, 2000b, p. 145; Astor & Chinkin, 2002, p. 150; Boulle, 2005, p. 29; Haynes, 1992, p. 24; Moore 1986, pp. 39-40). The mediator is therefore said to be neutral as to the content and outcome of the dispute, a distinction said to be a basic tenet of mediation (Astor & Chinkin, 2002, p. 146). Moore (1986, p. 36), for example, emphasises the procedural limits of the mediator’s sphere of influence, excluding it from the substantive content of the mediation. In the context of family mediation, Haynes (1992, p. 23) asserts that the mediator can not claim any process neutrality and that the mediator “should make it clear that he or she is neutral as to the outcome – the product of the content over which the family as a unit must have total control”. Mediators claim no responsibility for any decision the parties make: “The mediator’s role is to ‘facilitate’ discussion that will lead to the parties settling their dispute rather than imposing a judgment” (Mulcahy, 2001, p. 508).

There is an increasing recognition that the distinction between process and content or outcome is untenable, yet there is a strong value dimension in seeing it as integral to mediation practice. The mediator’s exclusion from the content and substantive outcome is said to be consistent with a fundamental belief in the primacy of party autonomy, or party self-determination. As Gibson (1999, p. 198) explains, the
“ownership” of and responsibility for agreements as a result of the process rest with the parties. As Astor (2007, p. 223) describes

The mediator’s task is to control the process of mediation, providing a procedural framework within which the parties can decide what their dispute is about and how they wish to resolve it. Neutrality in this sense is closely linked to consensual decision-making by the disputants.

According to Marshall (1990, p. 120) the distinction is theoretically convenient but quite illusory. There is a growing and explicit recognition that the presence and interventions of the mediator do influence both the content and outcome of the parties’ dispute (Astor, 2007, pp. 225-6; Boulle, 2005, pp. 29-30; Gibson, Thompson & Bazerman, 1996, p. 71; Gerami, 2009, p. 441; Winslade, Monk & Cotter, 1998, p. 23; Wolski, 2001, p. 249). The distinction is challenged on at least four grounds. First, it is argued that process and content can not be wholly or even partially distinguished (Boulle, 2005, p. 29; Winslade & Monk, 2000, pp. 35-7). Newer models of mediation, as discussed in Chapter Two below, eschew the process and content distinction, preferring to ground their analysis and approaches to mediation in a social constructionist view of reality (further examined in Chapters Two and Three) for which the distinction is irrelevant. Second, commentators have argued that process interventions by their nature, even if we can distinguish them from interventions as to content, have an inevitable impact on the outcome of a dispute. Wolski (2001, p. 249) argues that almost every process intervention made by a mediator has an effect on substantive outcome. According to Marshall (1990, p. 120), the structure of the process subtly predisposes parties towards cooperation and compromise and in that way has a direct impact on outcome.
Gorrie (1995, pp. 34-5) identifies a number of process interventions in order to demonstrate his view that mediators are not neutral and that their role is not simply to control a process. According to him, even the physical layout of the room makes a strong statement about preferred behaviour and communication styles, and mediators send subtle but powerful messages by modelling particular styles of communication in their interaction with parties. An early study by Shapiro, Drieghe and Brett (1985) shows a clear relationship between mediators’ process interventions and outcomes. In the context of industrial disputes, the study reveals that mediators choose process interventions based on their early assessments of what kind of settlement parties are likely to agree to. The authors established six possible settlement types, including compromise, withdrawal and company acceptance of the grievance. They found a significant relationship between settlement types and four mediator approaches, namely, deal making, shuttle diplomacy, pressuring the company and pressuring the union.

A third challenge to the process and content or outcome distinction mirrors commentators’ critiques of impartiality in the broad sense. Mediators have acknowledged their impact on content by acknowledging the influence of their own perspectives, experience and opinions on the process, despite attempts to exclude or minimise them (Astor 2007, p. 223). According to a fourth challenge, the presence and intervention of the mediator is said to move parties towards settlement, creating a settlement bias. Summarising studies of mediator interventions, Bush & Folberg (1994, pp. 74-5) note that “practice is widely characterized by mediator behaviors that focus almost entirely on reaching settlement, often on terms strongly influenced, if not imposed, by the mediators themselves.” Silbey and Merry (1986, p. 7) identify
strategies used by mediators which, they argue, are biased towards settlement as a goal. The authors point to an inherent tension in the mediator’s role – that of a mandate to facilitate settlement without any socially legitimised authority to render a decision. This tension produces process strategies aimed specifically to alleviate it by moving parties toward settlement. Other particular substantive outcomes have been identified as associated with the mediator’s control of the process. These include enhanced interpersonal ways of relating, changes in the relative power dynamic between parties, and personal enhancement or empowerment of individual parties (Gorrie, 1995, p. 36). Gorrie argues that categorising these matters as related to process, in the light of the mediator’s claimed neutrality as to content, relegates them to secondary, instrumental outcomes inconsistent with parties’ perceptions of their value.

The dilemmas associated with neutrality as impartiality and neutrality as even-handedness are closely related to the process and content or outcome distinction in mediation. Limiting the input of mediators to orchestrating the process of mediation logically requires that mediators exclude input according to their personal values, opinions and agendas, consistent with a broad definition of impartiality as articulated above, and challenged by some commentators. Further, interventions aimed to create equality between the parties (equidistance), rather than dealing with them equally (even-handedness), necessarily involve the mediator in making assessments. The mediator must assess the relationship between the parties and each party’s capacity to deal with the dispute at hand in the context of that relationship. It is questionable what knowledge a mediator, as mediator, would draw on to make such assessments. There would be ample opportunity here for the intrusion of personal values and ideology.
Furthermore, assessment of the parties’ relative bargaining power must be included in the substantive aspects of the dispute. Assessment of the relative bargaining positions of the parties moves the mediator beyond assisting them according to the process of mediation alone to an intrusion into the content of the dispute. From the vantage point of the process and content or outcome distinction, questions of bias become questions of intrusion into content and ultimately outcome. Bias due to the intrusion of mediators’ values and preconceptions or assessments as to the relative power as between parties is theoretically problematic because it amounts to an intrusion into the content of the dispute and its outcome.

1.5 ON MEANING AND WHAT NEUTRALITY IS NOT…

Commentators discuss not only what neutrality is, but also what it is not, which highlights particular inconsistencies and contradictions. From the discussion so far, it is evident that if mediators can be said to be impartial in a wide sense, they do not inject their own views, values or solutions into the process. Furthermore, mediators “don’t apply rules, enforce settlements, coerce people into resolving disputes, make decisions for the parties, offer advice, assign blame or establish guilt or innocence” (Mulcahy, 2001, p. 509). There is considerable emphasis on what mediators do not do in order to emphasise the parties’ bi-lateral exchange and the mediator’s relatively minimal role in assisting that exchange (Mulcahy, 2001, p. 509; Roberts, 1993, p. 375). Three negatives in the role of the mediator recur as themes in the literature and are examined below. According to those themes, neutrality means that the mediator is not directive in his or her interventions, that the mediator does not give advice, and that he or she exercises no real power or influence in the mediation. As becomes evident, these negatives are ideal conceptions open to considerable challenge.
1.5.1 A neutral mediator is not directive

Characterising the mediator’s role as non-directive is consistent with the view that the mediator has minimal input into the mediation encounter; that his or her intervention is limited to process and excluded from content; that the process does the work of mediation; that the mediator is relatively passive in directing the flow of communication; and that this approach emphasises the input of the parties and hence facilitates their autonomy in reaching their own decisions. According to McKay (1989, p.21):

To be truly neutral the mediator should be relegated to the role of impartial moderator, assuring an orderly process but otherwise taking no part. Undoubtedly, there are mediators who perform in just that manner, but they must be few.

A revealing study of this was conducted by Carnevale and Pregnetter, who investigated mediator interventions according to three categories of tactics – directive, reflexive and non-directive (as derived from the work of Kressel, 1972). The authors concluded that the data collected showed the importance of directive tactics, especially under conditions of great conflict intensity. Directive tactics were identified as those strategies that the mediator uses to promote actively a particular solution, or to pressure or manipulate the parties directly towards ending the dispute (Carnevale & Pregnetter, 1985, p. 67). The authors highlight the challenge to neutrality posed by their results, noting that in “some ways, the directive category is conceptually the most interesting of the three categories since it has evidence of role conflict for mediators – seemingly contradicting the ethos of impartiality and nondirectiveness that most mediators espouse” (Carnevale & Pregnetter, 1985, pp. 78-9).
Bernard and colleagues posit a continuum of settlement strategies between the two poles of neutrality and intervention. In the extreme neutralist position, the aim is to achieve any settlement that the parties freely agree upon and the neutral mediator works to avoid influencing that outcome (Bernard et al, 1984, p. 62). The “neutral role of the mediator is possible if the mediator intervenes only to facilitate the participant’s decision-making” (Bernard et al, 1984, p. 65). At the other end of the continuum, the mediator may actively challenge and refuse to accept an agreement fashioned by the parties. Bernard et al (1984, p. 62) identify family mediation as one particular context in which the mediator may actively intervene in order “to achieve the mediator’s vision of the parties’ best interests”. In between these polar positions, they describe middle-range, directive interventions, identified as option-enhancing and empowerment-through-information strategies. The authors note in conclusion that mediators who employ directive strategies “do not claim neutrality as a goal or desired value” (Bernard et al, 1984, p. 72). There is an overlap here between an interventionist approach and the intrusion of mediator’s views, values and solutions, signalling a lack of impartiality in a wide sense.

Roberts describes a continuum of mediation intervention from the mere provision of a forum for parties to reach their own decision to highly directive interventions in which the mediator defines the dispute, suggests solutions and then persuades the parties to follow a particular course of action. He advocates a “minimal form of mediation” constituted by four basic tasks: establishing and maintaining contact between the parties, providing a physical forum, providing a neutral presence supportive of the negotiation and stimulating a two-way flow of information (Roberts, 1986, p. 37). He applies his model to the sphere of family mediation. The model is constructed by giving primacy to the bilateral exchange between the parties, the breakdown of which
is taken to have led to third party intervention. It is based upon an idea that mediation can revive and support the bilateral exchange already familiar to parties in normal family life. Roberts allows for three forms of direction as deviations from an ideally minimal type: providing some ground rules within which the exchange will take place, assisting the parties to articulate the issues in dispute, and helping them to identify a range of options available to resolve the dispute. He notes that this last form of direction is the most controversial because it allows intrusions by the mediator and lessens parties’ ultimate control of the outcome (Roberts, 1986, pp. 36-7).

Roberts (1986, p. 39) pointedly distinguishes mediation from other professional interventions that include the giving of specialist advice, particularly law and counselling or therapy. Taylor, by contrast, examines neutrality in the context of four models of family mediation, one of which she describes as the therapeutic mode. Each model that Taylor examines incorporates greater intervention than that proposed by Roberts. But according to Taylor, only two of the four models present potential problems with neutrality. Her analysis equates neutrality with even-handedness, or treating the parties equally, rather than a broad or narrow idea of impartiality as defined earlier. The four models of intervention are educative, rational-analytic, therapeutic and normative-evaluative. According to Taylor, the first two models pose no difficulty for neutrality because parties are treated equally. In the first, parties are given equal information and education. In the second model, both parties are directed along a logical planning process to address the issues in dispute. Potential problems with neutrality arise with the other two models in which parties are afforded “differential treatment” which is “not strictly neutral or impartial” (Taylor, 1997, p. 221). In the therapeutic mode, the mediator may interact with only one party in order
to deal with that party’s emotional responses. In the normative-evaluative mode, the
mediator “may tell one or both clients ‘you can’t, you must not, you shall, you must’”.
Taylor concedes that by trying to direct the behaviour and agreements of the parties,
the mediator steps out of a strictly neutral facilitative role (Taylor, 1997, pp. 221-2).

According to McKay (1989, p. 21) a neutral mediator need not be entirely passive. He
argues that the mediator does not violate his or her neutrality by assisting parties to
identify the issues on which they agree and those that are in dispute. He suggests that
in “this sorting out process, the mediator may even gently lead the parties to a
mutually acceptable solution” (McKay, 1989, p. 22). McKay points to a tension in the
conventional view that the mediator is a neutral, entrusted with merely orchestrating
the process, as against his perception that parties want more than merely a
disinterested observer. He suggests that parties are entitled to expect something more
helpful and hence more interventionist. Solstad proposes the concept of an active
neutrality, which reflects McKay’s view, but which at first sight seems a contradiction
in terms. Solstad develops her concept drawing on the work of Susskind (1981), who
argsues that a mediator should actively employ expert knowledge in his/her field of
practice (for example, environmental disputes) and ensure that agreements reached are
fair (Solstad, 1999, p. 68). Solstad’s concept is developed in the context of
organisational conflict resolution in which the mediator is both a third party neutral
and an employee of the organisation. She suggests that where this clear intersection of
mediation encounter and organisational context occurs, mediators must protect both
the parties and the process from organisational pressures to reinforce discourses that
entrench inequities in the system (Solstad, 1999, pp. 70-2). Difficulties in reconciling
neutrality with the more interventionist approaches of Taylor, McKay and Solstad are
illustrated by McKay’s list of dilemmas associated with intervention beyond process only. Included amongst them is the question: should mediators offer advice? (McKay, 1989, p. 21).

1.5.2 A neutral mediator does not give advice

As discussed above, Roberts’ (1986, p. 39) model of mediation excludes any role for the mediator in giving specialist advice. The giving of advice is typically excluded in conceptions of the mediator’s role because it necessarily calls for intrusion into the content of the dispute (Fisher, 2001, pp. 199-200; Wade, 1998, p. 204) However, not giving advice is not a clear requirement of the neutral mediator when distinguishing different models of mediation, in particular when distinguishing between facilitative and evaluative models (Boulle, 2005, p. 112). Nonetheless, not giving advice is an accepted feature of mediation as distinct from conciliation, in which the conciliator typically has an advisory role. Conciliators are able to give advice because they bring a specialist expertise to dispute resolution, are less concerned with the distinction between process and content, and are seen as generally more active intervenors than mediators (Astor & Chinkin, 2002, pp. 368-9; Boulle, 2005, pp. 111-6; Street, 1994, p. 5; Leiderman, 1994, p. 21; Wade, 1994, p. 260). As Boulle (2005, p. 111) notes, there has been considerable debate about the similarities and differences between mediation and conciliation, and no broad agreement on distinguishing features.

According to the NADRAC (2003, p. 3) discussion paper on terminology, mediation is a purely facilitative process, whereas “conciliation” may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term “mediation” should be used where the practitioner has no advisory role on the content of the dispute and the term “conciliation” where the practitioner does have such a role. NADRAC notes,
however, that both “mediation” and “conciliation” are now used to refer to a wide range of processes and that an overlap in their usage is inevitable.

Despite the emphasis on the giving of advice as a distinguishing feature of conciliation, and of not giving advice as consistent with neutrality in mediation, scholarly critiques reveal that mediators do give advice. In a study of family mediation, Wade (1998, p. 287) concludes that all mediators give some advice. He refers to a commonly seen tension in practice between listening to parties and giving them advice, and between encouraging parties in their own decision-making process and advising and actively encouraging or directing particular solutions (Wade, 1998, p. 282). Wade (1998, p. 289) proposes an abacus constructed around eleven issues, each representing a continuum of intervention along which a mediator’s practice might sit in any given mediation session. One of the eleven issues is the distinction made between process and content, or substance. Using the abacus, Wade avoids the binary distinction between giving advice and not giving advice, and hence of neutrality as tied to one end of a continuum.

Fisher’s examination of the use of advice in mediation, again in a family context, goes further, suggesting that mediator interventions may not amount to the direct giving of advice, but may subtly mask the giving of advice, consciously or unconsciously on the mediator’s part. Fisher (2001, pp. 203-9) identifies three particular strategies that can be said to mask advice. They are – creating doubt, reframing and selective facilitation. Though these interventions do not fit a narrow definition of giving advice – i.e., recommending a specific course of action – Fisher (2001, p. 197) argues they are “not simply an intervention of process (rather than one of content), for they are intended to redirect a party’s attention to hitherto unthought of or unarticulated substantive
possibility.” Selective facilitation, is discussed above in the context of a review of empirical work conducted by Greatbach and Dingwell (1989, 1993). Creating doubt is a strategy used to assist parties to focus on “the strengths and weaknesses of their understanding of facts, evidence, rules, weight of argument, strategies and solutions” (Fisher, 2001, p. 204). Rather than offer direct advice, the mediator may raise questions about a party’s knowledge, attitude or emotional response, in order to suggest that the party reconsider and or re-evaluate in a way consistent with the specialist knowledge and or value position of the mediator.

Fisher argues that while reframing does not amount to giving advice as such, it functions in a similar manner because it is based on a view that the mediator exercises professional judgment in “knowing what is best for the clients” (Fisher, 2001, p. 207). Reframing is a core skill for mediators (Boulle, 2001, pp. 129-37; Charlton & Dewdney, 1995, p. 173). It involves translating what is said by a party in such a way as to retain the meaning of what is said, but replace its “frame” with one considered more conducive to a constructive bilateral exchange (Boulle, 2001, pp. 129-30; Fisher, 2001, pp. 206-7). Reframing encourages a change of perspective or frame of reference and “is a potent tool in that it promotes alternative construction of perception in a way that minimizes reactive confrontation” (Fisher, 2001, p. 206). Reframing can shift dialogue away from aggressive language, turn a negative statement into a positive proposal, shift attention to acknowledgment of an emotional response and away from statements of blame, and refocus parties away from positions to a consideration of interests (Boulle, 2001, p. 131; Fisher, 2001, pp. 206-7). Reframing is subtly directive and operates on an assumption that shifting the perspective of parties in a manner directed by the mediator is useful for them.
However, it may be experienced by parties as manipulative or partisan (Boulle, 2001, p. 132).

Defining the role of the neutral mediator as excluding the giving of advice is one of the commonly held “myths” of mediation. The scholarly investigations of Wade (1998) and of Fisher (2001) reveal that not only do mediators give advice but they do so in ways that are covert, often not acknowledged by practitioners themselves and of problematically partisan effect. According to Astor (2000a, p. 78), identifying conciliation with the giving of advice and conciliators as therefore “beyond the pale” of neutrality, is unhelpful in discussions about different consensual methods of dispute resolution. Astor (2000a, p. 78) argues for a contextualised typology of processes. She proposes a continuum of varying relationships to the law that depend on the context of the dispute, rather than a binary distinction between one process and another, such as between conciliation and mediation. Astor’s argument draws on Bryson and Winset’s critique of distinctions that ignore the differing contexts in which consensual dispute resolution processes take place. Nevertheless, Bryson and Winset (1998, p. 277) point to another feature of conciliation generally excluded from mediation. They note that, although the essential aim of conciliation is consensual agreement, “the use of pressure by the conciliator can be acceptable in many cases” (emphasis in original).

1.5.3 A neutral mediator does not exercise power and influence

The common argument about mediators’ exercise of power and influence is that, as neutrals, mediators do not bring any relevant power to the mediation process and as purely disinterested persons, they are not concerned with any power differences
between the parties (Marshall, 1990, p. 115). An incisive, contrary view is expressed by Marshall (1990, p. 119): “Mediators have power: otherwise why come to them at all?” Moreover, the importance of recognising that mediators do exercise power is aptly stated by Gerami (2009, p. 434),

Unless it is acknowledged that mediators exercise a significant power in the mediation process, the limits of that power and how it ought to be controlled to prevent abuse, and ensure legitimacy and fairness cannot be properly examined.

The earlier discussion about themes in the meaning of neutrality demonstrates that mediators do exercise power and influence, although that exercise may not be fully or even adequately acknowledged and understood. Mediators influence the process according to their values, preconceptions and predispositions, contradicting an idea of impartiality in a wide sense. They are interested in imbalances of bargaining power exhibited by parties and see themselves as having some part to play in redressing that balance. To do that, they must exercise their own power and influence. A passive or minimalist idea of the mediator’s capacity to intervene, as limited to process and not the substance of the dispute or its outcome, does not accurately reflect practice. According to Astor and Chinkin (2002, p. 102), a simple assertion that mediators are neutral masks the reality that they have considerable power in mediation and often use it in ways that are inconsistent with the distinction made between process and content or outcome.

In an early empirical study, Silbey and Merry concluded that mediators employ a variety of sources of power to develop a repertoire of strategies aimed at settling a dispute. They isolated four main types of strategies: presentation of self and the
program, control of the process of mediation, control of the substantive issues in mediation, and activation of commitments and norms (Silbey & Merry, 1986, pp. 11-19). They found that differential use of these categories creates a continuum of strategies between two main styles of intervention – bargaining and therapeutic styles (Silbey & Merry, 1986, pp.19-25). Employing the first strategy, mediators in the study claimed authority (legitimised power) based upon expert knowledge or legal authority. Those using this strategy described and presented themselves as people trained in dispute settlement, with expertise, like experts in other fields, based on knowledge and experience (Silbey & Merry, 1986, p. 12). Using the second strategy, mediators controlled the flow of communication and move “the parties closer together by slight changes in wording and phrasing, and more forcefully by simply not telling [repeating or summarising] all that was said” (Silbey & Merry, 1986, p. 15).

Rephrasing, like reframing, is a significant medium for mediators’ power. Silbey and Merry (1986, pp. 14-5) note that control of the flow of information enables control of the substance communicated. They found in relation to the third strategy that mediators manage the substance of communication by controlling the construction of an account that the parties will accept. They achieve this by broadening the dispute (interpreting and reinterpreting parties’ statements, determining relevance or irrelevance in parties’ statements and adopting particular styles of discourse); selecting issues (narrowing disputes and eliminating intractable issues); concretising issues (reshaping general complaints and demands into specific behavioural requests and or “bottom lines”); and postponing issues (suggesting future sessions when problems seem insoluble) (Silbey & Merry, 1986, pp. 15-8). Using the fourth and final strategy, mediators probe for existing commitments and sentiments that will
encourage settlement. They also frequently enunciate the values of negotiation, rational discussion and compromise to further that end. Silbey and Merry’s analysis is instructive in its uncovering of the varied uses of power and influence that mediators use in the face of any claims of neutrality. As discussed above (see 1.4.3), underpinning the authors’ interpretation of findings is the recognition of a tension in mediators’ mandate to settle cases while having no socially legitimate authority to enforce decisions. The mediators studied employed covert sources of power because the role of the mediator “is shaped by the strategies adopted to cope with this tension between the need to settle and the lack of power to do so” (Silbey & Merry, 1986, p. 7).

The model of minimalist intervention advanced by Roberts (1986, p. 36), discussed above, is predicated on his view that the informal, private nature of mediation raises the danger that the mediator might exercise a covert and unregulated form of power. Among commentators, there is growing recognition of the mediator’s power and attempts to provide theoretical understandings and grounds for its exercise. According to Wade (1994, p. 54), for example, “virtually every step taken by a mediator involves the exercise of power.” According to Mayer (1987, p. 75), “whether or not they consciously choose to exercise it, mediators inevitably use their influence at every point of the intervention.” Haynes (1992, pp. 22-4) argues that mediators exercise a form of professional power similar to other professional relationships, and that the “mediator has power whether or not she wants it” (Haynes, 1992, p.23). However, he differentiates power in the relationships between lawyer and client, and therapist and client, and between mediator and parties; while lawyers and therapists claim power over both the process and content of their interactions with clients, mediators “assert
power in controlling the process but deny power in relation to the content” (Haynes, 1992, p. 46). From a review of the scholarship on the question of mediator power Gerami (2009) identifies four categories of the mediator’s exercise of power. Those categories are – exercise of power through mediator knowledge and expertise, through design and control of the process, through reframing, and through imposing pressure to settle.

Two influential typologies of power have been advanced by Moore and Mayer, both of which have been applied to family mediation by Wade (1994). Astor (2005) has reviewed Mayer’s work in her more recent analysis of power in mediation. Wade (1994, p. 41) offers a broad description of power as “actual or perceived ability of one person to exert influence upon another’s behaviour or thoughts.” Mayer (1987) also identifies power as an ability to exert influence. He offers a broad distinction between structural and personal power, later described by Astor (2005, p. 32): “Structural power is located in the social context – the legal and practical realities in which a dispute occurs. Personal power is made up of those characteristics that individuals bring to mediation, such as resilience, and skill in communication.” Mayer first (1987, p. 78) identified ten sources of power and later, an additional three (Mayer, 2000, pp. 54-60). Wade (1994a) combines an analysis of Mayer’s initial ten sources of power with an almost equivalent number of forms of power as identified by Moore (1986, pp. 271-78), exercised by mediators. The emphasis in mediation, Wade (1994a, p. 54) affirms, is power over process, rather than power to press for a particular substantive outcome.

The sources of power identified by Mayer (1987, p. 78) are: formal authority (deriving from a formal position); expert/information power (deriving from expertise);
associational power (deriving from association with other people having power); resource power (the control over valued resources); procedural power (control over the procedures by which decisions are made); sanction power (the real or apparent ability to inflict harm); nuisance power (the ability to cause discomfort short of sanctioning); habitual power (the power of the status quo); moral power (power from an appeal to widely held values); and personal power (that which derives from a variety of personal attributes that magnify other sources of power, including self-assurance). In his later work, Mayer (2000, pp. 50-8) identifies a further three sources of power: legal prerogative (laws, rules, regulations and customary law); perception of power (influence exerted due to the potential to exercise power) and definitional power (to ability to define a situation, issue or conflict in a way which favours the person defining it).

The particular forms of mediator power that Moore identifies (1986, pp. 271-8; 2003, pp. 377-89) and as summarised by Wade (1994a, pp. 54-6) are: the authority and respect accorded a person experienced in dealing with conflict; the ability to organise the physical environment of the mediation; the authority to organise the orderly presentation of relevant facts; the ability to withdraw from the process if parties fail to comply with any ground rules; knowledge of the process and causes of conflict; the persistence and optimism of the mediator; the capacity to orchestrate the steps leading up to the mediation; the ability of mediators to educate parties as to the process; the capacity to continually clarify aspects of the process (about which Wade (1994a, p. 55) remarks, “persistent clarity is persistent pressure”); limited direct coercive power from statutory sources, or indirect coercive power as a result of a party’s desire to
gain approval from the mediator; and finally, gendered power, resulting from perceived or actual gendered alliances between a party and the mediator.

More recent, postmodern, analyses of power in mediation, which draw mainly on the work of Foucault, sit uneasily with the accounts advanced by Moore and Mayer (see Astor, 2005; Astor and Chinkin, 2002; Bagshaw, 2003). Postmodernism does not see power as a commodity that parties either do or do not possess. Power is not, in a postmodern sense, limited to exerting influence, nor is it as crude an instrument as suggested by Mayer’s (1987, p. 78) analysis of the avenues of influence open to a mediator – to reward, punish or persuade in order to accomplish a particular aim. Power, according to a postmodern account is not “something durable, quantifiable, easy to identify and access” (Astor & Chinkin, 2002, p. 148). Hence, it is not quantifiable or static in the way suggested by the typologies described above. Rather it is force capable of being exercised by both mediators and parties and its use will vary according to the context in which it operates and changes to that context.

Whether structuralist or postmodern, considerations of mediator power call our attention to the power exercised by the mediator rather than focus on apparent imbalances of power between parties (Mulcahy, 2001, p. 509). According to Wade (1994a, p. 57), the sources and forms of power in mediation are complex and “ultimately unknowable”. He argues that discussion of various sources and forms of power can nonetheless facilitate constructive intervention, and in particular “may avoid hasty overreaction in the face of the shibboleth and catch-cry, ‘inequality of bargaining power’” (Wade, 1994a, p. 57). Mayer (1987, p. 85) argues that:

When a mediator understands the dynamics of power in mediation and negotiation, is clear about how to develop and utilize his or her own power,
and does not equate neutrality with the absence of influence, he or she will be best able to empower the parties to engage in a collaborative negotiation process (emphasis added).

Mayer (1987, p. 79) identifies attempts to balance inequalities of bargaining power as only one part of the mediator’s exercise of power and broadens his analysis to a consideration of the appropriate role of the mediator in empowering the parties. He suggests six principles for mediators to guide their use of power (Mayer, 1987, pp. 82-3). The principles he sets out support the mediator to empower the parties by strengthening the process of mediation and include two principles directly related to neutrality. Accordingly, Mayer (1987, pp. 82-3) states that exerting influence and maintaining neutrality are not necessarily a contradiction; that “the mediator loses impartiality only when he or she exerts influence in favour of one party at the expense of the other”; and that it is better for the mediator to be conscious of the use of power rather than to deny its reality in the name of neutrality. Mayer equates neutrality with even-handedness, or treating the parties equally, rather than impartiality as defined in a wide or narrow sense. It is evident that although Mayer and Wade seek to elucidate how mediators appropriately use power, their analyses tend to remain centred on the question of redressing imbalances of power as between the parties. Furthermore, although instructive about perspectives on power, their analyses do not extend our understanding of neutrality beyond suggesting that perhaps it does not equate with a lack of power or influence.

By contrast, Astor and Chinkin (2002, p. 146) argue that power and neutrality are intimately connected aspects of the mediator’s role. Astor argues that mediators must understand power in order to determine which disputes are suitable for mediation,
how mediations are to be conducted and how they are to be terminated. Astor argues that “taking account of power, so that the parties have the capacity to bargain effectively for their own needs and interests, and managing power in mediation, so that the process and its outcomes are fair and not exploitative, are core skills for mediators” (Astor, 2005, p. 30). However, postmodern critiques have not yet included a thorough and convincing analysis that makes sense of that connection for mediation practice. Furthermore, despite Astor’s assertion that mediators have a role in managing power to ensure fairness as to process and outcomes, mediators in Australia do not currently have a mandate to ensure fairness of outcomes. The National Practice Standards do not require intervention to ensure fair outcomes, although under clause 9, mediators are required to conduct the mediation process in a procedurally fair manner. Studies in the United States of codes of conduct for mediators demonstrate the difficulty in establishing coherent standards for practice where mediators are required to be neutral and are simultaneously charged with ensuring fair results (Cooks & Hale 1994; Exon, 2006; McCorkle, 2005).

The distinction between process and content or outcome aims to ensure fairness by leaving the content and outcome to the parties to determine. Ensuring the parties’ control of the content and outcome enables the parties, in theory, to determine what is fair between them. Reflecting this assumption, clause 9(7) of the National Practice Standards provides that a mediator

…has a duty to support the participants in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participants’ own subjective criteria of fairness...
Given this requirement in the National Standards, any attempt by the mediator to ensure a substantively fair outcome, as judged by the mediator or according to objective criteria, could be seen as an abuse of power. The only clearly articulated safeguards against a mediator’s misuse of power offered by commentators are that any agreement must be acceptable to both parties before being formalised (Haynes, 1992, p. 23), and that a party can walk away from the process if he or she does not consent to any agreement being reached (Boskey, 1994, p. 372). These safeguards ignore subtleties of power and influence, and the reality of how mediators can and do influence both the substance and outcome of agreements. Astor and Chinkin (2002, p. 147-8) argue that a party’s capacity to withdraw from mediation will be dependent upon that party having an adequate understanding of the mediator’s neutral role, including when it is abused; an ability to protest effectively about the progress of a session; and the circumstances bringing them to mediation, including whether court-referred. Calling upon the parties’ ability to reject any proposed agreement and ultimately to reject the process itself are safeguards of last resort. Something more is needed to combine an acknowledgement of mediator power and an understanding of mediator neutrality.

1. 6 SUMMARY

Neutrality continues to be seen as a central component of the role of the mediator despite ongoing critique. It remains a legitimising principle for the practice of mediation in the context of the western ideal of liberal democracy, in which it is tied to ideas of fairness and justice. The neutrality of the mediator was central to early definitions of mediation, and although debate about its meaning and significance has seen the development of newer definitions without reference to neutrality, it remains a
central tenet of practice and an issue of definition for the mediation industry rather than an outdated ideal. With the emergence of a mediation profession in Australia, mediator neutrality is now more closely associated with ideas of professional objectivity than with judicial neutrality. The importance of neutrality for mediation’s new profession is reflected in the Australian National Practice Standards requirement that mediators have an understanding of neutrality and impartiality.

But how are neutrality and impartiality to be understood? Definitions of neutrality found in the literature reveal considerable ambiguity and uncertainty. Various attempts have been made to articulate the meaning of neutrality in relation to impartiality, but no single approach has been widely accepted. A broad range of other meanings are associated with neutrality, demonstrating its significance and relevance for theory and practice, but also its insufficient clarity. Neutrality remains a highly debated and contested concept for mediation (Astor, 2007, p. 223).

Three themes in the meaning of neutrality have been advanced here as useful to furthering our knowledge of how neutrality is understood and practiced in mediation. Those themes are neutrality as impartiality, neutrality as even-handedness, and neutrality as associated with the distinction between process and content or outcome in mediation. Problems associated with putting these meanings into practice have been identified. Impartiality is commonly understood in the narrow sense of an absence of bias or vested interest. In this narrow sense, impartiality is not difficult to accommodate in practice, but is also not an absolute requirement since parties may consent to waive it as a prerequisite. Impartiality in the wide sense of the absence of mediators’ preconceptions, predispositions, and conscious or unconscious values and
preferences, has been widely criticised as not being evident in practice and as misrepresenting the reality of mediation for its consumers. Even-handedness, or treating the parties equally, carries with it the dilemma that equal treatment may lead to unequal outcomes. The distinction between process and content or outcome in mediation ignores the mediator’s impact on the nature of the dispute and the substance of any agreement reached.

As a logical implication of mediators’ claims to neutrality, it is also claimed that mediators are neutral because they are not directive in their interventions (as to content and outcome); do not give advice and hence do not contribute to the substance (content) of the dispute; and exercise no power or influence in the determination (outcome) of a dispute. These negative characteristics of the neutral mediator are particular consequences of the distinction between process and content or outcome in mediation. Empirical research and scholarly critiques provide evidence that mediators do not wholly or invariably demonstrate these negative characteristics and furthermore that mediators are demonstrably not neutral in a positive sense.

Despite aiming to be neutral, meaning impartial in a wide sense, mediators do make value judgments about the nature of the problem brought to mediation and make assessments about preferred outcomes. Those judgments and assessments may be based on a principled approach derived from contextual sources, or may represent a personal view. They may be consciously held, or operate as unconscious preferences or preconceptions. Whether conscious or unconscious, principled or idiosyncratic, mediators’ values, preferences and preconceptions affect the mediation encounter.
The impact of the mediator’s personal views is problematic where neutrality is further associated with the process and content and outcome distinction in mediation. That distinction limits mediator input to process interventions. In so doing, the distinction demands that mediators bring no personal content to the mediation encounter and that they do not intrude into the parties’ content. The assumption underlying these exclusions is that it is content and not process that determines the substance of any outcome or agreement between the parties. Studies have shown, however, that mediators’ personal judgments do influence the mediation process and that so-called process interventions affect the content and outcome of mediations. Studies have shown not only that mediators have an impact, but also that they actively shape the content of the mediation and direct its outcome according to their own views and preferences. As a result of the tension between what is expected according to the process and content or outcome distinction, and what happens in practice, a number of commentators describe mediators as engaging to varying degrees in directive intervention rather than simply being non-directive.

Excluding advice-giving from the mediator’s role is consistent with the process and content or outcome distinction since giving advice intrudes into content. Not giving advice is said to be a central feature of the mediator’s role compared with that of a conciliator. However, scholarly critiques have argued that mediators routinely give advice and that significant process skills used by mediators mask the giving of advice. Using process skills covertly, if unconsciously, to intrude into content, such as steering the direction of mediation under the guise of process interventions, demonstrates mediators’ use of power and influence in mediation.
In an absolute sense, a neutral mediator might be seen as having no power in mediation because s/he purports to have no influence over its outcome. This view is consistent with the process and content or outcome distinction. However, even there, mediators control the process and correspondingly exercise power within it. Examinations of power in mediation have tended to focus on imbalances of power between the parties more often than on the power of the mediator vis-à-vis the parties. Whether to address imbalances of power rather than treat the parties equally, or even-handedly, is a question that has attracted considerable comment by academics and practitioners. More recently, analyses of power have included reference to postmodern considerations and expanded to incorporate explicit consideration of the position of the mediator. In all, there has been growing acknowledgement of the power and influence of the mediator, and hence of the need to reconsider the notion of neutrality.

This chapter has highlighted the place of neutrality in mediation, how it is understood by mediation academics and practitioners, and the problems that are recognised in putting neutrality into practice. The following chapter reviews the ways in which scholars have attempted to make sense of neutrality in practice, or have suggested alternatives to neutrality, and or have developed models of practice that seek to avoid the necessity of neutrality.
CHAPTER TWO

RESPONSES TO THE DILEMMAS OF NEUTRALITY
IN MEDIATION

2.0 INTRODUCTION

This chapter reiterates the core problems of putting neutrality into practice and critically examines the solutions proposed in the literature. The examination is organised around central questions arising from the meanings of neutrality as impartiality and even-handedness, as discussed in Chapter One. The process and content or outcome distinction features heavily in the analysis, given its primacy in current understandings of neutrality. Alternative theories offering answers to the dilemmas of neutrality in practice are also reviewed. The question of how mediator neutrality is dealt with is then considered in the context of different models of mediation and their theoretical underpinnings. In a summary of the literature, the final section articulates the research question for the empirical component of the study.

2.1 IMPARTIALITY AND THE IMPACT OF THE MEDIATOR

A significant problem associated with neutrality as impartiality is the impact of the personal values, preferences and preconceptions of the mediator. This problem is predicated on the process and content or outcome distinction in mediation. Whilst impartiality in a narrow sense excludes actual or potential bias as a precondition of mediation, in a wide sense it calls for the mediator not to affect the content and outcome of the dispute. Responses to the problem of putting impartiality in a wide sense into practice are discussed below. Proposed solutions are: a call for mediators to
A number of commentators have recommended that mediators identify and communicate their value positions to parties. Cohen, Dattner and Luxenburg (1999, p. 346) argue that the mediator should share his or her values and views with the parties and define for them the situations in which he or she will intervene. According to these commentators, communicating the mediator’s values gives the parties control over the mediator’s influence (see also Bernard et al, 1984, p. 73). Communication of values may be important and useful, but to assume that this shifts power from the mediators to the parties in a way that safeguards party control and the neutrality of the mediator is unrealistic. It ignores the complexity of the mediator’s position vis-à-vis the parties and the likelihood that parties will invest considerable authority in the mediator and possibly, if not probably, waive careful scrutiny of a mediator’s values. Moreover, what values should be communicated? Bernard et al (1984, p. 67) argue that mediator strategies are coloured and shaped by their personal views of conflict, justice, self-determination and, in the context of family mediation, moral conceptions of the family. Without a sound basis in mediation philosophy, articulated values could merely represent the idiosyncratic views of a given mediator. As Astor (2007, p. 229) remarks, “it cannot be acceptable for a mediator to be able to inject whatever ideas and opinions s/he thinks appropriate into the mediation, however ill-informed or eccentric those ideas might be”.

communicate their value preferences to parties, the model of symmetric prescriptive advice (SPA) advanced by Gibson, Thompson and Bazerman (1996); mindfulness in mediation; and adoption of a reflexive practice.
Gibson (1999, p. 203) argues that mediators should incorporate a statement of personal values in their opening statement to parties. Gibson, Thompson and Bazerman (1996) extend that requirement to the giving of advice to the parties. They propose a model they describe as symmetric prescriptive advice (SPA). According to Gibson (1999, p. 203), the model addresses the question of how mediators identify and gather facts and data relevant to a dispute – a question which “initially appears to be an intractable problem for ‘neutral’ mediators”. According to the SPA model, the mediator outlines optimal advice to both parties (prescriptive advice); the mediator serves both parties’ interests and this is understood by them (symmetry); and the mediator necessarily has an activist role (Gibson, Thompson & Bazerman, 1996, p. 70).

Gibson, Thompson & Bazerman (1996) offer the SPA model as an alternative to neutrality. It means, according to them, that the mediator will remain impartial (equated by the authors with even-handedness, or treating the parties equally) but can no longer claim to be neutral (impartial in a wide sense). However, the model is limited in offering possibilities for even-handedness. Choosing what information is relevant and how it will be brought to the process necessarily involves value judgements on the part of the mediator (Gibson, 1999, p. 203). Similarly, determining how much and what sort of information will constitute symmetrical prescriptive advice also involve value judgements. To assert impartiality (as treating the parties equally and hence even-handedness) in these circumstances requires an unrealistic expectation of the mediator’s ability to quantify equal measures of advice.
A precondition of communicating values is to be aware of them. Taylor (1997, p. 226) argues that it is important for maintaining neutrality that mediators examine, in the course of each session, their biases, assumptions and personal reactions to the parties. What does that awareness achieve? According to Rock (2006, pp. 348-9), being aware of bias in thoughts and emotions, and being able to exclude those thoughts and emotions from the mediation are central aspects of neutrality. He makes a distinction between internal and external neutrality, arguing that the presence of emotions, values and agendas in a person’s thinking is a natural part of human existence and it is only when these are translated into outward or external behaviour that they represent a threat to the neutrality of the mediator. This distinction between internal and external neutrality is particularly useful in making sense of the idea that mediators must appear to be neutral. The appearance of neutrality is consistent with the view, expressed by Tillett (1991, p. 56), that bias can at best be restricted but not eliminated. The issue becomes one of the effect and control of bias rather than its existence or non-existence.

Rock (2006, p. 350) advocates mindfulness in meditation as “a means of cultivating an awareness of what exists in the present moment, without objective, ambition, or judgement” (see also Fisher 2003; Brach, 2008). He argues that the practice of mindfulness enables the mediator to make conscious and deliberate choices, aware of any biased thoughts or emotions as they arise. Awareness enables the mediator to choose to “structure their outward behaviour to dissipate any manifestation of bias or preference” (Rock, 2006, p. 347). According to Rock, a mediator’s awareness that his/her perspective differs from that of the parties has the potential to enable the mediator to refrain from acting from a standpoint of bias. Fisher (2003, pp. 168-71)
suggests a number of practical strategies to introduce and increase mindfulness in mediation. Those strategies stress the self-awareness and authenticity that are central to the Buddhist concept of mindfulness, which Riskin (2002, p. 24) identifies as “to notice, without judging and with equanimity whatever passes through her awareness – bodily sensations, emotions, sounds and thoughts.”

Self-awareness is also central to another response to the threat of real or potential bias in mediation – that of reflective or reflexive practice. Mediators are encouraged to engage in self-reflection and evaluation in order to consciously address the potential for bias to affect the process (Astor, 2007, pp. 230-36; Bagshaw, 2005, pp. 1-8; Kurien, 1995, pp. 51-3). There are differing definitions of these terms in the mediation literature, which present challenges to understanding their impact and usefulness. Lang and Taylor (2000) develop a theory of ‘artistry’ in mediation based upon a “reflective practice”. The authors describe a number of characteristics which distinguish the artistic from the basically competent mediator. The artistic mediator applies “the principles and methods of reflective practice” which include a continual process of self-reflection (p. 123-127). Bagshaw (2005, p. 3) distinguishes between “reflection” and “reflexivity”, identifying the latter as “critical reflection”. Boulle (2001, p. 272) provides a commonly understood description of “reflective” practice as “learning from experience through self-briefing, mutual debriefing with a co-mediator, or supervisory debriefing with an experienced external mediator”. Martin and Douglas (2007, p. 296) define “reflexive practice” as practice which reflects upon power. Winslade and Monk (2000, p. 120-3) distinguish between reflective and
reflexive practice, defining the latter as a dialogical process inclusive of reflective practice. 5

Bagshaw (2005; 2003; 2001), advocates a reflexive practice because, she argues, mediators simply cannot claim to be neutral. In the context of an examination of the impact of modernist and postmodernist (including poststructural) perspectives in mediation, she argues that from these perspectives, neutrality is an illusion. Bagshaw (2003, p. 141) advocates a reflexive practice, which “demands awareness and control of one’s own professional, personal and cultural biases in order to understand the standpoint of the ‘other’”. She proposes a list of reflective questions aimed to “map the conflict” and separate the perspective of the mediator from those of the parties (Bagshaw, 2005, p. 8). She suggests, however, more purpose to an understanding of the perspectives of the parties than merely distinguishing them from that of the mediator. Despite critiquing any privileging of the power and knowledge of the mediator, Bagshaw (2005) argues that the mediator is “concerned about how clients’ world-views, or constructions of the conflict or events, are getting in the way of an effective solution” (p.1; emphasis added); and aims to assist the parties “to open up to alternative views or stories that might be more useful to their situation and to the resolution of the conflict” (p. 2). Bagshaw (1995, p.3) argues that party self-determination is a central precept of mediation, yet her analysis of reflexivity suggests that mediators have the necessary expertise and authority to determine “effective solutions” based upon their suggestions as to “alternative views or stories”. There is a lack of clarity here as to the role of the reflexive mediator. A reflexive mediator uses her increased self-awareness to limit intrusion of her own personal world view, yet

5 The distinction between reflective and reflexive practice is considered in Ch 3.
she also uses her insight to direct the process toward her own assessment of an effective solution.

Reflexivity offers a useful way of considering and acting to limit the intrusion of bias, but remains an incomplete approach because it does not deal with the implications of the process and content or outcome distinction. If mediators’ interventions can be, and are, limited to process, then there is no need for mediators to be aware of the content of either their own biases, or the similarity and differences between their perspectives and those of parties. If however, it is acknowledged that mediators do intrude on content and outcome, and that intrusion is inevitable, how might the mediators’ awareness of their own perspectives serve the parties? Is that awareness merely in the service of limiting the intrusion of the mediator or can it be properly employed to find appropriate solutions with or for the parties? If the perspectives of the parties are paramount in mediation, what need is there for mediators to be self-aware beyond the need to limit intrusion? Bagshaw (2003; 2005) seems to avoid this question by grounding her approach in a social constructionist ontology from which it could be argued that the process and content or outcome distinction is unsustainable. However, the question remains as to what principles guide more useful perspectives of parties’ conflicts in order to foster “effective solutions”.

Astor (2007, pp. 229-37) incorporates reflexive practice within five principles designed to “do neutrality” in a way that seeks to make sense of both theory and practice. Her approach is considered below (see 2.4).
2.2 EVEN-HANDEDNESS AND QUESTIONS OF FAIRNESS

The problem associated with even-handedness is that treating the parties equally may lead to unequal and unfair results. Questions of fairness tend to be framed according to the process and content or outcome distinction, rather than an established legal distinction between procedural and substantive fairness (see Boulle, 2005, p. 147). The latter distinction, however, is useful in combination with the first, in pointing to three approaches to fairness identifiable in the literature. According to the first approach, in order to retain the integrity of the process and content or outcome distinction, addressing questions of fairness is properly limited to process interventions and excluded from those of content or outcome. Here, the role of the mediator is limited to that of ensuring procedural fairness. Among those who argue that the role of the mediator extends to questions of substantive fairness there are two further views. The first emphasises the parties’ subjective views of what is fair, while the second allows for the intrusion of the mediator’s views and is particularly implicated in ideas of balancing power between the parties.

Limiting interventions that seek to redress power imbalances to interventions in the process ostensibly enables mediators to remain neutral as to content and outcome. The theoretical distinction between process and content or outcome is used to answer difficulties in putting even-handedness – treating the parties equally – into practice. Mediators are encouraged to treat the parties unequally in order to bring about equality of outcome, but only in relation to process interventions. Thus, for example, Mayer (1987, pp. 81-2) encourages interventions designed to achieve procedural equality with a focus on power differentials that may hinder productive negotiations.
He notes that while mediation can provide procedural equality within the confines of a session, it is unlikely to achieve change in inequities based on structural conditions and or unequal division of resources. He does not, however, equate process interventions with passivity or lack of influence from the mediator and notes that “almost anything a mediator does, from inviting one party to speak first to establishing eye contact at a certain point, is an application of their influence in the negotiation” (Mayer, 1987, p. 82). Taylor (1997, p. 221), by contrast, proposes a more content-focussed view (in the context of family mediation). She argues that the means of balancing power between the parties is to increase information, knowledge of entitlements and overall encouragement for the party perceived to be in a weaker position, in order to bring about a more equal positioning “in the room”. Incorporating content according to these dimensions is, however, contrary to the process and content or outcome distinction. Taylor’s argument is advanced according to her alternative, “expanded” idea of neutrality, examined below (see 2.4).

The problem of even-handedness and the contradiction in employing equidistance as a strategy to reduce power imbalances is repeatedly identified in the literature as an issue of mediator accountability for fair outcomes, as distinct from fair process. Moore (1994, pp. 281-2) has succinctly highlighted this dilemma:

The mediator because of his or her commitment to neutrality or impartiality, is ethically barred from direct advocacy for the weaker party, yet is also ethically obligated to assist the parties in reaching an acceptable agreement.

Several commentators identify a tension or contradiction between the mediator’s obligation to remain neutral and the need for equity in settlements (Boskey, 1994, p. 367; McKay, 1989, p. 22; Fisher, 2001, p. 199). “Fairness” is repeatedly referred to in discussions of the problems of neutrality, yet it is another concept ill-defined in the
mediation literature. As Boulle (2005, p. 147, fn 33) notes, fairness is itself an ambiguous and contested term.

Fairness, social justice and ethics are mentioned in various attempts to draw attention to the dilemmas of translating neutrality into practice. Gunning (2004, p. 93), argues that considerations of social justice ought to be integral to mediation practice, even though a concern for just outcomes must affect mediator neutrality. McCormick (1997, p. 295) argues that mediation should address social injustice and that “a mediator committed to representation of all the interests cannot be preoccupied with neutrality.” Gorrie (1995, p. 36) rejects the idea of mediator neutrality as being at best restrictive and ineffective, and at worst a sham, but more simply, unnecessary. He argues for the development of a set of “authentic ethical principles which emphasise and enable true client self-determination, empowerment and a genuine collaboration between mediators and parties”. Mulcahy (2001, p. 509) notes that in some contexts, the principle of neutrality has been elevated to ethical status, and several commentators identify the problems of neutrality as ethical dilemmas (Gorrie, 1995; Taylor, 1997; Field: 2000; 2003).

As noted above (see 1.5.2), mediation as grounded in the distinction between process and content or outcome, is said to ensure the fairness of outcomes by ensuring that control of the content and outcome remains with the parties. The connection between this and concepts of justice is described by Rock (2006, pp. 347-8):

> In mediation, justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution. It is the decision-making power of the parties which allows parties the freedom to craft solutions that best comport with their individual understanding of a just
outcome. Mediator neutrality is necessary for the parties’ retention of decision-making power.

According to this view, the process and content or outcome distinction simultaneously ensures justice for the parties and the neutrality of the mediator. The mediator need not intervene to ensure a fair outcome because that is assured as long as she does not intrude into content or outcome. As Boulle notes (2005, p. 31), “the claimed neutrality of mediators is regarded as both an ethical requirement and a practical consequence of the process/content distinction...”.

Equating a just outcome with the self-determination of the parties ignores the problem of unjust outcomes as a result of existing inequities between them. Hence, it is neutrality associated with the distinction between process and content or outcome that precludes consideration of substantive fairness. Calls for mediators to ensure the latter have tended, therefore, to imply or require an abandonment of neutrality. Mayer (2004, pp. 116-20), for example, extends his analysis of the scope of mediation to a broader consideration of conflict resolution and in doing so proposes that the role of mediators include advocacy at the expense of neutrality. He asks: “How can we be neutral in the face of injustice?” (Mayer, 2004, p.174). Mayer places conflict resolution within interdependent contexts of social justice (a social movement) and professionalism. He argues that social justice provides the all-important normative element to motivate the involvement of practitioners in the field ...But the social movement elements need the professional push to provide credibility, legitimacy, and business. This provides the all-important utilitarian element for the field. So there is a certain creative synergy, even symbiosis, between these two elements (Mayer, 2004, pp 150-60).
Mayer points to the danger of mediation as a mechanism of social control. He examines the role of mediation (and the neutrality of the mediator) in reinforcing and exacerbating existing inequalities in the light of the assumptions, practices and identities of mediators, who “remain a primarily white, middle-class, English-speaking field” (Mayer, 2004, p. 170). In a similar critique, Mulcahy (2001, p. 514) argues that mediators’ claims to neutrality may undermine the capacity of the community justice movement to protect, advocate on behalf of, and remain concerned about disadvantaged groups. Despite an emphasis on social justice, Mayer (2004, p. 162) argues that mediation processes cannot hope to change major sources of inequality such as racial and gender bias. At most, he argues, mediation can enable problems of equity to be canvassed, thereby raising awareness and limiting negative impact in individual cases.

In contrast with Mayer’s view, mediators in Mulcahy’s study, introduced in Chapter One, revealed a practice of advocating on behalf of individual disputants outside the mediation process. Mediators in that study claimed neutrality as part of the traditional model of mediation practiced by the community service, but acknowledged that their conduct did not match that claim. The mediators in Mulcahy’s sample acted as advocates, having reconstructed the disputes between parties as matters affected by systemic influences (the policy and practice of the local housing authority) and or as issues affecting a broader spectrum of community members (Mulcahy, 2001, p. 518). As a consequence of her findings, Mulcahy suggests that we abandon neutrality. As one solution to the gulf between theory and practice, Mulcahy proposes the
development of an ethic of partiality as a framework for making sense of practice, in preference to the impossibility of neutrality (Mulcahy, 2001, p. 506).

In sum, there are, broadly speaking, two approaches to ensuring fair or just outcomes in mediation. The first approach enshrines neutrality while emphasising the parties’ determination of what is fair. The second abandons neutrality in favour of an “external” determination of what is fair. “External” is used here in the sense of a determination beyond the parties’ view. An external view necessarily consists of the mediator’s perception of what is fair, whether a personal view or an interpretation of some objectively determined criteria, such as the notion of social justice. The first approach leaves the problem of imbalances of power between the parties unchallenged and even entrenches inequitable outcomes by its failure to adequately address the impact of disadvantage. Even where imbalances of power are recognised, there is a tendency to perceive situations requiring intervention as the rare exception rather than the rule (Mulcahy, 2001, p. 511). This view is consistent with the National Practice Standards, which both limit the role of the mediator to questions of procedural fairness and emphasise the parties’ determination of what is substantively fair (clause 9).

The second approach allows for the intrusion of mediator values and perceptions of what is fair, without any thoroughly developed practice principles. Merely making parties aware of mediators’ values will not ensure fairness, unless, as suggested by Mulcahy’s ethic of partiality, fairness is understood by the mediation community and developed as a coherent practice principle. As mediation stands, the confidential, non-reviewable nature of the process presents dangers for the *ad hoc* application of
mediators’ subjective views of what is fair and which situations require intervention to ensure fairness. Furthermore, reviews of existing codes of conduct and standards of practice reveal considerable complexity and contradiction in determining what is fair. In a review of standards of practice in the United States, Cooks and Hale (1994, p. 61) found provisions enshrining the self-determination of the parties and requiring mediator intervention for fair outcomes, but no objective standards by which fairness could be determined. The same standards also contained requirements of mediator neutrality (and impartiality) in seeming contradiction to requirements that mediators ensure fairness (see also McCorkle, 2005).

2.3 THEORIES OF NEUTRALITY

Taylor and Astor both argue for a contextualised understanding of neutrality. Taylor (1997, pp. 223-5) proposes an “expanded neutrality” as a means of reconciling impartiality (even-handedness) and the practice of equidistance. In place of the imperative to treat parties equally, the specific needs of individuals are addressed differentially according to the principle of party self-determination. Taylor (1997, p. 230) describes party self-determination as the “hallmark and most central value for mediators”, necessitating the “absolute requirement that mediators take their mandate from the clients”. Three potential limits to her analysis are evident. One is that she suggests a continuum of neutrality from “strict neutrality” to “expanded neutrality” and acknowledges very different approaches in these two extremes. Although she posits that mediators practice anywhere along the continuum, she identifies strict neutrality with legal problem-solving approaches and expanded neutrality with more therapeutic approaches, which works against a common understanding of neutrality applicable to all approaches. Second, in relation to one of the four models that she
identifies as relevant to family mediation (outlined at 1.5.2 above), the normative-evaluative model, Taylor concedes that the explicitly directive role of the mediator may contradict the principle of party self-determination. Hence, any attempt to construct an expanded neutrality for that model would be defeated because it could not rely on the principle of party self-determination. Finally, Taylor’s analysis relies on the distinction between process and content or outcome, with all the difficulties that poses for the idea of neutrality. She conscientiously asserts that the “clients are in charge of the mandate, scope, and outcome of mediation, and the mediator is in charge of the process’” (Taylor, 1997, p. 230).

Astor (2007, p. 227) argues that to distinguish between neutrality and impartiality (even-handedness) is to acknowledge that mediators have personal values and personal perspectives, but the distinction provides no guidance as how mediators might appropriately use them in mediation. She asks: How does a mediator know that they are treating the parties equally? And what would be the basis of that assessment? Further, she contends that “asserting impartiality as a solution merely cloaks the situatedness of the mediator and again conceals the operation of power” (Astor, 2007, p. 207). In an examination of theories of power in mediation, Astor relates “situates knowledges”, or the standpoints from which individuals view the world, to power and culture.

All individuals have a race, a gender, a sexuality and many other aspects of identity, so that there is no essential woman, or Aboriginal person or gay man. But culture does influence the ways power is distributed, who can exercise what types of power, what can be said and by whom, which stories are recognised and which stories can and cannot be told (Astor, 2005, p. 37).
Astor constructs an approach to “doing neutrality” which endeavours to take account of the varying contexts in which mediation is practiced and the personal situatedness, or perspectives, of mediators. In an early work, Astor advocates an abandonment of neutrality in favour of “maximising party control” (Astor, 2000b, p. 145). This principle shifts attention from the neutrality of the mediator and the problems of making sense of neutrality in theory and in practice, to a focus on optimising the parties’ control of the content and outcome of their dispute (Astor, 2000a, p. 81; 2000b, p. 145). In her more recent work, she acknowledges that mediators want to retain the notion of neutrality, and although problematic, it remains an idea “that defines and regulates the input of the mediator into the process, content and outcome of mediation” (2007, p. 228). Astor articulates a set of five principles as theoretical grounds for the practice of neutrality in mediation. Those principles are: understanding the mediator’s perspective; openness to other perspectives; valuing multiple vantage points and respecting the view from below; maximising party control; and dealing with power – maximizing the control of all parties. The first principle asks mediators to acknowledge and understand their personal perspectives and to employ a self-reflexive practice. The second asks them to be open to the perspectives of others and combine reflexivity with empathy. The third principle combines reflexivity with an understanding of relationships of power. The fourth ask mediators to determine their input into mediation not by any principle of neutrality, but by “the principle that parties should have the maximum control possible given their context and situation” (Astor, 2007, p. 234). The fifth and final principle combines maximising party control with an appreciation of the relationships of power between the parties.
A particularly compelling aspect of Astor’s analysis is her identification of the binary thinking in the question repeatedly underscored in the literature – are mediators neutral or not? (Astor, 2000a, p. 73). Her use of postmodern constructions expands examination beyond this binary question (2000a; 2005; 2007). Incorporating reflexivity, consideration of power and contextualised and situated understandings significantly enhances theoretical considerations of neutrality. Maximising party control accords with party self-determination, a more widely used and accepted term in the mediation literature. In my view, adoption of Astor’s approach is more likely if synergies between these two principles are explored and advanced.

A further response to the problems of neutrality is contained in the work of Cobb and Rifkin (1991a; 1991b), based on their empirical study reviewed in Chapter One above (and see Rifkin, Millen and Cobb, 1991). Cobb and Rifkin deconstruct the concept of neutrality in mediation, according to a post-structural perspective of neutrality as a practice in discourse. They draw attention to the meaning of neutrality as associated with three interrelated and interdependent terms: justice, power and ideology (Cobb and Rifkin, 1991a, p. 37). They argue that neutrality is a discourse that masks particular power relationships and the influence of particular views of justice and the role of mediation in pursuing justice for parties. Theirs is a complex analysis which unearths the assumptions underlying the practice of neutrality but does not reconstruct it in a way that provides a clear direction for practice. Taylor (1997, pp. 217-8) has remarked that approaches such as that advanced by Cobb, Rifkin and Millen may be so conceptual as to be of limited value to practitioners. The critique of neutrality they present is central to the narrative or story telling model of mediation they articulate.
That model offers an alternative to the practice of neutrality in mediation and is examined below.
2.4 PLACING NEUTRALITY IN CONTEXT: MODELS OF MEDIATION

The aims of this section are to review the principal models of mediation practice identified in the literature and to examine how each of them deals with the question of mediator neutrality. Three models are discussed here – the problem-solving model (of which there are a number of variants), the transformative model and narrative models (of which two versions are discussed). These three types are chosen for their distinctive approaches to neutrality and to the distinction between process and content or outcome in mediation. First, the three models are placed in the broader context of the variety of practice models.

2.4.1 A range of mediation models

Alexander (2008) offers a useful examination of current models of mediation practice, and typologies of intervention modes, as advanced by Riskin (1996, 2003), Boulle (2005), Bush & Folger (1994) Merry (1987) and Currie (2004), while developing her own metamodel of practice. The mediation metamodel she proposes represents six contemporary practice models: settlement, facilitative, transformative, expert advisory, wise counsel and tradition-based mediation. Each is characterised according to dimensions of interaction (positional bargaining, interest-based negotiation or dialogue) and intervention (according to the process of dispute resolution or the “problem”, the substantive content of the dispute). The metamodel aims to represent dominant practice models while acknowledging flexibility between them, elements of which may be used concurrently in a given mediation session (Alexander, 2008, p. 106).
While it has been recognised that there are many more approaches to mediation practice than a limited number of models suggests (Menkel-Meadow, 1995, p.228), the metamodel is useful because it distils considerable variation in practice into six themes in a way that can be used to orient mediators, parties, regulators, researchers and others (Alexander, 2008, p. 118). It does this by explaining each model’s objectives, methodology, useful aspects and known critiques. In the face of varying typologies and sometimes ambiguous, sometimes overlapping terminology, the metamodel offers a starting point from which to consider the diversity of practice models in the field. Its particular interest for this discussion is its reliance upon a distinction between process and problem (content) in identifying the intervention dimension of practice. Although the possible or probable intersection of these aspects is acknowledged (Alexander, 2008, pp. 103-5), the model separates process and content as its two parameters of intervention.

The metamodel’s reliance on a distinction between process and content illustrates the prevalence of that distinction in practice, though two theoretical models – the narrative and transformative models – reject it. Alexander (2008, pp. 115-7) treats these two as variants of “transformative mediation”, which she describes as framed by a dialogue “through which the parties are empowered to articulate their own feelings, needs, and interests and to recognize and acknowledge those of the other party” (Alexander, 2008, p. 115). She further identifies narrative and transformative models as forms of therapeutic mediation, as distinct from problem-solving mediation, relying on the distinction posed by Merry (1987) and others (Alexander, 2008, p 116). According to the metamodel, narrative and transformative models emphasise process
more than content. However, as is discussed below, each suggests something quite different about the relationship between process and content in mediation.

In the model of facilitative mediation identified by Alexander (2008, p. 111) mediators are said to restrict themselves primarily to interventions as to process. Facilitative models of mediation are also associated with a broader category of problem-solving models. Much of the preceding discussion in this chapter and Chapter One applies to problem-solving models and within that category, to facilitative models of practice. According to Della Noce, Bush and Folger (2002, p. 49), “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”. According to Boule (2005, p. 46), the facilitative model is assumed in much of the mediation literature and is taught in most mediation training courses in Australia.

Problem-solving, derived from the social and behavioural sciences, is an approach adopted by care professionals that uses a defined set of skills to assist clients to find their own solutions (Egan, 2002). As a mode of therapeutic intervention, it presumes that a generic set of skills can be effectively applied to a wide range of problems (content). Emphasis is given to the helper’s skills in communication and other therapeutic interventions, rather than his or her knowledge of the causes of problems and appropriate remedial strategies. Problem-solving as a therapeutic intervention emphasises client autonomy (Egan, 2002, pp. 7-9) in much the same way as problem-solving in mediation emphasises party self-determination.
There is considerable influence from therapeutic modalities in existing problem-solving, narrative and transformative models of mediation. Just as newer models of counselling, such as narrative therapy (Monk, Winslade, Crocket & Epston, 1997), have moved away from a reliance on the distinction between process and content integral to problem-solving counselling models, so too have newer models of mediation, such as the narrative model. Problem-solving models in mediation have, however, been more overtly associated with aims of dispute settlement and conflict resolution, as alternatives to judicial or quasi-judicial processes, and as different from therapeutic aims. From this perspective, problem-solving processes have been likened to aspects of the litigation process (Douglas & Field, 2006, p. 183). Problem-solving mediation models have incorporated the skills associated with generic counselling interventions, but used them in a different context. The juxtaposition of influences is complex, as are the elements of the many models practiced (as described, for example, by Coben, 2004).

The focus of this discussion is the problem-solving model, predominant in mediation practice, and alternative models, namely, narrative and transformative models, as part of mediation’s “second generation” of practice (Cobb, 2001, p. 1029). A decade ago, use of the transformative model of mediation had limited recognition in Australia (Astor, 2000a, p. 76). Narrative models of mediation have less recognition in the Australian literature, but have been practiced by the wider mediation profession for over a decade.
2.4.2 Problem-solving models

Problem-solving models of mediation are underpinned by negotiation theory. The most favoured is the integrative model (sometimes referred to as the win-win model) articulated by Fisher and Ury (1981). One of its essential elements is a focus on the interests of the parties rather than on their relative positions. A focus on positions is the central characteristic of a distributive negotiation model. As a foundation for mediation practice, the integrative model favours cooperative and collaborative problem-solving that ends in agreement. The mediator assists in this movement towards agreement, the content of which is said to be controlled by the parties, reinforcing a process and content or outcome distinction. A pervasive and persuasive view of mediation is as negotiation assisted by a neutral third party (Astor & Chinkin 2002, p. 83; Boulle, 2005, pp. 109-11; Moore, 2003, p. 16), wherein the mediator orchestrates the exchange between the parties by controlling the process and, without effect on the content, acts as a conduit for communication between the parties. The mediator is thus said to be neutral as to the content and outcome of the dispute.

Boulle describes negotiation as a “primary” dispute resolution process. It is primary in the sense of forming the basis of other processes, including mediation, and being itself irreducible to meaningful parts (Boulle, 2005, p. 110). Negotiation is a form of bilateral exchange in which “two or more people communicate in an attempt to reach agreement on some matter” (Astor & Chinkin, 2002, p. 105). According to Astor and Chinkin (2002, p. 111), the current focus on negotiation in dispute resolution emphasises the central importance of process: “This emphasis requires those involved in negotiations to distinguish between the process and the content of negotiations”. Mediation has been identified as the main form of assisted negotiation within the
range of dispute resolution processes available (Astor & Chinkin, 2002, p. 83; see also Spegal, Rogers & Buckley, 1998). Hence, negotiation theory, as it informs mediation practice, reinforces a process and content or outcome distinction.

Problem-solving models emphasise the importance of the individual, consistent with modernist conceptions and a liberal legal ideology, and focus on finding a solution to the problem that brings the parties to the mediation table (Della Noce, 1999, pp. 277-8; Della Noce, Bush & Folger, 2002, p. 49). They assume that the parties are “autonomous, self-contained, atomistic individuals, each motivated by the pursuit of satisfaction of his or her own separate self interests” (Della Noce, Bush & Folger, 2002, p. 49). According to Della Noce, Bush and Folger (2002, p. 49), these models also assume that the mediator’s expertise is limited to process interventions and their role as facilitators is mainly to assist the parties to come to their own mutually agreed outcomes. However, variants of the problem-solving model reflect the different types of intervention that mediators routinely engage in. They also reflect some acknowledgment that mediators contribute expertise about substantive content and that they directly influence outcomes.

Boulle (2005, p. 43) identifies four models of mediation – settlement, facilitative, therapeutic and evaluative. He describes these as paradigm models “in that they are not so much discrete forms of mediation practice but rather ways of conceptualising the different tendencies in practice” (Boulle, 2005, p. 43). Of these four models, three have been described as problem-solving models – the settlement, facilitative and evaluative models (Douglas & Field, 2006, p. 183). All three represent forms of assisted negotiation, with somewhat different roles for the mediator. Boulle (2005, p.
43) notes that the facilitative model is often referred to as the “orthodox”, “standard” or “classical” model of mediation. He describes the role of the facilitative mediator as “low intervention” and focussed on conducting the process with no necessary knowledge of the subject matter of the dispute. Settlement and evaluative models represent greater intervention on the part of mediators, who use their status or substantive expertise to exert greater control over the content and greater influence over outcomes (Boulle, 2005, pp. 44-5).

Boulle’s (2005, pp. 44-5) typology uses a number of dimensions to distinguish between the four models he describes. Intervention in the process, as distinct from content or outcome, is not explicitly used as a dimension, although he refers to these elements. He offers a critique of the distinction, noting its prevalence in much of the early Australian literature on mediation, in mediator codes of conduct and occasionally in court references to mediation (Boulle, 2005, pp. 29-30). As indicated by Alexander’s metamodel, the distinction remains a central theme in mediation despite more recent critiques. Boulle (2005, p. 46) has described the facilitative model in particular as upholding “the neutrality of the mediator, the process/content distinction, the minimalist intervention style and the consensuality of outcomes”. The distinction has, however, been largely rejected in mediation’s second generation of practice.

2.4.3 The transformative model

The transformative model, developed by Bush and Folger (1994; 2005), is framed around a identifiable “premises, purpose and principles” (Fisher, 2006, p. 2). The model is premised on a relational understanding of human nature. Rather than
assuming that disputants aim simply to satisfy their individual needs, this model assumes “that people are, by their essential nature, both separate and connected beings, who are distressed whenever negative interaction between them continues, even if their separate needs get satisfied” (Bush & Folger, 2005, p. 36). The model combines this premise with a theory of conflict that assumes that what people find most significant about conflict is not that it frustrates their individual rights or interests, but “that it leads and even forces them to behave toward themselves and others in ways that they find uncomfortable and even repellent” (Bush & Folger, 2005, p. 46). Bush and Folger argue that transformative mediation aims to achieve conflict transformation rather than conflict resolution. As such, it is premised on the assumptions that parties have both the desire and capacity to transform the conflict.

According to the model, conflict is experienced as an interactional crisis, which can intensify into a “negative conflict spiral”. Degeneration into this spiral is indicated by “mutual alienation and demonisation” in which each disputant experiences escalating “weakness and self-absorption” (Bush & Folger, 2005, pp. 49-51). The purpose of mediation and the role of the mediator is to assist parties to reverse this negative spiral and to move them individually from weakness to strength, and from self-absorption to responsiveness to the other. Strength is conceptualised as empowerment and responsiveness is conceptualised as recognition (Bush & Folger, 2005, pp. 51-9). Supporting opportunities for empowerment and recognition is the single most important principle directing Transformative Mediation practice (Fisher, 2006, 3) and is translated into specific strategies (Fisher, 2007). The mediator’s role is to support the parties’ desire and capacity to transform their conflict by supporting positive interactional shifts, characterised as empowerment and recognition shifts (Bush &
In the first edition of their work, Bush and Folger (1994, p. 2) define empowerment and recognition as follows:

In the simplest terms, empowerment means the restoration to individuals of a sense of their own value and strength and their capacity to handle life’s problems. Recognition means the evocation in individuals of acknowledgment and empathy for the situation and problems of others (emphasis in original).

Consistent with a relational world view, Bush and Folger (2005, p. 66) reject the distinction between process and content, maintaining that the two are intertwined and inseparable in practice (see also Bush, 1989b). Their model does, however, highlight outcomes and uses this element to conceptualise each parties’ self-determination as a result of the mediation. A hallmark of the model, according to its authors, is that responsibility for outcomes is left with the parties (Bush & Folger, 2005, p. 70). Bush and Folger (1994, pp. 104-5) acknowledge the influence of mediators on both process and content, but argue for a change to the nature of that influence. In so doing, they reframe the meaning of neutrality.

The meaning of mediator neutrality, in the context of inevitable influence, is commitment to use influence only for the sake of keeping the ultimate decision on outcome in the parties’ hands. Neutrality means that the mediator’s only interest is the interest in using his or her influence to make sure that the parties maintain control of decisions about outcome…By adopting the transformative approach, the mediation movement gains a solution to the problem of the inevitability of influence, and a new and meaningful conception of mediator neutrality emerges” (Bush & Folger, 1994, pp. 105-6, emphasis in original).

This reframing of neutrality to some extent addresses the problem of putting neutrality, as impartiality in a wide sense, into practice. It acknowledges the influence of the mediator on content, although the focus of interest for the mediator is the transformation of the conflict rather than the detail of the dispute (Bush & Folger,
The model has the advantage of articulating a clear set of premises, which frame its practice and can be communicated to disputants as values determining the encounter. Although it does not address the monitoring of unconscious bias, mediators are personally implicated in their own moral growth alongside that of the parties (Brenner, Segal & Serventy, 2000, p. 161).

Questions of fairness are not addressed in the transformative model beyond equating fairness with the self-determination of the parties and therefore with whatever outcome they determine. According to Bush & Folger (2005, p. 71), empowerment, a central aim of transformative mediation, is independent of substantive outcomes. “Whether the outcome is a settlement that the mediator finds fair and optimal or unfair and even stupid, or a decision not to settle at all, the goal of supporting empowerment [can be] achieved” (Bush & Folger, 2005, p.71). Furthermore, they expressly distinguish their goal of empowerment from any idea of balancing power between the parties, whether within the mediation session or as a consequence of the process (Bush & Folger, 2005, p. 76). They also distinguish between the mediator’s role in supporting empowerment shifts (achieved by individual parties) and any role as an advocate, adviser or counsellor. These other roles, they argue, are anathema to the transformative approach. They also distinguish between recognition and reconciliation. Recognition is described as one party’s response to the other party, which is supported but not directed by the mediator. It may or may not be reciprocated by the other party, but where demonstrated by one party signals achievement of the goal (Bush & Folger, 2005, pp. 56, 76-7).

The transformative model’s avoidance of questions of substantive fairness has been criticised by Noone (2008, p. 117), who argues that it assumes that parties have the
requisite capacity and knowledge to reach just and reasonable agreements. While the model excludes the imposition of individual mediator’s views of what is fair, it neither takes account of community standards of fairness nor addresses questions of the potential for an over-bearing party to take unfair advantage of the other party. Bush & Folger (2005, pp. 37-8) attribute both private and public benefit to the increased autonomy and connectedness experienced by parties as a result of conflict transformation. The public benefit “simply put, is the value of providing a moral and political education for citizens, in responsibility for themselves and respect for others” (Bush, cited in Bush & Folger, 2005, p. 81). According to Noone (2008, p. 118) this claim to long-term public benefit is yet to be substantiated.

2.4.4 Narrative models

There is more than one version of a narrative approach to mediation in the extant literature. The predominant versions are those advanced by Winslade and Monk (2000; and see Winslade, 2006; Winslade, Monk & Cotter, 1998) and Cobb (1993; 2001; also Rifkin, Millen & Cobb, 1991). Cobb’s approach is grounded in communication theory, while Winslade and Monk (2000, p. xii) build their model from a grounding in narrative therapy (see also Winslade, 2006, p. 510). In the discussion that follows, Cobb’s approach is described as “story telling”, in order to distinguish it from the work of Winslade and Monk, which is described as a narrative model. Common to both approaches – and consistent with a social constructionist view of reality and knowledge – is a rejection of the distinction between process and content, which grounds problem-solving models of mediation (Cobb, 2001, p. 1029; Winslade & Monk, 2000, p. 37). Cobb (2001, p.1029) describes rejection of this distinction as “second-generation” mediation practice and argues:
This is a radical departure from what could be called “first-generation” mediation practice, where the mandate not to impact on the content of the dispute is thought to be essential to preserving the privilege the parties have to define their own problems and build their own solutions. However, 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. This attention to the evolution of the content calls for a “second-generation” mediation practice in which mediators interact with disputants so as to evolve the conflict stories, reformulate relationships, reframe the past and rebuild the future.

2.4.4.1 The narrative model

The narrative model advanced by Winslade and Monk (2000, Chap. 2), is premised on a social constructionist ontology, an understanding of conflict as a function of the existence of difference and a narrative metaphor for mediation. The authors base their model on four specific principles – antiessentialism, antirealism, language as a precondition for thought and language as a form of social action (Winslade & Monk, 2000, pp. 37-41). Antiessentialism rejects any assumption of individual essential needs and replaces it with the notion that needs are constructed in social discourses – rather than essential, they can be transformed. Antirealism questions the existence of objective facts, positing instead that all knowledge is a matter of perspective. The principle that language is a precondition of thought implies that language is a meaning-making activity, not simply a form of expression. The principle that language is a form of social action means that language is intimately connected with the construction of social experience rather than being merely a form of its expression. These four principles have direct implications for mediation as a meaning-making, social activity in which parties reconstruct and co-construct their needs or interests according to ever-changing perspectives.
According to the Winslade and Monk (2000, Chaps.1 & 2), people rely on narratives, or stories, to make sense of their lives. Stories are culturally situated and are therefore shared according to various dimensions of identity. However, people’s real-life situations and prospects differ and so they create stories to make sense of those differences. An assumption of the narrative model is that conflict is produced within competing cultural norms. People construct needs and interests quite apart from any essential biological needs and may perceive these constructions as entitlements. Sometimes, “stories compete with or conflict with each other. Thus conflict can be understood as the inevitable result of the articulation of difference” (Winslade, Monk & Cotter, 1998, p. 25).

Differences that lead to conflict must be understood rather than necessarily resolved. Understanding may of itself precipitate resolution, but resolution is a not a primary aim. “In coming to understand the nature of a dispute, there are different versions of meaning to be explored, rather than sets of facts to be discovered” (Winslade, Monk & Cotter, 1998, p. 25). Understanding requires an appreciation of relations of power and privilege as these are constructed by, and in turn construct, dominant meanings and hence, dominant discourses (Winslade, Monk & Cotter, 1998, pp. 25-6; Winslade, 2006, pp. 501-5). Following Foucault, discourses are social practices “dispersed through a cultural world in linguistic forms and exerting a domination effect on what can be thought or spoken” (Winslade, 2006, p. 502).

The narrative mediator is not neutral. The narrative model does not separate process and content, because it is argued that “relationship, process, and content issues are all interwoven in the very fabric of mediation” (Winslade & Monk, 2000, p. 15).
Furthermore, narrative mediators take an overt position on issues of power and privilege. Narrative mediation espouses an overt bias towards the promotion of social justice (Winslade & Monk, 2000, p. 100; Winslade, Monk & Cotter, 1998, pp. 25-6; Winslade, 2006, p. 513). According to Winslade & Monk, “the mediator can either promote social justice and attend to equity and fairness, or reinforce unjust dominant cultural practices…The mediator in this situation is hardly neutral” (2000, p. 100). They introduce a concept of entitlement to theorise the relationship between identity and privilege (Winslade & Monk, 2000, pp. 94-106). Narrative mediators are encouraged to challenge any cultural norm that exaggerates entitlement, effectively privileging some groups of people over others. Violence, racism and sexism are explicitly mentioned as practices that must be challenged.

Given the postmodern premise that “there is no privileged viewpoint from which mediators can understand the realities of the world in which we live” (Winslade & Monk, 2000, p. 123), it is not clear how a concept of social justice drives a narrative approach. The authors use a notion of agency rather than self-determination and adopt a relational concept of power consistent with postmodernist thought. Rather than looking to balance power as between parties, a narrative approach seeks to open a space for relations of power to be reconstructed. “Narrative mediators would rather talk about how people can take up opportunities to resist the operation of power in their lives…This process of expressing resistance develops a sense of agency in people who have felt silenced and marginalized” (Winslade & Monk, 2000 pp. 50-1). The degree to which, in the co-construction of alternative narratives, the mediator controls the reconstruction is not clear. What is clear is that there is ample room for
the mediator to take control and that more than an appeal to general principles of social justice is needed to delimit his/her role.

The role of the mediator in the narrative approach is to assist the parties to create an alternative, preferred story. Three phases of the narrative model are described – engagement, deconstruction of the conflict-saturated story and construction of an alternative story (Winslade & Monk, 2000, p. 91). An alternative, non-adversarial story is constructed from gaps and contradictions in the conflict-saturated one (Winslade, Monk & Cotter, 1998, p. 26). Winslade proposes three goals for the narrative mediator: creating the relational conditions for the growth of an alternative story; building a story of relationship incompatible with the continuing dominance of the conflict; and opening a space for shifts in discursive positioning. In relation to the first goal, Winslade (2006, pp. 510-1) explains that the role of the mediator is to create the conditions for an ongoing dialogue between parties that is solution-bound rather than aimed at ensuring that the mediation ends in agreement. The mediator is concerned with “the construction of a respectful and equitable relational context that can serve as the basis of an ongoing relationship”. This relational context serves to reconstruct notional, ongoing relationships (between classes of persons) where there is no likelihood of an actual, ongoing relationship between the parties. The second goal assumes productive and harmonious themes in the relationship between parties who are hindered or restrained by the conflict. These themes are relied upon in re-telling the story of the conflict. The final goal is a shift that signals the building of more equitable relations as a result of destabilising the previously dominant narratives. Mediators are actively engaged in recreating the reality of experience for the parties.

That is, mediation conversations can open the space for the issues to be described in different terms, for positions offered within dominant discourses
to be refused, and for parties to reposition themselves within dominant discourses that they are experiencing as problematic (Winslade, 2006, p. 512).

2.4.4.2 *The “story telling” model*

According to Cobb’s story telling approach, the aim of mediation is transformation of the parties’ conflict narratives. She describes the latter as consisting of a particular perception of the problem, its antecedents and the roles played by the parties. Each party presents a story in which their role is one of a victim of wrongdoing by the other (Cobb, 2001, pp. 1022-3). The moral of the story presented by each party will require the other to change in some way (Cobb, 2001, p. 1020). The role of the mediator is to assist parties to re-tell the story of the conflict so that it contains elements of both disputants’ positions (Cobb, 1993, p. 255).

Cobb advances three particular strategies for the “re-storying” of disputes. First, she recommends conducting private sessions prior to bringing the parties together in mediation (Cobb, 1993, pp. 253-4). This strategy aims to counteract the dominance of the first story told in mediation (see Cobb & Rifkin, 1991a). The second strategy aims to increase participation in the mediation process by facilitating positive positions for both disputants (Cobb, 1993, p. 254). This requires understanding of the complexity of positioning within narratives to enable intervention that constructs a positive position for one party without threatening the position of the other. Cobb (1993, p. 254) suggests one way to achieve this is by a technique called “positive connotation”, in which a party’s actions are attributed with a positive intent, potentially altering the logic of the other party’s view of the conduct as having a negative intent. She argues that creating positive positions for both parties reduces adversarial conversation patterns “by altering the stories in which adversarial account sequences are enacted”
The third strategy is described as “circularizing” stories (Cobb, 1993, p. 255), which means creating interdependence between parties and between parties and their stories by the use of circular questions. Cobb (1993, p. 256) provides examples of circular questions, which she argues favour the construction of joint narratives.

In Cobb’s model, the mediator is highly engaged in re-storying disputes. Mediators act to construct meaning jointly with the parties by actively creating a space in which altered stories can appear. Mediators affect “the evolution of the conflict, both by the content of the conversation, as well as by the nature of the interaction in which that content emerges” (Cobb 2001, p.1029). Cobb makes some distinction between the outcome, and the content and process of mediation. She presents a case example and notes that while she was active in shaping the content through questions and comments, she did not suggest the “solutions” (meaning, the details of future strategies developed by the parties) (Cobb, 2001, p. 1028).

Cobb (1993, pp. 247-9) criticises mediators’ attempts to empower parties by balancing power between them. She argues that power in this context is used in the Weberian sense of the ability of one party to impose his or her will on the other. As such, it is developed externally to a given mediation, and functions to constitute the authority and privilege of the mediator as expert in assessing and attempting to balance power. According to Cobb (1993, pp. 247-8), “if mediators must monitor and control power-as-the-imposition-of-will, they privilege their account of power over disputants’ accounts of the problem, effectively usurping disputants’ rights to account for their own actions, to construct their own stories” (emphasis in original).
Paradoxically then, balancing power becomes disempowering since it de-legitimises party autonomy.

Unlike problem-solving approaches, in which party autonomy is advanced by the neutral and minimalist role of the mediator, Cobb’s model depicts the mediator as explicitly non-neutral and actively interventionist. The autonomy of the parties is presumably protected and advanced by the explicit moral dimension of practice. Cobb argues that the mediator’s input into co-construction of a new story is not arbitrary, but rather based on an explicit set of “favoured versions of reality”. These favoured versions combine value-determined assumptions about parties’ experience of conflict and values about appropriate conflict resolution. She describes mediator intervention as guided by an intent to establish clearly the suffering of each party; create descriptions of that suffering which acknowledge each party’s responsibility in it without minimising the experience of suffering or “blaming the victim”; attributing positive intent to the actions of each party; creating variation in character traits; and adding more and varied value sets to those presented by the parties (Cobb, 2001, p. 1028).

As a result of the transformation of conflict narratives, relationships are transformed – reconstituted through the construction of new moral frameworks. The public story (in mediation) about each victimisation and why it occurred generates a moral story about how people should behave towards one another. The role of the mediator is to witness (by actively participating in the evolution of narrative content) the roles of the parties, and to enable each party to witness themselves and the other in constructing the
conflict/victim story. Cobb (2001, pp. 1032-3) describes this process as “double witnessing”, a process that involves tracing the victim, as well as tracing [the] role that each plays in the victimization of the other. Double witnessing functions to create a set of doubled values – a new value system emerges that is used by each party to understand the new problem frame and there is a new set of meta-values, which celebrate personal responsibility and reciprocity...At this moment, community is formed as new social rules emerge.

This idea of community hinges on the emergence of the parties’ sense of interdependence, which enables and is enabled by the construction of a new, conjoint moral story. “All of this involves the creation of a space where the community can witness itself as community in which social obligations and norms materialize” (Cobb, 2001, p. 1031). The explicit value base of Cobb’s model precludes mediator neutrality, as much as the social constructionist ontology upon which her approach is premised. Her model does not deal directly with questions of procedural or substantive fairness. While it centralises party participation, it is not clear whether questions of fairness are equivalent to the parties’ ideas of fairness, or those of the mediator and, if the latter, whether they would need to be consistent with Cobb’s “favoured versions of reality”.

2.5 SUMMARY AND IMPLICATIONS

With the exception of the most recent offering from Astor (2007), responses to the perceived problems of neutrality in mediation have not offered a coherent and widely applicable theoretical basis for understanding its practice. This chapter has considered those responses as they relate to the problems of the impact of the mediator upon content and outcome, and the need to deal with imbalances of power between parties
to ensure fair outcomes, yet not intrude into the content of mediation. Theories of neutrality that attempt to deal simultaneously with both of these dilemmas have been examined. I have also examined models of mediation that rely on the process and content or outcome distinction and are therefore susceptible to the problems of neutrality and those that rest upon assumptions that ostensibly avoid the necessity of neutrality.

Responses to the problem of the impact of mediators’ values, preferences and preconceptions – which contradicts impartiality in a wide sense – have included communicating mediators’ values to parties, mindfulness in mediation, and reflexive practice. Communication of mediators’ values avoids apparent misrepresentation, but does not ensure that parties understand those values or can make effective choices about their involvement in mediation based upon them. A question remains as to what values mediators would properly communicate beyond those that are already part of established practice (including neutrality, confidentiality and the voluntariness of the process), all of which are principles subject to review and debate. Furthermore, communicating established values, or any set of values, does not prevent the impact of other uncommunicated and personal, even idiosyncratic, values.

Mindfulness in mediation offers an apparently practical strategy for limiting, if not eliminating, the impact of bias due to mediators’ values, preferences and preconceptions. Mindfulness also enables a distinction to be drawn between the reality of the mediator’s personal thoughts and feelings that occur in response to parties in the course of an encounter, and the need to refrain from acting on those thoughts and feelings. This distinction acknowledges the reality of humanness in
practice, yet also establishes a way of recognising, and putting into practice some limits to the intrusion of the mediator.

Mindfulness is predicated on the mediator developing awareness of his or her thoughts and feelings during a session. Self-awareness is also central to reflexive practice in mediation. Reflexivity is a practice that encourages the mediator to become aware of her perspectivity and hence, presumably, to avoid its impact as bias. Both Astor and Bagshaw define reflexivity as a practice in which mediators look to awareness of themselves and of the perspectives of the parties, in order to avoid privileging their own perspectives. Awareness of the identity and views of the parties is described by Bagshaw as awareness of the standpoint of “the other”, and by Astor as the principles of openness to other perspectives and valuing multiple vantage points. According to Bagshaw, reflexivity is necessary given the impossibility of neutrality. According to Astor, reflexivity enables mediators to “do neutrality” in a way that focuses on maximising party control. Theories of reflexivity in mediation are currently underdeveloped because they do not examine reflexivity sufficiently in the light of the process and content or outcome distinction. However, reflexivity, as a principle by which to address the subjectivity of a professional intervention, has a potentially significant part to play in tackling the problem of inappropriate intrusions of the mediator. As such, it is explored in greater depth in Chapter Three.

The problem of even-handedness (that it may lead to unequal results), has been addressed by scholars through a reframing of neutrality as fairness, justice or equity. These terms are frequently used in the literature, though rarely defined. Nonetheless, injustice can and has been said to arise where one party enters the mediation at a
disadvantage and that disadvantage is reproduced as an outcome of the process. One solution to this problem is to rely upon the process and content and outcome distinction, and to limit interventions aimed at redressing power imbalances to those of process. Another is to rely upon the same distinction and leave the content in the parties’ control, equating substantive fairness with whatever the parties agree between them, regardless of any external evaluations of what would be fair. A final approach is to reject the desirability of neutrality, to abandon it in favour of an avowed social justice perspective. As yet, however, a coherent set of social justice principles have not been advanced in the Australian context.

Calls to abandon neutrality as impartiality either ask mediators to retain even-handedness and its dilemmas, or to substitute underdeveloped alternatives such as reflexivity or broad ideas of social justice or fairness. Attempts to redefine and recontextualise neutrality, while apparently more convincing, are also open to critique and have not been widely adopted in practice to date. Taylor’s (1997) attempt, in particular, to distinguish between strict and expanded ideas of neutrality, while useful in its appeal to a contextual understanding, rests too heavily on legal and therapeutic distinctions, and the variants of models deriving from these influences. Astor’s contribution, being the most recent and comprehensive, remains to be tested in a community of practice. Importantly, Astor points to the interconnection between concepts of neutrality and power, and reflexivity, empathy and power; and shifts understanding away from binary ideas of how these ideas inform practice. Though her concept of maximising party control may not gain widespread acceptance in its present form, given its similarity to that of party self-determination and the greater use
of that term in the mediation context, her approach has the advantage of being applicable to different models of mediation.

Neutrality is central to the dominant model of mediation practice, the problem-solving model, which rests on a distinction between the process and content or outcome of a dispute. The mediator’s primary role in the facilitative version is to intervene in the process of mediation, but not in the content or outcome of the dispute. The neutrality of the mediator, according to this model, is premised on the distinction between process and content or outcome. Newer models of mediation are informed by postmodern, particularly social constructionist, perspectives, which assume the co-construction of meaning and hence of reality in the interaction between human beings and their environment. In these newer models, a mediator cannot be said to be neutral, because he or she is integral to the reality created in the mediation encounter.

Developed over the past fifteen years or more, narrative and transformative models emerged out of a critique of the problem-solving model and some of the assumptions upon which it rests. Each of these models articulates particular views of reality and human nature at odds with the individualism of a problem-solving approach. Each is premised on its own theories of conflict and conflict resolution, which do not assume that maximising the satisfaction of individual interests by mutual agreement is the optimal goal of mediation. Each of the transformative and narrative models discussed exhibit explicit value dimensions that contradict the idea that mediators have no substantial impact on the process. The transformative model espouses empowerment and recognition for the parties, and moral growth for society at large as the goals of mediation. Here, neutrality is recast as the mediator’s lack of control over outcomes.
(rather than content and outcome). The parties are said to control outcomes (if not content). Furthermore, the transformative mediator is not concerned with the substantive fairness of outcomes.

Narrative mediation, as proposed by Winslade and Monk (and others) claims an explicit social justice agenda, whose details are not particularly clear. Narrative mediators are co-creators of the parties’ experience of mediation and are therefore not neutral as to content. Nor are they neutral as to outcome, because they actively open up the possibilities of alternative stories that do not necessarily coincide with the dominant discourses presented by the parties. Challenging existing discourses means challenging existing power relations, which are said to be the product of ongoing struggles and contests. But details of the social justice perspective, from which the re-construction of conflict stories are produced by narrative mediators, are only broadly drawn in the literature.

Winslade and Monk favour the creation of opportunities for parties to exercise agency rather than attempts to rebalance power. They appear to prefer the principle of party-self determination, as one manifestation of social justice, though they make no explicit reference to that principle. Perhaps this is due to the somewhat ambiguous role assigned to the mediator in promoting individual agency but directing a social justice agenda. While there are differences in the narrative model advanced by Cobb, she also rejects the idea that power between parties needs to be balanced. She argues that any such balancing must be predicated on assigning the mediator a privileged position as expert and on an outdated Weberian concept of power. Cobb depicts the role of the mediator as actively engaged with parties in the re-storying of their dispute,
as actively intruding into content and therefore not neutral. She makes some
distinction between content and outcome. Unlike the open-ended social justice agenda
of Winslade and Monk, Cobb espouses the transformation of conflict according to a
set of explicit “favoured versions of reality”, which emphasise the transformation of
relationships and the emergence of community according to the values of personal
responsibility and reciprocity.

In sum, a convincing theoretical appreciation of neutrality that makes sense of the
diversity of practice has yet to be articulated and tested among a community of
practitioners, and a convincing alternative to neutrality as a cornerstone and
legitimising feature of mediation has yet to be advanced. There have been many
critiques of neutrality in mediation, but all have had limited impact. Furthermore,
empirical work investigating both the meaning of neutrality for practitioners and its
application in practice is limited. Significant, relatively recent investigations by Cobb
and Rifkin, and Mulcahy, discussed in Chapter One, conclude that we should abandon
neutrality as an integral feature of practice. Yet mediators continue to claim neutrality
as part of their practice and the Australian National Standards for Mediators still refer
to neutrality and impartiality as areas of needed competency. An evident gap in the
literature is an empirical study of Australian mediators’ views of neutrality and their
attempts to translate those views into practice. To address this gap, this study included
a fieldwork component in which two groups of mediators were investigated in order
to find answers to the following question:

How do mediators make sense of neutrality in practice?
The following two chapters report on the design of the fieldwork. Chapter Three examines issues of methodology – the metaphysical assumptions that guided the study – and the interplay of concepts of researcher objectivity, mediator neutrality and reflexivity that unfolded as the study progressed. Chapter Four details the methods of data selection, collection and analysis employed.
CHAPTER THREE
METHODOLOGY, MEDIATOR NEUTRALITY AND RESEARCHER OBJECTIVITY

3.0 INTRODUCTION
The purpose of this chapter and the next is to explain the research design adopted for this project. Research design choices are predicated on the researcher’s views of ontology and epistemology; that is, on beliefs about the nature of reality and whether any objective reality exists, how knowledge of reality is produced, and the capacity of individuals to know reality, however conceived. Just as mediator neutrality is no longer a self-evident truth, the objectivity of research and the researcher have also been debated. An examination of researcher objectivity is included here as a parallel question in order to inform my investigation of mediator neutrality and debate about the role of reflexivity in mediation practice. Mediator neutrality and researcher objectivity are parallel questions operating in differing practice contexts. Investigation of researcher objectivity served to establish the metaphysical assumptions guiding the project and to further understanding of mediator neutrality.

Discussion is framed around three interlinking concepts: the parallel questions of researcher objectivity and mediator neutrality and the role ascribed by mediation scholars to reflexivity in answering these questions. In particular, the different meanings of reflexivity according to different metaphysics are highlighted, which leads to an analysis of the limits of reflexivity in research and, by analogy, in mediation practice. The chapter also examines the relationship between metaphysical
assumptions and views of the nature of theory, in order to inform the theory building aim of the project. The project design has three core features – a theory building aim, a qualitative approach and a grounded theory analysis. This chapter describes the first of these; the qualitative approach and grounded theory analysis are discussed in Chapter Four.

3.1 MEDIATOR NEUTRALITY, RESEARCHER OBJECTIVITY AND REFLEXIVITY

Neutrality was described in Chapter One as a central concept in mediation theory and practice. It has served a legitimising function for mediation practice because of its connection with western democratic notions of fairness and justice. Nonetheless, mediator neutrality has been the subject of much critical debate; empirical studies and accounts of practice have challenged its very existence. It has been identified as a myth and critiqued as misrepresenting the mediation process to the extent of fostering potential unfairness rather than furthering justice.

Chapter One identified three themes in discussions of the meaning of neutrality in the mediation literature. According to those themes, neutrality is understood as impartiality, even-handedness, and central to the distinction between the process and content or outcome of a dispute. A fourth theme is discussed in this chapter: neutrality can be understood as “value neutrality”, or the absence of a situated perspective on experience. Value neutrality is embedded in our understanding of mediator neutrality; its absence underscores dilemmas associated with putting those meanings into practice. One of the dilemmas associated with neutrality as impartiality is the impact of the personal values of the mediator (see at 1.4.1). Another, associated with even-handedness, is that treating the parties equally may lead to unequal and therefore
unfair results (see 1.4.2). A dilemma associated with neutrality as to the content and outcome of a dispute, though not the process of mediation, is the recognition that mediators influence the content of a dispute and exercise considerable power in directing the outcomes of mediation (1.4.3, 1.5.3). The impact of personal values, the fairness of outcomes and the proper exercise of mediator power all raise questions of ideology and as such challenge a perception of mediators, and of mediation itself, as value neutral. As Boulle (2005, p. 31) observes “there can never be an entirely value-neutral occupation or practice”.

A critique of value neutrality is important for an understanding of neutrality in mediation because it has implications for an understanding of social processes in general. Furthermore, underlying any understanding of social processes are assumptions about the nature of knowledge (including how it can be acquired and how it is determined as legitimate) and ultimately, of the nature of reality itself. The significance of such assumptions, or worldviews, has been recognised in conflict resolution practice (Goldberg, 2009). A central question in debates about the nature of social reality is whether it can be said to be objective. A related debate about the nature of knowledge is whether it can be objectively acquired. Like the question of mediator neutrality, the question of researcher objectivity has often been framed in binary terms – objectivity versus subjectivity (Ratner, 2002, p. 1). A consideration of objectivity in research is a particularly useful analogy for mediation practice given similar perceptions of the mediator’s and the researcher’s neutral/objective, professional stance. Traditionally, a researcher is said to be objective in the sense of being able accurately to mirror reality without polluting the image reflected (Guba & Lincoln, 1994, p. 110). Similar to this image of researchers is “the idea of mediators
as ‘neutrals’ - clean (white?) pages upon which nothing is written…” (Astor, 2007, p. 145).

Reflexivity is not confined to mediation practice and is advocated in other professional interventions, including social work (Bagshaw, 2006). It offers a means of conceptualising and actively addressing the subjectivity of an intervener in whatever professional context it is applied. As such, reflexivity assumes that an intervener cannot demonstrate absolute objectivity or neutrality. Reflexivity has been given considerable attention in the field of research activity. Finlay (2002, p. 209) defines reflexivity in research as a practice in which “researchers engage in explicit self-aware meta-analysis”. Finlay describes five variants of its practice in research: introspection, inter-subjective reflection, mutual collaboration, social critique and discursive deconstruction. In the following discussion, these variants are related to differing research paradigms. As Thomas Kuhn argued, paradigms in research are indicated by a cluster of beliefs and prescriptions in science communities as to the proper objects and processes of research (Bryman, 1998, p. 4). Relating differing meanings of reflexivity to different paradigms reveals how it can be differently understood depending on the underlying assumptions about reality and knowledge. The meanings proposed by Finlay are also traced to the context of mediation practice, in order to explore reflexive practice as a response to the dilemmas of mediator neutrality.
3.1.1 Researcher objectivity

In research practice, neutrality is commonly referred to as objectivity (Guba, 1981, p. 81). Researcher objectivity refers to freedom from the impact of the personal preconceptions of the researcher, whether in the form of bias, vested interest or non-rational (emotional) content (Bryman, 1988, pp. 13-8; Seale, 1999, pp. 19-30; Crotty, 1998, pp. 18-41). Objectivity is thus similar to the most common meaning ascribed to neutrality in mediation, that of impartiality. However, objectivity in research has a deeper meaning; it refers not only to the stance of the researcher in relation to participants in the research but also to the nature of all reality. An assumption of objectivity is consistent with traditional research perspectives and the “modernist thinking” described by Bagshaw (2005, p. 1; 2003, p. 130).

Traditional research perspectives are referred to as paradigms of science, or rationalism (Bryman, 1988, pp. 1-5; Guba, 1981, p. 81) and most frequently as positivism and post-positivism (Bryman, 1988; Denzin & Lincoln, 2000; Guba & Lincoln, 1994; Seale, 1999). Positivism recognises two forms of knowledge as adequate and legitimate:

- empirical knowledge as derived from the natural sciences and adapted to a science of society according to the work of Comte (Crotty, 1998, p. 19-23).
- logical knowledge as represented by the logic of mathematics and central to the quantitative research field established by Descartes, who “…proclaimed the importance of mathematics and objectivity in the search for truth” (Hamilton, 2000, p. 62)

Combining an ontological view of reality as objective, and an epistemological view of legitimate knowledge as empirical and logical produces a particular set of assumptions guiding research activity. A positivist perspective assumes “that there
exists an objective, external reality about which secure, ‘truthful’ statements can be achieved through inquiry” (Guba, 1992, p. 17). Reality is assumed to exist independently of theory, values and the interaction between the researcher and the researched. There is only one perspective, one truth. The objectivity of the researcher is presumed to be both possible and desirable in order to access that truth (Bryman, 1988, pp. 14-5; Guba & Lincoln 1994, pp. 105-6; 109-10).

A claim to mediator neutrality is consistent with positivist assumptions of value neutrality. It assumes that the mediator can act within the process without affecting it by the intrusion of cultural, historical or ideological predispositions. Neutrality becomes synonymous with invisibility and passivity (Mulcahy, 2001, p. 509). The conduit metaphor reviewed by Phillips is suggestive of a modernist view: the mediator orchestrates the exchange between the parties by controlling the process and, without impact on the content of the dispute, acts as a conduit for communication between the parties (Phillips, 1999, pp. 162-5). Similarly, the problem-solving model of mediation is said to rely on positivist assumptions (Winslade & Monk, 2000, pp. 32-5). Within problem-solving mediation, the “ultimate model for the mediator is that of scientist-practitioner, the detached neutral observer applying the knowledge generated within modernist scientific traditions, in which the concept of problem-solving is well entrenched (Winslade & Monk, 2000, pp. 34-5).

From a modernist perspective, reflexivity is arguably irrelevant both to the practice of research and the practice of mediation, since there is no recognition of the impact of any subjectivity to be examined. The practice of the researcher or mediator might properly be the subject of scrutiny from a positivist stance, as distinct from the
identity of the practitioner, as presented to and or shaped by the encounter. From a positivist perspective, practice knowledge is knowledge of the relationship of the means to the end/s (Schon, 1983, pp. 30-7). Hence reflections on practice, as opposed to reflexivity, represent revision of techniques used by the practitioner. Generally, reflective practice is encouraged in mediation and is incorporated in various types of debriefing. It is seen as a tool for the improvement of practice and a way to learn by experience (Schon, 1983, pp. 30-7; Boulle, 2001, p. 272; Hardy, 2009, pp. 385-88; Winslade & Monk, 2000, p. 120).

The difference between reflective and reflexive practice provides a useful illustration of the impact of metaphysical assumptions upon practice as a function of perspective. Practice and the practitioner are distinguishable within a positivist view of reflection. Reflexivity, by contrast, incorporates the personhood of the practitioner in addition to his/her practice as the focus of self-examination. This is a subtle but significant distinction as exemplified by a study of mediator interventions, conducted by Kressel and Pruitt (1985), in which three categories of intervention are identified in answer to the question: what do mediators do to resolve disputes? Those categories are reflexive, contextual and substantive interventions. The authors describe reflexive interventions as tactics “designed primarily to affect the mediator. They are the means by which mediators attempt to fashion themselves into the most effective instrument of conflict management” (Kressel & Pruitt, 1985, p. 188; emphasis added). The authors identify three broad subclasses of reflexive activity, which they identify as tending to come early in a mediation session – gaining entry, bonding and diagnosis. Although Kressel and Pruitt use the term “reflexive interventions”, their analysis suggests that they conceive interventions as the means to certain ends and “reflexive”
tactics as those where the mediator takes on the part of a “means”, or as they describe, an “instrument”. The mediator embodies technique in this account and review of that technique amounts to a *reflective* practice using the distinction between reflection and reflexive posed here. A *reflexive* practice would, by contrast, incorporate more than mediators’ employment of particular techniques aimed at a particular result. A reflexive practice would include self-awareness and self-monitoring of both the professional perspective and personal identity of the mediator, and pay attention both to the impact of these on the encounter and how the encounter in turn affects the mediator’s perspective and identity.

3.1.2 Subjectivity, alternative paradigms and reflexivity

Alternative research paradigms have emerged in the wake of widespread dissatisfaction with the positivist world view and its emphasis on objectivity (Seale, 1999, pp. 19-30). At their extremes, objectivity and subjectivity are counterpoised and irreconcilable. The objectivism associated with positivism posits both an external, mind-independent reality and a capacity in the researcher objectively to know that reality. At the opposite extreme lies a subjectivism in which all reality is relative and mind-dependent. In the middle range there are alternative paradigms that attempt to deal with the question of objectivity by incorporating perspectives on subjectivity. Broadly speaking, and for present purposes, three alternative paradigms are identified and examined below: interpretivism (extending to social constructionism), postmodernism and critical theory.

These research paradigms contain key assumptions that underlie a broad spectrum of social theories and the work of particular social theorists. Examining assumptions in
research practice is one avenue to an understanding of how different schools of thought might be applied in practice. The differing perspectives are evident both in models of mediation and in research about mediation. The narrative models developed by Winslade and Monk (2000) and Cobb (1993; 2001) for example are grounded in a social constructionist perspective, and use a narrative metaphor consistent with postmodern thought. Other approaches are less explicit about their premises. As Tillett (2004, p. 186) argues “most works in the field of alternative dispute resolution fail to identify the theoretical framework within which the authors are writing, although the underlying assumptions can generally be identified”. A critique of varying approaches is assisted by understanding these assumptions.

Different perspectives underpin existing empirical research into neutrality. In their study of neutrality, Cobb and Rifkin (1991a, pp. 37-8) “offer a post-structural perspective on the mediation process, one that addresses the relationship between discourse and social processes and challenges the objectivism at the core of our understandings about mediation and neutrality”. Epstein (1995, p. 92) identifies post-structuralism as the theoretical trend associated with postmodernism as cultural response. For her empirical study of neutrality, Mulcahy (2001, p. 151) adopts the interpretive framework of symbolic interactionists, “who make no claim to being neutral or passive filters of the truth”, and who proceed from the assumption “that interviews and participant observation produce an intersubjective narrative which is constructed by both the interviewer and interviewee”. Understanding the conclusions of these studies requires an understanding of the perspectives from which the studies were conducted.
The categories of interpretivism, postmodernism and critical theory encompass an array of detailed and variable accounts of reality and knowledge. The broad-brush examination of paradigms that follows is sufficient to identify differing conceptions of reflexivity and their applicability to research and mediation practice.

3.1.2.1 Interpretive paradigms

Interpretive research perspectives have grown out of a critique of positivism (Bryman, 1988, pp. 2-5). They are identified with such theoretical approaches as phenomenology, symbolic interactionism, *verstehen*, naturalism and ethnogenics (Bryman, 1988, pp.51-61). Interpretivist researchers “study things in their natural settings, attempting to make sense of or interpret phenomena in terms of the meanings people bring to them” (Denzin & Lincoln, 2000, p.2). This moves attention away from observation of behaviour to an examination of meaning and action (behaviour and its meaning) (Gage, 1989, p. 5). From an interpretivist perspective, research focuses on “understanding lived experience” (Hamilton, 2000, p. 64). In that experience, meaning is “subject to interpretation” because, despite evidence of patterns in social interaction, people may always differ in their responses to the same or similar circumstances. Grounded in interpretations, social patterns are viewed not as reflective of essential, mind-independent uniformities but rather as interpretive constructions (Gage, 1989, p. 5).

Interpretivism in research pays particular attention to the subjective processes of those under study by attempting to “see through their eyes”. There are at least two ways in which interpretivists deal with the impact of the researcher’s subjectivity. One is to distinguish the ordinary life processes of those under study from the particularly
skilled interventions of the researcher. This distinction is evident in Ratner’s (2002, p. 9) view that “interpretation requires that the researcher employ an active, sophisticated subjectivity to objectively comprehend subjective experience (Erlebnis) in life expressions”. Taking an objective view of another’s subjective experience is not far from a positivist account. It suggests a privileging of the researcher’s experience and a failure to recognise that experience as a similarly constituted, though contextually different, “life experience”. Similarly, mediators may adopt a stance that acknowledges their subjectivity but privileges it in a way that can “reify and reinforce the power and knowledge of the mediator” (Bagshaw, 2005, p. 2).

An approach derived from phenomenology acknowledges the subjective experience of the researcher but requires its exclusion by a process of “bracketing”. According to phenomenology, the task for the researcher is to bracket out or exclude a “dense thicket of prior understandings in order to grasp subjective experience in its pure uncontaminated form” (Bryman, 1988, p.51). Similarly, in an account of transformative mediation, Brenner, Steven and Serventy (2000, p. 159), advocate a “finely tuned and sensitive self-monitoring” in which mediators become attuned to their own recognition and empowerment needs in order to “account for and, where necessary, ‘bracket’ or suspend them in the mediation process.”

Reflexivity as introspection offers another response. Rather than an attempt to “be objective”, reflexivity in this sense asks the researcher to examine his or her own experience. Inclusion of subjective processes, from an interpretivist view, is logically extended to the lived experience of the researcher. Researchers’ “own reflecting, intuiting and thinking are used as primary evidence” (Finlay, 2002, p. 213). This
approach to reflexivity is consistent with an acknowledgement of the inevitable impact of mediators’ situatedness, awareness of which, according to Astor (2007, p. 230), is a prerequisite for good practice.

Constructionism shifts the research focus beyond subjective processes of interpretation *per se* to the interaction of those processes with an external reality. Its central idea is that meaning is constructed by human beings as they interact with the world they are interpreting.

“All knowledge, and therefore all meaningful reality as such, is contingent upon human practices, being constructed in and out of interaction between human beings and their world, and developed and transmitted within an essentially social context” (Crotty, 1998, p. 42; emphasis in original).

Constructionism and social constructionism are significantly derived from Berger and Luckmann’s *Social Construction of Reality* (1967). Social constructionism refers to the manner in which meaning is generated by people in interaction with their social and natural environments. Social reality is seen as a function of shared meanings internalised by individuals through the medium of culture, which consists of complexes of concrete behaviour patterns including customs, usages, traditions and habits (Crotty, 1998, p. 53). Crotty’s distinction here, between (social) constructionism, which posits an internal reality in interaction with an external reality, and constructivism, which posits an extreme subjectivism is adopted here. The terms constructionism and constructivism are not always distinguished in the literature and are sometimes used interchangeably.\(^6\)

\(^6\) For example, in an early work, Bagshaw (2003) identifies her approach as social constructionism and later as social constructivism (2005), both of which she cites as postmodern ideas. See also Schwandt (2000).
The subjective processes of meaning production are a central focus of constructionism, but so too is the external, or objective, reality with which humans engage. Subject and object are interdependent. External reality limits and shapes subjective experience. “Experiences do not constitute a sphere of subjective reality separate from, and in contrast with, the objective realm of the external world…Subject and object, distinguishable as they are, are always united” (Crotty, 1998, p. 45). Objects within a subject’s world can be material or social. Hence, social constructionism takes account of the creation of intersubjective meaning. This is significant for research practice in that the researcher and those studied are seen to co-construct the reality of the research event and its product. Rather than seeking an “optimal distance” (Guba, 1981, p.77) from research participants, researchers aim to explore the meanings co-created in the research encounter.

Consistent with a constructionist paradigm, a researcher may adopt reflexivity as intersubjective reflection or as mutual collaboration, in order to account for the impact of their own subjective processes on research outcomes. Intersubjective reflection calls on the researcher to “explore the mutual meanings emerging within the research relationship”. This can involve exploring “inward meaning”, the otherwise unconscious needs and transferences of the researcher, and “outward meaning”, the complexity and dynamics of meaning created by the researcher–participant relationship (Finlay, 2004, p. 215). A different approach is adopted using reflexivity as mutual collaboration. In this approach, participants are enlisted as co-researchers, and researchers as participants, acknowledging the capacity of both for reflexive dialogue. Researchers and participants “engage in cycles of mutual reflection and experience” (Finlay, 2004, p. 218).
A focus on intersubjective meaning creation is consistent with Bagshaw’s view of the role of the reflexive mediator as “engaging in conversation rather than as intervention” (2005, p. 2). It is also consistent with narrative models of mediation, which emphasise the co-construction, by mediator and parties, of re-storied disputes. Reflexivity as intersubjective reflection is a useful way to conceptualise both the impact of mediator preconceptions and the co-construction of meaning in the encounter. Reflexivity as mutual collaboration highlights the active role of the mediator in mutually reflexive dialogue. This mutuality is highlighted in a collaborative–constructionist model of communication applied to mediation practice by Phillips (1999, p. 165) which, he argues

compels us to see mediation as a relational process in which disputants and mediators reciprocally influence each other as the session progresses. Unavoidably, the mediator, rather than being a neutral facilitator of conversations, is an active coauthor in the construction of dispute narratives.

Similarly, the relational ontology underpinning the transformative model (Bush & Folger, 2005, p.36) accommodates reflexivity as mutual collaboration. Relational accounts of human nature and society, and those that emphasise intersubjective meaning creation, are similar in their emphasis on the co-construction of reality. For those accounts that emphasise meaning as critical to human experience, such as those underpinning narrative models of mediation, intersubjective meaning creation becomes the critical focus of meaning creation in a social and dynamic context. For those with an emphasis on a relational understanding, the relationships between individuals, who are “by their essential nature, both separate and connected beings” (Bush & Folger, 2005, p. 36), are the critical focus for understanding and change.
3.1.2.2 Postmodernism

Postmodernism signifies a new kind of cultural response evident in art, literature, philosophy and popular culture, and the social sciences. Though it does not represent a unified theory or even a coherent set of positions (Best & Kellner, 1991, p. 2; see also Bagshaw, 2001, p. 206), there are some common, recurrent themes. A postmodern perspective rejects the essentialism of a modern science, “meaning the attribution of innate, presumably defining characteristics to an object, person, group, or for that matter, a word or concept” (Epstein, 1995, p. 94). The rational, autonomous self of Enlightenment thought is replaced with a socially and linguistically decentred, fragmented and always provisional subject. Postmodernism also rejects assumptions of social coherence and causal relationships “in favour of multiplicity, plurality, fragmentation, and indeterminacy” (Best & Kellner, 1995, p. 4). Rather than searching for metanarratives or grand theory, postmodernism focuses on microtheory and the micropolitics of localised settings, celebrating difference at the expense of unity. For postmodernists, there is no one truth but rather many perspectives. They reject the positivist search for certain, universal laws “taking instead ‘perspectivist’ and ‘relativist’ positions that theories at best provide partial perspectives on their objects, and that all cognitive representations of the world are historically and linguistically mediated” (Best & Kellner, 1995, p. 4).

Postmodernism deconstructs the modern subject “as a humanist fiction integral to the operations of a carceral society that everywhere disciplines and trains its subjects for labour and conformity” (Best & Kellner, 1995, p. 39). Postmodernism sees the individual as dominated by social institutions, discourses and practices in a postmodern world with little apparent space for the constitution of an autonomous
self. At the same time, perspectivism, which denies the existence of facts and insists instead that there are only interpretations, leans towards an extreme subjectivism and a denial of any “real” existence. This apparent contradiction between abandoning a coherent subject while emphasising subjectivity represents attempts by postmodern thinkers to think outside the binary distinctions inherent in language so that, “a rejection of the grounds for objectivism need not imply any subjectivism (or vice versa), nor…should a rejection of the grounds of absolutism imply a relativism, since a relativism may be predicated on an absolutism to which it must be compared” (Steier, 1991, p.8). Postmodernism challenges the binary linguistic distinctions characteristic of modernism, which are said to limit our understanding by failing to recognise intermediate, fluid and nuanced realities.

Postmodern theorists argue that perception of the world is mediated through discourse. “Discourse is both the process of talk and the interaction between people, and the products of that interaction” (Winslade & Monk, 2000, p. 42). Postmodern theory incorporates discourse theory, assuming that language and other signifying systems organise the psyche, society, and everyday life (Best & Kellner, 1995, p. 27). The narrative model articulated by Winslade and Monk (2000, pp. 42-3) uses discourse as a metaphor for understanding mediation and deconstruction as the uncovering of “taken-for-granted assumptions to which we become subject as a result of the operation of discourse”.

Focusing on the discursive context of a conflict is a significant move away from focusing on the individual as a unitary and contextually independent being who is the creator and cause of conflict. The emphasis falls on the way meaning is constructed within discourse rather then on the individual as the sole producer of the discord.
According to Finlay (2004, p. 222), reflexivity as discursive deconstruction pays attention to “the ambiguity of meanings in language used and how this impacts on modes of presentation”. More than merely self-examination and critique, postmodern reflexivity involves the researcher in examining him/herself as an ongoing construction. It acknowledges the multiple perspectives of participants and that “the ‘same self’ may be different as a result of its own self-pointing” (Steier, 1991, p.2). For mediation, this understanding identifies reflexivity as an ongoing discursive process in which the mediator is not a statically recurring presentation. It enables mediators to acknowledge and scrutinise a reshaping of self in each mediation encounter. Furthermore, reflexivity as discursive deconstruction decentres the perspective of the mediator as expert. It asks the mediator to look beyond essentialist conceptions of their own and the parties’ identities, and to challenge any negative cultural myths shaping these identities.

Postmodern theory has been criticised for its textual focus and its emphasis on deconstruction without adequate theorising of (re)construction (Best & Kellner, 1991, p. 27). According to Epstein (1995, p. 1000), a postmodern deconstruction of the subject leaves little room to theorise progressive social change. However, postmodern concepts of power have been usefully incorporated into critical inquiry.

### 3.1.2.3 Critical inquiry

examine social phenomena from the standpoint of marginalised lives (Harding, 2004, pp. 580-5). Critical forms of research focus on power and question existing cultural ideologies with the aim of advancing social justice.

Kincheloe and McLaren (2000, pp.139-40) identify a number of basic assumptions associated with critical research, including:

- all thought is fundamentally mediated by power relations that are historically constituted
- facts can never be isolated from the domain of values and will always contain ideological inscription
- language is central to the formation of subjectivity, that is, both conscious and unconscious awareness
- certain groups in society are privileged over others, constituting an oppression that is most forceful when subordinates accept their social status as natural, necessary or inevitable; and
- mainstream research practices are generally implicated, albeit often unwittingly, in the reproduction of systems of class, race and gender oppression.

Some critical theorists have adopted the postmodern conception of power theorised by Foucault (1978 p. 92), who defines power as:

> The multiplicity of force relations immanent in the sphere in which they operate and which constitute their organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the dysjunctions and contradictions which isolate them from one another.

Where modernist theories see knowledge and truth as objective, universal and vehicles of progress, Foucault analyses them as integral components of power and
domination. He conceptualises power as diffused throughout society, rather than held by any particular group. Furthermore, he sees power as intimately linked to knowledge so that modern rationality operates with a coercive, disciplinary force (Foucault, 1995, p. 218 and see Best & Kellner, 1995, p. 71). Pinzon (1996) has examined the significance of Foucault’s analysis of power for mediation practice. He considers the modernist approach inherent in the ‘satisfaction story’ of mediation and articulates three propositions from Foucault’s work that challenge that story. They are: that power is primarily something that flows, more than an object one can possess or alienate others from; that power is not primarily coercive but is rather productive; and that the use of power implies the creation of objects of knowledge, the latter carrying with them effects of power (Pinzon, 1996, pp. 10-6).

Foucault’s construction of power intersects with the importance given to ideology and culture characteristic of critical theory (Epstein, 1995, pp. 89-90). However, critical research is also primarily a political project which aims to produce emancipatory knowledge. Critical theory rejects the “value-free” knowledge of positivism as inherently supportive of the status quo, and instead adopts a “praxis-orientation” of reciprocal theory and practice aimed to produce a more equal world (Lather, 1986, p. 257).

Those models and approaches to mediation whose objective is empowerment articulate and highlight an explicit value dimension for practice (for example, Bagshaw, 2005; Cobb, 1993; Gibson, 1999). Transformative mediation is one example. As noted in Chapter Two (at 2.4.3), the transformative model developed by Bush and Folger is founded on twin objectives of empowerment and recognition. The
“transformation” envisaged is moral growth, as a consequence of the unique promise of mediation “to transform the character of individual disputants and society as a whole” (Bush & Folger, 1994, p. 20). Narrative models also operate from explicit value bases. As also noted in Chapter Two (2.4.4), the narrative model developed by Winslade and Monk aims to advance social justice. Cobb describes conflicts as morality stories and places her story telling model within clearly articulated moral commitments. Models of transformative and narrative mediation are therefore explicitly not value neutral. Not only the impact, but also the integral nature of mediators’ values in practice are aptly described by Della Noce (1999, pp. 272-73).

As they conduct the mediation session, mediators foster interactions between the parties which both reveal and reproduce the mediators’ views of the ideal social and moral order…The mediator’s practice “frame” depends upon his or her theory of practice, embedded in even more fundamental ideological assumptions about how human beings can and should properly conduct themselves in interpersonal conflict.

According to Finlay (2004, p. 222), “reflexivity as social critique offers an opportunity to utilize experiential accounts while situating these within a strong theoretical framework about the social construction of power”. Reflexivity in this context asks researchers – and by analogy, mediators – to be aware of and account for power as it circulates in the relationship between researcher and participants. In particular, critical inquiry combined with a postmodern sensibility directs mediators to unearth complex political/ideological agendas in their practice that could reinforce prejudicial views of participants (Bagshaw, 2003; 2005). A critical, emancipatory perspective opens reflexivity to include scrutiny of relationships of power, whatever combined perspective is taken. Thus, for example, Winslade and Monk (2000, pp.
120-1) argue that from a social constructionist perspective, reflexivity “makes privilege and power subjects for discussion and deconstruction”, and reflexive practices are “those that render transparent the practices of power in the mediation relationship and leave space for clients to alter the configuration of these practices”.

### 3.1.3 Limits of reflexivity

Reflexivity reframes the meaning of subjectivity away from a positivist understanding. Subjectivity as reflexivity is something other than a negative intrusion of the researcher *versus* a positively valued objectivity. Instead, it is employed to reject an absolute objectivity and incorporate the researcher’s subjectivity in constructive ways. Reflexivity seems to answer the question of researcher objectivity as an epistemic construct and as a research strategy. However, it is limited in two ways. In theory, it is limited conceptually to a focus on the opposite of objectivity, namely subjectivity, and therefore retains a binary emphasis. In practice, it is limited to a focus on one half of a researcher/research participant dyad, namely, the researcher. Hence, perceived problems of reflexivity in research are variations on a theme of excessive focus on the subjectivity of the researcher at the expense of participants in the research.

Reflexivity as introspection carries with it a danger of the researcher becoming preoccupied with his or her own experience and consequently reducing attention to the voices of research participants (Finlay, 2002, p. 215). Reflexivity as intersubjective reflection or mutual collaboration offers no identifiable limit to the input of the researcher in relation to that of participants. The more the research act is seen as a collaborative process, the less clear the distinction between the lived
experience of the researcher and those studied. In some contexts and for some research questions, this distinction may not be vital. However, there remains a view that research accounts should accurately depict the experience of “the other” and that researchers “must take steps to ensure that the words they put in subject’s mouths were in fact spoken by those subjects” (Lincoln & Denzin, 2000, p. 578). While constructionism usefully acknowledges the impact of the researcher in creating a reality with participants through the activity of research, the question persists of how much of the researcher is properly part of the research product so as to avoid “squeezing out the object of study” (Bruner, cited in Denzin & Lincoln, 2000, p. 578).

Reflexivity as social critique encourages awareness of assumptions guiding research practice, but awareness alone does not necessarily preclude intrusion of those assumptions. One danger in an ideological critique aimed at producing emancipatory knowledge is “a rampant subjectivity where one finds only what one is predisposed to look for, an outcome that parallels the ‘pointless precision’ of hyperobjectivity” (Lather, 1986, p. 259). In response, a reflexive practice adopts a self-critique of the assumptions that shape the researcher’s spontaneous perceptions and attitudes. Those perceptions and attitudes may be shaped by the ideology of critical theory itself, as well as those values and interests imbedded in dominant discourses in scientific communities. Harding (1992, pp. 577-80) addresses these two categories of assumption by distinguishing between objectivity as neutrality and a “strong objectivity” characterised by fairness, honesty and detachment. According to Harding, objectivity as neutrality certifies institutionalised research practices that advance the agendas of powerful groups as value neutral and apolitical. The neutrality ideal attempts to “depoliticise” science while at the same time creating an authoritarian
voice. “Thus, when sciences are already in the service of the mighty, scientific
neutrality ensures that ‘might makes right’” (Harding, 1992, p. 569). A strong
objectivity represents an alternate political position – one in keeping with critical
theory’s emancipatory aim and that directs the researcher to take account of the
potentially different perceptions, perspectives and values of research participants.

The reflexivity associated with postmodernism – labelled reflexivity as discursive
deconstruction by Finlay – has been criticised as liable to produce interminable
decompositions and loss of all meaning as researchers undertake a reflexive project of
Postmodernism carries a danger of endless “self pointing” with few references to
concrete human experience (Lincoln and Denzin 2000, p.577). In the positivist
paradigm, the subjectivity of the researcher and of the “object” of research is ignored.
An extreme subjectivism denies or largely ignores the objectivity beyond the
researcher, emphasising instead the “reality” created by the researcher: “worlds are
constructed, or even autonomously invented, by ‘scientific’ inquirers who are,
244) notes, “such one-sidedness occurs in both ‘subjectivism’ and ‘objectivism’. In
the former we look only inwards, so all we can learn about is our preconceptions; in
the latter we look only outwards at the phenomena we are trying to understand…”

While postmodern theory calls for consideration beyond the binary distinction of
objectivity and its opposite, subjectivity, the apparent reality of the researcher acting
in relation to a subject (or object) of research is difficult to avoid. Attaining a balance
between the intrusions of the researcher and giving voice to the “other”, the
participants in the research process, remains the subject of an ongoing conversation about which there is no objective truth. As Schwandt (2000, p. 119) describes it, researchers “struggle with drawing a line between the object of investigation and the investigator. The paradox of how to develop an objective interpretive science of subjective human experience thus arises.”

What are the implications for the practice of reflexivity in mediation? Placed in the context of differing world views, reflexivity in mediation does two things well. First, it brings into view the subjective processes of the mediator. Reflexivity is premised on acknowledgement of the fact of these subjective processes and their impact on mediation. It therefore signals a rejection of any absolute neutrality as impossible. Second, reflexivity as reflexive practice provides a discourse for the mediator’s awareness of his or her subjective processes and the impact of those processes on the mediation encounter.

From an interpretive perspective, the internal subjective states of both the parties and the mediator become relevant to the encounter. In the newer models of mediation, the emotional states and value positions of parties and mediators are made explicitly relevant. In some problem-solving accounts, the emotional responses of parties are emphasised as relevant to the dispute and its resolution. In others, emotions are something to be dealt with as almost impeding the bargaining process (see Maiese, 2006; Retzinger & Scheff, 2000). Different approaches to emotions can be seen as reflective of predominantly therapeutic or legal influences on practice, but can also be linked to the influence of modernist and positivist ideas. The rational, autonomous subject is the archetype of a modernist view. This includes a view of the professional
mediator as unemotional, rational and value neutral and a view of the optimal resolution of disputes as the product of rational approaches from the parties.

An interpretive perspective acknowledges the subjectivity of the mediator just as it acknowledges the subjectivity of the parties. The mediator’s subjective states become viewable as part of the mediation experience. Social constructionism extends acknowledgement of the subjectivity of mediator and parties by positing an inevitable connection between subjective states and the external reality in which they operate. The subjectivity of the mediator must, according to this view, operate in relation to the apparent external reality of the parties and the many layers of context in which the mediation encounter occurs. Reflexivity provides a discourse for awareness of these subjective and relational realities. Reflexivity as introspection, as intersubjective meaning creation and as mutual collaboration can be linked to differing underlying assumptions about reality. The first reflects interpretivism in its most elementary account, while the second and third are consistent with the relational perspective of social constructionism. At the same time, these variants of reflexivity represent useful constructs for understanding different vantage points of the mediator’s subjectivity: reflexivity as introspection focuses on the internal subjective states of the mediator; reflexivity as intersubjective meaning creation focuses on the co-construction of meaning in the mediation encounter, in which the mediator plays an integral part; and reflexivity as mutual collaboration accommodates the purposive nature of the encounter in which mediator and parties combine to produce something new (whether that includes an agreement or not).
Reflexivity as discursive deconstruction, or as social critique, draws attention to two further perspectives on the subjectivity of the mediator and how it operates in mediation. A postmodern focus on deconstruction draws attention to the internalisation of traditional discourses (culture) and the potential oppressive force of those discourses. Reflexivity as social critique draws particular attention to the value dimension of a mediation encounter. Just as social constructionism posits that meaning is not a neutral, inherent aspect of an object but is created in the experiencing of it, critical theory exposes how experience is value-laden, as is fact and theory. Both postmodern deconstruction and critical theory call attention to the power and privileging of varying perspectives. Reflexivity as discursive deconstruction and as social critique exposes the mediator’s self-examination of his or her own situatedness and positioning within the mediation encounter.

These varying accounts of reflexivity ensure awareness of the subjectivity of the mediator. Acknowledging this subjectivity and developing awareness of its multiple effects moves mediation theory beyond a modernist assertion of neutrality. What remains to be clarified, however, is what mediators can and should do with that awareness. Existing accounts of reflexivity in mediation advanced by Astor (2007) and Bagshaw (2003, 2005), suggest value in the potential of awareness to avert bias where it is combined with a recognition and acceptance of difference in parties’ perspectives. Mindfulness in mediation as advocated by Brach (2008) Fisher (2003) and Rock (2006) offers one way of shaping the impact of the mediator through increased awareness and a corresponding increased capacity for conscious choice. Other commentators have alluded to mediators’ increased awareness of their values as a prerequisite for putting into practice such aims as empowerment of the parties and
social justice outcomes. These possibilities for the function of a reflexive awareness, while instructive, point to the need to locate reflexivity within a view of the appropriate role of the subjectivity of which mediators are encouraged to be aware.

Awareness of the subjectivity of the mediator and its actual and potential impact upon mediation does not in itself address the question of what to do with that subjectivity. A problem for mediation, as for research, remains how and where to draw the line between the mediator and the parties, and how properly to deal with the mediator’s subjective impact. A postmodern theorist might simply argue that there is no line to be drawn. Yet, while all the actors in a mediation encounter affect one another, and the lines between them (like the lines between process, content and outcome) are not easily drawn, there is still something different about the roles of the mediator and the parties in the mediation encounter.

It may be impossible to exclude the intrusion of the mediator, but it may be possible to shape that intrusion in particular ways. Of particular importance, as is argued later, in Chapter Six, is the articulation of a theory of neutrality in mediation that identifies the relevance of reflexivity as a practice *in the service of the “other”*, the parties to the mediation. For the purposes of this chapter, a central argument is that clarity in the range of possible meanings of reflexivity, and hence the range of applications possible in practice, is significant in any claim to a reflexive practice.
3.2 A CHOICE OF (ALTERNATIVE) PARADIGM: A REFLEXIVE ACCOUNT

What follows is a reflexive account of the metaphysical assumptions that guided this project. Reflexivity as introspection was used to identify those assumptions, and in keeping with that approach discussion is presented in the first person.

No single paradigm, whether positivist or not, seemed to fit my thoughts about how I see the world and how I saw my research question and its possible implications. Neither an extreme objectivist position nor an extreme subjectivist position seemed satisfactory. A positivist paradigm would reduce an investigation of neutrality to measurable variables aimed at predicting and controlling the reality of neutrality, which is itself disputed in the literature. From a positivist perspective, a causal analysis of factors that might correlate with neutrality – for example, skills, attitudes and understandings that enable neutrality to exist in practice – might be useful. I assume an objective, manipulable world in which there are probable effects from certain conditions; but that is not the only world, or the only experience of the world. Furthermore, the question “what factors create neutrality?” seems inappropriate for our current understanding of the problem, since the concept of neutrality itself lacks sufficient clarity for such an investigation.

An extreme subjectivist view could obviate the necessity for any data collection or any empirical referents. An apparently straightforward solution would be to adopt a paradigm with an objectivist view of reality and a subjectivist view of knowledge creation. This would, however, neglect some of the threads of postmodernism characteristic of recent influences in the mediation literature. A choice between constructionist and critical theory paradigms is also exclusionary and hence limiting.
Is it possible to take from each paradigm elements that are not contradictory but that together seem to “fit” my research question? What could be taken from these interconnecting moments to ground the core design assumptions for this study? It became evident that the question I posed contained assumptions about how I saw the reality I had chosen to investigate and would affect how I went about the project. What were those assumptions and did they fit any of the paradigms? What I found, upon reflection, were a number of postulates and assumptions that I sought to connect with the paradigms depicted in the literature.

My early core design assumptions were the following:

- that the meanings mediators attribute to neutrality are significant in guiding their practice;
- that mediators’ experience of neutrality in practice in turn influences their understanding of the concept of neutrality;
- that mediators’ interpretation and experience of neutrality will not necessarily match the meanings depicted in the literature;
- that meaning is a changing phenomenon – consistent to a degree over time and context, but ultimately dynamic;
- that meanings are shared or at least experienced as shared; and that shared meanings constitute grounds for communication;
- that language, written or verbal, is a vehicle for shared meaning, though not the only one; that non-verbal communication is at least as significant; and
- that meaning is political and hence influenced by relationships of power.
I decided that it is possible to combine a number of non-conflicting assumptions from varying paradigms and to use this “choice of paradigm” for the project. Interpretivism offered a focus on meaning creation, which is the central issue for my project. Constructionism offered a focus on the interaction between knower and the world, which enabled me to focus on shared meaning and the culture of mediation. These interconnecting paradigms offered the best “fit” for my early design assumptions, within which processes of meaning creation were predominant. In addition, however, inclusion of assumptions from critical and postmodern perspectives enabled inclusion of ideas about power.

For the purposes of the project, and acknowledging the importance of relations of power in human experience and the value dimension of that experience, I drew a number of assumptions from all three alternatives to positivism, as discussed above:

- that social reality exists as a result of individuals’ interactions with an externally experienced reality;
- that meaning is co-constructed by individuals as they interact with their worlds, which are historically positioned and locally situated;
- that meaning is plural and open, and there is politics in every account;
- that meaning is cultural and individuals internalise systems of understanding through processes of tradition;
- that the researcher is not an objective, politically neutral observer. As Denzin remarks, “the age of putative value-free social science appears to be over” (Denzin, 2000, p. 501);
that power circulates in the relationships between individuals and groups. It is neither inherently positive nor negative, but can be exercised in ways and for ends judged as either empowering or abusive;

• that patterns of interaction which represent an exercise of power that creates disadvantage can be habitual to the point of representing substantive systematic patterns of disadvantage; and

• that systemic patterns of disadvantage require the mobilisation of emancipatory processes to change them.

I describe my perspective as broadly one of social constructionism with incorporation of postmodern ideas and a commitment to critical inquiry. This choice of “paradigm” has implications for the theory building aim of the project. The core aim of the project is to develop a theory about the practice of neutrality in mediation, based on mediators’ understandings and experiences. The next section offers a reflexive account of my examination of concepts of theory in furthering this theory building aim.

3.3 THEORY BUILDING

The aim of this project was to develop a theory about neutrality consistent with mediation practice. A concept of “theory” was therefore central to it. Furthermore, an understanding of the relationship between theory and method was necessary before choosing a method that would generate theory. Two schools of thought are evident in the research method literature about the nature of theory, which are also broadly associated with positivism and interpretivism, and with differences between quantitative and qualitative methods. It is evident that positivism, theory testing and
quantitative research methods represent an established and relatively unambiguous tradition. By contrast, interpretive approaches are more varied and ambiguous, and can exhibit some of the logic and rhetoric of a positivist paradigm.

Early in the project, I knew that I wanted to explore the meaning that mediators ascribe to neutrality and to develop a theory grounded in their perceptions. I also knew that I wanted to speak to mediators face-to-face in order to explore those perceptions in an open-ended manner. These objectives led me towards interpretivist and qualitative approaches. The difficulty I faced was in conceptualising clearly the nature of the theory I wanted to build. Interpretivist and qualitative research writings emphasise interpretation of data, but while they eschew the causal explanation central to positivist, quantitative approaches, alternative ways of conceptualising theory are not easily understood.

From a postmodern perspective, looking for a clear definition of theory could be criticised as essentialist and hence unnecessary, if not misguided. Indeed, some of the confusion I experienced could be attributed to encountering the persistent use of binary distinctions in the research literature despite the increasing influence of postmodern approaches. The distinctions between positivism and interpretivism, quantitative and qualitative methods, theory building and theory testing represent the “either or” of modernist thinking. Nevertheless, the literature dealing with empirical research studies does not entirely abandon binary thinking while it continues to search for credible and convincing alternatives in acknowledgment of postmodern conceptions. In the context of a question of the nature of theory, I trace below my
journey to hermeneutics through the distinctions between explanation and description, and between explanation and understanding.

### 3.3.1 Explanation or description: How, what or why?

It is often asserted in research method texts that the research question drives the research design. Why questions seek explanations, while how or what questions generate description (Neumann, 1997; Seale, 1999, p. 39). This distinction between descriptive and explanatory questions is consistent with a privileging of the latter by a positivist paradigm. Description gains a particular meaning within the logic of an objectivist world view. Where universal laws are assumed to exist, open to discovery and valuable for predicting and controlling the social environment, causal explanation is privileged. Accordingly, descriptive studies are seen as intellectually inferior, lacking effort and rigour (Bryman, 1988, p. 63).

The research question guiding this study is a how question and is therefore, according to traditional research approaches, prima facie, descriptive. Hence a preliminary issue for my study was whether this question was sufficient to generate “theory” rather than “mere” description. According to classical definition, a theory of a phenomenon is identified with an explanation of it. In a positivist paradigm, theory means explanation and explanation means causal analysis (Bryman, 1988, pp.30-4; 63; Patton, 1990, p.42; Seale, 1999, p. 22). If theory is explanation and explanation is causal analysis, then the question I posed could not generate theory. Therefore, I re-examined the distinction between why and how or what questions. I noted that the why of neutrality could be transposed to descriptive questions of what (factors) or how (generated) in order to describe postulated causal links. Thus, distinguishing between description
and explanation according to the sorts of questions asked is at best superficial and at worst, potentially misleading: “One can argue that many ‘what’ and ‘how’ accounts contain hidden assumptions about why things happen” (Seale, 1999, p. 39). Nonetheless, I was still looking for “meaning” rather than factors that could be said to cause neutrality since the fact of neutrality itself has already been convincingly disputed (see Chapter One above).

### 3.3.2 Explanation or understanding?

According to an interpretivist paradigm, understanding, not explanation, is the primary aim of research. A tradition of verstehen, understanding, is a central tenet of much qualitative inquiry (Bryman, 1988, pp. 56-7; Miles & Huberman, 1994, p. 6; Patton, 1990, p. 423). According to Hamilton (2000, pp. 63-5), an emphasis on verstehen grew out of an earlier transition from Cartesian philosophy, which focused on explanation (Erklärung), the importance of mathematics and objectivity in the search for truth, to a Kantian focus on interpretation and understanding.

Pursuit of understanding rather than explanation is one way in which the study of human society is distinguished from that of the natural sciences. Understanding can encompass the peculiar in human experience: human beings have feelings, values and purposes that affect their behaviour, and a capacity to think and determine their own direction. “Seeing through the eyes of the people studied” and capturing their “lived experience”, are keynotes of a qualitative approach (Berg, 2007, pp. 1-12; Bryman, 1988, pp. 61-9; Denzin & Lincoln, 2000, pp.5-6; Miles & Huberman, 1994, pp. 5-7). The meaning that actors attribute to their behaviour becomes a central focus of investigation and that meaning is considered in context in order to account for
Building theory is commonly associated with qualitative approaches to research. Theory testing is a key aim of a quantitative approach. Qualitative methods may be used with a positivist paradigm in order to build theory later tested according to quantitative methods. However, qualitative methods are strongly associated with interpretivist paradigms and implicitly critical of positivism and its reliance on quantitative methods (Denzin & Lincoln, 2000; Guba, 1981; Guba & Lincoln, 1994). Qualitative research is also associated with a broader search for understanding rather than merely explanation. According to Stake (2000 p. 239), “qualitative researchers are sometimes disposed toward causal determination of events, but more often tend to perceive…events not simply and singly caused. Many find the search for cause of little use, dramatizing, rather, the coincidence of events, seeing some events purposive, some situational, many of them interrelated.”

While understanding and explanation are counterpoised in some critiques of positivism, within the interpretivist tradition (see for example Hamilton, 2000), understanding has also been seen as encompassing explanation (see Bryman on Weber, 1988, pp. 56-8). Weber recognised two forms of understanding. One consisted of direct understanding of the subjective meaning of a given act, achieved through empathy and insight. The other consisted of a motivational explanation of behaviour. The latter suggests a linear analysis of cause and effect, albeit with variables of a subjective nature. Within a quantitative approach, subjective states are rendered objective in order to achieve a causal analysis – objective indicators of subjective
states are devised for the purposes of measurement and analysis. A causal analysis is more cumbersome using a qualitative approach, given the commitment to remain “close to the data” and to render a faithful and “thick” description of peoples’ experiences. Providing a thick, or detailed, description is another keynote of qualitative research. Exploration and description are emphasised in a qualitative framework, while explanation is a cornerstone of a quantitative framework. Exploration and description clearly advance a general notion of “understanding”. Nevertheless, in Weber’s formulations, although understanding seems to mean more than merely causal explanation, explanation is still emphasised.

In an examination of positivist and humanist\(^7\) traditions, Walker (1985, p.14) considers Weber’s approach as an attempt to build a bridge between the two paradigms, and (to put it briefly), concludes that he failed to resolve “the problem of reconciling human consciousness with deterministic law-making…” This difficulty is reflected clearly in different researchers’ views of the role of qualitative research in explanation. While space precludes discussion of these differing views,\(^8\) a continued focus on the apparent necessity of causal explanation in the work of many qualitative researchers reflects a measure of uncertainty about how fully to incorporate an interpretivist perspective into the research process. Despite a general preference for qualitative over quantitative processes, the continued influence of positivism as the “received view” (Guba & Lincoln, 1994, p.106) is evident among those who lean towards an interpretivist paradigm but have not yet developed a coherent alternative to linear, causal analysis.

---

\(^7\) Treated here as broadly synonymous with an interpretivist tradition.

\(^8\) See, for example, Patton (1990), and Miles & Huberman (1994).
There is some reason for this: testing for causal relationships – typically, hypotheses from a priori theory – has the practical advantage of providing initial clarity about the subject under study, and the potential for ease and efficiency in gathering data. Advantages such as these can lead to a preference for a quantitative framework over more open-ended and uncertain qualitative, interpretive fieldwork. According to Easterby-Smith and his colleagues (2008, p. 47), a qualitative approach may take more time and “researchers will often live with the fear that nothing of interest will emerge from the work.” Despite this uncertainty, an established tradition of theory as interpretation is evident in the tradition of hermeneutics, to which discussion now turns.

3.3.3 Theory as interpretation

Within an interpretivist paradigm theory “operates as interpretation” (Denzin, 1989, p. 39). This approach has its roots in hermeneutics (the theory of interpretation), a tradition of interdisciplinary inquiry concerning the nature of interpretation in literary criticism, philosophy, history and social theory (Palmer, 1969; Bauman, 1992; Crotty, 1998). In general, hermeneutic approaches question the universal applicability of subject-object dualism to all forms of understanding. They allow for a multiplicity of truthful interpretations, but nevertheless critically interrogate all such accounts in a continuous dialogue that refuses arbitrary relativism (Palmer, 1969; Bauman, 1992; Crotty, 1998).

A comprehensive account of hermeneutics is not possible here. What are emphasised are aspects of a hermeneutics that provide the basis for both a pluralistic and critical approach to interpretation. A useful distinction can be made between the “traditional
hermeneutics” of Schleiermacher and Dilthey, who focus on epistemological issues of interpreting texts, and the “philosophical hermeneutics” of Heidegger and Gadamer, with their ontological concerns about the nature of the interpreter and interpretive community (Guignon, 2002, p. 265).

Schleiermacher (1998, p. 5) developed hermeneutics as the “art of understanding correctly another’s meaning” in the interpretation of texts, whether juridical, literary or biblical. His guiding principle was that the parts of a text should be explained in terms of the larger whole to which they belong. For example, the meaning of a word must be looked at within the sentence of which it forms a part; a sentence interpreted within a paragraph, a paragraph within a larger text, and so on. This principle of the circular nature of interpretation, moving from part to whole and back again, remains central to any interpretive task today. Schleiermacher’s most notable disciple, Dilthey (1976) wanted to transform Schleiermacher’s art into a rigorous science and extend it beyond texts to interpretation of all forms of human activity. He rejected Schleiermacher’s apparent emphasis on recapturing the original author’s subjective meaning and emphasised instead the “expressions” of meaning or “lived experience” as they are found in writing, speech, artefacts and performance. Such interpretation is always context-dependent and open to extension. It also involves moving between different layers of meaning. Such meaning is not automatically given to sensory perception or common sense. It is only by entering the “hermeneutic circle”, with its ongoing iteration between the outward expressions of meaning and their context that our understanding deepens. Dilthey provides a key for distinguishing between interpretation as an active meaning-making activity and the simple replication of common knowledge.
Heidegger (1962) broke with Schleiermacher and Dilthey, who make hermeneutics a specialised methodology for the humanities, construing it instead as something ontological. That is, interpretation is an integral part of our human condition. He argues that interpretation always takes place against a background of “pre-understandings” and it is in light of these that we interpret anything we do not understand. Furthermore, interpretation involves our whole being (including our social nature), as we undergo a rich variety of experiences in the natural and cultural worlds. The disclosure of truth is not a matter of cognitive correspondence, but an event or the type of revelation that happens when something beyond our purview is “un-concealed”. The hermeneutic researcher does not simply “represent” the world as it is, but rather explains what has been obscured in the light of our shared pre-understandings, and thus extends our understanding.

Gadamer (1989) reminds us of the thoroughly social character of all interpretation, because we rely on language, history and others to begin to interpret anything at all. Meaning is not inherent in things themselves or cognitive structures, but in cultural traditions that people inhabit and which in turn inhabit all of us. Recognising the dynamic mediation of such traditions provides a holistic way of understanding what shapes experience. Interpretation, in Gadamer’s view, begins by questioning the tradition(s) in which an object of research, (i.e. a discourse or practice), is situated. It proceeds through dialogue with and between participants in such traditions (which may be a community of practice, or profession, such as mediation). In this process, prejudices are explicated, entertained, tested and subject to revision. Old meanings are recovered and new meanings – sometimes radically new – emerge in the interaction between co-interpreters, their tradition(s) and the thing being interpreted. This process
fosters critical reflection and change. Gadamer’s situated, dialogical and reflexive theory of interpretation suggests that genuine interpretation can never be manipulated or imposed. It is always in the process of becoming, a process that the researcher can facilitate but not force.

In sum, interpretation is about increased understanding of an experience and what shapes it. Understanding might include causal explanation, but the latter does not exhaust the meaning of an experience or practice. A qualitative approach represents an investigative approach that seeks to uncover and enhance understanding. The next chapter examines that approach as a core feature of this project.

3.4 SUMMARY AND IMPLICATIONS:

Research paradigms, social theories and models of mediation rest on sets of assumptions about the nature of reality and the nature of knowledge that cannot be absolute proven. Ultimately, perspectives on social phenomena rest on sets of beliefs and values. Value neutrality is not a reality; it is an assumption about reality and, where advocated, constitutes a value in itself. As Mulcahy (2001, p. 521) argues, “instead of viewing neutrality as a fundamental or shared concept it is more appropriately portrayed as explicit advocacy of a particular value system”.

Value neutrality is a modernist idea intimately connected with positivism. Alternative research paradigms challenge positivism’s emphasis on objectivity by redefining the reality about which knowledge is sought. Interpretivism redirects the focus of inquiry from an assumed external reality to the subjective processes by which meaning is generated and constituted. Social constructionism focuses on the interaction between
subjective and objective, between human beings and their worlds, wherein shared meaning is constructed. Postmodern theory critiques representation and the belief that theory mirrors reality, and directs our focus to discursive practices. Its project of deconstruction challenges not only existing categories of understanding, but also our method of understanding. By acknowledging the value dimension and determination of experience, critical inquiry contemplates not only what is, but also what ought to be.

Reflexivity rejects conventional objectivity and is a way to address the impact of the researcher’s subjectivity on the research process. Similarly, it rejects mediator neutrality (in any absolute sense), acknowledges the impact of mediator subjectivity and offers a means of addressing that subjectivity in practice. From an interpretivist perspective, reflexivity can represent the inclusion of the researcher/mediator’s experience as primary evidence or as an integral part of the mediation encounter. For social constructionism, reflexivity calls attention to the co-creation of meaning in the research/mediation relationship. In postmodernism, reflexivity is more than self-reflection, extending to a continual deconstruction of the researcher/mediator’s subjectivity. For critical inquiry, reflexivity represents a self-critique of the values and assumptions that shape the research/mediation encounter, both of which are seen as inherently political processes.

Reflexivity in mediation practice, like reflexivity in research, can be constructed from differing perspectives. The discussion in this chapter has highlighted how reflexivity is differently understood in mediation practice according to different models of practice. Understanding these various meanings and the assumptions upon which they
rest allows recognition of the impact of mediator’s subjectivity in mediation and offers a discourse for understanding that subjectivity. The impossibility of value neutrality, or of the mediator having no impact on the mediation encounter, makes that awareness desirable. However, more is needed if reflexivity is to be usefully employed to articulate the proper scope of the mediator’s intrusion into the content and outcome of an encounter.

Lincoln and Denzin (2000, p. 582) describe the different philosophies underlying research practice as intersecting historical moments, each affecting the present as researchers “struggle to find ways to make [their] texts meaningful beyond the artificial structures of conventional objectivity”. One could argue that differing paradigms, though co-existing in time, are theoretically mutually exclusive. Then, it could be argued that positivism’s ontological and epistemological objectivism is incommensurate with the subjectivist ontology of interpretivism, the subjectivist epistemology of critical theory, and postmodernist subjectivist ontology and epistemology. On the other hand, and as indicated above, postmodern themes have been convincingly incorporated into critical inquiries and can extend constructionism to radical versions. Here, I take the approach that different worldviews offer different vantage points from which to appreciate social experience. It is possible to extract a consistent set of propositions from those paradigms identified as alternatives to positivism as the metaphysics guiding this study.

The assumptions underpinning this project combine elements of social constructionism, critical theory and postmodernism. An assumption that humans attribute meaning to their social lives through intersubjective meaning creation is
central to my investigation of how mediators understand neutrality. The relational emphasis of postmodernism is recognised in the assumption that we all, including mediators, make sense of our experiences in relation to others. A particular impetus for this study is the possibility of an alternative to the binary, absolute idea of neutrality, following Astor’s critique (2000a; 2000b; 2007). A critical theory perspective is adopted in order to acknowledge the value dimension of this investigation and of its content. Just as mediation is not value free, nor is research. Many commentators on mediation, including myself, look to mediation’s capacity to improve the life experience of those in conflict. Both critical theory and postmodernism address questions of ideology and the power of dominant discourses. Both attempt to unmask the power of such dominant discourses by questioning their source, the nature of their operation and their consequences. Considering the role of power in mediation both between parties and between mediators and parties, is a central theme of this investigation. I describe my perspective as one of social constructionism that also keeps in mind the value-laden nature of inquiry and a postmodern context.

This dissertation describes my development of a theory of neutrality in mediation which is grounded in the meaning mediators attach to neutrality. I aimed to produce a theory as interpretation, in the tradition of hermeneutics. A view of theory as interpretation does not preclude theory as causal explanation, but sees it as more than that; as a form of analysis that offers increased understanding of our world.
In the following chapter, two further features of the project, a qualitative approach and grounded theory analysis, are discussed as core components of the project’s research design.
CHAPTER FOUR
RESEARCH DESIGN

4.0 INTRODUCTION

According to Yin (1994, p. 19), “in the most elementary sense, the design is the logical sequence that connects the empirical data to the study’s initial research questions and, ultimately, to its conclusions”. The three core design components of that sequence for this project are data selection, collection and analysis. Choices for these components were shaped by the metaphysical assumptions articulated in the preceding chapter and the theory building aim of the project. A qualitative approach, incorporating a case study design, was adopted as the method of selection and collection of data, and a grounded theory approach was chosen as the data analysis method. This chapter describes and explains those choices.

Briefly, the project consists of two qualitative case studies of mediation service providers – the Dispute Resolution Centre (DRC) of the Department of Justice and Attorney-General, Brisbane and the Family Mediation Service (FMS), Lifeline Community Care, Maroochydore. Data was collected in fourteen in-depth interviews with mediators employed by these services (ten with the DRC and four with the FMS). A grounded theory approach was used to analyse the data, which was subjected to a thematic analysis through a system of manual coding, later repeated using a computer-aided system for organising and displaying the data and testing the credibility of results (NVivo). Details of data selection and collection are reported below at 4.2. Details of the method of data analysis are given at 4.3.
4.0.1 Preliminary observations

a) The logic of design

The linear structuring of a quantitative research design from hypothesis to sampling to choice of method and finally to causal (or correlative) analysis of results is not appropriate to a qualitative design, except where it proceeds from positivist assumptions. A qualitative design has more of an iterative, cyclical and emergent character. It is difficult to depict this adequately using a linear reporting style, adopted for the most part here (and consistent with PhD norms (Evans & Gruba, 2002)). Reporting is further complicated by the use and synthesis of elements of case study and grounded theory approaches, which produce some overlap and potential for ungainly repetition. The design components are interrelated. The same components from a positivist perspective are logically related in an apparently seamless whole but rely on the particular assumptions discussed in Chapter Three (3.1.1) to ground that logic. Alternative paradigms offer multiple perspectives and more open-ended design options, even if the latter are sometimes still caught in a positivist discourse. The task for the researcher then, is to construct the logic of design as well as the design itself. The need to fashion the design rather than adopt a strategy already well developed means that detail of the actual cases is presented after considerable detailed discussion of the research context in which they are examined. The data sets are, then, described in detail at 4.2.1.

b) Data collection and the rhetoric of positivism

Although specific data collection methods are frequently identified as either quantitative or qualitative, and this distinction is often associated with that between positivism and interpretivism, sampling and analysis are typically constructed using
positivist terminology and hence elements of a positivist perspective. Sampling suggests representative or random sampling, the aim of which is to achieve statistical generalisation. Purposive and theoretical sampling are described below (at 4.2.1) as the best alternatives to positivist strategies; they were employed for data selection in this study using a quite different frame of reference. Matters of analysis are discussed in detail under the heading Grounded Theory Analysis, at 4.3.

c) Of case studies and grounded theory
Case study methodologies and grounded theory analysis are presented in the research literature as capable of incorporating either quantitative or qualitative methods, and of being amenable to different metaphysical perspectives. Both are also advocated as complete design approaches. Here, elements of each are combined in order to fill gaps in other qualitative approaches. In particular, a case study design was used as a sampling strategy – one that bounds the population examined and allows comparison between cases. A second case study was employed as a component of theoretical sampling, consistent with a grounded theory analysis and theory building strategy.

4.1 JUSTIFICATION FOR A QUALITATIVE APPROACH
A narrow definition of a qualitative approach identifies it with a particular range of data collection methods. A broader definition is used here, where a qualitative approach is understood as grounding the strategies of data selection (sampling), collection (method) and analysis in a manner consistent with the assumptions articulated in Chapter Three and the theory building aim. In this section, the choice of qualitative approach is explained through an examination of its key features, which
help to answer the research question: *How do mediators make sense of neutrality in practice?*

### 4.1.1 Seeing from the point of view of those studied

As noted in Chapter Three, a core characteristic of a qualitative approach is its commitment to seeing from the perspective of those studied (Bryman, 1988, pp. 61-9; Bryman, 2001, pp. 277-78; Miles and Huberman, 1994, pp. 5-7; Denzin and Lincoln, 2000, pp. 5-6). By contrast, a quantitative approach fails to account adequately for subjective processes and, importantly, the meaning that human beings attach to their individual and social worlds (Guba and Lincoln 1994, pp. 106-7). An examination of the meaning people attach to their experiences is consistent with interpretivist and constructionist perspectives which “focus on the processes by which these meanings are created, negotiated, sustained, and modified within a specific context of human action” (Schwandt 2000, p. 120). The focus of this project is an investigation of the meaning that mediators ascribe to neutrality; I was looking for their subjective understanding of the concept. I postulated that what mediators understand it to mean might be different from what is said in the literature about it, and I was looking for alternatives that might make sense of the practice of neutrality to and for them. Using a quantitative approach, what would an “explanation” of neutrality look like? How might I pose a positivist account of neutrality for investigation? Could I perhaps formulate a hypothesis about factors causing or correlated with neutrality? For example, are there skills, attitudes and understandings that allow neutrality to exist in practice and which could be
empirically tested? Such an investigation might be fruitful if the concept of neutrality were clearly defined as a reality consistent with mediators’ experience.

However, the scholarly literature on the subject clearly challenges the idea that neutrality is a reality at all; describing it as a myth or a mere aspiration (see 1.2). If a reality at all, then it fails to be exhibited in practice (see 1.2). In the context of controversy about whether neutrality exists or can exist, attempting to abstract factors that might lead to its concrete appearance would be “putting the cart before the horse”. Given no unequivocal understanding of what neutrality consists of or represents, despite its central place in the rhetoric of mediation practice, exploring what neutrality means to mediators is a critical first step. Furthermore, no investigation can uncover what neutrality is in an objective sense, since it has no concrete, tangible reality. It exists as a concept or construction depicting “something” apparently important for practice. What was important was to investigate what meaning is attached to neutrality by mediation practitioners.

4.1.2 Placing meaning in context

Providing context for understanding is another keynote of a qualitative approach (Bryman 1988, pp. 64-5; Bryman, 2001, pp. 278-79; Denzin & Lincoln 1994, p. 5; Miles and Huberman, 1994, pp. 5-7). Seeing from the point of view of those studied, with an emphasis on the creation of meaning, draws attention to the context in which meaning is framed. This engenders “a style of research in which the meanings that people ascribe to their own and other people’s behaviour have to be set in the context of the values, practices, and underlying structures of the appropriate entity…as well as the multiple perceptions that pervade that entity” (Bryman 1988, p. 64). By contrast,
quantitative methods typically attempt to render some variables constant and to exclude others in order to isolate those variables being measured – a process described by Guba and Lincoln (1994, p. 106) as “context stripping”.

Placing a study in context can mean providing contextual information, such as demographic details of the participants and or of organisations under study. Detail of this sort is reported for my two case studies at 4.2. Contextual detail can be interpreted as drawing limits to the generalisability of findings where such details are viewed as variables affecting postulated linear or correlative relationships. However, where participants are not chosen as representative of a population and statistical generalisability is not a central aim of the design, context provides a backdrop for a different understanding. Context colours the findings in a way which is not intended to be limiting but to add depth to understanding. One way in which this added depth is conceptualised is in an acknowledgement that context facilitates a holistic perspective that “assumes that the whole is understood as a complex system that is greater than the sum of its parts” (Patton 1990, p. 49). Furthermore, rather than simply limiting the scope of a study, contextual information can point to what might next be usefully explored. It is in this way that a second case was employed in this study, as further explained below, at 4.2.

Another sense in which context is important is in referencing the everyday life experiences of those studied – another hallmark of a qualitative approach. For qualitative researchers, paying attention to the context of everyday life experiences means doing fieldwork: “Fieldwork is the central activity of qualitative inquiry. Going into the field means having direct and personal contact with people under study in
their own environment” (Patton, 1990, p. 46). Doing fieldwork is essential to naturalistic inquiry, largely synonymous with qualitative research, and in which inquiry is conducted “in nature” (Guba 1981; Denzin 1989). Participant observation requires a greater immersion in the field than an interview strategy (generally speaking). However, both attempt to achieve an understanding that “comes from trying to put oneself in the other person’s shoes, from trying to discern how others think, act and feel” (Patton 1990, p. 47).

While statistical reasoning can filter and focus attention on defined variables, providing context is more open-ended. What and how much detail is gathered and reported is a matter of judgement. For this study, the significant context is mediation practice, within which mediators’ understandings of neutrality and the nuances of meaning that they associate with it were explored.

**4.1.3 Use of a case study design**

Bryman (1988, p. 87) has described case study research and qualitative research as more or less synonymous, but Yin (1994, p. 14) argues that a case study strategy should not be confused with qualitative research. These differences are arguably a product of differing ideas about qualitative and case study research. No matter how defined case study designs will rest upon different metaphysical assumptions indicating, for example, a predominately positivist approach (Yin, 1994, 2000) or interpretivist perspective (Stake, 2000). Consistent with a positivist approach, case studies have been traditionally used to supplement the predictive value of statistical methods. Stouffer (1941, p. 357), for example, concludes a discussion of the advantages of case studies, and parallels between case study logic and the logic of
statistical inference with the comment: “The statistician and case-study investigator can make mutual gains if they quit quarrelling with each other and begin borrowing from each other.” When used within an interpretive, qualitative approach, case studies “seek to understand social action at a greater richness and depth and, hence, seek to record such action through a complex, nuanced and subtle set of interpretive categories” (Orum, Feagin & Sjorberg, 1991, p. 17).

We find various descriptions of the detail of a case study approach in the literature, many of which stress that it is a bounded field of investigation. A case study might consist of an investigation of a person, group, social setting or event (Berg, 2007). It is a “strategy which focuses on understanding the dynamics present within single settings” (Eisenhardt 1989, p. 534). Where a setting is seen as a bounded system “the boundedness and the behaviour patterns of the system are key factors in understanding the case” (Stake 2000, p. 236). A case study can involve single or multiple cases and several levels of analysis (Stake 2000; Yin 2000), and can incorporate quantitative or qualitative data gathering techniques (Eisenhardt 1989; Yin 2000), although some accounts emphasise the former given a focus on in-depth, detailed investigation (Orum, Feagin & Sjorberg 1991; Stake 2000). A case study strategy can be used to provide description, to test theory or to generate theory (Eisenhardt, 1989). When used in the context of a qualitative approach, case studies allow close-up, detailed examinations of lived experience and the generation of theory by avoidance of prior commitment to any theoretical model (Lincoln & Guba 1985; Stake 2000).
Orum, Feagin and Sjorberg (1991, pp. 6-7) identify a number of advantages of a case study design, of which the following are applicable to this project:

- it allows for the grounding of observations and concepts about social phenomena in natural settings studied at close hand;
- it permits a holistic study of complex social networks and of complexes of social action and social meaning;
- it can provide context for the study of social life, enabling the researcher to acknowledge issues of continuity and change; and
- it encourages and facilitates theoretical innovation.

In sum, case studies provide opportunities for in-depth study of a bounded, complex web of social interaction. Using two mediation services as case studies for this project allowed a focussed investigation of two localised settings. Rather than seeking to establish connections between variables across a wide sample of population and needing thereby to sacrifice breadth and depth for potential generalisability, I used a case study strategy to place neutrality in a broad context of practice, though with a smaller sample of practice experiences. Entering the field using a case study design enabled openness to the possibilities that presented themselves, specifically, to the possibility that those sampled were making their own sense of the concept of neutrality in practice.

### 4.1.4 Generating theory from the data

A positivist, quantitative approach is characterised by the testing of preconceived or *a priori* theory according to statistical techniques. Testing of *a priori* theory has been criticised as liable to have no meaning for the people under study (Denzin & Lincoln
2000, pp. 4-6); as potentially blinding researchers “not only to the views of participants but also to the unusual and unanticipated facets of a strand of social reality” (Bryman 1988, p. 87); and as often extending inherited theory only minimally while neglecting the “important enterprise of theory generation” (Orum, Feagin & Sjorberg 1991, p. 14).

Qualitative researchers tend to use approaches in which theory and empirical investigation are interwoven. Theory generation is said to occur during and or at the end of fieldwork rather than specified prior to the collection of data. The prior or early specification of a theory tends to be avoided because of the possibility that it will depart significantly from the views of participants and prematurely limit the investigation (Bryman 1988, p. 69). In keeping with a theory building aim, qualitative research tends to adopt an emergent design, as eloquently described by Guba (1981, p. 79):

Naturalists...believing in unfolding multiple realities, in interactions with respondents that will change both the investigators and the respondents over time, and in grounded theory, will insist upon an emergent (unfolding, rolling, cascading) design, which is never complete until the inquiry is arbitrarily terminated as time, resources, or other logistical considerations may dictate.

The theory building aim of this project has been repeatedly stated. In summary, the characteristics of a qualitative research approach, as distinct from a quantitative approach, are consistent with the theory building aim of this study and hence justified as a design strategy. Building theory about processes of meaning creation is consistent with the research question, which calls for an examination of the frames of meaning that mediators associate with neutrality. Placing that meaning in context is consistent with an examination of neutrality in actual practice. A case study design enables
meaning to be contextualised, facilitates the gathering of data from the point of view of those studied and facilitates the grounding of data in natural settings studied in localised environments.

4.2 A CASE STUDY DESIGN (selection of data) AND INTERVIEW STRATEGY (collection of data)

Stake (2000) offers a useful typology of case studies according to the purposes for which they are used. He identifies three types of case studies:

1. *Intrinsic case studies* where the aim is not to understand abstract constructs or generic phenomena, but to explore the intrinsic aspects of a particular instance.

2. *Instrumental case studies* where the aim is to provide insight into an issue or refine a theory. In this type, the case is secondary to the matter under investigation.

3. *Collective case studies* which involve extensive study of several instrumental cases believed to advance understanding about a still larger collection of cases.

The second and third of these types describe the case studies investigated in this project and are discussed below, followed by a description of the interview strategy used to collect data from mediators in the two case studies.

4.2.1 Selection of data (sampling)

This section describes the function of a case study design as a sampling strategy, the process of selecting the particular case studies and the contextual details of the case studies. It also details considerations relevant to the choice of case studies. The
specifics are detailed under headings of a) the use of instrumental and collective case studies; b) the case studies described; and c) theoretical sampling and saturation.

4.2.1.1 *Instrumental and collective case studies*

The case study approach used in this study reflects the instrumental and collective types identified by Stake (2000). Cases were not chosen for an in-depth examination of their specific features but rather to advance the theory building aim of the project, and to extrapolate that theory to a larger collection of cases, consistent with the collective type advanced by Stake. From a positivist perspective, the sampling strategy would be described as purposive, rather than random or representative, the latter being consistent with statistical sampling techniques. The framing of instrumental as distinct from intrinsic case studies is significant in terms of the contextual information needed to ground the interview data. Material information in the first case was chosen according to dimensions of practice judged to be similar or different across cases. Material information for the second case mirrored that collected for the first but was also chosen in a theory building context consistent with theoretical sampling, a strategy discussed at 4.2.1.3 below.

4.2.1.2 *The case studies*

The material information gathered in relation to both cases included:

1. Whether the service was government funded and administered, or government funded but privately administered, or privately funded and administered.
2. What model of mediation was used by the service?
   a. Whether settlement, facilitative, transformative or evaluative, as identified by Boulle (2005, pp. 44-5).
b. Whether a co-mediation model was used.

c. What time was typically given to a mediation session (2-3 or more hours?).

d. Whether parties were given the opportunity to attend than one session.

3. What substantive areas of practice were provided by the service?

4. Employment arrangements for mediators:
   a. Whether employed under contracts for or of service.

5. What profiles were exhibited by those practitioners interviewed?
   a. Gender
   b. Age
   c. Training in mediation
   d. Qualifications
   e. Length of experience in mediation
   f. Whether involved in training of mediators
   g. Whether having practiced mediation with other services
   h. Whether concurrently practicing mediation with other services.

These material aspects are detailed below and summarised in tabular form in Tables 4.2 and 4.3.

**Case Study 1: Dispute Resolution Centre, Department of Justice, Brisbane.**

Ten interviews were conducted with mediators from the Dispute Resolution Centre (DRC), Department of Justice and Attorney General, Brisbane, Queensland, a state government funded and administered community mediation service that deals with a broad range of disputes including neighbourhood disputes, family law matters,
commercial matters, workplace disputes, environmental disputes and indigenous matters. The service also undertakes court-ordered mediations, though only two of the sample of mediators had conducted such mediations. Participants referred most frequently to neighbourhood and family disputes, although examples from all categories listed were mentioned. 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. Mediators employed by the service are specifically trained in that model, which would be categorised as “facilitative” according to the typology of four mediation models described by Boulle (2005, pp. 44-5).

Of the ten participants, three were female and seven male, and their ages ranged from 33 to 54 years and length of experience in mediation ranged from two to 12 years. Seven 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 ten 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 in both training and management roles with the service over a ten-year period. Six participants worked concurrently as mediators with other service providers.

**Case Study 2: Family Mediation Service, Lifeline Community Care, Maroochydore.**

Four interviews were conducted with mediators from the Family Mediation Service (FMS) (now the Family Dispute Resolution Service), Lifeline Community Care, Maroochydore, Queensland. The FMS is a government funded service administered
by Lifeline Community Care. The four mediators represented the full complement of mediation practitioners employed under contracts of service with Lifeline, Maroochydore. One other sessional worker were not interviewed because unavailable.

The FMS deals exclusively with family disputes, centring on the dissolution of marriage and de facto partnerships. Mediation is offered for matters of property division and the care of children. The model utilised by the mediation service is a facilitative, problem-solving model. Participants had not been specifically trained in the model used by the service; they acquired familiarity with it once employed there and introduced to it through practice. Three of the participants were female, one male; their ages ranged from 43 to 56 years. All had prior qualifications, two in law, one in social work and one in psychology. One worked contemporaneously with another family mediation service. None was actively involved in mediation training. Their experience as mediators ranged from six months to five years.

Table 4.1

Service Demographics

<table>
<thead>
<tr>
<th>Service Demographics</th>
<th>Case 1</th>
<th>Case 2</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>DRC Department of Justice</td>
<td>FMS Lifeline Community Care</td>
</tr>
<tr>
<td>Service type</td>
<td>Government funded and</td>
<td>Government funded and</td>
</tr>
<tr>
<td></td>
<td>administered</td>
<td>privately administered</td>
</tr>
<tr>
<td>Model of mediation</td>
<td>Facilitative</td>
<td>Facilitative</td>
</tr>
<tr>
<td>• Session length</td>
<td>3 hours +</td>
<td>2 hours</td>
</tr>
<tr>
<td>• More than one</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>session offered?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Co-mediation?</td>
<td>Yes</td>
<td>Yes, depending on availability of mediators</td>
</tr>
<tr>
<td>Substantive practice</td>
<td>Neighbourhood, family,</td>
<td>Family matters</td>
</tr>
<tr>
<td>areas</td>
<td>commercial, workplace,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>environmental</td>
<td></td>
</tr>
</tbody>
</table>

168
<table>
<thead>
<tr>
<th>Employment arrangements with mediators</th>
<th>Contracts for service (9)</th>
<th>Contracts of service (4)</th>
</tr>
</thead>
</table>

Table 4.2

Mediator Demographics

<table>
<thead>
<tr>
<th>Mediator Demographics</th>
<th>Case 1 DRC Department of Justice</th>
<th>Case 2 FMS Lifeline Community Care</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>3 female; 7 male</td>
<td>3 female; 1 male</td>
</tr>
<tr>
<td>Age</td>
<td>33-54 years</td>
<td>43-56 years</td>
</tr>
<tr>
<td>Training in Mediation</td>
<td>Compulsory in-house</td>
<td>Varied</td>
</tr>
<tr>
<td>Qualifications</td>
<td>7 with postsecondary qualifications</td>
<td>4 with postsecondary qualifications</td>
</tr>
<tr>
<td>Experience in Mediation</td>
<td>2-12 years</td>
<td>6 months-5 years</td>
</tr>
<tr>
<td>Experience with other services</td>
<td>6 participants concurrently practicing with other services</td>
<td>1 concurrently working with another FMS</td>
</tr>
</tbody>
</table>

4.2.1.3 Theoretical sampling and saturation

Theoretical sampling is a key strategy for the method of theory generation articulated by Glaser and Strauss (1967) known as grounded theory (discussed in detail below at 4.3). Grounded theory proposes an iterative process linking data selection, collection and analysis. Theory generation relies on continuous comparison of data and theory, beginning with data collection. Once initial data sources are selected and the data is collected and analysed, further data is selected, collected and analysed in cycles of revisional theorising. Theoretical sampling directs the process of theory building.
Theoretical sampling is the process of data collection for generating theory whereby the analyst jointly collects, codes and analyzes his data and decides what data to collect next and where to find them, in order to develop his theory as it emerges. The process of data collection is controlled by the emerging theory…The basic question in theoretical sampling (in either substantive or formal theory) is: what groups or subgroups does one turn to next in data collection? And for what theoretical purpose? In short, how does the sociologist select multiple comparison groups? The possibility of multiple comparisons are infinite, and so groups must be chosen according to theoretical criteria (Glaser and Strauss 1967, pp. 45, 47).

Grounded theory uses a strategy of constant comparison within and between data sets, analysed in categories, in order to generate theory. Theoretical sampling involves choosing cases to investigate, people to interview and settings to observe, with a view to challenging the limitations of theory as it is developed. Theoretical sampling is therefore not a discrete sampling process separate from data collection and analysis. Data is collected and analysed contemporaneously with theory construction until a point of saturation occurs.

The criterion for judging when to stop sampling the different groups pertinent to a category is the category’s theoretical saturation. Saturation means that no additional data are being found whereby the sociologist can develop properties of the category. As he sees similar instances over and over again, the researcher becomes empirically confident that a category is saturated. He goes out of his way to look for groups that stretch diversity of data as far as possible, just to make certain that saturation is based on the widest possible range of data in that category…The adequate theoretical sampling is judged on the basis of how widely and diversely the analyst chose his groups for saturating categories according to the type of theory he wished to develop…The inadequate theoretical sample is easily spotted, since the theory associated with it is usually thin and not well integrated, and has too many obvious unexplained exceptions. (Glaser & Strauss, 1967, pp. 61, 63)
Theoretical sampling is a potentially limitless process. The concept of saturation represents an attempt to provide a boundary for the process within a theoretically justifiable limit. Importantly, theoretical saturation is consistent with a view of research as creating provisional truths, “suggesting that researchers operate in the same pragmatic manner as ordinary members, who cease inquiry when this seems unlikely to be fruitful for practical purposes” (Seale, 1999, p. 93).

The case studies selected for this project, and the number and character of interviews conducted for each case study, were determined by considerations consistent with the theory building aim of the project, practical considerations of access to data sources and the limited resources available to fund the project.

Access to data was significantly limited by the confidential nature of the mediation process. Several design options were attempted and abandoned because potential participants, both mediators and parties, were unwilling to consent to the necessary intrusion, however benign, that the research posed (see 4.2.2.3). Access to the two services was facilitated by my contact with each prior to initiating the research. I attended a five-day mediation training course with the DRC in 1997 and had been employed by the FMS as a sessional mediator. Prior contact with management staff facilitated further access for the purposes of data collection and gave me a working knowledge of the models used by both services. This level of familiarity was not a necessary precondition for the research and could be viewed as source of potential bias. However, it did enable a ready understanding of nuances of meaning articulated
by participants, given our common understanding of the context in which neutrality is applied.

Ten interviews were conducted with mediators from the DRC and later transcribed. This number was determined by a method of self-selection of participants, described at 4.2.2.1. Four interviews were conducted and later transcribed with mediators from the FMS. That number equalled the total number of mediators employed by Lifeline’s mediation service in Maroochydore. The total number of interviews and the two case studies were determined both by an assessment that sufficient data had been collected to generate a substantive theory about neutrality, and by funding considerations primarily associated with interview transcription costs.

The substantive theory developed about neutrality in mediation remains open to revision, just as all theories are provisional. The questions in theory development judged to be central to guiding data selection and collection were those bearing on existing definitions of neutrality:

1. defining and limiting interventions by the mediator in terms of process and not content (see 1.4.3)
2. raising issues of mediator interventions to redress power imbalances between the parties (see 1.4.2); and
3. raising issues of the mediator’s exercise of power vis-à-vis both parties (see 1.4.1).

Both services investigated use a facilitative model of practice. As the first case chosen, the DRC exhibited certain features useful for grounding the study in a
practice context. The service’s model is clearly articulated. All mediators who work for the service are trained in-house and use that model in their practice with the service. The substantive areas of practice provided by the service are wide-ranging and include areas recognised as exhibiting power imbalances between the parties, namely family and employment matters. Hence, the model used (process) was initially perceived as a constant in a context of variable substantive application (content). I judged that examining a practice context in which the model used is constant while the substantive areas of practice vary would be most likely to shed light on the process and content distinction associated with neutrality (see 1.4.3) since the model would remain a relative constant in terms of mediator training and use. However, I found that a significant number of the mediators interviewed concurrently worked with other models for different services and had had training from other sources. This provided an unexpected depth to the responses because participants were able to comment on their experience of the model used by the service and compare that with their experience of other models. In particular, four participants were concurrently employed with the Residential Tenancy Tribunal in Brisbane as conciliators.

A further consideration in choosing the DRC as a case study was the fact that the service did not provide mediation exclusively for family matters. In the early design phase, I considered that a study of family matters alone would be heavily context-laden given the particular power imbalances relevant, such as those relating to gender and the division of labour in domestic settings. I was aware that power imbalances could and would exist in other inter-party relationships and was concerned to elicit data more widely than family matters alone. Furthermore, my initial focus was on the relationship of power between mediator and parties rather than between parties.
Therefore, the examination of a generic model – one used across content areas – was considered optimal for gathering data about the mediator’s role.

Despite my attempt to broaden data gathered about power relationships beyond family matters, they remained an area of significant comment by mediators. As a broader view of power in mediation began to emerge from the first case study, the specifics of family matters appeared less critical to a developing understanding. At the same time, almost paradoxically, a broader view of power pointed to family mediation as a fertile source for further investigation. It became apparent that such a broader view of power in mediation underpins mediation practice generally and would be fruitfully examined in areas such as family matters where it frequently becomes a question requiring investigation. Hence, the second case study was chosen because the FMS at Lifeline is a service whose area of practice is exclusively family matters. The second case enabled the collection of data relevant to the research question from the context of a particular model of practice used in a particular, substantive area of practice. It also enabled comparisons with the first case study across areas already pointed to (model used and substantive areas of practice) and less obvious dimensions of context, including, for example, time-frames of sessions, intake procedures and the participation of lawyers in the process. These variations and others have been incorporated into the analysis as instances within categories emerging from the comparison between case studies.

4.2.2 Collection of data (semi-structured interviews)

The following discussion describes and justifies the semi-structured interview process used to collect the data.
4.2.2.1 Crafting instruments and protocols

In the first case study, the sample of mediators interviewed was determined by a process of self-selection. The DRC engages mediators for particular sessions from a panel of over one hundred personnel trained in the service’s mediation model. Each panel member received a letter of invitation to participate in the study from the DRC management. Included in the letters were information and consent forms (see Appendix A). Twelve members of the panel responded positively and all twelve were interviewed. However, two of the interview tapes proved to be of too poor quality for transcription purposes. Audio tapes were used to record interviews in this first case study and were later transcribed. In the subsequent case study, a digital recording device allowed the interviews to be downloaded onto audio files and transcribed later.

In the second case study (the FMS), the mediators were approached personally by the service manager who provided them with the information and consent forms (see Appendix B). In each case study, the scope of the inquiry was explained to participants at the beginning of each interview, reinforcing the information earlier provided in writing. Participants were given an opportunity to ask questions and then asked to sign the consent forms.

Semi-structured interviews were employed to collect the data for both case studies. Unstructured interviews are a technique in which the researcher provides minimal guidance to participants and allows participants considerable latitude in their responses (Bryman, 1988, pp. 46-7; Bryman, 2001, pp. 314-5). Semi-structured interviews were chosen in preference to structured interviews or a survey design, because of the emphasis in the investigation on the meanings that participants themselves attribute to neutrality. Face-to-face interviews were done in order to build
rapport with participants and thereby provide a context in which they would be comfortable discussing matters important to them. Also, in semi- or unstructured interviews, the researcher has minimal control of the process thus allowing an interviewee to “ramble”, or to move into areas of interest to him or her (Bryman, 1988, pp. 46-7) further enabling collection of data about mediators’ own constructions of neutrality.

The interviews were conducted on the premises of each service, in Brisbane and Maroochydore, and were scheduled for one hour each. On average, the interviews with the DRC lasted 50 minutes and those with the FMS 35 minutes. The difference between these averages is notable and is attributed to further contextual variation. Participants from the DRC attended the interviews as work time, for which they could claim casual rates from the service (as they do for mediation sessions). They made appointments to suit their personal and work schedules; the interviews were conducted over a period of two weeks. Participants from the FMS were scheduled for appointments as part of their working week and to accommodate work commitments of the service. Generally, participants from the DRC were less hurried and more relaxed during the interview. I surmise that the FMS interviews took less time on average because of the pressures of work commitments.

An interview protocol was devised and is reproduced at Figure 4.1. Participants from both the DRC and FMS were initially asked to provide the personal contextual information described above (summarised in Table 4.3). A general “prompt” question was then used to elicit responses about what issues mediators perceive as important to
their practice. These questions, for each interview and both case studies, were compiled in a memorandum\(^9\) and illustrated with one example below:

What I would like to talk about today is what you see as issues in mediation practice; for your own personal practice or mediation generally. In other words what would you see as important and you feel should be emphasised and/or what would you change, because you see needs some development? (CS1_D)

The aim of such a general question was to elicit the broadest possible discussion of practice issues important to the respondent, in order to place discussion of neutrality in the context of those issues. If neutrality did not emerge as an issue in response to the general prompt question, a specific question about neutrality was put. In the first case study, three participants, and in the second case study one participant, were prompted with such a specific question. These questions are recorded in the memorandum referred to above and an example is given below:

One of the things that I'm particularly interested in is looking at how practitioners implement or operationalise the concept of neutrality, which you will have been aware has been an issue in terms of whether it's a realistic expectation or not, and what it means. Have you got any comments on that? (CS1_D)

Given the close association between neutrality, even-handedness and perceived power imbalances described in the literature and discussed in Chapter One, a specific prompt question was used to elicit responses about power imbalances. This second prompt question was employed where respondents made no mention of power imbalances or in order to focus discussion when some mention was made. Such a prompt was used for four participants in the first case study and one in the second case. The questions

\(^9\) Input into the NVivo computer program used for coding purposes, a copy of which is provided with this dissertation, and headed “MemoRePromptQuestions”.
used are included in the memorandum referred to above, and one example is provided here:

What would be your view if you are confronted with a situation where there appears to be this imbalance of power? (CS1_D)

Given the close association between neutrality and impartiality, often regarded as synonymous, at the end of each interview participants were asked to think of words or phrases that they associate with impartiality on the one hand and bias on the other. The results of these free associations are tabulated and analysed in Chapter Five.

**Figure 4.1**

<table>
<thead>
<tr>
<th>INTERVIEW PROTOCOL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Introductions</strong></td>
</tr>
<tr>
<td>• Names exchanged</td>
</tr>
<tr>
<td><strong>Overview of the study</strong></td>
</tr>
<tr>
<td>• Purpose and scope of the study explained</td>
</tr>
<tr>
<td>• Opportunity for questions provided</td>
</tr>
<tr>
<td>• Establishment of informed consent (oral)</td>
</tr>
<tr>
<td>• Explanation of recording device</td>
</tr>
<tr>
<td>• Signing of consent form</td>
</tr>
<tr>
<td><strong>Collection of demographic details (providing context)</strong></td>
</tr>
<tr>
<td>• Mediation training: where, when, type</td>
</tr>
<tr>
<td>• Mediation experience: ADR/ FMS; other; type and length of (years); as trainer or coach</td>
</tr>
<tr>
<td>• Current employment: with mediation service; other; as full-time/part-time employee/casual</td>
</tr>
<tr>
<td>• Qualifications</td>
</tr>
<tr>
<td>• Age</td>
</tr>
<tr>
<td><strong>PROMPT QUESTIONS</strong></td>
</tr>
<tr>
<td><strong>General and introductory:</strong></td>
</tr>
<tr>
<td>• How do you see your role as a mediator?</td>
</tr>
<tr>
<td>• What do you see as issues for practice?</td>
</tr>
</tbody>
</table>
What would you emphasise as important?

What would you change?

Re power imbalances: (example)

- What would be your view if you are confronted with a situation where there appears to be this imbalance of power?

Free associations (at conclusion of interview): (example)

- I will give you two words and ask you to tell me what words come to mind when you hear them: impartiality/bias.

4.2.2.2 Ethical considerations

Approval to conduct the research was obtained from the Human Research Ethics Committee of the University of the Sunshine Coast. It was contingent on compliance with the National Statement on Ethical Conduct in Human Research. Four ethical matters were addressed in the research design: informed consent, confidentiality, secure storage of data and the possibility of any negative impact of the research upon participants.

Informed consent was achieved by providing potential participants with written and verbal descriptions of the purpose, scope, design and use of research outcomes. The research was described during a professional development session of the DRC; a description was provided to FMS staff during a staff meeting. Written information was provided by way of an invitation to participate (in a mail-out for the DRC and via the service manager for staff of the FMS). Written consent forms were attached to these information sheets (see Appendices A & B). Once participants had accepted the invitation to participate and attended an interview, the research was again described to them and they were asked to sign the consent form (if they had not already done so). The consent forms were detached from the information sheets and locked away.
The confidentiality and anonymity of participants was protected by use of a non-identifying coding system for recording and use of the interview data. The coding system, described below, which identified participants according to case study and individually according to letters of the alphabet, was used consistently from recording, to transcription, to analytical coding, to written presentation of results.

The interview data is stored in the form of tapes, for the first case study, in a locked cabinet accessible only to me, as are the consent forms. Transcribed interviews and digital files are stored in password-protected computer files, also accessible only to me. Material derived from primary data has been de-identified, and has and will be used only for the purposes of research, including publication of results.

The effect of the research on participants was assessed to be of low impact, with minimal risk of adverse consequences. Nevertheless, response to the unlikely event of discomfort sufficient to require withdrawal from the project was incorporated into the design. Information and consent forms stipulated that participants were free to withdraw their consent at any stage of the research and that if they chose to do so, then data collected from them would be withdrawn from the project. None of the participants chose to withdraw. Referral for counselling services was also made available and known to participants in the unlikely event that they experienced any distress due to their involvement in the project. This contingency was planned more specifically for parties to mediation whose input into the project was initially sought. Interviews with parties proved unsuccessful, for reasons described below.
4.2.2.3 Abandoned design options and limitations of the study

Since its inception, the focus of this project was mediators’ understandings of neutrality. How mediators make sense of neutrality in practice incorporates what they think about neutrality and what they actually do to put it into practice. Hence, an early design sought to include data gathered from observations of mediators’ interventions. As the emphasis of investigation was on mediators’ understandings of their own conduct, rather than any external assessment, I devised a design that allowed mediators to comment on their own interventions. To facilitate this opportunity for commentary, mediation sessions were to be video-taped. Pre- and post-mediation data collection phases were devised. Mediators were to be individually interviewed, paired with another participant to co-mEDIATE a session organised through the DRC, conduct the session that was to be video-taped, and later view the session for commentary. The process of data collection required the co-operation and consent of the participating mediators and the parties whose mediation would be video-taped.

Suitable mediations were to be vetted by the intake officers of the DRC. However, parties did not consent to the intrusion of video-taping. Invitations to potential (mediator) participants to use simulated sessions for video-taping and subsequent comment were also unsuccessful. Given these circumstances, data collection was extended to a second case study. For this second case, a check on the credibility of mediator’s responses and an effort to expand the data source was to be achieved by interviews with parties, in order to gauge their understandings of and responses to mediator neutrality. Unfortunately, parties were not willing to participate.

As the data is drawn from mediators’ verbal accounts of their practice only and not examined in the light of parties’ perceptions, it is limited to that extent. However, that
limitation does not detract from the relevance and credibility of the data collected in answering the research question posed. The data is directly relevant to the research question since it consists of mediators’ accounts of their understanding of neutrality and of how they put it into practice. The aim of the research was not to examine whether mediators are neutral or not, and the project design did not aim to determine whether what they said they did to “be neutral” was what they actually did in practice. The opportunity to gather further reflections from mediators in a review of video-taped mediation sessions was intended to add depth to the interview accounts rather than to validate them. Similarly, an opportunity to gather data from parties about their perceptions and experience of neutrality was intended to add depth to mediators’ accounts. Any inconsistencies between what mediators said they do and what they actually did, and between what they said they do and parties’ perceptions of their conduct was sought in early design options in order to further the investigation of what neutrality does and can mean in practice. These abandoned design options remain possibilities for future projects.

4.3 A GROUNDED THEORY ANALYSIS (analysis of data)

Grounded theory is a method of theory generation developed by Glaser and Strauss (1967), which rests on the proposition that theory can be generated by close examination of data. Its use is consistent with exploratory research and it can be employed using either quantitative or qualitative data, although it is most often applied to observational and interview data associated with qualitative approaches (Seale 1999, pp. 100-02). Grounded theory is a suitable method of analysis given the exploratory nature of the investigation, its use of a qualitative data selection and collection design, and its theory building aim.
4.3.1 Features of a grounded theory approach

In an attempt to distinguish grounded theory from traditional approaches, it has been characterised by an inductive method of analysis and contrasted with the hypothetico-deductive method of a quantitative approach. Inductive reasoning is emphasised in grounded theory’s focus on the generation of theory from data (Seale, 1999, p. 23). In contrast, quantitative research is characterised by hypothetico-deductive reasoning in which specific hypotheses are extracted from general accounts of reality and submitted to empirical testing (Bryman, 1988, p. 15; Seale, 1999, p. 23). The distinction, however, ignores the position of Glaser and Strauss (1967, p. 17), who assert that “there is no fundamental clash between the purposes and capacities of qualitative and quantitative methods or data”; and that “the distinction usually drawn between qualitative and quantitative data [is] a distinction useless for the generation of theory” (p. 9). Furthermore, both inductive and deductive reasoning are evident in qualitative and quantitative research approaches. In particular, the hypothetico-deductive method presupposes a body of theory as a backdrop to specific hypotheses. The “notion of science, and in particular scientific theories, being a compendium of empirically established facts is often referred to as the doctrine of inductionism” (Bryman, 1988, p. 15). In addition, it has been argued that “both characterizations of science are limited, as neither pure induction nor pure deduction can wholly account for what scientists do” (Seale, 1999, p. 101).

Defining grounded theory as an inductive method is more usefully seen in the historical context of its authors’ critique of the positivist, verification paradigm. Tracing sociological trends over time, Glaser and Strauss (1967, p.17) note that the position of logico-deductive theorists became subordinated to “the rhetoric of
verification”. According to the verification paradigm, data is collected in order to test the truth value of theoretical propositions. Rather than a concern with verification of a priori theory, Glaser and Strauss aimed to produce a method that would systematically enable researchers to generate theory. Their core assertion is that researchers can build new theory, rather than merely test existing theory; hence their emphasis on inductive reasoning as a means of generating theory (Glaser & Strauss 1967, pp. 1-18).

As noted in the foregoing discussion of theoretical sampling and saturation, grounded theory emphasises the continual cycling back and forth between theory construction and the examination of data. Seale (1999, p. 96-7) has summarised the original approach of Glaser and Strauss (1967) according to four stages. In the first stage, different incidents or instances in the data are coded into categories so that they can be compared. This comparison generates ideas about the properties, or characteristics, of the category. In the second stage, comparison is made between instances within categories, noting for example how properties of those instances are related or interact. Further comparison between categories is also undertaken at this stage. The third stage is represented by theoretical saturation, described above, in which no new categories or inter-relationships between them are found. In the fourth stage, the theory, as evident in the analysis, is documented or “written up”. Consistent with a postmodern sensibility, theories developed in this way have a local genesis and application. Glaser and Strauss (1967) describe such theories as “substantive” in that they explain the immediate phenomena of interest to the researcher.
A more complicated process was later advanced by Strauss and Corbin (1990), in which three additional layers of coding are included in the method of constant comparison – open, axial and selective coding. Open coding represents the coding process of the original scheme. “During open coding the data are broken down into discrete parts, closely examined, compared for similarities and differences, and questions are asked about the phenomena as reflected in the data” (Strauss & Corbin, 1990, p. 62). Axial coding involves intensive work with a single category, examining how it relates to other categories and exploring its “conditions, contexts, action/interactional strategies and consequences’ (Strauss and Corbin, 1990, p. 96). Selective coding involves the establishment of overarching, core categories which subsume other categories and their properties, and from which theoretical propositions are drawn (Seale, 1999, p. 100). These additional layers of coding have been criticised by (Glaser, 1992, p. 43) in whose view,

Strauss’ method of labelling and then grouping is totally unnecessary, laborious and is a waste of time. Using constant comparison method gets the analyst to the desired conceptual power, quickly and with ease and joy. Categories emerge upon comparison and properties emerge upon more comparison. And that is all there is to it.

According to a number of authors, grounded theory has been poorly understood and poorly applied (Bryman, 1988; Reason & Rowan, 1981; Seale, 1999). Researchers have been criticised for describing their analysis as grounded theory with little reference to or application of a systematic approach to data analysis (Bryman, 1988, p. 84-7). Nonetheless, qualitative research is usually premised on grounding concepts and theory in the data (Bryman, 2001, p. 281). Furthermore, slavish adherence to the either the processes outlined by Glaser and Strauss, or Strauss and Corbin is contrary to originators’ primary aim. According to Glaser and Strauss (1967, p. 8), “our
principal aim is to stimulate other theorists to codify and publish their own method for generating theory” (emphasis in original).

4.3.2 Core components of analysis

The aim of my analysis was to generate theory as interpretation of the data collected. The analysis aimed to produce categories of meaning and to explore how such categories might be related to one another. The two case studies were coded to identify each as separate and to de-identify individual participants. Interviews from the DRC were coded as case study 1 (CS1) and each of the ten participants was assigned a letter of the alphabet. Similarly, interviews from the FMS are coded as case study 2 (CS2) and each participant assigned a letter. Demographics of the participants were collated from the transcripts and notes compiled during the interviews. Results of the word associations conducted at the conclusion of each interview were separately compiled. The data collected from each interview was subjected to a systematic coding analysis, described below, using the grounded theory terminology of open, axial and selective coding. The coding process overall was thematic in nature as themes in the construction of meaning were elicited from the data. That thematic examination was grounded in a constant comparison (Glaser and Strauss, 1967) of themes aimed to elicit similarities and differences of meaning.

4.3.2.1 Open coding

For the purposes of this study, open coding refers to the creation of categories of meaning from the interview data, and the coding of extracts from the interviews into those categories. Analysis began with existing categories derived from the literature, namely, neutrality as impartiality, as even-handedness and as closely associated with
the process and content or outcome distinction in mediation. Further categories were elicited from the transcripts. Categories of meaning were identified, numbered and recorded as analysis proceeded.

The transcripts for the first case study were coded using a manual coding system, according to which the written transcripts are read and as each segment of meaning identified, is labelled with an annotation in the margin of the text. Each new segment of meaning was numbered to form a category of meaning. Categories were further confirmed and refined from a second reading of the transcripts, and summaries of each interview were created in the form of memoranda. The summaries provided useful overviews of individual interviews, and an opportunity to extract themes and consider issues beyond but related to the coding process. Cross-referencing of interviews was continuous as new categories of meaning emerged. The categories of meaning were then manually identified using numbered documents, and extracts from the transcripts were coded using a cut-and-paste process. This became cumbersome and difficult to sustain. However, reading the transcripts, and making annotations and further notes was a useful means by which to examine the data closely.

Later, the first case study transcripts were put into the data-sorting computer program, NVivo\textsuperscript{10} and re-examined, enabling the coding to be verified, with occasional amendment and refinement. More categories of meaning were elicited in the NVivo round, but otherwise the coding was consistent with the manual round. The second case study data was coded using the NVivo program. The categories of meaning elicited in the first case were used in analysis of the second. Further categories were

\textsuperscript{10} See Bryman 2001, pp. 409-24 for an introduction to this program.
created from reading of the second case study transcripts which were put into the program as documents and read on-screen. The memoranda (memos) for each interview in the first case study were attached to the corresponding transcripts already put into the program. Similarly structured memos were produced for the second case study and put into the program. Coding of extracts from the transcripts was more readily done using the NVivo program. The program was used to organise and present the data (a copy on CD is attached to this thesis).

A systematic effort to remain “close to the data” was made during each examination of the transcripts, in order to avoid premature interpretation. This process was recorded in a memorandum\textsuperscript{11} (entitled “MemoReCategories”) and is reported in Appendix C. Across the two case studies, 64 categories (three from the literature existing, plus 61 generated from the coding process) of meaning were identified. Consistent with the assumption of intersubjective meaning creation between researcher and participants, the categories of meaning elicited are of three main types:

1. those elicited from the initial literature review – that is, pre-existing constructions taken from scholarly examinations.
2. those that reflect the language of participants – that is, meanings articulated by participants; and
3. those that represent the meaning communicated by participants as interpreted by the researcher as a summary of ideas.

\textbf{4.3.2.2 Selective coding}

For the purposes of the project, selective coding refers to the creation of overarching categories of meaning within which the open coding categories were subsumed.

\textsuperscript{11} This memorandum is also found in the NVivo program file for the project.
Selective coding describes the process of selecting and creating these categories. The analysis used to determine them is described with the results, in Chapter Five. This process was followed by an in-depth consideration of individual categories to verify their “fit” within an overarching category. Axial coding, for this study, refers to this in-depth consideration of individual categories. Adjustments to both the determination of overarching categories and those subsumed within them were made on the basis of axial coding. A broader form of axial coding was then undertaken by examination of the data within overarching categories.

The end product of open, selective and axial coding were the themes in the participants’ construction of the meaning of neutrality reported in the next chapter.

4.4 SUMMARY

The research design consists of three core features: theory building, a qualitative approach and a grounded theory analysis. Theory building as the aim of the project was explained in Chapter Three; the perspective adopted was theory as interpretation, from the tradition of hermeneutics. The aim of the project is to generate an understanding of neutrality in mediation from the perspective of practitioners. It is their interpretation of neutrality’s meaning that is explored, with a view to offering an interpretation that makes sense of practice.

A qualitative approach was used, using case studies as a sampling frame. A qualitative approach is consistent with a social constructionist perspective, but more than that, it

12 Overarching categories are described in the NVivo program as tree nodes, as distinct from the free nodes of the open coding process. The tree node function of the NVivo program was not used. Tree nodes (overarching categories) were coded using hardcopy documents and are described in Chapter Five.
represents a methodology rather than simply a method for this study. Hence, the research design is guided by a set of qualitative principles, not merely particular methods. The principles particularly relevant to this project were: seeing from the point of view of those studies, placing meaning in context, and generating theory from the data. The choice of how to analyse the data reflects those principles, using a grounded theory approach.

This chapter has described the process of entering the field, gathering the data, recording and analysing it. Table 4.5, adapted from Eisenhardt’s (1989) work on the process of building theory from case study research, summarises the process adopted for this study, and links what is described in this chapter to the development of a model of mediator neutrality for practice. Presentation and analysis of the results of the investigation are detailed in the next chapter.

Table 4.5 The Process of Building Theory from Case Study Research

(Adapted from Eisenhardt, 1989)

<table>
<thead>
<tr>
<th>Step</th>
<th>Activity</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Getting started:</td>
<td>Formulation of research question</td>
<td>Focuses efforts</td>
</tr>
<tr>
<td></td>
<td>Establishing initial constructs</td>
<td>Provides grounding of constructs</td>
</tr>
<tr>
<td>2. Selection of data:</td>
<td>Specify population</td>
<td>Retains theoretical flexibility</td>
</tr>
<tr>
<td>A case study design</td>
<td>Select case studies as the research proceeds</td>
<td>Focuses efforts on theoretically useful cases</td>
</tr>
<tr>
<td>Theoretical sampling</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Collection of data:</td>
<td>Choice of data collection methods: unstructured interviews</td>
<td>Considers the most appropriate data to answer the research question</td>
</tr>
<tr>
<td>Crafting instruments and protocols</td>
<td>Ethics approval</td>
<td>Ensures the integrity of the</td>
</tr>
<tr>
<td>Entering the field</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Obtaining informed consent</td>
<td>study and protection of participants</td>
</tr>
<tr>
<td>---</td>
<td>---------------------------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Transcription Storage</td>
<td>Ensures data is translated into a useable form and properly stored</td>
</tr>
</tbody>
</table>

| 5. Analysing data: a grounded theory approach | Coding – open, axial and selective Memo writing Use of NVivo program (Reported in Chapter Five) | Adoption and use of a systematic process of analysis |

| 6. Interrogation of results and enfolding literature | Examining results in the light of broader debate in the literature (Chapter Six) | Places the results within the context of existing literature, while extending analysis beyond that context |

| 7. Reaching closure | Developing a model for practice (Chapter Six) | Synthesising the analysis and presenting a practicable response based upon theory as developed |

| 8. Write up | Crafting the thesis production | Presentation of results |
CHAPTER FIVE

RESULTS

5.0 INTRODUCTION

The purpose of this chapter is to report the results of the fieldwork. The results consist of an analysis of raw data gathered from in-depth interviews with mediators. The interview data was collected from the two case studies and analysis proceeded according to a grounded theory approach (as detailed at 4.3). Meaningful themes were elicited through that approach’s method of constant comparison; they are analysed in answer to the research question: How do mediators make sense of neutrality in practice? Results are organised and reported according to the categories of meaning elicited from the coding procedure, and the themes in meaning as used by mediators in their practice.

5.1 CATEGORIES OF MEANING ELICITED

Categories coded from an initial open coding procedure were examined for themes (axial coding), further grouped together under broader, encompassing categories (selective coding), again examined for themes and further examined for conceptual relationships. The results of open and selective coding are reported in this section. They derive from an ongoing process of axial (thematic) coding using constant comparison to search for similarities and differences. The themes that emerged as a result of coding analysis are then reported in section 5.2.
As described in Chapter Four (at 4.3.2), each interview transcript was examined for instances of meaning using the open coding procedure. The terms “categories” and “codes” are used interchangeably in the following discussion. “Category” is the preferred term, used to indicate categories of meaning. “Code” is a term used in a grounded theory approach to analysis. “Node” is used in the NVivo coding program employed to organise the data but is avoided in this report for the purpose of clarity. Categories, codes and nodes all represent conceptual indicators.

### 5.1.1 Open coding

The categories elicited from open coding are detailed below in Table 5.1.

#### Table 5.1

<table>
<thead>
<tr>
<th>Number</th>
<th>CATEGORY</th>
<th>Sources</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Impartiality</td>
<td>9</td>
<td>18</td>
</tr>
<tr>
<td>2</td>
<td>Even-handedness/equidistance</td>
<td>7</td>
<td>13</td>
</tr>
<tr>
<td>3</td>
<td>Process and content or outcome distinction</td>
<td>9</td>
<td>28</td>
</tr>
<tr>
<td>4</td>
<td>Underlying principles/values</td>
<td>10</td>
<td>27</td>
</tr>
<tr>
<td>5</td>
<td>Emotions</td>
<td>6</td>
<td>14</td>
</tr>
<tr>
<td>6</td>
<td>Lack of advice</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>7</td>
<td>Steps in the process</td>
<td>9</td>
<td>19</td>
</tr>
<tr>
<td>8</td>
<td>Apparent v. actual</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>9</td>
<td>Models of mediation</td>
<td>12</td>
<td>56</td>
</tr>
<tr>
<td>10</td>
<td>Active intervention</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>11</td>
<td>Conciliation</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>12</td>
<td>Time constraints/mediation as bounded in time</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>13</td>
<td>Outcome</td>
<td>9</td>
<td>22</td>
</tr>
<tr>
<td>14</td>
<td>DRC (CS1)</td>
<td>6</td>
<td>16</td>
</tr>
<tr>
<td>15</td>
<td>Non-judgmental attitude/approach</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Topic</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>---</td>
<td>-----------------------------------------------------------------------</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>16</td>
<td>Mediator’s assessment/knowledge</td>
<td>8</td>
<td>33</td>
</tr>
<tr>
<td>17</td>
<td>Personal values/needs/preferences</td>
<td>13</td>
<td>26</td>
</tr>
<tr>
<td>18</td>
<td>Lack of (personal) reaction</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>19</td>
<td>Intake/pre- &amp; post-mediation practice</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>20</td>
<td>Power imbalance</td>
<td>13</td>
<td>35</td>
</tr>
<tr>
<td>21</td>
<td>No vested interest</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>22</td>
<td>Ground rules and explanation of process</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>23</td>
<td>Neutral as to the interpretation of events</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>24</td>
<td>Client focus/ownership</td>
<td>10</td>
<td>33</td>
</tr>
<tr>
<td>25</td>
<td>Process skills</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>26</td>
<td>Lack of bias</td>
<td>5</td>
<td>11</td>
</tr>
<tr>
<td>27</td>
<td>Modelling behaviour</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>28</td>
<td>Future focus</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>29</td>
<td>Relationships between parties</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>30</td>
<td>Process as voluntary</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>31</td>
<td>Access</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>32</td>
<td>(Emotional) detachment</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>33</td>
<td>Option generation</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>34</td>
<td>Seeing from the point of view of the “other”</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>35</td>
<td>Truth claims</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>36</td>
<td>Influence of lawyers/other professionals</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>37</td>
<td>Impact of language/jargon</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>38</td>
<td>Role of the mediator</td>
<td>10</td>
<td>16</td>
</tr>
<tr>
<td>39</td>
<td>Empowerment</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>40</td>
<td>Flexibility of process</td>
<td>11</td>
<td>20</td>
</tr>
<tr>
<td>41</td>
<td>Performance evaluation</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>42</td>
<td>Neutrality and impartiality compared</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>43</td>
<td>No prior knowledge of parties</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>44</td>
<td>Fair and balanced</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Category</td>
<td>Sources</td>
<td>References</td>
</tr>
<tr>
<td>---</td>
<td>-------------------------------------------------------------------------</td>
<td>---------</td>
<td>------------</td>
</tr>
<tr>
<td>45</td>
<td>Self awareness</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>46</td>
<td>Repetition in cases/disputes</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>47</td>
<td>Parties expectations of mediation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>48</td>
<td>Other intervention distinguished</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>49</td>
<td>Lawyers as participants</td>
<td>6</td>
<td>27</td>
</tr>
<tr>
<td>50</td>
<td>Neutrality</td>
<td>13</td>
<td>66</td>
</tr>
<tr>
<td>51</td>
<td>Power</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td>52</td>
<td>Organisational culture</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>53</td>
<td>Professional development/standards</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>54</td>
<td>Mediator qualifications/standards</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>55</td>
<td>Family Law Act changes</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>56</td>
<td>Matters in relation to children</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>57</td>
<td>Measures of success</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>58</td>
<td>Matters in relation to property</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>59</td>
<td>Non-aligned</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>60</td>
<td>Strategies to maintain neutrality</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>61</td>
<td>Coaching of parties</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>62</td>
<td>Parties’ perceptions of mediator neutrality</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>63</td>
<td>Matters in relation to family violence</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>64</td>
<td>Parties’ interpretations/commonality and difference</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 5.1 records the 64 categories of meaning elicited from open coding. Each category is named and numbered. The third column headed “sources” records the number of participants whose responses were put into a given category. The fourth column records the number of textual “references” to a given category across sources.

Each of the transcripts was analysed for themes as open coding proceeded. Those themes were recorded as new categories (nodes) and annotations within the NVivo
program (appearing at the end of each recorded category within that program), and as main points in the memoranda compiled for each interview and inserted into the NVivo file. A sample memorandum for one interview is provided in Appendix D and each is recorded within the accompanying NVivo file.

The first three categories created and reproduced in Table 5.1 depict the three meanings of neutrality identified in the literature – impartiality, even-handedness (and the strategy of equidistance), and the distinction between process and content or outcome. The categories numbered from 4 to 50 were elicited from the first case study; those numbered from 51 to 64 from the second case study. Categories numbered 47 to 50 were elicited from a re-reading of the first case study transcripts.

The first three categories, consistent with the themes derived from the literature, were decided before the coding. One view of a grounded theory analysis, advanced by Glaser (1969), recommends data collection and analysis without prior examination of the literature. However, the approach I took was to do an initial review of the literature, which allowed identification of the problem to be investigated, then collected the data and coded it. I then further examined the literature and analysed the results in a cyclical and iterative process. Constant comparison was made between participants’ views of the meaning of neutrality and scholarly commentary, in order to gauge similarities and differences. The number of references coded within the first three categories reflects participants’ general understanding of these categories, consistent with meanings found the literature. The comparative number of references across the three categories – Impartiality (18); Even-handedness (13); Process and
content or outcome (28) – indicates neutrality is predominantly understood as the distinction between the process and content or outcome.

5.1.2 Selective coding

As a simple measure of the significance of a given category of meaning, those with the most references and sources were identified as possible overarching categories into which others could be subsumed (a process identified as selective coding in Chapter Four, at 4.3.2.1). This measure is “simple” because it has indicative, interpretive significance rather than any statistical significance, and because it required examination of the coded content to establish actual significance. Passages of text were cross-categorised, as open coding was done using the method of constant comparison. A category with any number of references might contain content readily subsumed under other categories, yet demonstrate a distinct, if overlapping, theme. For example, axial coding of category (43) “No prior knowledge of the parties”, revealed that all responses for that category were also coded under other categories. A category with a large number of references might contain responses that were particular and also those appearing under other codes. Its significance could be the inter-relationship of categories of meaning as well as the distinction of a given theme; for example category 50, Neutrality.

Determination of the overarching categories and the categories that fell within them was achieved by three steps:

1. comparison between categories with ten or more sources and those with ten or more references; those with ten or more sources were chosen based on considerations detailed below.
2. categories with ten or more sources were closely examined and a choice of seven (including the pre-established first three) overarching categories was made. Two additional general categories, entitled Contextual factors and Other, were added; and

3. open categories were subsumed under overarching categories following a process of close examination.

Those categories coded with ten or more sources were:

**01 Impartiality:** 9(18)\(^1\)

**02 Even-handedness/equidistance:** 7(13)

**03 Process and content or outcome distinction:** 9(28)

04 Underlying principles: 10(27)

09 Models of mediation: 12(56)

17 Personal values/need/preference: 13(26)

20 Power imbalance: 13(35)

24 Client focus/ownership: 10(33)

38 Role of the mediator: 10(16)

40 Flexibility of process: 11(20)

50 Neutrality: 13(66)

In comparison, those categories registering fewer than ten sources but more than ten references (in addition to the first three categories) were:

**01 Impartiality:** 9(18)

**02 Even-handedness/equidistance:** 7(13)

**03 Process and content or outcome distinction:** 9(28)

05 Emotions: 6(14)

06 Lack of advice: 6(10)

07 Steps in the process: 9(19)

---

\(^1\) Sources (references)
Decisions as to which categories to use as overarching categories were based on a comparison of those listed above by number of sources and those listed by number of references. A number of considerations featured in that process, reported below.

5.1.2.1 Selective coding by number of sources

The category Neutrality (50) appeared late in the open coding stage of analysis (as the last code for the first case study), during a re-reading of the first case study interviews. It was introduced in response to participants’ unprompted references to neutrality itself, as well as the meanings they ascribed to neutrality coded in preceding categories. During later axial and selective coding processes, this category revealed a number of definitional statements, reported below (at 5.2.1), and also considerable overlap with other categories. It clearly encompassed the first three codes (as much by my conceptual analysis as by participants’ responses) and extended those meanings, as is indicated by the overlap of content with other categories.
The category Role of the mediator (38) also logically overlaps with Neutrality (50), since one role of the mediator is to “be neutral”. The manner in which the interviews were conducted (open-ended, in-depth and with an initial prompt for participants’ views about issues for their practice) enabled this category (among others) to represent matters other than neutrality, and at the same time to allow responses that suggest connections between neutrality and other key concepts in mediation. One of the most significant for this study was the relationship between neutrality and party self-determination, a principle appearing under the category Underlying values (04) and encapsulated in the category of Client focus/ownership (24). The categories Personal values/need/preference (17) and Power imbalance (20) reflect the main problems associated with impartiality and even-handedness as discussed in Chapter One. The category Models of mediation (09) was identified as a contextual factor in translating neutrality into practice, reflecting the various models and their approaches to neutrality.14 Use of the facilitative model of practice was also central to the study given its employment in both case studies and its grounding in the process and content or outcome distinction (category 03). Flexibility of process emerged as a significant issue for participants in the first case study though not the second, which has implications both for a comparison of the case studies, and the role of the process and content or outcome distinction for understanding neutrality.

5.1.2.2 Selective coding by number of references

In deciding about selective codes, I compared the “fit” of the codes with a similar examination of the codes referred to more than ten times. Three of those codes directly related to meanings ascribed to neutrality and impartiality in the literature,

---

14 This category is not reported in depth here given consideration of the relevance of differing models in earlier discussion, but is included in as much as responses bear on the question of neutrality.
and could thus be subsumed under those categories; namely, Lack of advice (06); No vested interest (21); and Lack of bias (26). The categories Steps in the process (07) and Outcome (13) are directly linked to the process and content or outcome distinction (03). The category Intake pre- & post-mediation practice refers to steps in the process, models of mediation and the process and content or outcome distinction. For the purposes of the project, questions of power were related to questions of even-handedness and the role of the mediator. The categories Family Law Act changes (58) and Matters in relation to children (56) are significant in terms of the context of the second case study, rather than applying across case studies. The category Lawyers as participants (49) represents considerable commentary from four respondents and emerged as an issue peripheral (to a degree) to the main issue of neutrality. These considerations suggested that a better approach was to use the codes with over ten sources as selective codes.

The three final categories with over ten references, Emotions (05), Mediator’s assessment/knowledge (16), and Mediator qualifications/standards (54), were subject to particular examination for their significance. Mediator qualifications and standards of practice are particularly relevant in the current Australian context of National Mediation Accreditation Standards. The required knowledge base of mediators, which bears on their capacity for professional assessment, is particularly relevant for the emergent system. Qualifications, standards and a consistent knowledge base are important to the mediation industry’s view of mediation and mediator neutrality as framed by the process and content or outcome distinction. Emotion in mediation, both the emotional responses of mediators and of parties, and how it is addressed is
relevant across models of practice, and is also an area of competence relevant to the knowledge and skills base of mediators.

The categories listed by number of sources represent key issues emerging from the analysis, according to the considerations of the individual and related categories already reported. Those considerations reduced the number of overarching categories within the set of ten or more sources and added the two aforementioned categories of “contextual factors” and “other”:

(A) 50 Neutrality: 13(66)
(B) 01 Impartiality: 9(18)
(C) 02 Even-handedness/equidistance: 7(13)
  20 Power imbalance: 13(35)
(D) 03 Process and content or outcome distinction: 9(28)
(E) 04 Underlying principles: 10(27)
  17 Personal values_need_preference: 13(26)
  24 Client focus/ownership: 10(33)
(F) 09 Models of mediation: 12(56)
  40 Flexibility of process: 11(20)
(G) 38 Role of the mediator: 10(16)
(H) Context
(I) Other

All 64 categories were selectively coded, as shown in Table 5.2.

Table 5.2
Selective coding

<table>
<thead>
<tr>
<th>OVERARCHING CATEGORY</th>
<th>SUBSUMED CATEGORIES (Open coding)</th>
</tr>
</thead>
</table>

202
<table>
<thead>
<tr>
<th>A_50 Neutrality</th>
<th>50 Neutrality</th>
</tr>
</thead>
<tbody>
<tr>
<td>08 Actual v. apparent</td>
<td></td>
</tr>
<tr>
<td>62 Parties’ perceptions of mediator neutrality</td>
<td></td>
</tr>
<tr>
<td>59 Non-aligned (B, C)</td>
<td></td>
</tr>
<tr>
<td>60 Strategies to maintain neutrality</td>
<td></td>
</tr>
<tr>
<td>B_01 Impartiality</td>
<td>01 Impartiality</td>
</tr>
<tr>
<td>10 Active intervention</td>
<td></td>
</tr>
<tr>
<td>15 Non-judgmental attitude/approach</td>
<td></td>
</tr>
<tr>
<td>17 Personal values/needs/preferences</td>
<td></td>
</tr>
<tr>
<td>18 Lack of personal reaction</td>
<td></td>
</tr>
<tr>
<td>21 No vested interest</td>
<td></td>
</tr>
<tr>
<td>23 Neutral as to the interpretation of events</td>
<td></td>
</tr>
<tr>
<td>26 Lack of bias</td>
<td></td>
</tr>
<tr>
<td>32 Emotional detachment</td>
<td></td>
</tr>
<tr>
<td>34 Seeing from the point of view of the “other”</td>
<td></td>
</tr>
<tr>
<td>35 Truth claims</td>
<td></td>
</tr>
<tr>
<td>42 Neutrality and impartiality compared</td>
<td></td>
</tr>
<tr>
<td>43 No prior knowledge of parties</td>
<td></td>
</tr>
<tr>
<td>45 Self-awareness</td>
<td></td>
</tr>
<tr>
<td>59 Non-aligned (A, C)</td>
<td></td>
</tr>
<tr>
<td>64 Parties’ interpretations of events</td>
<td></td>
</tr>
<tr>
<td>C_02 Even-handedness/equidistance</td>
<td>03 Even-handedness/equidistance</td>
</tr>
<tr>
<td>20 Power imbalance</td>
<td></td>
</tr>
<tr>
<td>29 Relationship between parties</td>
<td></td>
</tr>
<tr>
<td>31 Access</td>
<td></td>
</tr>
<tr>
<td>44 Fair and balanced</td>
<td></td>
</tr>
<tr>
<td>51 Power</td>
<td></td>
</tr>
<tr>
<td>59 Non-aligned (A, B)</td>
<td></td>
</tr>
<tr>
<td>D_03 Process and content or outcome distinction</td>
<td>03 Process/content &amp; outcome distinction</td>
</tr>
<tr>
<td>06 Lack of advice</td>
<td></td>
</tr>
<tr>
<td>07 Steps in the process</td>
<td></td>
</tr>
<tr>
<td>13 Outcome</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>16</td>
<td>Mediator’s assessment/knowledge</td>
</tr>
<tr>
<td>19</td>
<td>Intake_/pre- &amp; post-mediation practice (F)</td>
</tr>
<tr>
<td>22</td>
<td>Ground rules &amp; explanation as to process</td>
</tr>
<tr>
<td>25</td>
<td>Process skills</td>
</tr>
<tr>
<td>33</td>
<td>Option generation</td>
</tr>
<tr>
<td>40</td>
<td>Flexibility of process (F)</td>
</tr>
<tr>
<td>48</td>
<td>Other intervention distinguished</td>
</tr>
<tr>
<td><strong>E_24</strong></td>
<td>Client focus/ownership</td>
</tr>
<tr>
<td>24</td>
<td>Client focus/ownership</td>
</tr>
<tr>
<td>04</td>
<td>Underlying principles/values</td>
</tr>
<tr>
<td>30</td>
<td>Process as voluntary</td>
</tr>
<tr>
<td>39</td>
<td>Empowerment</td>
</tr>
<tr>
<td><strong>F_09</strong></td>
<td>Models of mediation</td>
</tr>
<tr>
<td>09</td>
<td>Models of mediation</td>
</tr>
<tr>
<td>11</td>
<td>Conciliation</td>
</tr>
<tr>
<td>19</td>
<td>Intake/pre- &amp; post-mediation practice (D)</td>
</tr>
<tr>
<td>40</td>
<td>Flexibility of process (D)</td>
</tr>
<tr>
<td><strong>G_38</strong></td>
<td>Role of the mediator</td>
</tr>
<tr>
<td>38</td>
<td>Role of the mediator</td>
</tr>
<tr>
<td>05</td>
<td>Emotions</td>
</tr>
<tr>
<td>27</td>
<td>Modelling behaviour</td>
</tr>
<tr>
<td>47</td>
<td>Parties’ expectations of the mediator</td>
</tr>
<tr>
<td>57</td>
<td>Measures of success</td>
</tr>
<tr>
<td>61</td>
<td>Coaching</td>
</tr>
<tr>
<td><strong>H_Contextual factors</strong></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>DRC (CS1)</td>
</tr>
<tr>
<td>36</td>
<td>Influence of lawyers/other professionals</td>
</tr>
<tr>
<td>37</td>
<td>Impact of language/jargon</td>
</tr>
<tr>
<td>42</td>
<td>Performance evaluation</td>
</tr>
<tr>
<td>49</td>
<td>Lawyers as participants</td>
</tr>
<tr>
<td>52</td>
<td>Organisational culture</td>
</tr>
<tr>
<td>53</td>
<td>Professional development/standards</td>
</tr>
<tr>
<td>54</td>
<td>Mediator qualifications/standards</td>
</tr>
<tr>
<td>55</td>
<td>Family law Act changes</td>
</tr>
<tr>
<td>56</td>
<td>Matters in relation to children</td>
</tr>
<tr>
<td>58</td>
<td>Matters in relation to property settlement</td>
</tr>
</tbody>
</table>
The choice of codes subsumed under each overarching category as shown in Table 5.2, was made after examination of each category and the drawing of “close” connections between the overarching category and those that fell within it. A “close” connection was defined as a logical, interpretative relationship in the light of the research question, in the context of what was already known and what was revealed as the coding proceeded. For example, under the category Even-handedness, Evenhandedness/equidistance was a logical (self-evident) inclusion. Related questions of procedural fairness, both as indicated in the literature and expressed by participants, brought the categories of Relationship between parties (29), Access (31) and Fair and balanced (44) under this heading. The dilemma, in practice, of intervening to redress power imbalances yet remaining neutral suggested the categories Power imbalance (20) and Power (51). The first of these is relevant to the practice dilemma described; the second, Power, while extending comment beyond the particular practice dilemma described, was included under the heading of Evenhandedness/equidistance in order to focus analysis on answering the research question. This was necessary given the open-ended nature of the interviews with mediators, which were conducted to limit potential response bias and to elicit contextualised responses. The final category under this heading, Non-aligned (59), was coded under three overarching categories – Even-handedness/quidistance, Impartiality and Neutrality – given its association with the meaning “not taking sides” and the conceptual overlap between these categories. Other categories coded under
more than one heading were Intake/pre- & post-mediation practice (03, 09) and Flexibility of process (03, 09). Both of these were coded under the Process and content or outcome distinction and under Models of mediation (09) since they emerged as particular features of the facilitative models used in each case study. Following initial selective coding, the categories were re-examined within the selective codes and cross-referenced. Adjustments were then made according to relevant themes and relationships between themes. Notably, one selective code was changed. The overarching category Underlying principles and values (E) was changed to Client focus and ownership, in recognition of the prominence of that principle found in the responses coded.

5.2 THEMES IN THE CONSTRUCTION OF MEANINGFUL PRACTICE
Six main themes in mediators’ definitions of neutrality are reported and examined here, corresponding to categories A-E and G in Table 5.2. Key themes from these categories that overlap with those found in F, H and I are also reported. Direct quotes from interviews are used as evidence of the themes and as data used to ground the analysis. Individual participants’ responses are reported using a non-identifying coding scheme, according to the case study of which they form a part by the code CS1 (DRC) or CS2 (FMS), and further distinguished according to individual responses by numbering 1-10 (CS1 DRC) and 1-4 (CS2 FMS). While the content remains faithful to participants’ responses, the quotations have been minimally edited to improve comprehension, and to provide minor contextual details needed to make sense of the written account. As evidence of themes, participants’ responses are individual and illustrative – they are not representative of the sample of mediators interviewed.
Individual responses represent ideas from the field, later examined as themes in the development of a theoretical model for practice (in Chapter Six).

Given the amount of raw data in the verbatim interview transcripts and the open-ended nature of the interviews analysis required a narrowing of focus as coding proceeded from the initial phase. Not all of the coded responses are reported here. The data as a whole, however, is accessible in the NVivo program file attached to this report in CD format.

Discussion of the results begins with participants’ commentary on the possibility of neutrality in an absolute sense, definitions of neutrality and the range of meaning that participants associate with it. Findings are then presented under the headings Neutrality as impartiality; Neutrality as even-handedness; the Distinction between process and content or outcome; Client focus and ownership (party self-determination); and the Role of the mediator.

5.2.1 Neutrality: possibilities and definitions

As noted in Chapter One, neutrality has not been clearly and unequivocally defined, and has been critiqued as an aspiration or ideal that cannot be realised in practice. These themes are evident in participants’ responses and appear in the data contained in the first overarching category entitled Neutrality (A). That category also contains considerable overlapping commentary on meanings associated with neutrality, namely, impartiality and even-handedness. Commentary drawn from the categories subsumed under Neutrality is reported below (see Table 5.3).
All of the participants regard neutrality in some form as integral to their practice, illustrated in the following comment:

I think it’s important from the word go, from intake even before the session starts. It is important that it’s embodied in every little tiny aspect of the process. In exploration in private sessions, that’s where the most happens (CS1 D).

The view that neutrality is impossible in an absolute sense is reflected in the following responses:

I don’t think it’s possible to be completely neutral, I think that’s a complete fallacy, it’s just not possible, but it’s possible to get pretty close. In spite of how much you do push on with the process, because you’re the mediator and you are in charge, you cannot help but at some level let your personal bias inform, in some way, what happens (CS2 B).

I don’t feel I am neutral at all because I would like to see people try to work out their own agreement. If I was completely neutral I wouldn’t actually react in any way to any little thing that happens in the process. Just by the fact that I am there wanting to assist means that I’m not neutral (CS1 A).

In reality, nobody can actually be neutral, so it’s an impossible place to try and find. There’s no such thing in my mind so there’s always going to be some bias. It’s about how you actually apply that bias and what the consequences of that is [that’s important] (CS2 C).

Given the impossibility of absolute neutrality, the question whether an appearance of neutrality is sufficient received mixed responses:

I’m not sure about that, to be honest. I think many times you are seen to be and you are. I think occasionally you may not be but you’re seen to be and maybe that is enough. Maybe you’re not going to be absolutely neutral every time.
Maybe it’s not possible. I mean there would be some issues [on which] you couldn’t compromise your own values and judgments, but you can be seen to be neutral (CS1 E).

For mediation to work at all, people have to believe that we are not on one person’s side or the other, that we’re really not forming opinions. I mean, the word neutrality is bandied about a lot and it’s a difficult word. But the perception of neutrality with our clients is one of the big tools that we have to work with (CS2 D).

I don’t think any of us [is] totally neutral. It’s how we demonstrate [neutrality] and how we come across to the parties - that’s the critical thing (CS1 J).

One participant noted that a party’s perceptions of neutrality might have little or no apparent correlation with the conduct of the mediator, and that the same conduct might suggest different things to different parties. The complexity of managing parties’ perceptions of neutrality rather than of being neutral as was emphasised by that participant:

There is demeanour, language, and lots of things. How you negotiate all of that is really difficult. I think a lot of it happens instinctively or intuitively throughout the mediation (CS1 J).

Participants offered varied definitions of neutrality; more than one equated neutrality with not taking sides, or being non-aligned (see CS1 A; CS2 A; CS2 C). In the extract below, that association is also placed in the context of the process and content or outcome distinction:

Well, basically it’s not taking sides. Like an input into the content of the process, the mediator is there as a facilitator to a lot of process and the neutrality means that they are not putting any input into what the content of it is and letting the people discuss that themselves (CS2 A).
Further definitions were given in a context of comparing neutrality with impartiality. A preferred view in the first case study (Dispute Resolution Centre, Department of Justice) was identified by the training officer in the extract below:

We [the DRC] say that neutrality is how you are perceived by the parties in terms of your role and relationship with them; whereas impartiality is defined by your behaviours and how you deal with them in the session.

I may know you, and so if I do a mediation, you or the other person may have a question about my neutrality because I have a distant sort of a relationship with you. That may not necessarily mean that if I [were] to mediate between the two of you that I couldn’t be very impartial and that I couldn’t be very fair and balanced. We say to parties, to trainees and staff, that you need to be able to consider both of those issues and be aware of how the parties perceive your neutrality or otherwise, and also your behaviour during the session as being impartial (CSI I).

According to this view, “neutrality” is understood to mean no pre-existing relationship with the parties suggesting impartiality in a narrow sense; while “impartiality” is associated with fairness and balance between the parties, resembling even-handedness as described in Chapter One.

Apart from the response extracted above, rather than articulate clear and comprehensive definitions, participants tended to identify neutrality with a range of meanings indicating both the importance of it to their practice and its perceived synergies with wider aspects of practice. One respondent, for example, defined mediator neutrality as not deciding a dispute, not taking a non-judgmental attitude, not
taking sides, and as facilitating the parties’ opportunities to “be heard” through unbiased listening to their stories (CS1 F).

Putting neutrality in the context of a professional practice, one participant described the reality of neutrality as a matter of professional discipline:

I think it’s just a discipline, like any other in a professional context [in which] you know your job and it’s part of it to keep your stuff and your nose out of there. To the extent that sometimes you notice that you’re not [doing so], that you’re starting to form opinions and starting to get brittle or bitter around somebody [then] it’s just time to park it, you know, to just say to yourself, like you do in any professional undertaking: this doesn’t belong here, put it aside and refocus and just do what you can for your clients. Because, honestly, nobody feels good about getting mired in extraneous thoughts and feelings. It doesn’t feel good when you’re mediating and you know it isn’t working for the clients. As soon as you fall into that trap, you can feel that you’re no longer being effective. So it actually feels pretty good to be able to just go, “wait a minute” and just park it (CS2 D).

Participants’ understanding of neutrality extended beyond the main themes found in the literature to include association with active listening:

Within the process itself I think those issues of neutrality are extremely important. I think those active listening skills are extremely important; that you can encourage people to look at different perceptions of the same event. I guess that focuses in on neutrality (CS1 E).

The meaning of neutrality was also extended to include association with the parties’ “ownership” of the dispute and the decision-making process:

I don’t own the problem. I don’t own the solution. There is that distancing thing. There is a physical distancing between “I’m in control of the process” or “we are in control of the process”. If you are the disputants – that’s yours. There is that. 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 here to do is to direct the flow of communication between the two of you (CS1 J).

The most evident strategy used by participants to maintain their sense of neutrality in practice is to look to the process and content or outcome distinction as a guide to their input and interventions in a given mediation session. The significance of that distinction for participants is explored below. Other strategies described by respondents are relevant to limiting the intrusion of personal reactions and managing perceived power imbalances, as discussed below.

5.2.2 Neutrality as impartiality

As described in Chapter One, impartiality is associated with a lack of bias. According to a narrow interpretation, bias – and hence a lack of impartiality – may occur as a result of prior knowledge of, or association with, the parties and their dispute, and is usually addressed before a session by way of disclosure, which gives the parties the opportunity to withdraw. Bias may also occur in a wider sense where the mediator affects the encounter due to his or her conscious or unconscious values, preferences and preconceptions. Sixteen categories of meaning are subsumed under the heading Impartiality, reflecting established meanings found in the literature, extended meanings and strategies to deal with practice issues.

One definition of impartiality is “not taking sides”, also associated by participants with the term neutrality, as already indicated. In addition, that meaning was extended by the idea of “sitting on the fence”; described by one participant as meaning “valuing both sides”, or a client-centred understanding of impartiality:
I don’t know that I can ever be impartial, so sitting on the fence is seeing both sides of things. Because you’re seeing both sides, you see the value of both sides. So it’s about ways of finding how to sit on the fence and be supportive of both sides and not get knocked off the fence (CS2 C).

Participants associated both vested interest and bias with impartiality. Having no vested interest in an outcome was closely associated with the process and content or outcome distinction, and the principle that the parties “own” the dispute and its solution. This connection is illustrated in the following description:

[Impartiality means] that the process belongs to them and the outcome is theirs, and there is no vested interest from the mediators (CS1 C).

Meanings that extend existing ideas of bias and vested interest emerged in discussion of the impact of the personal responses of mediators, consistent with a wide interpretation of impartiality:

If you allow your own personal agenda to get in the way and you are not trained to pick it up then you have got real problems with neutrality [as impartiality] (CS1 C).

First and foremost, [impartiality means] not to let my personal viewpoints, morals, ethics, whatever, come into the equation and sort of colour my opinion of things, which is difficult (CS2 B).

Consistent with scholarly commentary, some measure of mediator influence is acknowledged as inevitable, and at best restricted if not eliminated:

The fact is that we actually do things, that we are not rocks in the mediation. Maybe a rock would be impartial but the fact that we actually open our mouths and do something means that every time you open your mouth and do
something or stop someone from talking or ask someone to talk or your timing [influences what occurs] (CS1 I).

References were made to having no opinion about the parties or the dispute (CS1 A; CS1 F). One participant made a useful distinction between having an opinion, of which he could be consciously aware, and acting on that opinion, reflecting the distinction advanced by Rock (2006) in the context of mindfulness in mediation (see 2.1). Simply put:

You will always have a personal view. But you might not act on that (CS1 A).

Differing views were expressed as to the whether the mediator could or should influence the content and outcomes of family mediations according to externally determined standards of child care. According to one view, impartiality requires the exclusion of any personal view, the impact of which must be guarded against. According to another view, impartiality is consistent with the self-determination of the parents and the absence of any “right” approach. According to a third view, “objective” standards of the best interests of the child require consideration, but as these standards are difficult to determine there is uncertainty as to the mediator’s role:

I’ll give you a classic example, [from] last week. It was a spousal one. It was access arrangements for children. The woman kept on saying to her ex-partner “You don’t have any right to ask to see her when you have not seen her since she was six days old”. Now, from a value system, I believe that it doesn’t matter how much time has passed, [since] the other partner or the person does [have] the right to actually request some contact with their child. That is my belief. I have to work on those times when something triggers…my value or my belief, [in order to] to make sure the language that I use in my transitions is very neutral language. That is a very conscious thing. I know what my triggers are really, really well. (CS1 J)
[So-called age appropriate behaviour] is such a generalisation. In reality each situation is so different. I wouldn’t venture an opinion because I think that’s typical of the sort of thing where one or other of the parents, maybe both of them, would see you as starting to take sides, you know, to say, be obliquely saying, “well, yes, I mean, naturally he’ll want to go down the beach with his mates. Dad, you need to be backing off”. I’m not going to ever look like I’m saying such a thing (CS2 D).

Well, I guess neutrality is not taking sides, basically, with one parent or the other. However, I think the neutrality is limited in terms of what is best for the children. So one of the very grey areas is [where] parents [are] in a position where they [are] making decisions that could be considered not in the best interests of the children – where does that put the mediator? Does the mediator say, well, I’m not going to allow you to make these agreements? (CS2 C).

Additional responses about the meaning of impartiality and bias were collected according to the free association exercise conducted at the conclusion of each interview described in Chapter Four. The results of the exercise are considered below before examination of the interview responses. The exercise results appear in Table 5.3. The responses were variable and demonstrate open, creative meaning associations.

**Table 5.3**

<table>
<thead>
<tr>
<th>IMPARTIALITY</th>
<th>BIAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>CS1 A</td>
<td>Ignorant</td>
</tr>
<tr>
<td>Having wisdom</td>
<td>Balanced</td>
</tr>
<tr>
<td>Balanced</td>
<td>Reactive</td>
</tr>
<tr>
<td>Detached</td>
<td>Opinionated</td>
</tr>
<tr>
<td></td>
<td>Slanted</td>
</tr>
<tr>
<td>CS1 B</td>
<td>Demonstrating alignment verbally or non-verbally</td>
</tr>
<tr>
<td>Fair and equitable</td>
<td>Believing that equity is not equality</td>
</tr>
<tr>
<td></td>
<td>Self-aware of prejudice – perceived and actual</td>
</tr>
<tr>
<td>CS1 C</td>
<td>Having a vested interest</td>
</tr>
<tr>
<td>Even-handed</td>
<td>Balanced</td>
</tr>
<tr>
<td></td>
<td>Having a blind spot</td>
</tr>
<tr>
<td>CS1 D</td>
<td>Giving no clue of leaning one way or the other</td>
</tr>
<tr>
<td>-------</td>
<td>------------------------------------------------</td>
</tr>
<tr>
<td>Parties’ perceptions</td>
<td>Not letting someone “have a go”</td>
</tr>
<tr>
<td>Fair</td>
<td>Blocking</td>
</tr>
<tr>
<td>CS1 E</td>
<td>Even-handed</td>
</tr>
<tr>
<td>Neutral</td>
<td>Being directive</td>
</tr>
<tr>
<td>Non-judgmental</td>
<td></td>
</tr>
<tr>
<td>CS1 F</td>
<td>Neutral</td>
</tr>
<tr>
<td>Fair</td>
<td>Preferential/partial</td>
</tr>
<tr>
<td>Reasonable</td>
<td></td>
</tr>
<tr>
<td>Recognising extent of own bias</td>
<td></td>
</tr>
<tr>
<td>Taking a mental step back</td>
<td></td>
</tr>
<tr>
<td>Being open</td>
<td></td>
</tr>
<tr>
<td>Being response-able (responsible)</td>
<td></td>
</tr>
<tr>
<td>CS1 G</td>
<td>Don’t care</td>
</tr>
<tr>
<td>Soft</td>
<td>Loaded</td>
</tr>
<tr>
<td>Listening</td>
<td>Bigoted</td>
</tr>
<tr>
<td>Professional fence sitting</td>
<td>Showing favouritism</td>
</tr>
<tr>
<td>Not taking sides</td>
<td>Adversarial</td>
</tr>
<tr>
<td>Ensuring fair process</td>
<td>Hard</td>
</tr>
<tr>
<td>CS1 H</td>
<td>Neutral</td>
</tr>
<tr>
<td>Not putting own thoughts/views to the parties</td>
<td>Prejudice</td>
</tr>
<tr>
<td>Leaving “ownership” of the dispute with the parties</td>
<td></td>
</tr>
<tr>
<td>CS1 I</td>
<td>Equitable</td>
</tr>
<tr>
<td>Behaviours [exhibiting impartiality]</td>
<td>Subtle</td>
</tr>
<tr>
<td>Give balanced treatment</td>
<td>Conscious v unconscious[bias]</td>
</tr>
<tr>
<td>Fair</td>
<td></td>
</tr>
<tr>
<td>CS1 J</td>
<td>Separating process from the problem</td>
</tr>
<tr>
<td>Directing traffic – the communication</td>
<td>Having a vested interest in an outcome</td>
</tr>
<tr>
<td>CS2 A</td>
<td>Not taking sides</td>
</tr>
<tr>
<td>CS2 B</td>
<td>Neutral</td>
</tr>
<tr>
<td>Equal</td>
<td>Judgments</td>
</tr>
<tr>
<td>Without bias</td>
<td>Dilemmas</td>
</tr>
<tr>
<td>Sitting on the fence</td>
<td>Favouritism</td>
</tr>
</tbody>
</table>
These results are evidence that the participants conceive impartiality as having a broader meaning than bias or vested interest. In Tables 5.4 and 5.5 the meanings that they associate with impartiality and bias, respectively, are re-tabulated according to frequency and four thematic categories. The meanings presented are categorised as mediation-specific (according to the mediation as context or as having particular characteristics), legal, therapeutic, and “other”, wherein a common, popular meaning was used, unrelated to the other themes or possibly overlapping with one or more (for example, Parties’ perceptions). I drew on my own experience in mediation, law and social work to make reflexive connections. The inclusion of my experience as data in this instance is an example of reflexivity as introspection, discussed in Chapter Three. The tables indicate that participants have borrowed from legal, therapeutic and common sense understandings to ground extended meanings of impartiality significant for their practice.

The responses shown in Tables 5.4 and 5.5 are tabulated numerically according to response rate (for example “prejudice” was referred to by three (3) respondents). Those meanings that emerged in the free associations and were also discussed by participants during their interviews are indicated by an asterix (*).

Table 5.4
### IMPARTIALITY

<table>
<thead>
<tr>
<th>MEDIATION</th>
<th>LEGAL</th>
<th>THERAPEUTIC</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>*An ideal</td>
<td>Equitable (2)</td>
<td>*Detached</td>
<td>Wise</td>
</tr>
<tr>
<td>*Neutral (4)</td>
<td>Believing that equity is not equality</td>
<td>Attentive</td>
<td>Showing balanced treatment(3)</td>
</tr>
<tr>
<td>*Leaving ownership of dispute with parties</td>
<td>*Even-handed (2)</td>
<td>*Non-judgmental (2)</td>
<td>Giving no clue of leaning one way or the other</td>
</tr>
<tr>
<td>*Separating process from problem</td>
<td>*Fair (process) (5)</td>
<td>*Recognising extent of own bias</td>
<td>*Parties’ perceptions</td>
</tr>
<tr>
<td>*Directing traffic – the communication</td>
<td>Reasonable</td>
<td>Being open</td>
<td>Taking a mental step back</td>
</tr>
<tr>
<td>Being value-free</td>
<td>*Without bias</td>
<td>*Being responsible (responsible)</td>
<td>Don’t care</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Table 5.5

**BIAS**

<table>
<thead>
<tr>
<th>MEDIATION</th>
<th>LEGAL</th>
<th>THERAPEUTIC</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partial</td>
<td>*Having a vested interest</td>
<td>*Reactive</td>
<td>Ignorant</td>
</tr>
<tr>
<td>*Taking sides (3)</td>
<td>Adversarial</td>
<td>Demonstrating alignment verbally or non-verbally</td>
<td>Opinionated</td>
</tr>
</tbody>
</table>

218
Meanings found in the literature were extended by participants as shown in their responses to the free association exercise. Participants emphasised a cluster of ideas around “judgment”, “non-judgmental” and “prejudice”, which figured as types of personal responses that might emerge during a mediation session and thus fall within a wide interpretation of impartiality. For respondents, being non-judgmental means not judging, that is, not blaming, assessing as right or wrong, good or bad, the parties or the dispute; avoiding or minimising personal reactions; avoiding prejudice; remaining neutral as to the interpretation of events and refraining from assessing the parties’ stories according to claims of truth:
You can’t judge in the mediation, or allow it to be seen that you are judging people. I guess in your head you might be (CS1 E).

I guess in reality, I will conduct a mediation and there will be biases for me, and I’m certainly aware of those. What might go through my head is, “oh that’s very unfair or very unreasonable on one party or the other, or one side or the other.” However, I don’t think that it’s my role to actually make that judgement in any way (CS2 C).

You are not there to decide the dispute for them and [you are] continually reminding them of that fact. You are not there to judge, and when they tell you that they have done this or that, you are not going to “tut” and shake your head and say that’s not acceptable...The other thing is the listening side of things and reflecting back [so] that they understand that they have been heard. The difficulty or challenge is letting them know that they have been heard [when] their assumption is automatically, “well if you have heard and understood you can clearly see that I am correct so therefore you must be on my side”. You have to indicate that you have heard, but do that in an unbiased way: “I have heard this is what you have said.” That doesn’t mean that I’ve agreed (CS1 F).

Impartiality is further defined as emotional detachment, an idea also expressed in the free associations:

If you allow yourself to go with your bias all the time I think that’s very debilitating and exhausting. It brings to mind the classic way of dealing with conflict. You either respond or react. To react is exhausting, non-productive, whereas impartiality is...you respond, you let it go by. It’s probably that you care for yourself more if you can bring in [to the mediation] that mode (CS1 G).

Detachment was described as important for active listening and providing the parties with the opportunity to “be heard” (CS1 J) in order to reach mutual understanding. A bias for settlement was not evident in participants’ responses. Instead, emphasis was
put on parties’ potential to reach mutual understanding, rather than to establish the truth of their stories, or to reach agreement:

It is about promoting some shared understanding about each other’s position. Not necessarily agreement, but I think often if the parties can get to the point where they understand why the other party thinks the way that they do, then whether they agree with them or not entirely is not important (CS1 B).

It doesn’t matter even if after five hours there is no agreement, if I have taken them through all of that and if they have been able to actually say to me, “well, I'm happy with where we have come, yet I still don’t want to write an agreement and I still don’t agree with what he or she said”, then that’s OK. Even if they haven’t even agreed and they are still volatile I think that is still progress. The progress is that they have sat there for that amount of time and they have at least tried to talk (CS1 J).

The literature identifies a number of responses to the problem of eliminating or at least minimising the impact of the mediator’s personal opinions, values and agendas, whether consciously or unconsciously held. Participants recognise the difficulties in finding ways to counteract personal intrusions from the mediator:

If you establish that it is happening, it’s sort of heightening your awareness I guess. If you establish [that] 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 jeopardising your impartiality? Do we do any stuff where it is happening sub-consciously? (CS1 I).

Participants also put considerable emphasis on the value of self-awareness, considered in the literature under the rubric of reflexive or reflective practice (see 2.1), for limiting or even eliminating the intrusion of a personal response, and as a means of monitoring impartiality in practice:
I know that I mediate best when I’m completely and fully aware of myself so I’m not reacting at all (CS1 A).

It really comes back to the mediator and what they feel themselves and what they sense themselves. I guess to some extent it comes back to self-awareness. To what extent are you being affected and in what way are you affecting what is happening in the mediation? The only person who can answer those questions is the mediator themselves (CS1 I).

Self awareness was emphasised both as self-monitoring activity during a mediation session and as part of the process of debriefing afterwards.

I have been trained to tune into my own internal workings. If I am beginning to feel annoyed with someone or wanting a special outcome then that is a trigger for me to begin to say “what’s going on here?” (CS1 C)

Perhaps you can like a person or the way that they behave…that’s something you need to be really aware of….it is something I always try to be aware of in a mediation because sometimes it can creep up on you a little bit (CS1 E).

Sometimes you want to focus on one party. “Look, that person really hooked me. Any sort of dimension, whatever the dimension is, they hooked me and they got to me”. What do I do next time so I don’t have that situation again? (CS1 B)

Debriefing is important closure for mediators themselves. There are things that I want to say to the party that I can say to the co-mediator [instead] knowing that [my remarks] are not going to leave the room (CS1 H).
Considerable value was attached to the co-mediation model adopted by both services both as an aid to debriefing and as a means of reflecting on issues of neutrality and impartiality as a mediation session progresses:

There are checks and balances in this model. One is that co-mediation helps. I feel that if someone is moving down a vested interest direction, hopefully you have a co-mediator who will stop the process and privately talk about that (CS1 C).

It’s something [co-mediation] I particularly like and I think it actually helps with [neutrality]. [It’s an advantage] being able to confer. Or sometimes even just listening to a co-mediator that may be [operating] in a certain way and it’s useful because I wouldn’t necessarily have picked upon what they have picked up on (CS1 E).

There was one [mediation], going back quite some time, I can’t remember what I did, but my co-mediator said “Do you realise you did such and such?” and I had no idea. “I can’t believe it!” Often, you’ll pick up when you think [you] should have done that or could have done that better, or it was a bit stupid. I didn’t even know I had done it. There you go – that’s the idea of the co-mediator model. I think it’s really good, in that one person can be working with the parties and the other one can be doing a reflection of what’s going on and often pick up some threads (CS1 G).

That question of impartiality. It’s about analysing my performance and that of my co-mediator. Saying “how did I feel about the two parties, how did I behave and did my behaviour give some sort of obvious advantage to one person or the other?” In isolation, everything that you do could [come] under criticism or analysis. [Over] the whole three- or four-hour mediation, do I feel that I was aware of what was happening for me and at the end of the day all those things that I did, were they balanced? Do I feel as though I treated the parties equitably? (CS1 I)
Limiting the intrusion of mediators’ personal agendas and reactions is seen as important for 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 [and] 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 (CS1 B).

5.2.3 Neutrality as even-handedness

Even-handedness refers to the equal treatment of parties. The problem associated with it in practice is that it can lead to unequal outcomes. This dilemma has been addressed by treating the parties unequally, described as the strategy of equidistance, in order to bring about equal outcomes. However, there is an inherent contradiction between professing neutrality and treating the parties unequally. Participants’ responses reveal both a commitment to treating the parties equally and an awareness of the difficulties that poses when there appears to be an imbalance of bargaining power between the parties.

The term “even-handed” was used by some but not all participants, but reference was made by all to treating the parties equally. One participant likened treating parties equally to creating a level playing field:

If parties come with an array of support that hasn’t been negotiated and if we just allowed it to happen you would have maybe half a dozen on one side and a poor, alone disputant on the other. You just can’t allow it. You must make sure that the bodies are as equal as can be or [that] there is some negotiation about that. If there is a disability that [must be] attended to. 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 [possible] (CS1 C).

Creating such a level playing field might, however, mean treating the parties differently:

You may have to treat them differently in order to get them each to have a fair sense of time spent on their issues and the development of their ideas. It may be that people are sufficiently healthy and emotionally intelligent [and] it’s part of their relationship to be hearing each other well, but often it’s not. So you may have to treat people fairly differently in order to get more of a level playing field, which doesn’t mean treating them disrespectfully in any way. But just to be really overt about what you’re doing is often a good way to just do it, to say “well, you know, Fred, you’ve been talking and you’ve said that five times and you’ve talked around it for about ten minutes and Amanda’s only had two minutes. So let’s go and see what she’s got on her mind”. To be that overt about it, I think is helpful (CS2 D).

Fairness in this context means:

It’s not what I think is fair. It’s just [that] I want them to feel they’ve been fairly heard and they can tell me if they have or not. To feel like they’ve explored the issues as much as they want to and have developed their ideas as much as they want to (CS 2 D).

Participants recognise that parties might attempt to win over (align) the mediator/s in order to gain recognition for the truth or worth of their story or position vis-à-vis the other party:

Parties will often try to align the mediators. Sometimes [they] will try to divide the mediators, particularly in the two-mediator model. Again you need to be mindful of that. Typically you might hear, “you’re a male you understand this”, [while] the female mediator is there. You need to be really careful that you don’t comment on any issue whether its gender specific, [or]
whether it’s racial. “You look like you….” or “You have kids yourself”. It doesn’t matter if I have kids or not. But parties will often try and do that...Parties have asked me questions like, am I married? Do I have kids? What do I do when the neighbour’s next door dog barks? You need to be careful (CS1 B).

Reference was made to the need for distance or detachment from the parties, in order to maintain a neutral stance between them and simultaneously to engage each party in order to build trust and rapport:

If you don’t respond to [attempts by a party to align the mediator/s] you run the risk of alienating your relationship with the parties. I'm not saying alienating in terms of giving up neutrality. I’m saying in terms of establishing rapport with the parties. If the parties think that you are keeping your distance then often they are not inclined to become more intimate in terms of what they truly feel and believe. Sometimes I think mediators, in an attempt to maintain neutrality, present as indifferent or aloof, [which] doesn’t build a sense of trust with the mediation process itself (CS1 B).

In recognition of the importance of the question of addressing power imbalances, each participant was asked a direct question about whether they see any need to address imbalances of power and if so, in what way (described at 4.2.2). Family matters were frequently referred to as instances in which power imbalances are evident. But questions of imbalance are not limited to family disputes:

No, that’s the classic stuff. That’s where you think it is. It can be in other things. People can manipulate…all sorts of things. No I wouldn’t say it’s your classic marital stuff. The workplaces are the very difficult ones. Where a client who may be a co-worker but further down the ladder [from] the other person...Workplaces ones are hard and fascinating because of all that (CS1 G).
**Workplace relationships:**

If there is an obvious power imbalance between the parties that may in fact be a completely normal feature of the nature of the relationship between the parties. Say, for instance, workplace mediations where you might have a manager and an employee come to mediation because they haven’t been able to get on. I can think of a couple of instances where this has come up (CS1 B).

**Domestic relationships and changing dynamics:**

Power imbalances, I think, are intrinsic to couple relationships. You usually find that someone’s got more power in one area and the other’s got more power in a different area, like parenting and economics, wage earning and family relationships. So they have their areas of expertise which can be used against each other if they choose to. So I think it’s just a normal part of the landscape (CS2 D).

There are always power imbalances in any relationship. I suppose the typical ones are [that] a mother may have the power when it comes to the relationship if she is with the children. A male may have the power when it comes to the financial arrangements and the business transactions going on. Of course, when they separate, this can be all turned around. So it comes as a bit of a shock to both of them. Things change and basically it’s encouraging people to see just actually what is going on and that transformative element again. They’re saying “okay, well, things have changed” and that relationship is not the same any more. So the kids are going to have to get used to mum looking after the finances a bit more and they’re going to have to get used to dad playing the house-carer role (CS2 A).

One participant described power between the parties as shifting during the course of a mediation:

The power imbalance between the parties – it’s definitely there, but one of the interesting things about mediation, I think, is the way that it moves and shifts
and changes. So often there’s one party at the beginning of the mediation who seems to hold all the cards, but as the mediation progresses, things shift and move and change and you get this sense that it’s not simple. It’s not just a matter of saying the man is more powerful than the woman and that’s the end of it, so we’ve got to deal with it somehow. It’s an evolving beast (CS2 C).

Another participant made reference to differing sources of power:

In terms of your power model, I suppose you’ve got personal power and positional power. It might well be that there is a power imbalance from a positional point of view. One person is the manager and the other one is the team member. It might also be that on a personal level, because of life experience, ages or whatever, there is a personal power difference as well (CS1 B).

Participants expressed varying views of whether mediators should intervene to redress power imbalances.

I think that to be perfectly impartial, no, you wouldn’t [intervene]. You would let that slide; if there is power imbalance, well so be it – if you are being “textbook impartial” (CS_I).

Intervention inappropriate given the risk to neutrality, but perhaps having a limited role:

I don’t see that in the mediation process it’s legitimate for the mediator to try and correct [power imbalances] other than in the context of the mediation, making sure that the parties are treated fairly and equitably. I think sometimes we try and give the underdog the day in mediation. Once you start thinking about that as a mediator you are all of a sudden aligned, big-time (CS1 B).

Part of the mediator’s role:
I think there’s an imbalance of power in relationships quite often. Part of the mediator’s role, I believe, is to try and equalise that power imbalance to the best of their ability in a way that’s supportive to both. I often think that the power imbalances aren’t obvious to the people that are in the relationship (CS2 C).

**Intervention as a duty of care owed to parties:**

I think you have a duty of care to the client. That is assessment that comes in. It’s not you being “under neutral”, it’s you assessing what has bubbled up, what is happening. It’s you assessing that this person appears to be being bullied by that person into agreeing to whatever. I think it’s your role to do a whole heap of reality checking about what’s happening and getting them to have a look at it – ultimately wanting them to make a decision. They may say: “Look I’m happy with that. It doesn’t bother me that I appear to be giving into him because it’s starting to get the matter sorted and get it out of my life.” If you are really checking that they are happy, that’s fine. You are not controlling the decision-making. I can see where people can see that as not being neutral and but I would see that as an assessment of what’s going on (CS1 G).

The predominant response of participants regarding the need to treat parties equally in the face of possibly unequal outcome, was to identify questions of power imbalance as ones of communication between parties, rather than questions of the relationship between parties, or of the content and outcome of the dispute. The following are examples of how power imbalances are identified:

**One party as more articulate than the other:**

I guess people can be at an advantage a number of different ways. One of the ones I was thinking of is that one person is a lot more articulate than the other. I think you can probably assist [the] 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 (CS1 E).

A loud and dominating party and one who is comparatively quiet and unassertive:
Throughout the process I think [neutrality] is imperative. Especially if one is a very subservient, meek and mild party, and the other person is a loud, dominating person. I could very easily try and take the side of the quiet party and stand up for their rights or whatever. I think it’s very crucial that I maintain that neutrality and guide that process, and let the party that is fairly quiet know that they are being heard; [to know that while] this person may have been demanding and dominating out there as a neighbour or whatever, it’s not going to happen here (CS1 H).

Defining power imbalances as issues of communication (for the purposes of mediation) enables participants to identify appropriate strategies to redress power imbalances as process interventions. The commentary below indicates how participants address power imbalances in terms of process.

Providing equal “airtime”:
I think it’s really important to be “into them” in the same manner. That also goes into making sure that they have the same airtime. Sometimes some people tend to be a bit dominant. The other person needs to also be expressing themselves [in order to keep] that balance of neutrality (CS1 E).

Providing unequal “airtime”:
We may give someone a little bit more opportunity to speak if we feel that they are not quite as verbose as another party. As a mediator you have to make a judgment as to when that’s appropriate. When you are doing that appropriately and when you have over stepped the line? And also, what is your justification for doing that? If you are making a conscious decision to try and slightly address that imbalance, then that’s fine. If you are doing it just
because of this person over here, you hate the sound of their voice and you are not aware of it, [then] you are learning towards [the other] person (CS1 I).

*Emphasising ground rules:*

If the more powerful person [were] constantly interrupting or threatening in tone I would speak to them and let them know this is what the process is, where you both have your chance to have your say. [I would say] “if you have some comments please write them down”; or “You are talking to me at the moment or talking to us at the moment. We will give you the chance later to speak with each other.” I think you have to even it up to have that balance. By speaking that way to that loud person, I’m not showing favouritism to the more quiet person. [I am saying], “this is a process. You have agreed to be guided by us. Everyone has a chance to have a say.” So I think that you have to address that situation (CS1 H).

*A series of intervention possibilities:*

Simple things like getting both people into the construction of an agenda, ensuring that nobody dominates, the time is shared. [Ensuring] that people get a chance to reflect what they think they heard so that any concerns that you might have about miscommunication can be slowed down enough to be checked, and make sure that communication is being received as it’s being broadcast, those kinds of things. Some people just need to take more time to think than others, you know. So just slowing it down, giving people enough time to think and enough time to explore the issues and then to come up with possible solutions that nobody’s thought of yet. The development of options, even ones that aren’t likely to get considered – if they go up, they start to look like: we’ve got a smorgasbord of choices here and I helped to create some of them (CS2 D).

By identifying power imbalances in terms of process and seeking to address them by process interventions, participants reinforce the distinction between process and content or outcome integral to the facilitative model of mediation. As a logical
extension of this distinction, participants tend to exclude the possibility of intervention to address perceived power imbalances where these are more clearly a function of substantive aspects of a dispute. Yet the mediators are not entirely comfortable with the process limits, however useful, placed on their role in addressing disadvantage. They express concern and ambivalence about the need to remain neutral in circumstances where one party is 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 attempts to articulate the tension they experience in adhering to the principle of neutrality.

A family law matter – distinguishing choices made on the basis of poor information and those consciously made to benefit the other:

In private sessions it was going along the lines [of that] he wanted a part of the property and she actually did want him to have that. She could have got more. She made a decision to let him have this house in Victoria that would give him about fifty per cent of their assets because she said, “I’ve got the girls”. I’m happy and I’m entitled to this. I’m going to give him that because it will make him deal with the whole situation better. That would be a conscious choice that would seem inequitable given the circumstances, as opposed to a poorly informed person who might not be very powerful in negotiation. I know what you mean and it is a really big issue. It’s still there, that’s life. There are limitations (CS1 1).

A parenting dispute in which one party “very clearly had not obtained 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. We were raising it and she was 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”. These are the sorts of things the parties say. We were reality testing and saying, “if you got legal advice and found that there are different outcomes possible for you?” But she was still wanting to settle. I was 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 (CS1 3).

**A family matter – beyond substantive legal content to a consideration of cultural difference:**

The spousal one that I did was with two parties who had emigrated from an African country. Their cultural norms were significantly different to mine and those of the female co-mediator who was working with me. There was lots of statements coming from the husband about how his wife should be grateful that he is taking her under his wing and that he looks after her and she should do what he says. She should do these other things and there is no need for her to have any access to any of her own money. He should have all the money. She shouldn’t talk to the children because they were all boys and because he is the man…That was particularly challenging because of my opinions and what I perceive to be the cultural norms that operate here, which were influencing the woman, and that was what she was heading towards, and that was what was causing the dispute. But at the same time she was still bound by [her own cultural norms]. She said diddley squat during the mediation because it wasn’t her place. In a private session she said quite a lot. Then when we got back she didn’t say anything again. That was one where we were both very conscious of the fact that we had opinions about what we thought should be happening. At the end of the day…[response trailed away] (CS1 F).

**A commercial case study in which one party had been misled about her 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
Participants stressed the importance of intake procedures in vetting matters appropriate for mediation and in particular, identifying relationships between parties as too unbalanced to allow equal participation and equitable outcomes.

DV [domestic violence] cannot be managed in the same room if it’s active and fear-provoking. Landlords and tenants can be problematic and it would always be addressed at intake. But if for some reason something got through to your table, clearly then you need to do something about that (CS1 C).

Part of [addressing power imbalance] is done in intake particularly in spousal mediations. We always suggest that they get legal advice so that they have a good knowledge of their rights and responsibilities before they actually go into the mediation. So part of that’s dealt with in the intake, as I said. That’s one of the regular questions that we ask with spousal mediations – whether in fact they can negotiate on their own behalf. When it actually gets to the mediation those sorts of issues appear less often. But if it were to happen in the mediation, I think possibly, other than deal with that in the open forum, which might not be appropriate, we would probably look at having a private session (CS1 E).
The need to terminate mediations in some circumstances was recognised:

It also gets to a level – and even this brings into question your impartiality. If your perception is that what you are observing is that that imbalance is just way too great, then I think sometimes we need to stop mediations. That’s the ultimate call.

Or you might just subtly run up the talk time. You are shutting that down and taking it out of the parties’ hands. I think part of the reason that you would do that is if you saw no way as a mediator of subtly addressing some of concerns. The next step would seriously bring into question your impartiality. Then rather than stepping over that line, shut it down (CS1 I).

I think you do have the responsibility. You might talk very carefully to them about how you’re going to terminate so it’s not seen as a result of that person’s bullying (CS1 G).

5.2.4 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 not the content or outcome, and is therefore neutral as to the latter. This distinction is said to be a basic tenet of mediation. However, there is explicit recognition that the presence and intervention of the mediator does, in fact, influence both content and outcome of the parties’ dispute. The themes and extracts reported below are taken from the overarching category of Process and content or outcome distinction (D). Eleven open categories are subsumed under this selective category. Principal themes are highlighted below.

According to one participant, the difference between neutrality and impartiality mirrors that between process and outcome:
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 and equal footing to get to the outcome (CS1 C).

A neutral stance towards outcomes is associated with a non-judgmental approach to the solutions, which are meant to be generated by parties themselves:

I think it’s really important in that stage [negotiation] that the mediators demonstrate their neutrality by not judging the solutions. As outlandish a solution it maybe, but in that particular set of circumstances that’s the appropriate one (CS1 D).

One of the things I am always mindful at that point is that, whether in a verbal or non-verbal sense, I am not seen to be judging any of the ideas. Remembering that the parties that are in the mediation are at a heightened stage of awareness, 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 that you [as the mediator] believe the way for this to be resolved is that, this and this. That’s for the parties to decide (CS1 B).

A neutral stance is seen as relevant throughout the process phases of a mediation session:

Neutrality is important in taking statements – demonstrating that you are going to let each side have their say. I mean it’s [important] all the way through exploration and just in general, and making sure you are not letting one person talk and interrupt the other person when they are having their say. Exploration is the main point where I have been conscious of it because that’s when a lot of the stuff starts coming out and [the parties will be saying], “surely you can see that I am right and it happened this way!” You have to do your round-up
of paraphrases and give that back to them and say: “Yes, everybody is hearing what you say but that doesn’t mean that I agree.” When you get to the other side of private sessions, you need to be conscious of being all those things – impartial, unbiased and neutral (CS1 F).

Concern was expressed about (other) organisational cultures where there is an expectation that mediators work towards measurable outcomes, mainly in the form of agreements or settlements. By contrast, primacy for the participants is given to the parties’ experience of mediation, identified in terms of its process:

Process is about the experience of being respected and empowered and allowed to negotiate. If the outcome is not resolved for both of them, at least the process has been an experience hopefully that has empowered them and given them a sense of being heard. The outcome-based [approach] affects the process. It’s mediator driven and railroaded. I have seen railroading of the parties because the outcome is the goal (CS1 C).

Nonetheless, one participant identified the facilitative model as aiming for settlement and she has a sense that this objective itself produces pressure to reach agreements.

I’ve been very uneasy about a sense of coercion. I think that it’s very, very easy to focus on agreements and try and have that very much as your end-point and in doing so, losing sight of…just sort of focusing too much on agreements. But that’s what we strive for, that’s what we must have and when you’ve got that as your end-goal, whether you’re conscious of it or not, you exert a kind of subtle pressure on the participants to get through these agenda items, talk about them, discuss, agree, write something down and move on (CS2 B).

Mediator intervention in content is associated with the giving of advice, particularly in the form of option generation, associated with conciliation (as distinct from mediation). Comparisons were made with conciliation as a model used in other
contexts by a number of participants, and one in which “pure” neutrality is considered unachievable:

When I’m doing conciliation work at the RTA [Residential Tenancy Authority] that’s probably more compromised in that I’m actually applying an Act or giving advice about the Act, therefore I’m not really neutral there (CS1 A).

[As a conciliator] you’re working out what is going to be the best approach to negotiate this. What does each party want to achieve out of this? You’re formulating what is going to be best for all parties. And you do a lot of reality testing and option generation. It’s not my role to tell either party what they should or shouldn’t do. It’s like, have you considered this? (CS1 H)

While input into and impact upon the content of the dispute was not explicitly acknowledged by participants in the facilitative mediation model, effect on content is implicit in comments made about “reality testing” (a procedural step associated with private sessions, or caucuses (see Boulle, 2001, p. 186-7)). There, the distinction between process and content is not sharply drawn by participants, allowing them to test the strengths and weaknesses of a party’s case:

In private session you can do some pretty sharp reality testing...Also you can ask questions like, “have you had legal advice? Have you contacted Centrelink [federal government income support agency] to see how this will impact on your payments?” You can ask questions that point them in a direction that they can explore or pursue (CS1 A).
One participant explicitly linked the use of reality testing to content, but did so while departing from the predominant view that intervention to redress power imbalances properly occurs in process only.

You don’t address power imbalance by going into bat for a person, but it’s how you deal with the content that’s come out. But not by the mediator supporting, let’s say, that women who has really been bullied by that bloke over here. You do it in the context of their discussions. That doesn’t mean amount of airtime. You look at the decisions. If people get to the negotiation phase and one is really caving in to the other person and it’s become obvious, in your private session you name it to them: “What I’m seeing is that you are actually caving in to the other person.” I’ve actually said to people, “I feel I wouldn’t want to arrive at an agreement with what you have agreed to” (CS1 G).

Reality testing is also recognised as an avenue through which external standards, not necessarily chosen by the parties, might intrude on the process. The following commentary reveals an inherent tension in attempts to avoid the imposition of external community standards or those personal to the mediator, yet deal with a situation in which a party is not being realistic.

You need to be careful what you define that [reality testing] as being, [so] 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 (CS1 B).

The influence of particular models and organisational expectations on the practice of neutrality is acknowledged. With that acknowledgement comes recognition of a
potential contradiction in assisting parties towards some kind of resolution and being neutral as to outcomes.

A settlement, or a no-settlement outcome, is an outcome as well. If things are beginning not to look like they are going to move down toward a settlement, it is difficult for the mediator to maintain neutrality. So there’s a challenge to neutrality inherent in the [facilitative/settlement] model. [In some other models], if there isn’t a certain outcome there are repercussions. I guess that’s when neutrality can be compromised (CS1 C).

[In another context], the mediator literally changes hats at the end of a mediation and has to [make] the funding recommendation. If the matter didn’t settle, the parties are aware too that the funding is limited and they may be under pressure to settle because they may not have another bite of the cherry (CS1 C).

In the facilitative model used in the first case study, emphasis was given to the parties’ “ownership” of the dispute and its solution, if any, and its link to the distinction between process and content or outcome.

Getting back to the neutrality part, if I come to a mediation session with the whole idea that it’s a result orientated thing [then], to me, I am actually owning the dispute, owning the argument as well. I have to remind myself again that this is theirs, it’s not mine. I have got to separate myself. I have just a job to do (CS1 J).

5.2.5 Client focus and ownership: party self-determination

Related to the distinction between process and content or outcome were very clear statements from participants about parties’ ownership of the dispute and its resolution. This theme overlaps significantly with overarching categories reported earlier. As noted above, the meaning of neutrality was directly related to parties’ ownership of
the dispute and its resolution. Being impartial and thereby limiting the personal intrusion of the mediator is identified as giving primacy to the needs of the parties. Questions of even-handedness, or treating the parties equally, and addressing power imbalances raised further questions about parties’ determinations and experiences of fairness. Themes and extracts from the category of Client focus and Ownership ((04)/E), encompassing four open codes, are reported.

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 (CS1_B).

Conceptual links between neutrality, the distinction between process and content or outcome and the autonomy of the parties are reflected in one respondent’s answer to the question: How do you describe neutrality to people when they come?

As I mentioned before about the participants being responsible for the content and advising people that we won’t be telling them what they’re basically going to be talking about. They first have to agree to what they are going to talk about as issues and what they come up with will be entirely up to them (CS2_C).

In statements about the philosophy of mediation, central issues for practice and perceptions of the role of mediators, participants’ responses included the following descriptions.
A flexible process that empowers parties to make their own decisions:

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. Other concerns with mediation are that it is a true process where people are empowered to make their own decisions and do make them. That it is available community wise; the provision of service and provision of a good service. To me it’s a process. It’s not the model. It’s not like a DRC (Dispute Resolution Centre) twelve-step process, which is very effective. To me it’s the philosophy behind that. I think as a mediator, you need to be flexible in that philosophy. Not constrained to: ‘My God what’s step 4, we have to finish at 5, I can’t possibly go to step 10 now’. To be aware of what you are doing while you are doing it to meet the needs of the party (CS1_G).

A facilitative process that encourages parties to take ownership of their dispute and its resolution:

I think [mediation] is important in that it gives people the opportunity to take some sort of ownership of resolving their own disputes despite the fact that I think that most people still come to them expecting more. Intake tells them that it’s ‘your dispute’, but I think they still want to come and have somebody else resolve it for them. They have said things like: ‘We want to come and present our case and have you tell us or decide or give us some sort of direction.’ That’s when you get to jump in and say: ‘We are not here to assist, this is yours, we’re just here to facilitate.’ I think it’s important in that context. So I suppose my role as a mediator is to try and help them to take ownership and to resolve it for themselves. I think what’s wrong these days; people aren’t taking ownership for a lot of their own stuff (CS1_F).

Justification for intervening to address power imbalances was presented in terms of the parties’ ownership of the process and the primacy of meeting their 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 (CS1 H).

Meeting parties’ needs is seen as “client–centred” practice and exemplified by the following commentary:

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 what these two people: How do 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? (CS1_B).

The needs of the parties are seen as determinant of current practice and of the trends in the development of practice over time:

I think when we [the DRC] came from a school, when we started, where we had this very interest-based distinction between process and content; don’t give advice and all that sort of stuff. We certainly didn’t move into the evaluative models of mediation. The types of issues were very ‘garden variety’ mediations. So all those issues of jargon and having to know the area in which you mediated were not relevant. They [the parties] were talking about a barking dog and noisy children and that’s sort of pretty easy to follow. I think we have moved to a point now we are looking at all these new types of mediations and how flexible we are in meeting 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 their options and does the mediator appreciate what the client’s needs are, and where do you find that middle ground? (CS1_I).

5.2.6 The role of the mediator

The role of the mediator (H) is a category of particular themes as identified in Table 5.2 and a pivotal category of meaning which brings together key themes from other
overarching categories. The system of coding used presupposes a separation of themes as categories and their hierarchical ordering according to overarching categories. Close examination of categories revealed considerable overlap of responses between categories and relationships between themes, which are more cyclical than linear and more densely inter-related than seems at first sight. The role of the mediator is a category of meaning that exemplifies the more cyclical inter-relationship of themes. Key examples are reported below.

Mention has been made of the power and authority attached to the role of the mediator, conceived in relation to the process and content or outcome distinction:

The authority that the mediator has is the ability to manage the process. So in that sense, the mediator has authority. They have authority to be able to conduct who talks when, and under what circumstances each talks, so it can be quite a powerful position to be in. Also when people are in the room, you can tell that the mediator has the authority because often both parties will talk to the mediator, not to each other. That gives the mediator the authority to be able to direct what happens in the room, so that’s a powerful position. People give away their power to the mediator in that sense (CS1 2C).

Participants described the mediator’s understanding of core values as including neutrality, process and client-centred practice:

[It’s important for mediators to understand] those issues about neutrality and confidentiality, the voluntariness of it. That would be the first up, to have that understanding of the process and to be able to make it work for people. You know, its client focussed (CS2 A).
Active listening was described as a core skill for mediators by several participants. In the following extract, that skill is linked to party decision-making and a socio-legal context:

I suppose the really core skill or the core ability is the listening skills. Not so much wanting to direct and guide, but being really comfortable with the idea of just letting people come out with their story and letting the people go with the flow a little bit. So, to just let it happen a little bit; which is probably not what the legal profession would like to do, but more from a social science point of view. I suppose they might be used to a generic type of counselling skills, but then you have people in the legal profession who are good at that too because they are skilled negotiators anyway (CS2 A).

Active listening is also linked to the mediator’s role in enabling parties to “be heard”:

If you talk to each party separately, they’ll both be saying the same thing about the other party. So they’re both feeling, in many ways, unheard, not acknowledged, not valued; both parties will be feeling that. I guess it’s trying to be able to introduce that into the mediation room – that both parties are being heard and that both parties’ ideas are valued. Both parties have a right to an opinion, so that’s, I guess, part of the mediator’s role to try and facilitate that (CS2 C).

Facilitating parties’ opportunities to be heard was further linked to dealing appropriately with emotions, particularly negative ones.

When people are really angry at someone it’s because they don’t feel that they have been heard. You can provide the opportunity for the person to tell the other what they want, and for the other to say what they think that they have heard with us [the mediators]. It’s very difficult sometimes (CS1 J).
Reference was made to the role of the mediator in facilitating negotiation between parties, consistent with the model employed by both case study organisations. In the following extract, that role is extended to include some coaching or role modelling:

I think my role as a mediator is primarily to facilitate their negotiation. There’s a bit of coaching involved, particularly in the pre-mediations and the private sessions. If that’s been done and there’s reverberations in the session, I might continue with a bit of coaching in the session because often they’ve tacitly given me approval to remind them when they’re starting to talk in dictatorial tones and might want to say instead: “What I’d like is…” Coaching is about thinking and about communicating. So to think about how you’ll put aside the flight mechanisms that might have been getting in the way and focus on the children and the future. But also habits, just plain old habits of communicating. In a mediation, it’s worth trying something new and just putting aside those old habits and being coached a little bit (CS2 D).

Role modelling by the mediator is also seen as an avenue for capacity building with the parties:

I know that for me, having gone through the training and seen the process, gives me a framework in other situations dealing with conflict. If you model it successfully for them [the parties] and they get an outcome from the dispute that they are reasonably happy with, then they saw that it can be done. If somebody says: “What happened?” [and they reply] “I said what was worrying me and the other guy said what was worrying him and we identified the things that were important and we talked about them”. From that [description] they may see that they could do the same sort of things or at least assist someone else in the same way. It’s capacity building. Mediators aren’t rocket scientists. They are just people like you (CS1 F).

Participants expressed differing views as to the training and qualifications needed to be a mediator. A shift away from drawing mediators from the community and training
them in the requisite process skills to requiring a broader range of expertise, including knowledge of content, was noted.

Process knowledge and life experience:

In my experience there has been a dramatic shift [from] when [mediation] began in Queensland. It was kind of come one, come all. Housewives, people with no qualifications could come and train, offering us the wisdom of their life experience. Now, where government departments, for example, are calling for expressions of interest, they want to know your qualifications – they want to know the mediation qualifications you have, they want to know your professional qualifications if you have any. So I wonder if there is a suggestion of a trend that it’s not enough to love people and be trained in the model. I do wonder (CS1 C).

Legal knowledge in the context of increasing court connected mediation:

We have a lot more lawyers on our [DRC] panel now; in management and also on our panel as well. That’s been a little bit of a conscious decision to actually look for lawyer mediators because if we are doing more work for the courts, even though it’s not always essential to have the content knowledge, its often useful just in terms of the mechanisms and the language to have someone with the same qualifications to talk the talk. You might have a mediation where there are two barristers and their instructing lawyers and somewhere at the end are the parties. If you have those legal people doing a lot of the driving they have a language of their own and they expect you to know that language. Sometimes it’s useful to have somebody who can talk that language (CS1 I).

Knowledge of content in family matters:

I would think there needs to be a minimum requirement that at least the mediators would have an understanding of child development at some level. I don’t think you need to be a child psychologist. However, I do think that it’s important for, say, a mediator to know if a child under two years has a need to
have his/her primary caregiver there. Children’s timeframes are very different from adult timeframes so they view time as being a lot longer than perhaps adults do. Very young children find difficulty in understanding what overnight actually means, and things like that. Maybe a child will need more contact with one or other of their parents, depending on their gender at particular developmental stages in their lives (CS2 C).

I think it’s a very complex question because, for example in property disputes, where I have done a few matters, I was absolutely delighted to be paired with a solicitor who knew property law. It’s about [knowing] something about the area legally so you know a little bit about the ball field. It also helps you to ask questions to give intelligent reality testing. If you know nothing about, for example, property law, I just feel as though you can’t be as effective. There are areas where I think content is important. Parenting disputes is another. I have learned and I have done a consistent amount since 1995 in that area and having the knowledge is really helpful, knowing how courts work is really helpful. It just gives you the edge on reality testing [more] than if you are just stabbing in the dark in terms of what the realities are for families and parties (CS1 C).

5.2.7 The case studies compared

There were two differences between the case studies worth noting. One involves the family mediation context, which is the sole area of intervention for the Family Mediation Service, Maroochydore and one of a number of areas for the Dispute Resolution Centre, Brisbane. Given the timing of interviews, participants from the FMS commented on the then projected changes to the *Family Law Act 1975* (Cth) achieved by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). (Interviews with participants in both case studies preceded those changes.) One participant in the second case study tried to find ways to incorporate voluntariness
into the process despite the projected introduction of *mandatory* family dispute resolution:

As from 1 July, parties have to attend family dispute resolution, unless you can show to the court there’s an exception because of family abuse or domestic violence. The government says you have to attend, so that actually shoots down the whole concept of voluntariness to start with, but that’s the starting point. The process can then still be voluntary, even if the reason why you’re there is not voluntary. At all stages it can still be voluntary. You know what agreements you come up with, the content of it, that’s all up to the participants, so there’s still that aspect of voluntariness to it. But the initial starting off point now is – well you have to attend (CS2 A).

Another participant looked for some other benefit to the parties at the expense of voluntariness:

It’s going to be really interesting because how can you force people into mediation? My hope, I suppose, is that even though people are told that they have to come, that because the court is the one telling them, it’s not their partner that’s initiating it, that maybe they’ll see…they won’t be suspicious that we’re in cahoots with the partner to try and railroad them or something, and once they are actually introduced to the process that they will see some benefit in it. (CS2 B).

Participants in the second case study were asked whether the requirement that mediators certify as to parties’ “genuine effort” to resolve any differences (see 1.1.2) would be inconsistent with the requirement of neutrality. In response, they tended to downplay the ramifications of the statutory requirement.

I personally think that if somebody has attended mediation, they made a genuine effort. Very straightforward (CS2 C).
I think from my point of view, and I think it’s pretty much a consensus with other practitioners I’ve spoken to, that the bar of whether it’s going to be genuine or not has been set pretty low. When they come into a mediation, a person could be at any stage in their life or the conflict that they’re in. So their ability to be able to participate is pretty much specific to them (CS2 A).

The other difference highlighted here is that while participants in the first case study emphasise the need for flexible process, those in the second emphasise the value in using the distinction between process and content or outcome as a structure to guide their decision making. This can be traced to the comparative rigour of the facilitative models used. The DRC model is a very clearly defined, tightly structured, twelve-step model that mediators are encouraged to move through without adaptation. According to one participant:

In their training the DRC are absolutely zealous about adherence to a twelve-stage process. I appreciate the need for that. I think as mediators become more experienced [we] become more attuned to making decisions as to whether that twelve-stage process is entirely necessary and how that can be modified. Certainly aspects of the twelve-stage process need to be emphasised. Unfortunately, I think that there is an expectation that you will go through the twelve steps almost whether the parties want it or not. As I said, once you have become more comfortable with the process, I certainly think you should be doing more listening to the parties and recognising that you can deviate from the standard process and feel ok about doing that (CS1 B).

The FMS model, on the other hand, is more open-ended and described in the following way:

The model that’s used is quite a broad one. It’s basically just getting people’s opening statements as a way of setting an agenda all in one and then from there, when you have those issues as an agenda item, just going through and exploring them one at a time and then just seeing if they can come up with an
agreement on each one of those points. It’s fairly flexible. It’s a flexible model (CS2 D).

The flexibility of the model used by the FMS appeared to prompt participants in the first case study to emphasise the value of a structured model, while the rigour of the model used by the DRC attracted a call for greater flexibility. Overall, however, it was evident that although participants struggle with intrusions into the content and outcome of the dispute, they support the distinction itself as a useful initial guide to direct their interventions. As one described it,

there is a real value in having a strong structure which people can fall back on when their, if you like, intuitive approach meets obstacles or resistance or things don’t quite go the way you expect them to (CS1 D).

5.3 Summary and implications

The meanings of neutrality held by the participants in this study reflect those in the literature and demonstrate an awareness of inconsistencies between theory and practice. In response to that awareness, participants extend their understanding of neutrality in attempts to fit their practice. These mediators do not “solve” the dilemmas identified in the literature, but they make sense of their practice by adding meaning to the idea of neutrality in ways that allow them to find synergies with other core ideas and principles, particularly those of a client focus and client ownership.

As do scholars in the field, participants offer varying definitions of neutrality, but demonstrate some consistency around the idea of “not taking sides”. Some participants distinguished between neutrality and impartiality, while others treat them as synonymous. Most of the participants acknowledged that absolute neutrality is
unattainable, yet all note its importance as a working principle and its relevance throughout the process. Mixed responses were given to the question of whether the appearance of neutrality is sufficient for practice purposes. One response was that neutrality could be a near reality as a result of professional discipline in focusing attention away from “extraneous thoughts and feelings” (CS2 D). Those extraneous thoughts and feelings were described in terms of the personal influences identified in the literature as negating the neutrality (as impartiality) of the mediator. Participants associate a range of meanings with neutrality, including facilitating opportunities for parties to be heard, adopting non-judgmental attitudes, active listening and leaving ownership of the dispute and its resolution to the parties.

For the participants, impartiality is one definition of neutrality. They demonstrate an understanding of neutrality as impartiality in the narrow sense, and therefore as synonymous with avoiding bias due to conflicts of interest. They also appreciate the difficulty of excluding the impact of their personal values, preferences and preconceptions, signal impartiality in a wide sense. In response to a request to provide freely associated meanings of impartiality and bias they offered a broad range of socio-legal ideas. A number of those responses reflected definitions of neutrality found in the literature, such as even-handedness, not taking sides, and leaving the ownership of the dispute to the parties. Other responses used terms more ambiguously associated with neutrality, such as fairness, reasonableness, and value freedom. A further cluster of ideas extended accepted meanings to include a non-judgmental attitude, a lack of prejudice, detachment, being attentive, engaging in active listening, and facilitating mutual understanding.
The need to remain impartial by limiting the impact of personal values, preferences and preconceptions, whether consciously or unconsciously held, was acknowledged by participants. They recognise the tension in attempting to gauge whether they are absolutely impartial or not. Self-awareness and reflective practice are seen as important tools for attempting to limit the intrusion of mediators’ personal preferences potentially detrimental to parties’ ownership of the dispute and its resolution. Participants do not demonstrate an understanding of reflexive as distinct from reflective practice, but do acknowledge self-examination as integral to their practice. Co-mediation is seen as an important aspect of the models used in both case studies for monitoring and addressing personal intrusions.

Participants see treating the parties equally – described as even-handedness or equidistance in the literature – as another definition of neutrality. Treating the parties equally is associated with establishing a level playing field in which some measures of apparent disadvantage, such as numbers of support persons, language difficulties and physical disability, might be addressed. Creating a level playing field means possibly treating the parties differently, according to their individual needs in order to be fair. Fairness in this context means providing opportunities for both parties to be heard, reflecting procedural rather than substantive fairness. Resisting parties’ attempts to win support from the mediators is seen as consistent with attempts to treat the parties equally and to encourage their ownership of the dispute. Emotional distance or detachment, understood as not getting caught up in the parties’ emotional responses, is seen as enabling a neutral stance, while at the same time enabling mediators to build rapport with parties.
The question of whether it is appropriate to address power imbalances in mediation is understood by the participants as a source of tension. Some participants believe that power imbalances exist in all relationships. Such imbalances are often considered a feature of family, particularly spousal, relationships, but also evident in workplace relationships. While all participants acknowledge power imbalances as an important matter for their practice, there were very few references to the nature of power itself. One participant referred to personal and positional sources of power, and another referred to the shifting nature of power within a mediation session.

The need to remain neutral yet witness, without intervening, in situations in which one party is clearly negotiating at a disadvantage is seen as a dilemma not readily resolved. In response, mediators focus their attention on imbalances played out in the process or dynamics of communication between the parties, rather than the substantive content of that communication. This enables mediators to redress power imbalances by using process interventions, and drawing on the ground rules, steps and process philosophy of the facilitative mediation model. Rather than excluding any intervention, in order to maintain “textbook” neutrality, or failing to be neutral by intervening, participants create a middle ground in which some intervention in some circumstances is possible. Yet, as mentioned earlier, mediators are not entirely comfortable with the limits, however useful, placed on their role in addressing disadvantage. Their responses in these matters tended to trail off in uncertainty and dissatisfaction, and they stressed the importance of intake procedures in vetting disputes unsuitable for mediation, particularly where domestic violence is involved. They also identify the need to stop mediations in circumstances where a power imbalance has surfaced during a session and is a threat to the safety of one party.
The connection between neutrality and the process and content or outcome distinction figures strongly in participants’ responses, consistent with the facilitative models adopted in each case study. The distinction is both explicitly referred to and an underlying assumption framing responses. Descriptions of neutrality offered include explicit reference to the process and content or outcome distinction. One participant defined neutrality in terms of outcome and impartiality in terms of process. Others define a non-judgmental attitude as including a neutral stance as to outcome. Neutrality is identified as relevant throughout the process. Parties’ experience of the process is described as being more important than reaching settlement. The giving of advice is seen as an intrusion into content and, though consistent with the role of conciliator, outside the scope of the mediator’s facilitative role. Delving into content during reality testing, as a procedural step often associated with private sessions, is seen as acceptable, though recognition that this actually involves intervention into content is not acknowledged. Participants alluded to the impact of externally determined standards, particularly in family matters involving children, and to the need to take account of organisational objectives.

They also referred to the distinction between process and content or outcome in discussion of the problems associated with impartiality and even-handedness. Participants see the problem of the intrusion of their own personal values, preferences and preconceptions as an intrusion into the content of the dispute that has an impact on outcomes. Furthermore, they see problems of interventions to address power imbalances between parties occurring when such intervention intrude on the content or outcome of the dispute, rather than being limited to a question of process.
Participants drawn from the first case study emphasised a need for flexibility in the facilitative, twelve-step model adopted by their service rather than a slavish adherence to process. Participants in the second case study emphasised value in using the process and content or outcome distinction as a rule of thumb for navigating the complexity of a given mediation session while maintaining a client-centred practice.

The mediator’s power and authority are seen as grounded in their control of the process of mediation, but not the content or outcome of a dispute. Core values in the role of mediator include neutrality, commitment to the process and a client-centred practice. Core skills for mediators include active listening to enable parties to be heard, the capacity to deal appropriately with emotions, and capacity-building in the form of coaching, or role modelling. Views vary as to the training and qualifications required for mediation practice. Some emphasis is given to knowledge of, and demonstrated or developing skill in the process, but expertise in the content of disputes was also mentioned as useful, though not essential.

Participants extended the connection between neutrality and the process and content or outcome distinction through to a connection with a client focus, or client-centred practice. They see their role as client-focused and therefore consistent with parties’ “ownership” of the dispute and its resolution. They see their practice as neutral because it is client-centred and because it therefore leaves ownership of the dispute and its resolution with the parties. Mediation is seen as both allowing and encouraging parties to take ownership of their disputes, and as empowering them to make their own decisions. Giving primacy to the needs of the parties is seen as integral to a client-centred approach.
These ideas of client-centred practice are intimately linked to another core principle in mediation – that of party self-determination. According to Bush (1992, p.15), party self-determination is a core theoretical principle in mediation. A significant finding of this study is the interrelationship found in participants’ responses between neutrality and a client-centred practice, or the self-determination of the parties. This finding is significantly supported by the recurrence of ideas of active listening, enabling parties to be heard, and a non-judgmental approach related to neutrality and its recognised associated meanings (of impartiality, even-handedness and as related to the process and content or outcome distinction).

The mediators in this study clearly make their own sense of neutrality in practice. Despite expressing some uncertainty and dissatisfaction with putting existing concepts of neutrality into practice, participants adopt neutrality as a working principle. While having an appreciation of the dilemmas enunciated in the literature and encountered in practice, they have a creative capacity to construct meaningful connections between well-established ideas associated with neutrality and other principles of practice. In particular, participants relate their practice of neutrality to party self-determination. The results of this study point to the potential for retaining neutrality as a central principle for practice, with the challenge of shifting its meaning away from a pure or absolute sense towards one which sees its meaning in relation to that of party self-determination. Such a redefinition of neutrality, mediated by a post-modern understanding of power, is advanced in Chapter Six. That reconstruction is then used to ground a theoretical model for the practice of neutrality in mediation.
CHAPTER SIX

TOWARDS A RECONSTRUCTED NEUTRALITY

6.0 INTRODUCTION

The aim of this chapter is to examine the findings reported in Chapter Five in the light of broader debate about mediation theory and practice. The discussion draws on the three central findings of the study:

1. the adoption of neutrality as a working principle by mediators in the two case studies, despite their awareness of problems in translating it into practice;
2. the emphasis placed by participants on the principles of party self-determination in their attempts to deal with the dilemmas of neutrality; and
3. the combination of legal and therapeutic/community themes in participants’ understanding of neutrality.

Based on these findings, this chapter presents a reconstruction of neutrality that redefines mediator neutrality as a concept having meaning not of itself but in relation to that of party self-determination, mediated by a postmodern idea of power. The reconstruction is grounded in a concept of relationship, rejecting the process and content or outcome distinction central to problem-solving models of mediation. A model for neutrality in mediation is proposed using a systems analysis to frame a contextualised understanding of neutrality in mediation. A systems framework uses both a micro analysis, which focuses on the dynamics of mediation sessions, and a macro analysis, which places mediation within a broader context of interacting social systems.
6.1 RECONSTRUCTING THE CONCEPT OF NEUTRALITY

The most significant finding of this study is the emphasis that participants place on the principle of party self-determination in their attempts to deal with the dilemmas of mediator 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 for the presence or absence of neutrality, it is possible to reformulate it 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 that of party self-determination. Redefined, the two concepts are no longer absolutes but interactive ideas that have significance in relation to one another. The necessity of defining and realising either principle in an absolute sense is thereby avoided.

Examining the responses of participants in the light of theoretical discussions about mediation and in particular mediator power, offers an opportunity to reconstruct, rather than abandon, the concept of neutrality for practice. Based on the study’s findings, I develop the following arguments:

- that the meaning of neutrality can be constructed in relation to that of self-determination;
- that a relational understanding of neutrality and self-determination can be grounded in the relationship between the mediators and the parties;
- that in the context of the relationship between mediators and parties, the distinction between process and content in mediation is inadequate to determine the boundaries of the mediator’s role;
that the structuralist concept of power in mediation is inadequate to deal with the problems of both imbalances of power between the parties and the power exercised by the mediator;

that a postmodern idea of power, drawing on the work of Foucault, can be a mediating force between neutrality (depicting limits to the mediator/s exercise of power) and self-determination (depicting a maximising of the parties’ exercise of power); and

that the proper exercise of mediator power coincides with the “other focus” of the mediator, and hence mediator neutrality is understood quintessentially as the “other focus” of the mediator in relation to the parties.

6.1.1 Neutrality and self-determination

The responses of mediators who participated in this study echo assertions found in the literature, discussed in Chapter One, that the intrusion of some measure of mediators’ values and preferences is inevitable and that as a result, absolute neutrality is not possible. Participants identified the limiting of that intrusion as a dimension of neutrality as impartiality in a wide sense. They respond to the dilemma by moving between ideas that depict a locus of attention on the mediator and those that shift the locus to the parties. Participants described techniques of self-awareness and self-reflection, and hence a focus on themselves, as tools with which to limit the impact of their personal preferences. They further described a dynamic process of introspection and outward attention. In shifting attention away from their own personal responses, they described a capacity to pay primary attention to the needs of the parties, the parties’ attempts to move towards resolution of the dispute and the parties’ ultimate authority in coming to a decision. Rather than attempting to be “neutral” in an
absolute sense, mediators incorporate an understanding of both the limitations of their role and the primacy of the parties’ role (their self–determination), in making sense of neutrality in practice.

Party self-determination has been described as a primary objective of mediation (Coben, 2004, p.65). The Australian literature acknowledges self-determination as a core value of practice (Boulle, 2005, pp. 65-7; Bagshaw, 1995, p. 3), though it is more prominent in the American context (see Coben, 2004; Welsh, 2001). According to the Australian National Mediation Accreditation System, it is now clearly identified as a principle guiding practice. In the new Practice Standards, mediation is described, in clause 2(6), as: “essentially a process that maximizes the self determination of the participants”. A legal concept with similar meaning used in the context of alternative dispute resolution is consensuality. Astor refers to this principle in her argument for replacing neutrality with the principle of maximising party control (Astor, 2000b, p. 146; 2007, p. 235). In recent work depicting mediation as an emergent profession, Field (2007, p. 181) argues 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”.

Like neutrality, party self-determination is not unequivocally defined (Coben, 2004, p. 72) and it is associated with a range of meaning (Welsh, 2001, pp. 15-8). Lichtenstein (2000, p. 21) defines self-determination as “the individual’s right and ability to make decisions and take actions to follow those decisions through.” Coben (2004, p. 66) states that self-determination is just as problematic a concept for mediation as
neutrality. He argues that reliance on mediator neutrality and party self-determination as principles of practice “has inevitably left us with a process routinely characterized by mediator manipulation and deception”. Party self-determination, like neutrality, is not achievable in an absolute sense. There are at least three reasons for this. First, assisting parties to achieve their own outcomes contradicts a pure or absolute form of self-determination. Second, since mediators’ interventions into either process or content influence the course of a dispute, parties can never be self-determining in an absolute sense. Furthermore, if self-determination were possible, only one of the two parties could be absolutely self-determining. In reality, 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.

A limit to self-determination inherent in the relationship between the parties is reflected in core concepts associated with differing models of mediation. Central to problem-solving or settlement models, and the model used by the services under study here, are notions of compromise leading to agreement (Boulle, 2005, pp. 62, 92; Wolski, 1994, p. 218). In narrative models, core ideas include social justice (Winslade and Monk, 2000, p. 100; Winslade, Monk and Cotter, 1998, p. 25) and participation (Cobb, 1993, p. 255). Central to the transformative model of mediation are the dual aims of empowerment and recognition (Bush & Folger, 2005, p. 14; Bush, 1989, p. 269; Dewdney, 2001, p. 21; Brenner, Steven and Serventy, 2000, p. 156). Each of these core concepts points to the relationship between parties and an inherent limit to realising the interests of only one party, given that relationship.
Understanding neutrality and self-determination as related ideas is not new. Boulle (2005, p. 67), notes for example that “mediator neutrality is the other side of the self-determination principle”; and Astor (2000b, p. 145) argues that “party control is, in a sense, the other side of the coin of mediator neutrality”. What is different in this reconstruction is the understanding of the two concepts as relational in the sense that their meaning derives from that relationship. Rather than seeing each concept as having a separate, discrete meaning and attempting to relate them to each other, here, I construct their meaning as interdependent (at least in the context of mediation). The meanings of mediator neutrality and party self-determination are interdependent because each is grounded in the relationship between mediator and parties. Without that relationship, the concepts have no meaning for mediation.

6.1.2 Grounding neutrality and self-determination in “relationship”

In mediation, neutrality and party self-determination only make sense when viewed in context, that is, in the context of the relationship between the mediator/s and the parties and between the parties themselves. Participants in this study described parties as self-determining, vis-à-vis mediators, to the extent that the focus of attention, energy and effort in mediation is on the parties’ dispute and their attempts to resolve it, not on the personal interests, experiences and predilections of mediators. “Being impartial” means more than not having a vested interest (impartiality in a narrow sense), or personal view that affects the process (impartiality in a wide sense), it also means acting to facilitate the parties’ chosen outcomes. Hence, the mediators understand impartiality as being not merely about them (their lack of vested interest or personal view) but also about the parties (and their chosen outcomes). With this
understanding, we can construct a meaning of neutrality in relation to that of self-determination, rather than as an absolute concept. Rather than conceptualising neutrality as an attribute of the mediator and self-determination as an attribute of the parties, we can ground both concepts in the relationship between mediators and parties, and give both concepts meaning in the context of that relationship.

“Relationship” is given its ordinary meaning here. The Concise Oxford dictionary (1976) defines it as a state of being related, and “relation” as what one person or thing has to do with another – the way in which one stands or is related to another, and as a kind of connection or correspondence. A relational understanding of social processes is central to a social constructionist ontology, and is a core premise of transformative and narrative models of mediation practice. Narrative models focus on relational meaning creation, while the transformative model focuses on relational conflict transformation. Relational understandings take as their premise the fact that human beings act in relationship to one another and their environments. The transformative model offers a useful illustration of a relational perspective, which is premised on the fact of relationships between participants in mediation.

The relational ontology of a transformative approach posits interconnection or interdependence as a basic part of human existence. According to Bush and Folger (2005, p. 36) a relational ontology recognises a “dual consciousness, of simultaneous separateness and connection, as inherent in human beings”. Brenner, Segal and Serventy (2000, p. 157) describe the orientation as relational rather than “relationship-oriented”, arguing that the aim of the model is to improve the quality of the parties’ conversation rather than to resolve problems in the relationship between the parties.
The distinction is useful in pointing to an analytical difference between a relational understanding of social processes and the fact of relationships between social actors, which, though different, are intimately connected. Understanding concepts and processes as relational enables us to appreciate the interdependence of meaning creation both between humans, as they make sense of themselves and their environments, and between the concepts they create as representations of lived experience. This relational understanding is necessarily grounded in and reflective of the fact that human beings act in relationship with others and their environments. But while grounded in relationships, relational understandings are not necessarily about the characteristics or qualities of, or change in those relationships. A relational understanding is a basic assumption of a particular worldview. Hence, the ideas of empowerment and recognition in the transformative model represent relational concepts grounded in the fact of relationships between parties, and between them and mediators, but are not necessarily about “improvement” of those relationships. That the aims of the model suggest change in a particular direction is a function of the explicit value dimension of the approach.

Other ideas can be substituted for empowerment and recognition to represent relational concepts grounded in the relationships between actors in mediation. For example, it could be claimed that the aims of mediation are fairness and social justice. Fairness might represent fairness for the individual as defined by that individual, much as empowerment means optimising party autonomy. Social justice would represent fairness as it exists in a social context. The concepts could be understood as relational if fairness for the individual is recognised as only making sense within the constraints of social justice, since an absolute fairness for each individual as defined
by them is impossible in a social context. Fairness and social justice or empowerment and recognition are, in this analysis, relational concepts and also values, given their explicit character as values, but also because, from a postmodern perspective, “values” and “facts” though analytically distinguishable, are never separate.

Understanding neutrality and party self-determination as relational concepts means grounding understanding in the fact of the relationships between actors. At the same time, neutrality and party self-determination together represent an explicit value dimension of practice, since together these concepts define the scope of the relationships between actors. As core principles of practice, together they determine the scope of these relationships irrespective of the model of mediation employed. The interaction between mediators and parties has three dimensions – the mediator’s relationship towards each (or both) parties; the role the mediator plays between the parties; and the parties’ relationship towards each other. Shifting the emphasis from the process and content distinction as structuring the dynamics of mediation to the relationships between players offers a more flexible understanding of practice, since relationships are shifting and fluid by nature. Understanding neutrality in mediation as grounded in the relationship between players does not require abandonment of the process and content distinction, but sees that distinction as a useful practice tool rather than an absolute principle for practice. It allows understanding of the inherent complexity of those relationships, and appreciation of similarities and differences according to the identities of participants and contexts in which they interact.

The need to move away from an analysis that grounds practice in the process and content or outcome distinction is illustrated by the responses of mediators in the study.
to the problems associated with neutrality as even-handedness. Particular focus is
given in the literature to the place of the mediator between the parties in the idea of
even-handedness, or treating the parties equally. The dilemma of even-handedness
(that it can lead to unequal outcomes), focuses attention on the parties’ relationships
with each other. The problem of neutrality in this context is identified as the problem
of redressing imbalances of power between them. Doing this 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 of my study indicate that in this
complex web of relationships, and where issues of power were raised, mediators
cannot rely on the distinction between process and content since it is unclear and
cannot guide their interventions satisfactorily.

In the face of perceived power imbalances, mediators in this study attempted to
describe their role as limited to process interventions, but they experience
considerable uncertainty and tension in adapting to that limitation. Participants are
uncomfortable and dissatisfied with outcomes where one party’s potential autonomy
has been limited by inadequate knowledge, misinformation, or apparent gender and
cultural differences. They express uncertainty and confusion where their
interventions, though focused on the needs of the parties, meet competing demands
from the parties. The process and content or outcome distinction provides a way
forward, but not one that participants find ultimately satisfying. The inadequacy of the
distinction between process and content for grounding the concept of neutrality was
also evident in mediators’ use of private sessions and “reality testing” to intrude on
the content of a dispute. These phases in the mediation encounter are used to probe
and test the views of parties according to mediators’ assessments of the content of
negotiations, despite the latter’s adherence to the rhetoric of the process and content or outcome distinction.

The distinction between process and content is a useful analytical tool insofar 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, or between the knowledge and skills that together make up professional expertise. Limits of the usefulness of the distinction 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 experience the ebb and flow of mediation as it occurs. They consequently experience the interweaving and synthesis of process and content as a session plays out and ultimately reaches an outcome. Consistent with the limits of the process and content or outcome distinction, participants in the first case study stressed the need for greater flexibility in applying the facilitative model adopted by their service. Consistent with the usefulness of the distinction as an analytical tool, those in the second case study emphasised the process and content or outcome distinction as an important rule of thumb, a beginning point in assessing the need for intervention.

The neutral role of the mediator can be more flexibly, fully and sensibly understood when not delineated in terms of process vs. content but instead understood in terms the fact and scope of relationships with the parties. Importantly, this reframing enables explicit and open consideration of the mediator’s exercise of power in
mediation as an inherent characteristic of his or her relationship with the parties and as a parameter of the relationship between mediator and parties.

6.1.3 From process and content or outcome to 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 both services that have been studied here. The distinction between process and content or outcome on which this model relies represents another binary construction that, while attempting to render mediation meaningful, restricts our understanding because it becomes a limiting lens through which practice is viewed. Interventions are conceived as matters of either 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” (Cobb & Rifkin, 1991a, p. 39). The same limiting logic applies when party self-determination is seen as infringed when mediators intrude into the content of a dispute. The grounding of this principle in the process and content distinction is evident in clause 2(5) of the National Practice Standards, which states: “The principle of self determination requires that mediation processes be non-directive as to content.”

As identified in Chapter One (1.4.3; 1.5.3), there is considerable scholarly critique of the idea that mediators have no impact upon the content and outcome of a mediated dispute. Recognition of the impact of the mediator on content and outcome is logically implicated in the mediator’s exercise of power in mediation. Mediators in this study made explicit reference to power in relation to the issue of balancing power.
between the parties. Participants’ recognition of their own power is notably more implicit than explicit. Implicitly, they referred to their own power in relation to both parties by acknowledging their capacity to influence the course of the mediation, to intrude on content, to take “ownership” of the dispute and to facilitate the parties’ self-determination, whether these interventions are viewed positively or negatively. Participants made few comments on the nature of power or its relevance to their practice beyond the matter of balancing power between the parties.

Analyses of power in mediation were considered earlier, in Chapter One (see 1.5.3). Discussion of mediator power in the literature has significantly mirrored that of neutrality by referring to the process and content or 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” (Haynes, 1992, p. 23). The relative power of the parties was examined with the process and content distinction in mind, illustrated by the assertion that mediators’ “process(ing) behavior, by its timing and content, can be a deliberate effort to shape the agreement by changing the parties’ relative power” (Bernard et al, 1984, p. 62). Mediator’s exercise of their power has also been identified as a potential problem for the parties’ control of content and outcomes. Boskey (1994, p. 368) acknowledges the mediator’s power and its impact upon party autonomy, and asks what compromises to party autonomy might represent a fair use of mediator power. Fisher (2001, p. 201) argues that given the power of the mediator, his or her recommendations may carry considerable authority in the eyes of the parties and run counter to the latter’s self-determination.
Analyses of power in mediation have tended to rest on an idea of power as something measurable and inherently coercive. As Lichtenstein (2000, p. 25) observes “power is traditionally defined as the ability to get others to do what you want.” Such a view is consistent with structuralist perspectives of social processes, according to which people are said to have more or less power, power can be exercised over people and it adheres in social structures that reproduce inequalities of power. These analyses, while instructive about sources of mediator power, have tended to reinforce limiting features of the distinction between process and content or outcome. However, a focus on understanding postmodern ideas of mediator power offers a useful way to reframe the neutrality debate.

The possibility of neutrality in an absolute sense is consistent with a structuralist approach to power but not a postmodern one. Postmodernism accounts of mediation rely primarily on the work of Foucault, for whom power consists in the relations that constitute the practices of everyday life rather than a “thing” possessed by some and wielded against others (McHoul & Grace, 1993, p. 7). For Foucault (1979, p. 93), power is a productive force:

power is everywhere; not because it embraces everything but because it comes from everywhere…Power comes from below…there is no binary and all encompassing opposition between ruler and ruled at the root of power relations, and serving as a general matrix – no such duality extending from the top down and reacting on more and more limited groups to the depth of the social body.

According to Astor and Chinkin (2003, pp. 148-9) power in a postmodern sense is not “a tool wielded by one person against another, but…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”. It is “fluid, elusive and changing” (Astor & Chinkin, 2002, p. 148). According to Foucault (1980, p. 98), power

must be analysed as something which circulates, or rather as something that only functions in the form of a chain. Power is employed and exercised through a net-like organisation…individuals are the vehicles of power, not its points of application.

Seeing a connection between mediator neutrality and the mediator’s exercise of power is not new (Astor and Chinkin, 2002, p.146-57). However, neutrality has generally been associated with an absence mediator power or as inconsistent with its exercise rather than being viewed, as here, as delimited by a proper exercise of mediator power. This aspect of an alternative construction of neutrality, which relies upon a postmodern idea of power, is explicated below.

6.1.4 Mediator neutrality, party self-determination and a postmodern idea of power

The results of this study point to a reconstruction of mediator neutrality in relation to party self-determination mediated by a postmodern definition of power. Power in mediation is understood here as a concept that has meaning in relation to mediator neutrality and party self-determination and at the same time gives these concepts meaning in relation to each other. A discourse for mapping the interrelationship of these three concepts is advanced. “Discourse” is used here in a postmodern sense of “whatever constrains – but also enables – writing, speaking and thinking within…specific historical limits” (McHoul & Grace, 1993, p.31; emphasis in original omitted). A postmodern idea of power is combined in this discourse with a narrative framing of the interaction between players in a mediation session.
Using a Foucauldian definition of power, mediation can be constructed as an interaction between players – mediators and parties. 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 signalling the central plot. In the setting of the mediation, the mediator exercises power in relation to the parties, individually and collectively. Each party exercises power in relation to the other party and the mediator; power may be exercised by one party in relation to the other or one party in relation to the mediator. In a postmodern sense, however, power is not located in any fixed sense, but rather exists in motion and is reflected in the players’ capacities to interact. Neutrality is construed as limiting the mediators’ exercise of power. Self-determination is defined as the optimal exercise of the parties’ power, individually and collectively. The limits imposed by neutrality and party self-determination are contextual and situated in character. Importantly, the limits of mediator power incorporate self-imposed limits consistent with ideas about the legitimate scope of mediator influence given a commitment to party self-determinism.

Context refers to factors external to the mediation but which impinge on it, including the legislative, professional and organisational expectations of the mediator and of mediation. Significantly, they translate to questions of fairness and professional intervention, and are introduced below in a redefinition of even-handedness. Situated limits to neutrality and party self-determination are those that derive from situated knowledges, or ways of viewing the world. These translate to questions of the values, preferences and preconceptions of mediators, whether entirely personal or related to
professional, organisational and other environmental cultures. The impact of situated knowledges is introduced below in the discussion of a reconstructed impartiality. Both context and situatedness, in a postmodern neutrality, are also further later examined as isolated issues.

The advantages of the discourse charted above 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 neutrality and self-determination in the sub-text of the mediation;

3. it adopts a postmodern definition of power as fluid and changing, and enables ideas of neutrality and party self-determination to be seen as fluid and changing; and

4. it sees neutrality and party self-determination not as absolutes but as open concepts, the character of which is determined by the intersection of a number of contexts in any given mediation session.

Mediator neutrality and party self-determination are related by and through a relational construction of power. Mediator neutrality is about the mediator’s exercise of power, specifically as it is limited by a commitment to parties’ self-determination. A party’s self-determination is about his or her exercise of power, which is limited by the relational context of mediation itself. The model for the practice of mediation advanced below redefines neutrality, impartiality and even-handedness, by grounding their meanings in the relationship between mediators and parties; it explores further relationships, using a systems analysis, as contexts within which mediation occurs.
6.2 A MODEL FOR PRACTICING NEUTRALITY: NEUTRALITY AS AN “OTHER FOCUS”

Central to the proposed model and detailed in the following discussion is the thesis that the relationship between mediator and parties is defined by the “other focus” of the mediator. In the relationship, the mediator’s exercise of power and self is bounded by a predetermined role marked by this “other focus”. The input and impact of the mediator is principled, rather than relying on the individual personality of the mediator. The personality of the mediator is subjugated to the task of the mediation, which is, foremost, enablement of the self-determination of the parties. The “other focus” of the mediator is demonstrated by the findings of this study, which emphasise the client-centred nature of practice. The neutrality of the mediator is the other side of party self-determination, as earlier described by Boulle and Astor, but it also a precondition of party self-determination in the mediation context. As such, mediator neutrality is synonymous with limits to the exercise of mediator power and the limits are determined by the role of the mediator as “other focussed”.

The model provides a framework for putting a relational construction of neutrality into practice. It emphasises the centrality of the relationship between mediator and parties and aims to articulate reconstructed meanings of neutrality as impartiality and even-handedness, by drawing on the legal and therapeutic themes found in the responses of the mediators in this study. A systems analysis is used to organise and trace the complexity of the relational contexts.

6.2.1 A systems analysis
A systems analysis is used here to understand the relationship between mediator and parties, the meanings of neutrality in that relationship and the relationship of mediation to broader social processes. Systems thinking, or systems theory, are rooted in the functionalist sociology of Talcott Parsons, and his grand theory of the “social system” (Seidman, 1994, pp. 64-73). Systems theory was used in therapeutic social work in the 1960s to map relationships within families, and interactions between individuals, families and their environments. It has been heavily criticised by radical social work theorists for allegedly ignoring broader social, political and economic structures, within which power is said to operate to produce disadvantage (Martin, 2003, p. 20).

Where used as a biological metaphor, systems theory posits states of equilibrium and disequilibrium within systems. Conflict is said to cause disequilibrium and conflict resolution allows the system to return to an optimal functional state of homeostasis. Conflict is unmet need and its resolution is an imperative of the system. Winslade and Monk (2000, p. 34) critique this biological metaphor as an underlying assumption of problem-solving mediation. Systems theory, however, remains a significant theoretical framework for family therapy and has been applied by scholars and practitioners to mediation practice (see for example, Regina, 2000). It has furthermore seen resurgence, with modification, as critical systems theory in sociology (see Flood, 1990; Flood & Romm, 1996).

Systems analysis – rather than systems theory – is also extensively used in applied contexts such as industrial relations (see Sappey et al, 2009, pp. 8-9) and alternative dispute resolution itself, of which mediation forms a large part (see Sourdin, 2005, pp.
For the model proposed here, a systems analysis is valuable because it incorporates an assumption of multiple, intersecting causes of an event, situation or experience. It concedes cause and effect in social reality, but acknowledges the multiplicity of causes and originality of effects. Importantly for this thesis, it enables a contextual and situated understanding of meaning and events. As with any analytical scheme, a systems analysis is artificial. It approximates experience; it does not capture it. It is an analytical tool and no more, but a useful one in helping to make sense of the myriad factors that combine in a mediation encounter. A systems framework is combined here with a critical interpretive perspective in order to make sense of a reconstructed neutrality for practice.

The diagram overleaf at Figure 6.1 depicts the model proposed. The mediator and parties are shown in relation to one another – the mediator in relation to each party and both parties, and the parties in relation to one another. The elliptical circles depict contexts for the identities of each party and the mediator – the historical, cultural, gender-specific, professional and other biases that actors in a mediation session bring to the encounter. The mediation itself sits in an institutional context of intersecting influences from professional and organisational cultures, and regulatory contexts. The diagram shows a system with its own life and multifaceted influences. Each mediation encounter has its own energy, its own synergies, its own culmination of varying traditions and immediate influences. In reality, the system depicted is shifting and its influences nuanced. It represents no more than a means of thinking about the intersecting relationships and contexts of mediation encounters. It does not explain those relationships, but is a framework in which those relationships can be give
meaning. In the discussion that follows, a relational understanding of neutrality is applied to its associated meanings of impartiality and even-handedness.

6.2.2 Neutrality as impartiality: a reconstruction

Two definitions of impartiality were identified in Chapter One (see 1.4.1). In a narrow sense, impartiality of the mediator means an absence of pre-existing knowledge of or association with the parties and their dispute, and a lack of vested interest in the outcome of the dispute. In a wide sense, impartiality excludes influence of the mediator’s personal values, preferences and preconceptions, whether held consciously or unconsciously. Both definitions of impartiality address the impact of mediator bias, but according to different sources and with different implications for practice.

The concept of bias and the necessity of avoiding it are central to the principles of natural justice that guide common law systems of adjudication (Field, 1999, p. 247). Bias is also a central issue in legal fiduciary relationships. Fiduciary relationships in law are relationships of trust and confidence into which well established legal duties are implied (Hanrahan, Ramsey & Stapledon, 2008, p. 196). There are differences between the application of the bias rule in the contexts of adjudication and fiduciary relationships. While arguments about mediator neutrality in the sense of limiting bias can be derived from an application of the bias rule in adjudication (Astor 2007, p. 223), a better approach is to ground mediator neutrality in the legal concept of a fiduciary relationship. This argument is developed in the following two sections. In the first, the limits of the bias rule in adjudication for mediation are related to the process and content or outcome distinction. In the second section, it is argued that
issues of bias and the impartiality of the mediator can be grounded in the fiduciary relationship between mediator and parties.

6.2.2.1 Impartiality and the bias rule

The legal principle underpinning the bias rule in adjudication is enunciated by the High Court in *Livesey v New South Wales Bar Association* (1983):

> The principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it (pp. 293-4).

The similarity for adjudication and mediation is the requirement of “an impartial and unprejudiced mind”. In *Webb v The Queen* (1994) Deane J identifies four circumstances in which an adjudicator would be disqualified by reason of bias: where the decision-maker has a vested interest in the outcome of proceedings, where actual or potential bias is evident, where prior association gives rise to an apprehension of bias, or where knowledge of some incidental matter gives rise to an apprehension of bias. These instances of bias largely correspond to those relevant to mediation, but differences can be traced to differences in the roles of adjudicators and mediators.

The exclusion of bias, in whatever form and according to whatever source, is required of judges because, according to the High Court in *R v Watson; Ex parte Armstrong* (1976), “if fair minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in that decision” (p. 263). In a modernist conception of adjudication, the judge is said to remain impartial even when deciding in favour of one party over the other. He or she is said to retain an impartial
stance on the assumption that the application of legal principles in deciding a case is a rational technique untainted by the personal predispositions of the judge. In mediation, however, there is no recourse to a body of legal principle to mask the intrusion of the personal preconceptions, prejudices and interests of the mediator. Hence the problem of impartiality in a wide sense is not merely one of taking sides but also the potential intrusion of the mediator as an authoritative voice in mediation, extending from process to content, whether recognised as such or not.

As mediators do not come to decisions about the outcome of disputes as judges do, the exclusion of bias does not have the same purpose. In mediation, the locus of attention for an “impartial and unprejudiced mind” has been the process over which the mediator is said to be in control, not the content of the dispute, because mediators are said to have no role in intervening in content. Hence impartiality in the narrow sense of absence of vested interest, prior knowledge or association, has developed for mediation practice as a requirement to avoid intrusion into content, and has been treated as a requirement of process, a procedural necessity. Impartiality in a wide sense is not readily dealt with in mediation because it is not linked to an intrusion into content by means of the application of legal principle leading to a judgment. Rather, in mediation, impartiality in a wide sense is problematic because in theory the process and content or outcome distinction makes it irrelevant and unnecessary while at the same time practice points to it as problematic.

The exclusion of bias, according to the bias rule in adjudication, includes actual and apparent bias. A party to a dispute may challenge the impartiality of a judge if he or she has a “reasonable apprehension” of prejudice, partiality or prejudgment. The test
of reasonable apprehension is determined objectively according to the “hypothetical reasonable and fair-minded but informed observer” (*Aussie Airlines v Australian Airlines* (1996) per Merkel J, p. 763). An apprehension of bias may be engendered by any of the four situations identified by Deane J in *Webb’s Case*. In relation to a wide definition of impartiality, in the context of mediation, a reasonable apprehension of bias might be raised in the face of the particular conduct of the mediator, including statements made in the course of a session, or where knowledge of prejudicial information held by the mediator becomes evident. However, more significantly, a reasonable apprehension of bias could be argued to exist due to the mere presence of the mediator, given acknowledgement of the inevitability of the mediator having some impact on the content of the dispute. In the light of the process and content or outcome distinction in mediation, the expectation of a lack of bias equates an “impartial and unprejudiced mind” with a mind devoid of content, at least as far as “content” relates to knowledge of the dispute at hand (knowledge that in any other way would impinge on the dispute) and one limited to a knowledge of process of the mediation encounter (the content of the process at hand).

The bias rule is one of two rules described as central to natural justice (procedural fairness). The other rule is that parties must be given adequate notice and opportunity to be heard (*Gas & Fuel Corporation of Victoria v Wood Hall* [1978]). Fairness in treatment of each party and between parties is an element of Boulle’s definition of impartiality (the third meaning of neutrality identified in his analysis). According to him, impartiality means that a mediator is neutral in the sense that they conduct the process fairly, even-handedly and without bias towards either party. Boulle’s (2005, pp. 32-3) three meanings of neutrality, as disinterestedness, independence and
impartiality, all reflect the legal concept of natural justice or procedural fairness. Further, in their connection with procedural fairness, all these meanings emphasise an understanding of neutrality as tied to procedural or process aspects of mediation. There is, therefore, an underlying assumption, in the reliance on principles of procedural fairness, that mediators are responsible for the process but not the content or outcome of mediation. The question remains as to the intrusion of the mediator’s conscious and unconscious “content” into the content of the mediation.

The bias rule in adjudication, as it equates with a narrow definition of impartiality and Boulle’s categories of disinterestedness and independence, can be usefully applied to the practice of mediation, but its application is limited by its inability to deal with the problems associated with impartiality in a wide sense. The rule enables identification of potential sources of bias which may interfere not with the mediator’s capacity to decide a dispute in contrast with the role of a judge, but with the parties’ capacities to be self-determining. Bias due to a vested interest or prior knowledge of or association with the parties has the potential to interfere with the latter’s own decision-making since it has the potential to colour the mediator’s interaction with the parties. However, the rule has limited application to the problem of impartiality in a wide sense. The question remains how to deal with the conscious and unconscious “prejudice, partiality or prejudgment” that mediators inevitably bring to the process and which must inevitably impact upon the process.

**6.2.2.2 Impartiality and fiduciary relationships**

An alternative to the bias rule in adjudication, which enables a consideration of the impact of the mediator on the mediation encounter, can be found in the legal concept
of fiduciary relationship. Grounding the interaction in mediation in a concept of relationship suggests a reframing of the bias rule within an analogous legal relationship – that of a fiduciary. A fiduciary exercises power within the limits imposed by duties of loyalty, good faith and avoidance of conflicts of interest. Power is exercised by the fiduciary on behalf of others who are in a position of dependence. “A fiduciary is a person who is expected to act in the interests of another person. Fiduciaries cannot use their knowledge or position to benefit themselves rather than the person on whose behalf the fiduciary is required to act” (Hanrahan, Ramsay & Stapledon, 2008, p. 196).

In Australia, certain relationships are recognised in law as fiduciary, including between director and company, between partner, trustee and beneficiary, agent and principal, employee and employer, and solicitor and client (Bhojani, 2003, p. 22). Fiduciary relationships typically apply to professional relationships, though not all of these are recognised by the Courts as fiduciary. In Breen v Williams (1996) the High Court held that a doctor–patient relationship is not automatically a fiduciary one, although duties of a fiduciary nature may be imposed on a doctor. Similarly, though a solicitor–client relationship is of a fiduciary nature, fiduciary obligations do not extend over the entire relationship (Bhojani, 2003, p. 22).

The precise preconditions of a fiduciary relationship are not clearly stated in law. As yet there is no precise or comprehensive definition of the circumstances in which a person is constituted as a fiduciary in his or her relations with another (Breen v. Williams (1996)). However, there are broad indicia. Fiduciary relationships have been said to arise in circumstances where one party has an ascendancy or influence over
another, or where one party is in a position of dependence or trust in relation to another (Bhojani, 2003, p. 22). A broad test is articulated by the High Court in \textit{Hospital Products Ltd v United States Surgical Corp} (1984), according to which, a fiduciary relationship arises where a putative fiduciary gives an undertaking or agrees to act for or on behalf of or in the interests of another person, in the exercise of power or discretion, which will affect in a legal or practical sense the interest of that other person.

The elements of the test from the \textit{Hospital Products Case} can be applied to mediation and the relationship between mediator and parties. The principle of party self-determination and the mediator’s role in facilitating that self-determination is an undertaking to act for, or on behalf of, the interests of other persons, namely the parties. The requirement to act in the interests of another in the exercise of power is a feature of the mediator’s relationship with the parties. This element, when applied to mediation, enables a concrete acknowledgment of the mediator’s exercise of power in relation to the parties. Furthermore, applying this fiduciary requirement to the exercise of mediator power provides a clear principle for the exercise of that power, namely, that it be exercised in the interests of parties and not the mediator. The mediator’s exercise of power will affect the interests of parties at least in a practical sense and hence satisfy the final requirement. Agreements in mediation may or may not be legally enforceable, but practical implications flow from the parties’ experience of mediation and any agreements reached.

Cases dealing with questions of breach of fiduciary duty indicate that the test in the \textit{Hospital Products Case} has tended to be applied with a narrowing effect rather than
offering a broad basis for inclusion. Interpretation of its meaning and application to particular situations suggests that the relevant undertaking or agreement require the putative fiduciary to act as a representative of the other party (Bhojani, 2003, p. 22). This is generally not true of mediators. The undertaking or agreement of a fiduciary is also likely to require the giving of advice plus the making of a recommendation upon which the other party relies (Lyons, 2001, p. 24). Highlighting the giving of advice as part of a fiduciary relationship as applied to mediation is useful because it is consistent with the views of Fisher (2001) and Wade (1998), discussed in Chapter One (at 1.5.2), who argue that mediators do give advice although the practice is often not acknowledged and may occur covertly, if unintentionally. The additional requirement, of a recommendation to the affected party, could encompass evaluative models of mediation but would not readily extend to other models.

Establishing that the relationship between mediator and parties is a fiduciary relationship in law might prove difficult in an action for breach. Nonetheless, elements of that relationship have significance for mediation. The focus on a dynamic of interaction, characterised as a relationship within which mediators undertake obligations in relation to the parties, has a greater application to practice than a forced analogy with adjudication and the operation of the bias rule in that context. The analogy is forced because the rule in adjudication operates to remove bias from the decision-making of judges and arbitrators – a type of decision-making that does not occur in mediation. Mediators make judgments and decisions about their interventions but do not decide the outcome of a dispute as do judges and arbitrators. Significant features of a fiduciary relationship which fit the context of mediation practice are the work of fiduciaries/mediators in acting in the best interests of another, the parties;
acknowledgement of the fiduciary’s/mediator’s exercise of power (the fact of that exercise); the potential to set limits to mediators’ exercise of power by implying duties into the mediation relationship (limiting the boundaries of a proper exercise of power) as implied into fiduciary relationships; acknowledgement of the impact of fiduciaries/mediators on content, whether in the form of advice or otherwise; and a strong focus on accountability with acknowledgement of the impact of fiduciaries/mediators on the practical outcomes. Importantly for this discussion, the issue of bias within the relationship between mediator and parties can be specifically addressed where that relationship is characterised as a fiduciary one.

Bias is addressed in fiduciary relationships by the duty to avoid conflicts of interest. There are several duties implied by law into fiduciary relationships (including the duty to act in good faith in the best interests of the other, to act for a proper purpose, to avoid conflict of interest, to retain discretions and to act with reasonable care and diligence). Those of particular relevance for this discussion are the duties to act in the best interests of the other and to avoid conflicts of interest. Bias can be constructed as a situation or circumstance in which the interests of the other, which have priority, conflict with the personal interests of the fiduciary. In such circumstances, and similar to the bias rule in adjudication, the fiduciary is required to disclose any actual or apparent conflict of interest, thereby giving the other the opportunity to proceed with or without the input of the fiduciary. The parties’ best interests both individually and collectively encompass access to procedural fairness. Hence, a concept of fiduciary relationship applied to that between mediator and parties enables us to address the question of impartiality in a narrow sense, putting primary focus on process rather than content. In this sense, it does not offer any more than the bias rule in
adjudication, but it also enables impartiality in a wide sense to be considered because the best interests of the parties can add matters of substantive content to the procedural or process requirements. What those best interests are in any particular case will generally be determined by the principle of party self-determination, qualified by statutory requirements and other legitimised contextual factors. It can be noted here that the concept of fiduciary relationship permits acknowledgement of mediators’ intrusion into content, which is consistent with the scholarly critique of the process and content or outcome distinction discussed in Chapter One (at 1.4.3). While the nature of the substantive content is variable, the question of what to do about the intrusion of the personal prejudices, partiality and agendas of the mediator is constant. However, while the concept of fiduciary relationship acknowledges the mediator’s intrusion into the content of a dispute and its outcome, it does not necessarily tell us what to do about that intrusion. For consideration of that question, discussion now turns to an examination of therapeutic relationships.

6.2.2.3 Impartiality and therapeutic relationships

In the context of her argument for an expanded neutrality, discussed in Chapter Two (at 2.3), Taylor (1997, p. 220) notes that in therapeutic relationships it is acknowledged “that there is no such thing as total impartiality, neutrality or lack of bias when working with people, even though practitioners may strive for such ideals.” In an examination of the concept of neutrality in psycho-therapeutic relationships, Baker (2000) traces the concept from its Freudian, scientific beginnings through more recent intersubjective conceptions, to his own proposition of the “neutral position”. His analysis is particularly pertinent for mediation practice in that it traces different approaches to neutrality over time and examines how they address the question of the
impact of conscious and unconscious processes of the therapist (mediator) on the patient (parties).

In a modernist, Freudian sense, neutrality is an absolutist concept in which “the analyst’s posture is that of a mirror which shows the patient only what the patient presents” (Baker, 2000, p. 130). This view has been the focus of ongoing debate, but according to Baker, enjoys little support today. It is a view consistent with modernist and positivist ideas about reality, knowledge, objectivity and neutrality in a variety of contexts. One criticism of a modernist approach has been its lack of acknowledgement that the analyst’s value system affects his or her interpretation of the patient’s situation, and hence of the importance of the person of the analyst in the relationship between analyst and patient. According to Baker, later intersubjective and relational orientations have tended to dismiss the concept of neutrality as unworkable or impractical, even illusionary and mythical. The analyst is never objective, the analyst’s interpretations are acknowledged as suggestive, and the developing perceptions of the patient are recognised as inevitably contaminated by the presence of the analyst. Accordingly, the psychoanalytic relationship is conceptualised as a dyadic, intersubjective system of mutual influence (Baker, 2000, pp.135-40).

The relational, intersubjective approaches in psychotherapy are consistent with a social constructionist ontology, which emphasises intersubjective meaning creation, and underpins newer models of mediation (as discussed in Chapter Two). Both social constructionism and intersubjective orientations in psychotherapy acknowledge “the inevitable involvement of both personal subjectivity and theoretical assumptions in the ongoing investigation” (Baker, 2000, p. 66). The solution to problems of neutrality
for the therapist using such approaches is an abandonment of the concept in favour of an “investigatory stance of sustained empathic-introspective inquiry designed to illuminate the principles unconsciously organizing the patient’s experience, the principles organizing the analyst’s experience (introspection), and the oscillating psychological field created by the two (intersubjectivity)” (Baker, 2000, p. 140). Introspection and examination of the intersubjective field are consistent with variants of reflexivity associated with interpretivism, as discussed in Chapter Three (at 3.1.2.1). Both provide foci of inquiry beyond an “illusory” objective reality and do not assume that the parties and their dispute are technically separate from the process of mediation or the role of the mediator within it. But in the context of mediation, these reflexive options suffer certain limitations, considered in Chapter Three (at 3.1.3), including the lack of guidance as to what to do with a reflexive appreciation of the impact of the mediator on the process.

Baker’s analysis, when applied to mediation practice, offers a way to understand the value of neutrality, conceived as neither an absolute concept nor total illusion, by pointing to the purpose of neutrality in psychotherapy, and, by extension, for neutrality in mediation. According to Baker (2000) the function of neutrality, in a classical sense, is to avoid instances of countertransference within the therapeutic relationship. The aim of therapy, according to him, is for the patient to experience the analyst as a transference object (the object of past trauma) without the analyst entering into the experience of the patient as that object. If the analyst enters into the experience, then he or she becomes an actualised transference object and the reactions of the analyst while in this experiential space amount to countertransference. If the analyst does not react to the patient and enter into the experience, but rather responds
with empathic understanding, then the patient is able to “hear” herself and thereby gain insight into her situation. Similarly, a distinction between *responding* to parties in mediation according to a non-judgmental attitude, rather than *reacting* to them according to unexamined preconceptions, was made by one of the mediators in this study.

Where countertransference occurs, the opportunity for the patient in therapy to hear themselves before entering into an enactment of past trauma is lost. By analogy, neutrality in mediation is as not simply a protection against bias, but also a precondition to providing parties with an opportunity to “hear” themselves and gain insight as a result. Taylor notes that mediators, as practitioners of a process developed from a fusion of law and therapy (and other disciplines) do not provide the extensive relationship with each party that is found in therapy. Nonetheless, Taylor goes on to argue (1997, p. 220) that mediators must pay attention to establishing relationships with parties “if only to ensure that both parties find the mediator unbiased, impartial, and attentive to their separate interest, needs, and abilities.” While an ongoing therapeutic relationship does not occur in mediation, there is some similarity with the therapeutic dynamic. The mediator maintains a measure of detachment from the detail and turmoil of the parties’ conflict, and he or she does not enter into the dispute by taking sides or rendering a decision about the conflict. Entering into the dispute would elicit reactions from the mediator that might be conscious or unconscious, or a mixture of both, rather than responses based on a premeditated understanding of the aims of the process and how these are translated into practice. However, the mediator must actively engage with the parties by building rapport, actively listening to the
content of their dispute, maintaining an alert interest and intervening in ways that provide opportunities for the parties to move towards resolution.

Entering into the parties’ dispute, rather maintaining an emotional detachment, would create something akin to the actualised transference referred to by Baker. In such circumstances, one or both parties experience the mediator as a participant in the conflict (if not the object of past trauma), and the mediator’s reaction to his or her own involvement could be likened to a situation of countertransference. Parties, both individually and jointly, consequently lose an opportunity to hear themselves and to gain insight from that experience. Providing opportunities for a party to be heard by the mediator and by the other party is emphasised in varying mediation skills texts models (for example, Charlton & Dewdney, 2004, p. 19). The opportunity to be heard is also consistent with principles of procedural fairness. Less explicitly highlighted in mediation skills texts is the opportunity provided for parties to hear themselves and to advance from the insight gained as a result. However, Goodhardt, Fisher and Moloney (2005) argue that this opportunity is a core component of transformative mediation, which they further argue has a therapeutic equivalent in Rogerian theory. One of three basic interventions that the transformative model holds in common with Rogerian therapy is “reflection”. Reflection, according to Goodhardt at al (2005, p. 320), has three purposes:

1. it allows a party to be heard and know that they have been heard;

2. it allows a party to hear their own words in the same way as the other party has heard them, thus enabling insight into the impact of their words on another; and
3. it gives parties a chance to refine or clarify what they have said as a result of insight and reflection.

These therapeutic themes in the nature of the relationship between mediator and parties are evident in the responses of mediators in this study. Participants emphasised that enabling the parties to “be heard” by the mediator and the other party is central to the process and the client-centred nature of their practice. Participants associate the meaning of neutrality with the parties’ opportunities to be heard and their ability to listen actively to the parties’ stories. They emphasise emotional detachment from (typified by responding rather than reacting) yet active engagement with the parties. As one participant remarked, neutrality does not mean aloofness; as Baker (2000, p. 136) confirms, neutrality does not mean disinterest or indifference, but requires a genuine acceptance of the “other”.

Baker proposes that, rather than adopt an absolute conception of neutrality that ignores the impact of the therapist, or a relational or intersubjective approach that abandons neutrality altogether, we should adopt the idea of a “neutral position”. That position is “neither a given prescription nor a set of instructions. It does not refer to any action, activity, or behaviour undertaken by the analyst. Neither does it embrace anonymity, nonresponsiveness, silence, coldness, aloofness, or disinterest” (Baker, 2000, p. 140). The neutral position is essentially an attitude in an interactive, intersubjective space, which places responsibility on the analyst as the “keeper and conscience” (Baker, 2000, p. 148) of the process. The neutral position requires the analyst to maintain a situation in which he or she:

1. does not take sides in considering the patient’s conflicts;
2. does not impose values on the patient but instead accepts the patient’s values;
3. does not try unilaterally to make things happen and is nondirective, eschewing out of principle any attempt to influence the patient toward change;
4. is non-judgmental towards the patient and those in the patient’s life;
5. subordinates his or her personality to the analytical task; and
6. repudiates any adversarial notion of the analytic relationship (Baker, 2000, p. 140).

Baker also offers a commentary of the features of the neutral position as detailed above, which are instructive as applied to mediation. He argues that:

    The neutral position is not a sanctuary into which the analyst may escape under the guise of neutrality…The engagement of patient and analyst in this process provides a creative, facilitating, but also protective interface that is not entailed in the traditional concept of neutrality…The neutral position is different for each patient…The very fact that the analyst may be directed, even led to, the location of the neutral position by the patient, is evidence of the dyadic nature of the position. The neutral position is therefore located not only in the patients’ experience and in the analyst’s subjectivity, but also in the transitional realm between cognitive and affective worlds of both patient and analyst (2000, pp.141-6).

The neutral position, by analogy with mediation, is therefore an attribute not of the mediator but of a given encounter in which the stance of the mediator is formulated according to the presence and make-up of the parties and their dispute. The neutral position combines a relational or intersubjective orientation with an explicit understanding that the role of the mediator is not the same as that of the parties, and that the role of the mediator is “other focussed”, requiring him to act in the best interests of the parties rather than her own interests. Importantly, the neutral position
gives purpose to the practice of reflexivity, which is consistent with a relational or intersubjective orientation. Reflexivity becomes a practice of self-examination, which facilitates and enables the “other focus” of the mediator and her ability to maintain the characteristics of the neutral position as identified above.

The six characteristics of Baker’s neutral position have immediate applicability here. By substituting “parties” for “patient” and “mediator” for analyst, each characteristic can be applied to the relationship between mediator and parties. Not taking sides, the first characteristic, is the literal, popular meaning of impartiality. It encompasses the absence of bias or vested interest, and alignment with either party on the basis of these intrusions, and of alignment due to broader and more subtle predispositions of the mediator. Impartiality in its wide sense is aptly encompassed by the next four characteristics, according to which the mediator does not intrude by imposing his or her own values on parties, does not direct the parties towards any outcome constructed by the mediator, does not judge the parties in terms of “right” or “wrong” and, while contributing to the process in an individually unique way, aligns that input according the principles attached to the mediator’s role rather than manifesting an individual personality. Furthermore, each of these characteristics emphasises the primacy given to the parties’ interests and their capacities to be self-determining, through accepting parties’ values, avoiding influencing them towards change, adopting a non-judgmental attitude and subordinating the mediator’s personality to the task of furthering the parties’ interests.

Being non-judgmental (Baker’s fourth characteristic) is one synonym for impartiality found in the responses of participants in the study and which was highlighted in my
individual interviews. Adopting a non-judgmental attitude is a core skill in therapeutic interventions adopted and adapted in mediation (Charlton & Dewdney, 2004, p. 297). It means communicating no opinion as to the whether either party is right or wrong, no opinion as to whether the parties’ behaviour is blameworthy or exemplary, and no opinion as to whether the parties’ values and opinions are acceptable or not. It may be that, according to the context in which mediation occurs, particularly a statutory setting, certain consequences flow for the parties from particular attitudes, values and behaviours. However, the neutral position of the mediator requires that his or her personal judgments do not intrude into the encounter. Adopting a non-judgmental attitude is consistent with Baker’s sixth and final characteristic neutral position – repudiating any adversarial conception of the analytic relationship. This is immediately relevant to mediation as an alternative to adversarial processes. It points to a minimisation of an adversarial approach both between parties, and between the parties and the mediator. The questions that arise are not about who is right and who is wrong, who is blameworthy and who will win, but rather about seeking solutions based on changed understandings.

### 6.2.2.4 Neutrality and a relationship of trust

Central to fiduciary and therapeutic relationships is the element of trust; both are characterised as relationships of trust and confidence. Several commentators refer to the importance of trust in mediation (Boulle, 2001, pp. 41-2; Goldberg, 2005; Kydd, 2006; Moore, 2003, pp. 191-4). Trust between the parties has been identified as a significant factor in successful negotiations. In the context of relationships between parties, Moore (2003, p. 192) defines trust as “a person’s capacity to depend on or place confidence in the truthfulness or accuracy of another’s statements or
behaviour”. Some commentary ends with this focus rather than consideration of the relationship of trust between mediator and parties (see for example, Moore, 2003, pp. 191-4 and Kydd, 2006). However, the element of trust in the relationship between mediator and parties has been described as central to the relationship (Brown, 1991, p. 334; Poitras, 2009, p. 307; see Druckman, Olekalns & Smith, 2009, p. 18-9).

Boulle defines trust as “one person’s willingness to believe, to be open to, and to take risks with, another person” (emphasis in original omitted). He identifies a number of techniques that the mediator can use to encourage the parties’ trust in them and the process of mediation, and lists the following suggestions for mediators (2001, pp. 41-2):

- affirming their credentials as mediators and dispute resolvers;
- showing respect and concern for the parties;
- establishing a personal rapport with the parties;
- using active listening skills and acknowledging the parties’ concerns; and
- being impartial and even-handed in the conduct of the process.

There are a number of significant points in this list. First, being impartial and even-handed is only one aspect of a broader relationship of trust. In other words, the relationship of trust between mediator and parties overarches the impartiality and even-handedness of the mediator. Affirming a mediator’s credentials means acknowledging their expertise and while this, according to Haynes (1992, p. 23), produces an automatic imbalance of power, it can be employed, Boulle says (2001, p.41) in developing a positive relationship of trust. Showing respect for parties means acknowledging their autonomy and (if necessary) acts a reminder of the role of the
mediator in fostering that autonomy. Establishing rapport, actively listening and acknowledging concern for parties debunks the idea that neutrality requires distance and aloofness. Mediator neutrality in a relationship of trust does not exclude, but rather requires an active engagement with the parties, short of entering into the dispute. In a study by Goldberg (2005, p. 366) more than seventy-five per cent of the mediators sampled attributed their success in mediation (measured by settlements) to their ability to develop rapport with the parties, described as “a relationship of understanding, empathy and trust”. According to a recent study by Poitras (2009, p.321), impartiality was found to be the most significant variable in developing a relationship of trust between mediator/s and parties. The study found that partiality, or appearing to take sides, was enough to “shatter trust”.

The centrality of trust in the relationship between mediator and parties is consistent with the client-centred emphasis claimed by mediators. Integral to that relationship of trust is the non-judgmental attitude of the mediator, also emphasised by participants in this study. Communication of a non-judgmental attitude and acceptance of the parties’ values (for the purpose of the mediation encounter) does not necessarily mean that mediators do not experience judgmental feelings, or that they accept the values of the parties as part of their own world view. These features are part of the role of the mediator, or part of the persona adopted by the mediator for the purposes of practice. Gadlin and Pino make a useful distinction here between neutrality as it attaches to the position of a mediator (ombudsperson) and the personal subjectivity of the mediator. According to Gadlin and Pino (1997, p. 17),

People are never neutral – we are anchored in our cultures, guided by our conceptual frameworks, motivated by desires and values, and driven by commitments and passions…The neutrality of the [mediator] originates not in
Similarly, there are implicit expectations in the relationship between mediators and parties. One of those is the neutrality of the mediator. Having explored the relationship between mediators and parties in terms of aspects of both fiduciary and therapeutic relationships, we can now think about a reconstructed neutrality that combines elements of these relationships. The neutral mediator is one who avoids conflicts of interest and acts in the best interests of parties. The mediator adopts a neutral position in the service of parties’ interests, meaning in the service of the parties’ self-determination. That neutral position is framed by a relationship of trust between mediator and parties which, following Poland’s (1984, p. 285) vision of a “true neutrality”, “originates in genuine respect for the patients’ [parties’] individuality” and reflects a “fundamental regard for the essential otherness of the patient [parties]”.

A distinct advantage in grounding our understanding of neutrality in a relationship of trust between mediator and parties is that all aspects of that relationship become central to understanding the mediation encounter. Being impartial and even-handed become elements to foster in order to build and maintain trust, but so too do the many other elements (meanings) associated with neutrality by mediators in this study, such as a non-judgmental attitude, active listening, being attentive, remaining emotionally detached and fairness. Discussion now turns to this last idea, fairness, as it relates to a reconstruction of even-handedness.
6.2.3 Neutrality as even-handedness: a reconstruction

Neutrality as even-handedness, and as described in Chapter One (at 1.4.2), means treating the parties equally. The central problem of even-handedness is that equal treatment may lead to unequal outcomes. Furthermore, treating the parties unequally in order to bring about equality (the strategy of equidistance) means introducing bias, which is contrary to a requirement of neutrality in a modernist, absolute sense. Fairness is the one purpose of neutrality, identified by commentators, which seems to add something to the concept of neutrality itself. However, as noted in Chapter Two (at 2.2), fairness is an ill-defined concept, rather loosely and amorphously applied in the mediation literature. Nonetheless, the need for fairness is a recurrent theme in the identification of problems associated with even-handedness in mediation.

6.2.3.1 Even-handedness and fairness

Attempts to translate even-handedness into equidistance in order to bring about fair outcomes presents a dilemma. There is an apparent conflict between the requirements of procedural fairness on the one hand and those of substantive fairness on the other. Treating the parties equally, though procedurally fair, may lead to a substantially unfair outcome. Treating the parties unequally, though procedurally unfair, may lead to substantively fair outcomes. Three particular implications for mediation practice arise from this apparent conflict.

The first implication is that the conflict between the requirements of procedural and substantive fairness undermines reliance on the process and content or outcome distinction as a theoretical grounding for practice. Commentators have repeatedly posed questions about the circumstances in which a mediator might legitimately
intervene to dissuade parties from an agreement that the mediator considers to be unfair (Bernard et al 1984, p. 63; Boskey, 1994, p. 370; Fisher, 2001; Gibson, 1999, p. 209; McKay, 1989; Taylor, 1997). Such questions raise issues of substantive fairness, which are about the content of a dispute. A second implication is that questions of substantive fairness challenge not only a concept of neutrality, as grounded in the process and content or outcome distinction, but also an absolute conception of party self-determination. Gibson (1999, p. 179), for example, applauds parties’ opportunity to fashion their own agreements in mediation, but argues that

…mediators can not ignore the nature of the settlement. Parties may be unreliable judges of their own best interest, and there are invariably wider social issues that need to be considered…there ought to be some mechanism for external review of all mediated outcomes.

The third implication is simply the necessity to decide what is fair. It could be determined by the parties, the mediator, or influences outside the mediation encounter. Leaving the parties to determine what is fair is, on the face of it, consistent with the principle of self-determination. For those commentators who take the view that mediators should not interfere in questions of substantive fairness and emphasise the process and content or outcome distinction, the principle of self-determination legitimises their view. According to this approach, even attempts by mediators to “optimise” parties’ outcomes would contradict the principle of party self-determination where it reflects the mediator’s rather than the parties’ view of what is optimal.

Gibson (1999, p. 201) makes a distinction between two types of objective criteria – those that parties will accept as standards existing independently of themselves and those “true for all time, independent of any observer”. The first he describes as
objective criteria, intersubjectively determined by the parties, and of the type important in the Fisher and Ury model of integrative bargaining. Gibson argues for adoption of the second type, because the first will not necessarily produce a fair outcome in fact, but only one perceived by the parties as fair. He argues that use of objective criteria “hold the promise of being impartial and defensible rather than arbitrary or biased” (Gibson, 1999, p. 200; Gibson’s (1999, p.197) argument, as extracted above, has an unfortunate ring, seeming to imply that parties “don’t know what’s good for them” and that mediators might “know better”. However, he does point to a role to be played by external criteria of fairness, which, moreover, is neither clearly articulated nor thoroughly examined in the current literature.

From a postmodern perspective, no criteria of fairness would be “true for all time” and none would be totally independent of the person or persons applying it. Is a perception of fairness on the part of parties the only approach possible and is it enough to underwrite the fairness of mediation? It is here that the position of the parties in relation to each other according to ideas of an imbalance of bargaining power becomes of particular concern. An imbalance of power may arise due to the experience of a party as manifestly, evidently or apparently disadvantaged (from a western cultural perspective) due to inadequate knowledge, misinformation or apparent gender or cultural difference. Such imbalances and the concerns they raise are illustrated by the case studies presented by participants in the study (see 5.2.3). The parties’ capacities to fashion their own agreements based on their own intersubjectively determined criteria work as far as each is able to communicate the chosen criteria and come to a genuine, informed agreement about what is important to them. However, an unqualified adherence to the principle of self-determination in
deciding what is fair ignores situations in which one party’s view of fairness overrides that of the other party.

Without externally determined criteria to deal with such situations, the burden of determining what is fair and what to do about it falls to the mediator. Mediators might avoid the issue, relying on a limitation of role according to process, and be left feeling uncertain and dissatisfied, as was the case with participants in this study; they might do as much as they can in process interventions and be left perhaps less dissatisfied; or they might allow their own ideas about what is substantially fair to intrude on the process, whether consciously or unconsciously. Hence, together with the potential for one party’s view of fairness to override that of the other, the mediator’s personal views of what is fair can potentially intrude upon the process and conflict with the autonomy of the parties.

A reconstructed neutrality recognises that community standards, as expressed in legislation and affecting a dispute, developing professional codes of practice applying to mediators, and organisational policies all have a place in determining the outer limits of substantially fair outcomes. Such standards ought to mark minimalist requirements consistent with party self-determination, but also reflect accepted protections for parties from each other, the mediator and within the larger community context. Articulating these minimal standards would help to remove any unrealistic burden on mediators to assess the fairness of outcomes, and introduce some measure of consistency in order to avoid the idiosyncratic imposition of mediators’ values (Astor, 2007, p. 229). Setting limits to the parties’ autonomy is consistent with a
reconstructed neutrality, since both neutrality and self-determination are qualified within one mutually overlapping context.

According to a reconstructed neutrality, the outer limits of fairness represent the outer limits of mediator neutrality and, at the same time, the limits of an intersubjective self-determination (meaning the self-determination of parties in relationship to each other). For example, situations where a pattern of domestic violence is established would represent an outer limit of both a reconstructed neutrality and the possibility of an intersubjective self-determination. Agreement between the parties about what is fair is not possible where the genuine, informed consent of one party is undermined by a threat of physical violence (see Field, 2004). As Gibson (1999, p. 209) notes, where “issues of harm to self or others are involved, the mediator cannot be neutral in the sense of disinterested; he or she has an affirmative obligation to make sure that some kinds of settlement are questioned.”

Where an imbalance of power is structured into the relationship between parties and this is recognised through legislative enactment, the legislation will present a context and limits to a reconstructed neutrality. For example, in the relationship between landlord (or landlord’s agent) and tenant, relevant legislation (State Residential Tenancies Acts) provides a context for dispute resolution that articulates rights, obligations and consequences for breach, and establishes externally determined criteria of fairness based on enacted community standards. Furthermore, a reconstructed neutrality need not require the distinction between conciliation and mediation that absolute neutrality requires given the role of the conciliator in advising about relevant legislation.
Existing legislative frameworks and established practice related to matters such as family violence provide important contextual factors for translating a reconstructed neutrality into practice. Beyond these, the imposition of mediators’ individual views of what is fair remains an area of concern. However, individual standards are being placed within the context of an emergent profession (Field, 2007) and the development of standards for practice and accreditation (the National Mediation Practice Standards). In that context, the concept of a neutral position allows flexibility in considering what is fair according to the circumstances of a particular dispute, and the identity and experience of given parties. The emergence of professional standards raises somewhat different questions for neutrality and party self-determination. In particular, with the emergence of a professional status for mediators, there is the growing, if not overtly acknowledged, development of a knowledge base beyond understanding of process to the exclusion of content, to which discussion now turns.

### 6.2.3.2 Even-handedness and professional intervention

Interventions aimed to create equality between the parties rather than deal with them equally necessarily involve the mediator making assessments. The mediator must assess the relationship between the parties and each party’s capacity to deal with the dispute in the context of that relationship. The question remains as to what knowledge a mediator, as mediator, would draw on to make such assessments.

Some commentators argue that the role of the mediator should be limited to conducting the process fairly (procedural fairness), and that mediators should not attempt to redress power imbalances derived from factors outside the mediation (see Boulle, 2001, p. 225). This view is consistent with approaches that ground an
understanding of mediation in the process and content or outcome distinction (problem-solving models). As a consequence of that distinction, the legitimate knowledge base of mediators is limited to process knowledge, meaning knowledge about the process of mediation and its impact on the parties and their dispute. Hence, where the mediator’s role is seen as limited to process, there is no legitimacy to do other than address apparent inequalities in the process and to do so by means of process interventions. This was clearly the approach taken by mediators in the study. Nonetheless, mediators evaluate, make decisions and act upon views of the interaction between parties in the mediation encounter. Their responses are influenced by a growing body of knowledge about mediation practice.

Within that growing body of knowledge sits an extensive mediation skills literature. A sample of that literature illustrates a central focus on the process and content or outcome distinction, and a consequent focus on aspects of the process as ways to address issues of power as between the parties. Boulle (2001, p. 226), for example, lists a number of aspects of mediation which, he asserts, “have as one of their objectives the adjustment or moderation of power relations between parties.” Boulle’s list includes the neutrality and impartiality of the mediator. Otherwise, it consists of apparent process aspects of mediation, for example, control of lines of communication, appropriate physical, environmental and timing arrangements, and separate meetings with each party. He describes this kind of intervention as a minimalist approach, dealing indirectly with issues of power between the parties (2001, p. 226), and goes on to describe direct interventions aimed at increasing the power of a weaker party and or reducing the power of stronger parties (2001, p. 227). Boulle acknowledges that “these interventions involve some potential deviation from
the mediator’s neutrality and impartiality.” In relation to the stronger party, he
describes possible interventions to reduce that party’s power:

They involve the mediator creating doubt in the mind of the stronger party
over the facts, the law, the evidence and their likelihood of being successful in
litigation; in pointing out the downsides, particularly in the longer term, of
using their strength to overpower the other side; in being the agent of reality
and devil’s advocate in separate sessions; and in threatening to terminate the
mediation, and actually terminating it, where the proposed settlement is
significantly “outside the range” (2001, p. 227).

Possibilities for “inside the range” settlements include the conventional or usual,
based on court decisions, industry norms, community standards or “simple
commonsense” (Boulle, 2001, p. 232). These are external criteria to be applied by
mediators in an assessment of what is substantially fair. Furthermore, the
interventions that Boulle describes in the extract above are content-laden – playing
devil’s advocate and creating doubt about facts, law and evidence, for example,
intrude into the content of the dispute.

A dilemma for mediators, therefore, is adhering to a process and content or outcome
distinction in circumstances where issues of substantive fairness arise. Such
circumstances need not be framed as overt instances of an imbalance of power as, for
example, when one party is overtly exerting advantage over the other in a mediation
encounter. “Out of the range” settlements, according to Boulle (2001, p. 233), will
occur whenever one party is at a disadvantage, because of ignorance, emotional
upheaval, inadequate advice or other circumstances. This list of disadvantage mirrors
that described by participants in this project. Participants in the sample are
uncomfortable with the process limits placed upon their role in addressing
disadvantage. They expressed concern and ambivalence about the need to remain neutral in circumstances where one party is evidently negotiating at a disadvantage, but as mentioned earlier (at 5.2.3), their responses on this issue tended to trail off in uncertainty and dissatisfaction.

Boulle’s distinction between indirect and direct interventions to redress power imbalances reflects the process and content and outcome distinction. Minimalist, indirect interventions focus on process, while more robust, direct interventions intrude on content. The neutrality and impartiality of the mediator becomes aligned more closely with minimalist interventions as identified and discussed in Chapter One (at 1.5.1). It is evident, however, that the distinction between process and content or outcome and its use in grounding a concept of neutrality does not hold true in the face of the direct interventions Boulle describes. Furthermore, in attempts to make sense of practice, continued adherence to that distinction limits the development of creative and appropriate mediator responses.

Acknowledging that mediators do intrude into the content and outcome of a dispute, and accepting that in some circumstances they have an obligation to do so, challenges practice and practitioners because the distinction is tied not only to the concept of neutrality but also, and perhaps more importantly, to the idea of party-self-determination. Limiting mediators’ interventions to process means leaving parties to delimit their own content and determine their outcome. There is an understandable reluctance among mediators to see themselves as developing a field expertise beyond process because limiting their expertise in that way is supposed to safeguard parties’ autonomy. There is a difficulty in developing and acknowledging a knowledge base as
well as a skills base for mediation because, unlike in other professions, in
distinguishing what mediators do, mediation skills are seen as more important than knowledge.

The skills used by a mediator do not, however, preclude an articulated and developing knowledge base. Being non-judgemental (a skill in mediation), for example, does not mean a lack of professional judgment based on an articulated knowledge base. To date, knowledge for mediators has largely been equated with knowledge of the process. With that limitation, even-handedness, as synonymous with treating the parties equally, has meant providing equal opportunities to be heard in a procedural sense, and in reliance on the process and content or outcome distinction. Where even-handedness is grounded in the relationship between participants in mediation “being heard” has a qualitatively different meaning, as pointed to in earlier discussion. “Being heard” in mediation means an opportunity for a party to put his/her version of events, or story, and an opportunity to hear themselves and the other party. That “hearing”, on the part of the mediator, is more than listening to one side of a dispute. It also involves an acknowledgement of the person of the party/storyteller and of the person behind and within the content of the dispute. With this reframing, treating the parties equally is translated to treating the parties equitably. Taking account of the personhood of the parties to a dispute and understanding the content of a dispute according to that personhood, enables mediators to intervene according to the individual needs of each party (following Taylor, 1997) to “be heard”.

Legitimately extending the knowledge base of mediation practice into areas of content carries with it the dangers of professionalism. Those dangers include the potential to
license professional judgement as a mask for manipulation, social control and disempowerment through, amongst other things, mystification for consumers entering a discourse of expertise. But to limit the development of that knowledge by insisting on limiting mediators’ expertise to process can have a similar effect, since it masks the intrusions into content that actually occur and fails to enable the development of appropriate responses that articulate self-determination as an overarching priority.

As mediation’s emergent professional status takes shape, the inherent imbalance in the relationship between mediator and parties based on the mediator’s knowledge must be acknowledged in order to determine the mediator’s proper exercise of power in that relationship. This analysis is consistent with a Foucauldian view of the intimate connection between knowledge and power; a connection Foucault refers to in the single term “power/knowledge” (Foucault, 1980; Best & Kellner, 1991, p.48-54). As Haynes notes, one of the determinants of a mediator’s power is the professional–client relationship which “is inherently unbalanced because the client requests an interaction with the professional because the professional has more knowledge” (emphasis in original) According to Haynes (1992, p. 23), “the mediator’s management of the negotiations, problem-solving, decision-making and context knowledge is the key to successful mediation” (emphasis added). As mediation’s professional status emerges, it is context knowledge that needs greater acknowledgement and articulation. A reconstructed neutrality recognises and accommodates this context knowledge while maintaining a clear relational link to the principle of party self-determination.
6.2.4 Reconstructing neutrality: context and situatedness

The relationship between mediators and parties exists within a domain of overlapping and interacting contexts. This perspective is depicted in Figure 6.1 above, which interconnects the micro-dynamics of individual mediation sessions with the variable contexts in which they take place. The following discussion emphasises the contexts alluded to in the earlier discussion of impartiality and even-handedness as reframed according to the model; and introduces a further context of critical perspectives.

6.2.4.1 Reconstructing neutrality and practice contexts

The theories advanced by both Taylor (1997) and Astor (2001a, 2001b, 2007), examined in Chapter Two (at 2.3) call for a contextual understanding of neutrality. The contextual focus of a postmodern perspective has received both scholarly applause and vigorous critique. Seeing things in context has the advantages of offering widened horizons and different vantage points, and adding depth to an understanding of meaning as shifting and nuanced. The disadvantage of context is the potential degradation of meaning through an extreme relativism, associated with certain strands of postmodern thought as noted in Chapter Three (at 3.1.2; 3.1.3). Neutrality defined by context could mean something that shifts and changes across different models of practice, institutional and organisational environments, and according to the dictates of a particular encounter. In this way, neutrality defined by context could have little or no stable meaning.

The model proposed here avoids an extreme relativist view of neutrality by grounding its meaning in the relationships between players in mediation. In the context of that relationship, mediator neutrality and party self-determination are related by and
through the exercise of power by each participant in the encounter. Once the reality of mediator power and its exercise are acknowledged, the question becomes one of the “proper exercise” of that power. The proper exercise of mediator power, according to the model advanced here, is primarily shaped by the relationship of trust between mediator and parties and the essential “other focus” of the mediator’s role. A proper exercise of mediator power will be congruent with optimising parties’ self-determination, while an improper exercise of power will detract from or limit that potential.

The exercise of mediator power in whatever context will be delimited by the parties’ optimal exercise of their power, or self-determination. For example, the impact of a mediator’s bias towards a particular outcome is constructed 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 would represent a proper exercise of mediator power where those values are consistent with party self-determination. One example is the value placed on diversity, identified by one participant in the study as consistent with the principle of party self-determination. As a general rule, even-handedness, or treating the parties equally, represents a proper exercise of mediator power because it facilitates the self-determination of each party. At the same time, where the behaviour of one party is assessed as impeding the self-determination of the other party, treating the parties unequally in order to remove that impediment is a proper exercise of mediator power. Neutrality in these instances, and as reflected in a proper exercise of power, avoids the absolutism of previous conceptions. The mediator is not simply neutral or not neutral. Rather, finding the neutral position means responding to parties at any given turn in
the encounter by giving primacy to the “other focus” of the mediator’s role and optimising opportunities for party autonomy.

“Context” in this analysis becomes those relationships and environments that combine to determine a proper exercise of mediator power when intersecting with the core relationships in mediation. According to the model proposed, 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, the model of mediation employed, the statutory context of practice, and relevant organisational goals and cultures. Constructing the contexts for mediator 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 and content or outcome distinction. That distinction remains 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 legitimately intrudes into areas of substantive content where the best interests of the child are at stake. More broadly, mediator power is constructed as properly exercised when intruding upon content where that intrusion is sanctioned by a clear regulatory context. Acting within legislative boundaries, according to a proper exercise of power, does not preclude neutrality; rather it shifts the starting point of the neutral position. Moreover, a proper exercise of mediator power in a regulatory context is consistent with limits imposed on party self-determination (on the power exercised by parties) according to recognised community standards.
Particular practice models, contexts and organisational cultures may also identify the provision of expert information and advice by the mediator as consistent with a proper exercise of mediator power and party self-determination. Providing information about legislative standards and assisting in the generation of options consistent with those standards does not represent a lack of neutrality, if neutrality is constructed not as an absolute concept but as a proper exercise of mediator power. This approach is consistent with the focus on party self-determination evident in the National Mediator Accreditation System. Clause 2(2) of the Australian Mediation Practice Standards states: “Some mediation processes may involve participants seeking expert information from a mediator which will not infringe upon participant self determination.” Further, in clause 2(7) of the National Practice Standards and clause 2(4) of the National Approval Standards reference is made to processes in which a mediator may be called upon to give expert information and advice in order to enhance the decision-making of parties. The approach here extends the conceptual basis of these clauses by relating party self-determination to mediator neutrality using a postmodern idea of power.

One variable context for the exercise of mediator power is the practice model that the mediator employs. As discussed in Chapter Two, alternative models of mediation, including narrative and transformative models, reject the distinction between process and content, acknowledging instead the impact of the mediator on content and premising their approaches on a social constructionist ontology. Narrative models abandon neutrality given an acknowledgment that the mediator affects process, content and outcome. The transformative model rejects neutrality in relation to process and content, but maintains the idea that mediators are neutral in relation to
outcome as a necessary condition of the parties’ retention of decision-making power. While the fact of mediator impact on content is acknowledged in newer models of mediation, questions remain unanswered in those models as to the legitimate scope of that impact. Questions about the legitimate scope of the impact of the mediator raise other, implicit questions about the proper exercise of mediator power and or authority (legitimised power). Consequently, narrative and transformative models need some conceptual means of locating proper limits to an exercise of mediator power, currently not evident in those models as examined in Chapter Two (at 2.2). In the model proposed here, neutrality is not irrevocably tied to the process and content or outcome distinction. Therefore, a whole or partial rejection of neutrality on the basis of that distinction is not necessary. A reconstructed neutrality has application across all models of practice. Though defined differently from established meanings found in the literature, a reconstructed neutrality is consistent with the prevalent view found in practice (Wing, 2009, p. 384, 389), and echoed in the findings of this study, that neutrality and self-determination are at the core of what mediators do.

6.2.4.2 Situated knowledge: reconstruction and critical perspectives

The influences of tradition, culture and identity on the relationship between mediators and parties are acknowledged in this systems framing of the encounter as contexts within and from which the players come to meet in mediation. These influences constitute bias in its broadest sense. They are recognised as important influences in the shaping of a mediation encounter, and as important considerations for mediators attempting to provide a sensitive and appropriate service that meets the diverse needs of parties (see, for example, Astor & Chinkin, 2002, pp. 168-73; Boulle, 2005, pp. 78-83; Fisher & Brandon, 2009, pp.293-311; Kalowski, 1996; Gunning, 1995).
As discussed in Chapter Three (at 3.1.2.2) reflexivity from a postmodern perspective challenges the mediator to look beyond any essentialist depictions of their own and parties’ identities, and to identify and challenge any negative cultural myths shaping these identities. Postmodern deconstruction and critical theory seek to unearth the power and privileging of varying perspectives. Reflexivity, from the perspectives of postmodern theory and critical inquiry, demands that the mediator examine his or her own situatedness and positioning in the mediation encounter. Postmodernism links the micro-level of analysis applicable to the mediation encounter to the external contexts in which that encounter occurs through the concept of discourse. Context becomes situatedness where discourses become internalised and manifested in micro-level relationships. Critical theory links micro-level relationships with broader social processes through the concept of ideology.

The value placed on neutrality and party-self determination in mediation represents a particular discourse or ideology in mediation. A significant limitation of that discourse to date is that, because it conceives these ideas as absolute concepts, they have become embedded in a micro-level of analysis with little or no apparent relevance to broader forces of social change. Hence, long standing critiques remain of mediation’s potential to reinforce existing social inequalities and “render conflict conservative” (Abel, 1981, p. 263). Attempts to construct mediation as a movement for social change appear to require abandonment of neutrality as a core component where framed as an absolute concept (Mayer, 2004). Attempts by mediators to connect problems experienced by parties to wider social processes and to advocate on behalf of parties in those wider contexts have required them to devise multiple roles
and routinely step outside their neutrality in acknowledgment of the inconsistencies in their practice (Mulcahy, 2001).

The way in which the discourse of mediator neutrality and party self-determination acts to avoid connection with wider social processes is suggested by a recent analysis of inequality in mediation offered by Wing. Wing (2009, p. 387-8) presents three justifications for a failure in mediation to address parties’ experience of inequality. The first of these gives precedence to the principle of party self-determination. Mediator neutrality exists in the service of that self-determination. The mediator’s responsibility then, is to be and remain neutral, and responsibility for outcomes, however “unequal”, rests with the parties. The second justification frames responsibility for neutrality as a personal responsibility of the mediator. If the mediator violates the principle of neutrality and a party or parties experience unequal treatment as a result, then it is a personal failing of mediator and not of the mediation process. The final justification combines the principles of neutrality and self-determination with a view that mediators are not responsible for social, organisational or interpersonal imbalances of power. According to this reasoning, whatever imbalance of power exists between parties is not addressed by mediators, because of the principle of absolute neutrality. Indeed, those imbalances are not even seen as requiring a response because they are not the business of mediation or mediators.

These justifications will be recognised as themes in earlier discussion of neutrality as impartiality and even-handedness. Moreover, the individualism inherent in these rationales is consistent with the modernist, or positivist, worldview considered in Chapter Three. The way in which this discourse is constructed both supports a
modernist worldview and “confounds critical reflection” (Wing, 2009, p. 389). The limiting absolutism of this approach is avoided in the model proposed here. This is achieved by redefining neutrality and party self-determination as relational concepts, grounded in a relationship of trust between participants in mediation and incorporating a postmodern idea of power as integral to that relationship. The relationship between participants is located in wider social contexts, which are necessary to a contextual understanding and application of neutrality and party self-determination. Moreover, a relational understanding of these two concepts invites consideration of those wider contexts. Thus the embedding of a modernist paradigm is avoided. Furthermore, acknowledging the importance of those contexts does not necessarily mean accepting them. Just as recognising the power of the mediator requires further consideration of the proper scope of that power, recognising the influence of context is the first step; the second is to maintain an attitude of critical reflexivity.

Postmodernism has been criticised for both a potential extreme relativism and failing to deal with questions of systemic patterns of disadvantage, particularly by those scholars who identify with critical inquiry (Bagshaw, 2001; Ife, 1999). The term “systemic patterns of disadvantage” is adapted here from the 1997 NADRAC discussion paper on Issues of Fairness and Justice in Alternative Dispute Resolution, which examines issues of substantive, systemic bias in mediation. It is used here as a term virtually synonymous with “structured inequalities”. Both terms draw attention to disadvantage that is recurrent and subsisting in established relationships, whether recognised at micro or macro levels of analysis. The postmodern view of power adopted in the mediation literature (Astor, 2005; Astor & Chinkin, 2002; Bagshaw,
2001; 2003; Gray, 2006) as elsewhere, can leave the impression that power is so diffuse, fluid and changing that inequality is more ethereal than real. The emphasis on localised experience and micro-politics seems to suggest there is no reality in the influence of structures, for example, hierarchical relationships within judicial institutions and government organisations. Postmodernism can leave the impression that experience of inequality is only a matter of perspective.

However, postmodernism is a critique of the idea that patterns of inequality are fixed and unchanging (at least without major contrary forces at work), as in structuralist accounts. A postmodern account challenges the view that the relationship between victim and oppressor is a fixed reality, replacing it with one that sees power as circulating in the relationship and usable by either party. This construction of power does not, however, deny the reality of the experience of inequality or discourses (both practices and institutions) that engender and perpetuate it. Foucault did not deny the effects of the repressive power of the state or of dominant social forces, but he argued that social structure and order are achieved in a postmodern world not by centralised systems with the power to enforce obedience but by disciplinary strategies used in localised sites such as prisons and hospitals. Foucault did not reject all efforts to describe general social processes, but did reject efforts to infer local social processes (for example, particular experiences of inequality) from global processes (for example, capitalism) (Foucault, 1978; Seidman, 2008, pp. 171-83).

Postmodernism arguably does, therefore, allow for consideration of systemic inequalities and the discourses that engender and perpetuate them. Mediation has, however, been heavily criticised for failing to address systemic disadvantage. That
criticism has been launched most vocally by critical theorists and in particular by feminists. Lichtenstein (2000, pp. 20-1) offers a useful summary of three criticisms of mediation from a feminist perspective. First, mediation privatises events and situations that are primarily political. Family disputes, for example, become instances of individualised conflict, requiring individual solutions according to an approach that obscures political implications. Second, she argues that mediation ignores power differentials between men and women which put women at a disadvantage in negotiating with men. Finally, mediation is unsuitable for dealing with situations of sexual or physical abuse. Lichtenstein asserts (2000, pp. 20-1) that

the mediation process is based on several assumptions that endanger battered women: mediation is voluntary, parties have similar or equal bargaining power, the session is private and nonadversarial, and the mediator is a neutral who does not pass judgment and considers both parties equally blameworthy for the current conflict and its resolution.

Earlier discussion referred to the latter two of these criticisms. The first is rendered more complicated by the growing institutionalisation of mediation both as a court-connected process and as a professional endeavour, also referred to in earlier discussion. The contextual focus of the model advanced here opens the way for consideration of these criticisms, unlike the modernist discourse described above. The model does not answer the criticisms but provides a space within which they can be debated and addressed while retaining neutrality and self-determination as core principles for practice. For example, it provides space to account for legislative standards in relation to domestic violence and recognised, accepted practice approaches to imbalances of power without violating an otherwise absolute neutrality.
Lichtenstein argues that despite these criticisms, mediation has significant similarities with feminist principles. She charts these similarities with particular reference to transformative mediation and the principle of party self-determination as “empowerment”. As noted in earlier discussion, self-determination can have more than one meaning. The idea of empowerment has also been criticised as something “done to you by others”. It has been argued that empowerment in this sense has been colonised by professionals who effectively disempower those it claims to empower (Parker, Fook & Pease, 1999, pp. 150-1; see also Winslade and Monk, 2000, p. 51).

The idea of imbalances of power can also been criticised as assuming a quantification of power at odds with postmodern accounts (Cobb, 1993, pp. 247-8; Winslade & Monk, 2000, pp. 47-51). The model advanced here does not claim to answer all of the complex problems challenging mediation practice. However, it does offer a way of looking at the complexity of many issues by paying foremost attention to the relationship between participants and working outwards from there to the array of intersecting contexts and questions confronting mediation practice in terms of both the role of mediators and of mediation.

6.4 SUMMARY AND IMPLICATIONS
This chapter began with a summary of the results of the study. Three central findings are identified – that mediators in the sample have adopted neutrality as a core principle for their practice; that they understand neutrality in relation to another core concept in mediation, that of party self-determination; and that they have constructed meanings of neutrality beyond those found in the literature and according to a combination of legal and therapeutic themes. From these findings, neutrality in mediation has been reframed away from an absolute, binary concept to a relational
one that has meaning in relation to that of party self-determination. The relationship between these concepts is grounded in the actual relationship between mediators and parties.

Drawing on postmodern conceptions, it has been argued here that power circulates in the relationship between mediator and parties, and that the process and content or outcome distinction is inadequate to determine the boundaries of the mediator’s proper exercise of power. A relational understanding of the concepts of neutrality and self-determination allows us to understand neutrality as marking the boundaries of the mediator’s proper exercise of power in relation to the parties’ optimal exercise of their own power, or self-determination. Existing ideas of neutrality as impartiality and as even-handedness have been reframed in accordance with this redefinition of neutrality, and by drawing upon the legal and therapeutic themes from in mediators’ responses in the study.

Neutrality as impartiality is reframed by placing it in the contexts of legal fiduciary and therapeutic relationships. Questions of bias in mediation are more fruitfully answered by reference to the principles of fiduciary obligations than by drawing on the bias rule in adjudication. An examination of the bias rule in adjudication reveals that it offers an understanding of avoiding bias and vested interest in keeping with the meaning of impartiality in a narrow sense. Given the differences between intervention by a judge or arbitrator, and a mediator or conciliator, the bias rule serves different purposes in adjudication and mediation. In adjudication, it fosters “an impartial and unprejudiced mind” in a judge as decision-maker, and serves natural justice. In mediation, that “impartial and unprejudiced” mind is reserved for interventions into process only in the service of procedural fairness. A judge can intrude on the content
of a dispute when applying legal principle to the facts. A mediator must not. Hence the problem of impartiality in a wide sense arises, in which there is always a likely intrusion of conscious and unconscious prejudice, partiality or prejudgement on the part of the mediator.

Problems associated with neutrality as even-handedness and its translation into equidistance have been shown to raise questions of both procedural and substantive fairness. Some commentators argue that limiting the role of the mediator to process and excluding content ensures substantive fairness because outcomes are determined by criteria developed and agreed upon by the parties. But that argument fails to take account of situations where one party is at an evident disadvantage because of inadequate information, resources or advice, or due to emotional distress or other factors. It also fails to account for situations in which one party exerts their power according to established patterns of interaction that may derive from systemic inequalities, to the disadvantage of the other. Limiting mediator’s interventions to process is an unsatisfactory solution in situations where an affirmative duty to act on behalf of a disadvantaged party can be strongly argued. The results of this study suggest that mediators find questions of substantive fairness the most difficult to resolve for themselves as well as for the parties. Trends in practice indicate that at such times, the distinction between process and content is not absolute, and is potentially confusing given the rhetoric that defines the mediator’s role.

Grounding neutrality in a concept of relationship rather than the process and content or outcome distinction allows us to reconsider the dilemmas of impartiality and even-handedness in a different conceptual framework. It allows us to think about features
of relationships from legal and therapeutic perspectives which, this study shows, suggest other themes in mediators’ understanding of neutrality. While the relationship between mediator and parties is not the same as that between lawyer and client, or therapist and patient, core elements of these relationships are paralleled in mediation. It has been argued here that the relationship between mediator and parties can be likened to both fiduciary and therapeutic relationships. Analogous with these relationships, the essential framework of a mediation encounter is the relationship of trust between mediator and parties. Reframing the mediation encounter according to this relationship, rather than according to the process and content or outcome distinction, enables greater focus to be given in theory as well as practice to those factors which engender trust in this relationship. One of those factors is the neutrality of the mediator, whether conceived as impartiality or as even-handedness. But there are other factors suggested by the responses of mediators in the study, such as being attentive and active listening.

In a fiduciary association, a relationship of trust and confidence requires the fiduciary to act in the best interests of the other and to avoid conflicts of interest. These duties can be fruitfully applied to mediation and deal effectively with impartiality in both its narrow and wide senses. The duty to avoid conflicts of interest incorporates a duty to avoid the impact of any bias, vested interest, or prior association or knowledge. The duty to act in the best interests of the other enables inclusion of the conscious or unconscious prejudices, preferences or agendas of a mediator, as considerations in the requirement of impartiality in a wide sense. These personal, potential intrusions in an absolute sense are no longer the problem. The problem that remains is their intrusion when they conflict with the best interests of the parties. Reflexivity is acknowledged
as a useful, important tool in generating awareness of the potential intrusions of mediator’s personal predilections. What to do that with that awareness is answered by Baker’s “neutral position”.

Baker’s six characteristics of the neutral position offer six clear signposts for an application of a reflexive practice. Together, they offer a set of six “principles” that can be applied to the role of the mediator as she acts in the best interests of parties. In other words, they enable a concrete translation of the fiduciary obligation to act in the best interests of another to the relationship between mediator and parties. Therefore, in the relationship between mediator and parties, there is a conceptual overlap between an obligation to act in the best interest of the parties and the neutral position. Importantly, each of the six principles can be used as signposts across different models of mediation. Since the neutral position is not an absolute concept and does not contradict a social constructionist (or intersubjective or relational) approach to experience and meaning creation, it can be applied to transformative and narrative models of mediation despite their whole or partial rejection of the concept.

The neutral position and the principles that determine it are consistent with the principle of party self-determination. The duty to act in the best interests of parties generally means to facilitate and enable the parties to determine and manifest their own best interests. The neutral position, however, allows consideration of situations in which the interests of the parties conflict to such a degree that one party is evidently and manifestly disadvantaged, and in which the interests of one or both parties conflict with clearly articulated community standards, whether in the form of legislation, organisational policy or professional standards. This consideration is
possible because the neutral position depicts not an absolute neutrality but a variable, fluctuating position guided by principles that place the interests of “the other” before those of the mediator. Those interests may sometimes and in some contexts be influenced by external criteria, particularly where account is taken of the potential for parties’ interests to conflict, or where the interests of external third parties require particular attention (for example, those of children in family matters).

The process and content or outcome distinction remains a useful analytical tool. It is not unlike that between the substantive and procedural aspects of a legal action, or between knowledge and skills as they apply to professional expertise. What is important in the development of mediation as a profession is that a growing knowledge base, alongside an already developed skills base, be informed by a concept of neutrality that delimits the interventions of mediators in a manner consistent with the principle of party self-determination. A safeguard for that development is provided by a reconstruction of the concept of neutrality in relation to that of party-self determination, mediated by a postmodern concept of power. A reconstructed neutrality emphasises delimitation of the proper exercise of mediator power.

The proper exercise of mediator power is foremost bounded by the relationship of trust between mediator and parties, the other focus of the mediator’s role and the mediator’s commitment to the principle of party self-determination. The complexity of relationships between parties, and the location of the mediation encounter within intersecting wider relationships, or contexts, further bound the mediator’s proper exercise of power. Those relationships include legislative, professional and organisational expectations. What this means for the reality of a given encounter must
be determined for that encounter as it presents itself. The framing of mediator neutrality in terms of a proper exercise of mediator power grounded in the relationship with parties avoids an extreme relativism for the meaning of neutrality but retains a measure of flexibility according to context.

The model advanced here does not claim to solve the problems of mediation or even to provide detailed answers to the challenges of putting neutrality and party self-determination into practice. What it does is provide a different way of thinking about neutrality that avoids the limiting aspects of an absolute conception and the further limitations of the process and content or outcome distinction (while retaining this distinction as a practice tool). It redefines neutrality and self-determination as related to the exercise of power in mediation, and as grounded in the relationship of trust between mediator and parties.
SUMMARY AND CONCLUSIONS

This study began by asking the question of how mediators make sense of neutrality given research and scholarly critique suggesting that it is not evident or even possible in practice. I asked this question against the background of a broadly social constructionist worldview, which sees reality as constructed by human beings in their interaction with their environments. I adopted a theory building aim for my investigation intending to develop a theoretical understanding of neutrality in practice rather than to test for its putative causes. I chose an interpretivist approach to theory building relying on the interpretive tradition of hermeneutics.

I asked mediators directly about what they understand neutrality to be, how important it is to them and what problems they experience in putting it into practice. In order to do this, I designed and implemented a qualitative project that consisted of two case studies of mediation service providers and in-depth interviews with fourteen mediators. My search for meaning and mediators’ translation of meaning into practice was aided by the use of a grounded theory analysis, characterised by a method of constant comparison across interpretive categories.

I found that the mediators I interviewed see neutrality as a core principle for their practice; understand from experience the dilemmas of putting neutrality into practice; and have found creative ways of extending their understanding and practice beyond the established meanings and approaches found in the literature.
In addition, I found that mediators relate neutrality to another core principle of practice, that of party self-determination. They do this by seeing their neutrality as a necessary condition of a client-centred approach, that is, a practice that aims to meet the needs and enhance the autonomy of parties. Furthermore, the mediators use a broad mix of legal, therapeutic and common sense ideas to extend the meaning of neutrality and to link it to their practice as a whole.

The following summary and concluding remarks, trace the development of a model for the practice of neutrality in mediation. It is developed from an examination of existing scholarly approaches to neutrality, the results of the empirical component of this study, and a reconstruction of the meaning of neutrality, one which incorporates a postmodern critique of its use as an absolute concept and a postmodern idea of power.

In the first chapter of this dissertation, I examined the importance of neutrality in mediation. That importance was traced to neutrality’s function in legitimising mediation as a form of third party intervention within a western democratic system of dispute resolution. Neutrality of the third party intervener emerged as a core element of early definitions of mediation. I have argued that its absence in more recent definitions, which emphasise an “acceptable” rather than “neutral” third party, is a function of the contested nature of neutrality and its place in mediation rather than its abandonment. In the face of ongoing debate, I drew attention to the National Mediator Accreditation Practice and Approval Standards which contain a requirement that accredited mediators demonstrate an understanding of “neutrality and impartiality.”
The meaning of neutrality was next examined and I found a lack of clarity and consensus in definitions in the literature. I then proposed three meanings as associated with neutrality which represent recurrent themes in the literature: neutrality as impartiality, as even-handeness, and as associated with the distinction between process and content or outcome. I advanced these three meanings as those ascribed to neutrality rather than meanings distinguishable from neutrality. I have taken this approach in order to avoid the confusion from the varying attempts to define neutrality as distinct from impartiality. Two meanings are advanced for impartiality: a narrow meaning identifying impartiality with the bias or conflict rule, and a wide meaning identifying impartiality with a perceived need to prevent the mediator’s personal values, preferences and preconceptions from impacting upon a mediation encounter. Even-handedness is identified with treating the parties equally. The process and content or outcome distinction is identified as a recognised framing of mediation and one particularly associated with problem-solving models. The mediator is said to be in control of the process of mediation but neutral as to the content and outcome of the parties’ dispute.

I identified particular practice dilemmas and negative features of the mediator’s role as related to these three themes. A dilemma associated with neutrality as impartiality in a wide sense is the impact of the personal values, preferences and preconceptions of the mediator. A dilemma associated with even-handedness is that treating the parties equally may lead to unequal and hence unfair results. A dilemma associated with idea that mediators are in control of the process of mediation, but neutral as to the content and outcome of a dispute, is the growing recognition that mediators influence the content of a dispute and exercise considerable power in directing the outcomes of
mediation. Outside that growing recognition, and consistent with an insistence that mediators are neutral in regard to the content and outcome of a dispute, neutral mediators are said to intervene without directing the parties, without giving advice to the parties and without exercising any power and influence in relation to substantive aspects of the dispute and its outcome. A considerable body of literature that challenges these assumptions about a neutral mediator was reviewed in Chapter One.

In Chapter Two, I reviewed responses to the problems of translating neutrality into practice, including newer models of mediation that reject neutrality, wholly or in part, as a response to those problems. Scholarly suggestions for dealing with the inevitable impact of the personal views and values of the mediator include communicating those views and values to parties; rejecting neutrality in favour of a strategy of symmetric prescriptive advice (SPA); attempting to limit the impact of personal intrusions of the mediator by the practice of mindfulness and developing an awareness of those intrusions through a reflexive practice.

I have argued that making parties aware of the values of the mediator does not absolve mediators from exercising their power consistent with their own personal views and values. The assumption that awareness of mediators’ values empowers parties to choose whether to continue or discontinue a mediation session represents a naive and idealistic view that fails to account for the subtleties of mediator power and authority, of which the mediator herself may not be aware. Enabling the mediator’s personal values to intrude because they have been communicated to parties exposes parties to a multiplicity of perspectives rather than a clearly articulated mediation philosophy. The strategy of symmetric prescriptive advice advanced by Gibson and his colleagues
replaces neutrality as to content and outcome with even-handeness by providing the parties with the same advice. As such the SPA strategy places an unrealistic expectation on mediators to both recognise and quantify advice needed to remain even-handed.

Mindfulness in mediation is a practice drawn from Buddhist meditation. When applied to mediation it aims to increase mediators’ awareness of their responses during a mediation encounter. By increasing that awareness mindfulness widens the intervention choices available to mediators. Mindfulness points to a useful distinction between having a personal view, and or an emotional response, and acting upon it. Greater awareness increases one’s ability to have, but not act upon, potentially prejudicial reactions, and to choose to act upon principled responses. When tied to the process and content or outcome distinction, mindfulness might suggest a strategy of “mindlessness” in attempts to remain removed from the substantive aspects of a dispute. When divorced from that distinction, mindfulness represents a valuable strategy for distinguishing potentially intrusive reactions from more appropriate and principled responses.

Reflexivity in mediation practice is considered at length in Chapter Three as a response to questions of both mediator neutrality and researcher objectivity. Reflexivity rests upon an assumption that the subjectivity of the mediator inevitably has an affect on the mediation encounter. In Chapter Three I explored differing meanings of reflexivity and associated them with different worldviews. I examined reflexivity as introspection, as intersubjective reflection or mutual collaboration, as discursive deconstruction and as social critique, and as distinguished from a modernist
or positivist “reflection” about technique. I argued that each of these possibilities for understanding reflexivity adds to our understanding of the impact of the mediator on mediation. I related these differing meanings to differing approaches to mediation by examining the underlying assumptions about human nature and knowledge of those differing approaches.

I argue that reflexivity in mediation does two things well. Firstly, it acknowledges the influence of the mediator’s subjective processes on the mediation encounter given its premise that an absolute neutrality is not possible. Secondly, it provides a way of thinking about that influence according to the various meanings associated with it. What it fails to do for mediation, and arguably for research, is to frame the mediator’s/researcher’s self examination in a way which provides identifiable principles to guide its use. In scholarly accounts of reflexivity in mediation questions remain unanswered. In the intersubjective, relational space of a mediation encounter, how does reflexivity aid the intervention the mediator? How does the mediator’s awareness and critique of self relate to awareness of and assistance to the parties? I argue that in the relationship between the mediator and parties, it is the “other focus” of the mediator that guides intervention and hence the awareness gained from a reflexive practice.

Reflexivity is an idea predicated on critiques of positivist, or modernist, assumptions as to the nature of reality and knowledge. The theories of neutrality advanced by Taylor and Astor recognise a need for contextual and situated understandings consistent with positivist critique and postmodern analysis. Varying models of mediation can be linked to varying worldviews, and newer models reject neutrality consistent with critiques of positivism. Value neutrality is an idea implicated in
positivism’s rational, scientific worldview and as such is reflected in problem-solving models of mediation. Critiques of problem-solving mediation and newer models that call for an explicit value dimension to practice (with the aim of creating some measure of social change) are consistent with the challenges to established power and privilege integral to postmodernist perspectives and critical inquiry.

Transformative and narrative models reject an absolute neutrality as a consequence of adopting a social constructionist perspective. Consistent with this perspective, there is an emphasis in the transformative model on a relational understanding of social processes and in narrative models on intersubjective meaning creation. Both models reject neutrality as a consequence of rejecting the process and content distinction consistent with social constructionism. The narrative model rejects mediator neutrality outright. The transformative model reframes neutrality because it retains a distinction between outcome and process or content. The mediator, according to that model, cannot be neutral as to content but remains neutral as to outcome in order to further the empowerment of parties.

While narrative and transformative models acknowledge that the mediator has an inevitable impact upon both the process of mediation and the content of the parties’ dispute, neither model (or variant thereof) deals adequately with the question of delimiting that impact. Each model seeks to shape the impact of the mediator according to its aims – conflict transformation, and empowerment and recognition in the transformative model; social justice through the re-storying of disputes in the narrative model of Winslade and Monk; and new moral relationships through the transformation of conflict narratives in the model advanced by Cobb. Presumably the
mediator’s personal biases – values, preferences and preconceptions – would be subjugated in the enactment of these aims. However, issues of substantive fairness are avoided or apparently left to mediators to individually determine and address in these newer models.

In the transformative model, empowerment is seen as independent of substantive outcomes and the fairness of outcomes is equated with whatever the parties determine. The idea of balancing power as between the parties is rejected because it is distinct from the goal of empowerment. In the narrative model of Winslade and Monk, social justice is the aim but its precise meaning remains open to a mediator’s individual interpretation. For Cobb, the aim is a reconstituted moral relationship. Whether that relationship needs to be consistent with the parties’ ideas of fairness, or those of the mediator and, whether they would need to be consistent with Cobb’s “favoured versions of reality” if it is the latter, is unclear. In both narrative models examined, the proponents reject ideas of balancing power between the parties as an idea wedded to a Weberian and modernist conception of power.

What role, if any, the mediator has in balancing power between parties to mediation continues to attract considerable attention and debate. This question is implicated in the meaning and practice of neutrality as even-handedness. In Chapter Two, I examined responses to the problem of treating the parties equally yet producing inequality of outcomes. I identified three approaches to questions of fairness in mediation. One is to rely on the process and content or outcome distinction to limit mediator intervention to process, and hence limit intervention to achieving procedural fairness. In this approach, mediators are encouraged to treat parties unequally in order
to produce the “level playing field” associated with procedural fairness. Two other approaches address questions of substantive fairness. In the first of these, what is fair is left to the parties to decide, in other words, to “self-determine”. In the second, external determinants of fairness are seen as valid and necessary to address issues of substantive fairness in the relationship between parties, and according to the outcomes in mediation determined by those relationships. In the first two of these responses (in relation to procedural fairness and the first in relation to substantive fairness), mediator neutrality is claimed. In the first, the mediator remains neutral because his/her interventions are limited to process interventions. In the approach which leaves the question of substantive fairness to the parties, the mediator again remains neutral because s/he is claimed not to be intervening as to content. In the final approach, mediator neutrality is rejected as inconsistent with the imposition of external determinants of fairness via the intervention of the mediator.

It is the in response to the question of substantive fairness that mediators in the study demonstrate most difficulty. Findings about the mediators’ understanding of neutrality are reported in detail in Chapter Five. Participants acknowledge the meanings of neutrality found in the literature and distinguished as impartiality, in both a narrow and a wide sense, even-handeness and as associated with the process and content or outcome distinction. Participants also acknowledge difficulties, firstly, in putting these ideas of neutrality into practice, recognising problems in being absolutely impartial and having no impact on the content or outcome of a dispute. Secondly in limiting intervention to process in the face of power imbalances and any evident disadvantage experienced by one party in the course of negotiations.
Based on the results of the study, I have developed a model for the practice of neutrality in mediation. This model is presented in Chapter Six. Central to the model is a shift away from understanding neutrality as tied to the process and content and outcome distinction integral to problem-solving models of mediation. In its place, neutrality is reframed as grounded in the relationship between participants in mediation – between mediator and parties. That relationship can be analysed as having features of process and content but it is not dependant on that distinction for meaning.

Neutrality as impartiality, when grounded in the process and content or outcome distinction, carries with it the problem of dealing with the impact of mediators’ prejudice, partiality and prejudgments. The mediator’s role according to problem-solving models is limited to control of the process of mediation. As such, the mediator is restrained from impacting upon the content and outcome of a dispute. As the process of mediation, according to various steps, strategies and skills, is largely pre-determined, the mediator’s input is further limited. Development of principles for dealing with the impact of the mediator’s prejudice, partiality and prejudgments is largely hamstrung because in theory that impact is excluded. Furthermore, development of principles which substantiate the purpose and goals of mediation beyond a focus on process are circumscribed. Those models that have developed a more specific, substantive framework for practice, namely, narrative and transformative models have done so by rejecting the process and content distinction.

Where the role of the mediator is grounded in the process and content or outcome distinction, mediators have a mandate to intervene to ensure procedural fairness but
no mandate to intervene to ensure substantive fairness. The mediator’s personal views of substantive fairness and or objectively determined measures of substantive fairness are excluded in theory by the distinction. According to problem-solving models based upon this distinction, substantive fairness is assured by virtue of the parties’ control of the content and outcome of a dispute. What is fair is that which is determined as fair by the parties. A dilemma for practice is that unqualified adherence to the principle of self-determination in determining what is fair, ignores situations where one party’s view of fairness over-rides that of the other party. It is in such circumstances that the issue of the imbalance of bargaining power between parties arises.

Where practice is grounded in the process and content or outcome distinction, a mediator cannot exercise power, be directive or give advice without intruding into the content and or outcome of a dispute. By grounding an understanding of neutrality in the relationship between parties, issues of the intrusion of mediator bias into content and those of ensuring fairness in mediation can be reframed, opening them up to alternate understandings and practice responses. Integral to this reframing is recognition of the operation of power in the relationship between mediator and parties. Adopting a postmodern idea of power as circulating in the relationship between participants in mediation avoids the need to negate or ignore the power of the mediator in an attempt to characterise his/her input as neutral. From a postmodern perspective, all participants exercise power in mediation and no participant has more power in a quantitative sense than any other. At the same time, patterns in the exercise of power may be evident in the relationships between parties creating disadvantage as between them. This may appear in the relationship between mediator and parties creating improper intrusion or abuse of power.
Acknowledging the mediator’s exercise of power also points to a reconsideration of party self-determination as an absolute concept. Asserting that mediators do not exercise power and influence is consistent with the value placed on party self-determination in mediation. As an absolute concept, party self-determination would be infringed if the mediator were seen to exercise power and influence over content and or outcome. Once the mediator’s exercise of power is acknowledged, the question becomes one of its “proper” exercise. That proper exercise, according to my model, is framed by the relationship between mediator and parties and hence looks to that relationship for the principles that determine its exercise.

Rather than an evenly balanced, reciprocal relationship, the relationship between mediator and parties is one in which the mediator assumes a measure of responsibility for the parties. The mediator adopts a role in relation to the parties rather than interacting with the parties according the fullness of his/her identity. Therefore, the mediator assumes responsibility for guiding the parties through the process. The relationship between mediator and parties is not freely negotiated but rather determined externally by the intersection of professional, organisational and statutory contexts. The mediator acts in relation to the parties and their ownership of the dispute and its outcome. From the point of view of the mediator, his or her relationship with the parties, individually and collectively, is “other focussed”. This other focus frames the mediator’s exercise of power in relation to the parties’ exercise of their own power, their self-determination.
I have argued that the idea of mediator neutrality can be reconstructed in the context of the relationship between mediators and parties, in which all participants are recognised as exercising power. I have proposed a reconstruction of neutrality as consisting of the “other focus” of the mediator in his/her proper exercise of power in the relationship with parties. This reconstruction sees the meaning of mediator neutrality as relational in nature; that it makes sense in the context of the mediation relationship and that it has meaning in relation to that of party self-determination.

The “other focus” of the mediator is shared with other professions, such as law, social work and psychology. It is this focus, *inter alia*, which distinguishes the concept of mediator neutrality from that of judicial neutrality. Having reconstructed the meaning of neutrality in essential terms, I looked to the character of the professional relationship between mediator and parties to establish how neutrality can be translated into practice, as impartiality and as even-handedness. I have argued that mediator neutrality can be understood in practice by drawing upon socio-legal constructions of professional relationships. This possibility was pointed to by socio-legal constructions of neutrality presented by the mediators interviewed.

A reconstructed impartiality is grounded in a concept of relationship as between the mediator and parties rather than the process and content or outcome distinction. That reconstruction relies upon principles derived from existing understandings of fiduciary and therapeutic relationships. I have argued that fiduciary, therapeutic and, by analogy, the relationship between mediator and parties, are all fundamentally relationships of *trust*. Neutrality as impartiality is reconstructed in two senses. In a narrow sense impartiality is constructed as the avoidance of bias due to conflicts of
interest, and its application in practice draws upon principles associated with fiduciary relationships. In a wide sense impartiality is constructed using principles which guide both fiduciary and therapeutic relationships. Based upon principles guiding fiduciary relationships, impartiality means acting in the best interests of the parties, consistent with the principle of party self-determination. Impartiality in a wide sense, and as indicating an “other focus”, is constructed as one in which the mediator acts in the best interests of the parties consistent with recognised fiduciary obligations. The best interests of the parties, individually or collectively, will be determined in mediation according to the principle of party self-determination. Hence a reconstruction of impartiality recognises the “other focus” of the mediator’s role and the responsibility of the mediator to foster the best interests of the parties in ways consistent with the principle of party self-determination.

Based upon principles associated with therapeutic relationships, impartiality in a wide sense is reframed to mean the mediator’s adoption of a “neutral position”, characterised by an “other focus” and translated into practice according to the six principles articulated by Baker (2000). This reconstruction allows for inclusion of two key associations of impartiality gathered from the data – those of ‘not taking sides’ and a ‘non-judgmental attitude’. Furthermore, it allows for the inclusion of other associations as features of the relationship between mediator and parties as opposed to features of the process or the mediator’s control of the process. Other features associated with impartiality by participants in the study, such as emotional detachment, active listening, encouraging mutual understanding and monitoring of self are constructed as furthering a neutral position, portrayed as a dynamic space within the interaction between mediator and parties. The neutral position gives
purpose to the practice of reflexivity in mediation. It enables mediators to identify principles that can guide a reflexive practice. The principles articulated by Baker can be used by mediators as criteria to assess the appropriate boundaries of their input into mediation, both during the conduct of sessions and as part of the process of debriefing. The neutral position offers a way of dealing with the subjectivity of the mediator in a way which contributes to the “other focus” of his or her role, but does not require or imagine that the mediator has no impact in mediation beyond orchestration of the process.

Reconstructing neutrality as even-handedness in relation to party self-determination opens the door for the inclusion of acknowledged measures of substantive fairness. Here, it is acknowledged that mediation is never “value neutral”. It is acknowledged that neutrality and party self-determination exist as much as values as they do as theoretical concepts. As such they ground considerations of fairness, both procedural and substantive, as applied to the mediation encounter. Even-handedness is reframed to mean treating the parties equitably rather than equally. Considerations of equitable treatment include those drawn from the wider contexts which intersect to form context for a mediation encounter. Those contexts will include measures of substantive fairness that are the product of legislative enactment, organisational policy and of professional standards. Equitable treatment of the parties will in many cases mean providing parties with equal opportunities to “be heard” in a procedural sense. But it will also entail taking account of individual need and hence those circumstances and factors which foster an individual party’s capacity to be heard. Taking account of those factors and circumstances means that mediators must make assessments based upon the parties’ presentations. These assessments acknowledge mediator intervention.
into the content of a dispute as it is shaped by parties’ identities and experiences. Based upon these assessments, a reconstructed even-handedness means treating the parties fairly, or equitably, rather than merely equally. “Being heard”, as an integral component of mediation is a concept at which ideas of procedural and substantive fairness can intersect, thus breaking down the apparent inflexibility and absolutism associated with the distinction.

The model I propose uses a systems framework to map the relationship between participants in mediation and to place any given mediation encounter within wider intersecting contexts. What amounts to a proper exercise of mediator power consistent with the mediator’s role can only be determined by consideration of these intersecting contexts. Some of these will produce a measure of predictability in setting the outer limits of mediator intervention including, for example, legislative requirements and professional standards and expectations. The impact of these contexts will vary across fields of mediation and areas with a particular substantive focus. The “other focus” of the mediator’s role will also mean variation in response to the needs of parties as categories of clients and as individuals. In this way, neutrality as given by an “other focus” and proper exercise of power is a contextual and nuanced concept.

At the same time, neutrality, according to my thesis, is a generic formulation that sees neutrality and party self-determination as core concepts for practice whatever model of mediation is employed. Neutrality as grounded in the relationship between mediators and parties, rather than the process and content or outcome distinction, makes sense of the realities of the facilitative model (and problem-solving models) of practice. Neutrality as grounded in that relationship is a concept needed in
transformative and narrative models which, while acknowledging mediator impact on content and mediator power, require some conceptual means of delimiting the proper extent of that impact and power.

I have described mediator neutrality is quintessentially understood as the “other focus” of the mediator in relation to the parties. I have also introduced this project as a postmodern critique of neutrality in mediation. This might seem a contradiction given the anti-essentialism of a postmodern perspective. However, I have constructed neutrality as a relational concept consistent with a postmodern perspective, and the “other focus” of mediator neutrality describes that relational character. Beyond that, neutrality as an “other focus” suggests an explicit value dimension, particularly when understood in relation to party self-determination, to which I acknowledge a personal commitment.

I have placed my analysis within a social constructionist perspective which accommodates a postmodern context and a commitment to critical inquiry. The model I have developed therefore is situated within a perspective that acknowledges intersubjective meaning creation and a relational account of human existence. At the same time, the model rejects the process and content or outcome distinction as grounding mediation. It shifts instead to an emphasis on the relationship of trust between mediator and parties and is applicable to problem-solving models which retain elements of a positivist view. A postmodern view of power, drawing on Foucault, is central to the model. Its acknowledgement of the fact of mediator power and framing of neutrality as intimately connected to a proper exercise of mediator power are responses to questions of theory and practice applicable to all models.
mediation practice. The model’s reliance on postmodern ideas of power calls attention to existing ideas of “imbalance of power” and “empowerment”, opening them to critique and the possibility of reformulation and as significant areas for future research.
REFERENCES


Charlton, R. 2000, Dispute Resolution Guidebook, LBC Information Services, Sydney.


*Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR 41.


16, pp. 75-86.

—— 2000, *The Dynamics of Conflict Resolution – A Practitioner’s Guide*, Jossey-
Bass, San Francisco.


and Conflict of Interest in State Codes of Conduct”, *Conflict Resolution Quarterly*, 
Vol. 23, No. 2, pp.165- 83.


McHoul, A. & Grace, W. 1993, *A Foucault Primer: Discourse, Power and the 
Subject*, New York University Pres, New York.

McKay, R. 1989, “Ethical Considerations in Alternative Dispute Resolution”, *The 

Traditions, Ideologies, Paradigms, and Practices”, *Negotiation Journal*, Vol.11, No. 3, 
217-242.


National Alternative Dispute Resolution Advisory Council (NADRAC) 1997a, *Alternative Dispute Resolution Definitions*. (no longer available on the NADRAC website).


*R v Watson; Ex parte Armstrong* (1976) 132 CLR 248.


Tillett, G. 1991a, *The Myths of Mediation*, Centre for Conflict Resolution, Macquarie University, NSW.


*Webb v The Queen* (1994) 181 CLR 41.


Research Project Information Sheet

Mediators

A Study of the Dynamics of Mediation

Introduction
The Management Discipline, Faculty of Business, University of the Sunshine Coast is supervising a doctoral research study of the practice of mediation. The research is to be undertaken by Ms Sue Douglas, Teaching and Research Fellow (Management) and supervised by Prof. Andy Hede, Professor of Management, USC and Dr Cathy Urquhart, University of Auckland. Contact details are provided below.

<table>
<thead>
<tr>
<th>Researcher</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ms Sue Douglas</td>
</tr>
<tr>
<td>Teaching and Research Fellow</td>
</tr>
<tr>
<td>Faculty of Business</td>
</tr>
<tr>
<td>University of the Sunshine Coast</td>
</tr>
<tr>
<td>Tel: 07 5459 4452</td>
</tr>
<tr>
<td>Fax: 07 5430 1231</td>
</tr>
<tr>
<td>Email: <a href="mailto:sdouglas@usc.edu.au">sdouglas@usc.edu.au</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Principal Supervisor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prof. Andy Hede</td>
</tr>
<tr>
<td>Professor of Management</td>
</tr>
<tr>
<td>Faculty of Business</td>
</tr>
<tr>
<td>University of the Sunshine Coast</td>
</tr>
<tr>
<td>Tel: 07 5430 1220</td>
</tr>
<tr>
<td>Fax: 07 5430 1231</td>
</tr>
<tr>
<td>Email: <a href="mailto:hede@usc.edu.au">hede@usc.edu.au</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Associate Supervisor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dr Cathy Urquhart</td>
</tr>
<tr>
<td>Senior Lecturer</td>
</tr>
<tr>
<td>Department of Management, Science and Information Systems, University of Auckland</td>
</tr>
<tr>
<td>Tel: +64 9 373 7599 x3943</td>
</tr>
<tr>
<td>Fax: +64 9 373 7430</td>
</tr>
<tr>
<td>Email: <a href="mailto:c.urquhart@auckland.ac.nz">c.urquhart@auckland.ac.nz</a></td>
</tr>
</tbody>
</table>


The aim of the study is to increase knowledge of the process of mediation and the role of the mediator. As such the study entails research into what actually occurs in mediation sessions.

The purpose of this document is to:
- Inform the reader about the research and the extent of involvement of potential participants; and
- To invite participation in the study, subject to participants’ written consent.

**Objectives and Approach of the Study**

The study aims to provide an in-depth examination of the process of mediation through an investigation of mediation sessions. To enable an in-depth examination, mediation sessions will be videotaped. Videotaping equipment will be set up to operate during the sessions. Mediators involved in the session and the researcher will later view the videotape. This approach is aimed to enable a careful review of the process that occurred. A written record will be made of mediators’ comments about the session. It is these comments on the process of mediation, rather than details of the actual dispute, which form the focus of study.

**Participation in the Study**

Your voluntary participation in the study is sought. Your participation as a mediator is highly valued.

Your choice not to participate will involve no penalty or loss of benefits to which you might otherwise be entitled.

Your participation would require you to consent to:
- Provision of your contact details from the ADR branch, Department of Justice, Brisbane to the researcher, in order to arrange pre- and post- mediation interviews;
- A pre-mediation interview with the researcher (conducted with each individual mediator);
- Videotaping of the mediation session;
- Later viewing of the videotaped session by yourself, your co-mediator and the researcher for the purpose of comment, which will be videotaped in order to record cued responses;
- Written recording of your comments about the session from videotapes;
- A post viewing interview with the researcher (conducted individually with each-mediator); and
- Use of the material collected for the sole purpose of research.

A commitment of five hours for pre and post mediation interviews and the post mediation viewing is sought. It is estimated that the pre mediation telephone interview will take ½ hour; the post mediation interview, one hour; and the post mediation viewing, 3 ½ hours. The study has been funded to enable payment to mediators for up to five hours, as reimbursement, at the rate of $25.71 per hour (excluding travel time).
If you choose to participate in the study, you may discontinue at any time without penalty or the need to provide any explanation.

Confidentiality of Data and Access to the Research Information
The identities of all participants in the study will remain anonymous. Anonymity will be achieved using a non-identifying coding system. In other words, numbers and letters will be used instead of the actual names of participants. All records of the research, including tapes and written notes, will be stored under locked conditions during the course of the study, with access limited to the researcher and her supervisors. All records will be destroyed at the conclusion of the research.

Disseminating/Publishing the Research Findings
Findings of the study will be published in the form of a thesis, available to participants and the public through the University of the Sunshine Coast library. Publications referring to the results of the study will not contain the names of participants nor any other identifying information.

An opportunity for participants to provide feedback on their involvement in the study will be offered in the form of individual interviews with the researcher. Attendance for a feedback interview is optional.

Potential Risks and Discomfort
In the unlikely event that participants experience discomfort and/or distress during the conduct of the study, consent to involvement may be withdrawn at any time. Withdrawal of consent means that participants may request, without explanation, that audio and videotaping cease and that the researcher will immediately comply with any such request.

Agreeing to Participate
Please take your time to think about whether you wish to participate in this study. If you decide you would like to participate, please complete the consent form that follows and forward to Mr Peter Johnstone, ADR Branch, Department of Justice, Brisbane. You will be contacted by the researcher to arrange times for pre- and post-mediation interviews when a mediation suitable for the study is chosen. Your response by 7 December 2001 would be appreciated as it is planned to commence the study shortly.

If you have any complaints about the way that this research project is being conducted, you can raise them with the researcher or her supervisor. If you prefer, you can raise any complaints you have with an independent person, namely, Professor Robert Elliot, Chairperson of the Human Research Ethics Committee, University of the Sunshine Coast; Maroochydore DC Qld 4558, Telephone: 07 5430 1247; Email: ELLIOT@usc.edu.au.)
Consent to Participate in Research: Mediators

A Study of the Dynamics of Mediation

Your voluntary consent is sought to participation in the research entitled, “A Study of the Dynamics of Mediation”, to be conducted by Ms Sue Douglas under the supervision of Professor Andy Hede, University of the Sunshine Coast and Dr Cathy Urquhart, Auckland University, NZ.

Please read the attached Research Project Information Sheet and this Consent Form carefully before signing.

Participation in the Study

Your consent to participation in the research means that you consent, for the sole purpose of research, to:

• Provision of your contact details from the ADR Branch, Department of Justice, Brisbane to the researcher;
• A pre-mediation interview with the researcher;
• Videotaping of a mediation session conducted by yourself and a co-mediator;
• Viewing of the mediation session videotape by yourself, your co-mediator and the researcher;
• Videotaping of the viewing session;
• Written recording of your comments on the mediation session; and
• A post-mediation interview with the researcher, involving yourself and your co-mediator.

Your consent to participation in the research is given on the clear understanding that:

• You do not have to participate in this research study if you do not want to;
• You can withdraw from the study at any time and do not have to give any reasons for withdrawing;
• If, at any time, including mid-session, a mediator believes that the recording of a mediation session is impeding the process of mediation, the mediator can withdraw consent for the session to be included in the research, and does not have to give any reasons to any person or parties for withdrawing that consent.
• If you do choose to withdraw from the research study at any time, any information received from you or pertaining to you that was obtained during the research will not be used;
• You will not be penalised or treated less favourably or lose any benefit if you do withdraw from the study; and
• Your participation will be dependent upon consent being obtained from the parties to the dispute and the co-mediator involved in the mediation session.

Confidentiality of Information

Your consent to participate in the research is given on the clear understanding that:

• All material collected in the study will be sorted using a non-identifying coding system, in order that participants remain anonymous;
• All material collected in the study will be stored under locked conditions accessible by only the researcher and her supervisors, and will be destroyed on completion of the research;
• Information provided by participants during the research will be used only for the purposes of the research study; and
• Findings of the research will be made available to participants through the University of the Sunshine Coast library.

Statement of Consent (Mediator)
I have read and understand the contents of the Research Project Information Sheet and of this Consent Form, for the research entitled “A Study of the Dynamics of Mediation”.

I agree to participate in the research project and give my consent freely.

I understand that the study will be carried out as described on the Research Project Information Sheet, a copy of which I have kept.

I understand that whether or not I decide to participate is my decision. I also understand that I can withdraw from the study at any time and that I do not have to give any reasons for withdrawing.

Any questions I had about this research project and my participation in it have been answered to my satisfaction.

__________________________________________
Signature:                                                                                           Date:

__________________________________________
Name: (Please Print)
# Mediators

## A Study of the Dynamics of Mediation

### Introduction

Academic staff of the University of the Sunshine Coast are supervising a doctoral research study of the practice of mediation. The research is to be undertaken by Ms Susan Douglas, Lecturer in Accounting and Business Law, and supervised by Dr Lucinda Aberdeen and Dr Phillip Ablett at University of the Sunshine Coast. Contact details are provided below.

<table>
<thead>
<tr>
<th>Researcher</th>
<th>Principal Supervisor</th>
<th>Associate Supervisor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ms Susan Douglas</td>
<td>Dr Lucinda Aberdeen</td>
<td>Dr Phillip Ablett</td>
</tr>
<tr>
<td>Lecturer in Accounting and Business Law</td>
<td>Lecturer in Sociology</td>
<td>Lecturer in Sociology</td>
</tr>
<tr>
<td>Faculty of Business</td>
<td>Faculty of Arts and Social Sciences</td>
<td>Faculty of Arts and Social Sciences</td>
</tr>
<tr>
<td>University of the Sunshine Coast</td>
<td>University of the Sunshine Coast</td>
<td>University of the Sunshine Coast</td>
</tr>
<tr>
<td>Tel: 07 5459 4452</td>
<td>Tel: 07 5430 1218</td>
<td>Tel: 07 5459 4602</td>
</tr>
<tr>
<td>Fax: 07 5430 1231</td>
<td>Fax: 07 5430 2885</td>
<td>Fax: 07 5430 2885</td>
</tr>
<tr>
<td>Email: <a href="mailto:sdouglas@usc.edu.au">sdouglas@usc.edu.au</a></td>
<td>Email: <a href="mailto:laberde@usc.edu.au">laberde@usc.edu.au</a></td>
<td>Email: <a href="mailto:pablett@usc.edu.au">pablett@usc.edu.au</a></td>
</tr>
</tbody>
</table>
The aim of the study is to increase knowledge of the process of mediation and the role of the mediator. As such the study is designed to investigate what actually occurs in mediation sessions.

The purpose of this document is to:
- Inform the reader about the research and the extent of involvement of potential participants; and
- To invite participation in the study, subject to participants’ written consent.

**Objectives and Approach of the Study**

The study aims to provide an in-depth examination of the process of mediation through an investigation of mediation sessions. To enable an in-depth examination, mediation sessions will be observed by the researcher and both mediators and parties will be interviewed by the researcher. Mediators will be asked to participate in two forms of interview:

1. An initial unstructured interview aimed to gather data on their experience and perceptions of issues in mediation
2. Interviews following mediation sessions in order to gather data on mediators’ reflections on the process of mediation.

Digital and transcribed, written records of interviews will be made. Observations will be made in handwritten form and later typed up in electronic documents. It is participants’ experience of the process of mediation, rather than details of any actual dispute, which form the focus of study.

**Participation in the Study**

Your voluntary participation in the study is sought. Your participation as a mediator is highly valued.

Your choice not to participate will involve no penalty or loss of benefits to which you might otherwise be entitled.

Your participation would require you to consent to:

- An unstructured interview with the researcher;
- Recording of the interview by digital recording device;
- Transcription of the interview data to the form of electronic document;
- The presence of the researcher as an observer during nominated mediation sessions;
- Recording of the researcher’s observations of mediation sessions in handwritten form; to be later transposed to the form of electronic document;
- Use of the material collected for the sole purpose of research.

If you choose to participate in the study, you may discontinue at any time without penalty or the need to provide any explanation.
Confidentiality of Data and Access to the Research Information
The identities of all participants in the study will remain anonymous. Anonymity will be achieved using a non-identifying coding system. In other words, numbers and letters will be used instead of the actual names of participants. All records of the research, including digital recordings and written notes, will be stored under locked conditions during the course of the study, with access limited to the researcher and her supervisors. All records will be destroyed at the conclusion of the research.

Disseminating/Publishing the Research Findings
Findings of the study will be published in the form of a thesis, available to participants and the public through the University of the Sunshine Coast library. Publications referring to the results of the study will not contain the names of participants nor any other identifying information.

An opportunity for participants to provide feedback on their involvement in the study will be offered in the form of individual interviews with the researcher. Attendance for a feedback interview is optional.

Potential Risks and Discomfort
In the unlikely event that participants experience discomfort and/or distress during the conduct of the study, consent to involvement may be withdrawn at any time. Withdrawal of consent means that participants may request, without explanation, that digital recording ceases and that the researcher will immediately comply with any such request and any information received from you or pertaining to you that was obtained during the research will not be used.

Agreeing to Participate
Please take your time to think about whether you wish to participate in this study. If you decide you would like to participate, please complete the consent form that follows.

If you have questions or wish to raise any concerns about this research project or the way it is being conducted, you are welcome to contact the Researcher or her Principal Supervisor (contact details above) or if you prefer an independent person, contact the Chairperson of the Human Research Ethics Committee at the University of the Sunshine Coast: (c/- The Academic Administration Officer, Teaching and Research Services, University of the Sunshine Coast, Maroochydore DC 4558; telephone (07) 5459 4574; facsimile (07) 5459 4727; e-mail humanethics@usc.edu.au ).
Consent to Participate in Research: Mediators

A Study of the Dynamics of Mediation

Your voluntary consent is sought to participation in the research entitled, “A Study of the Dynamics of Mediation”, to be conducted by Ms Susan Douglas under the supervision of Dr Lucinda Aberdeen and Dr Phillip Ablett of the University of the Sunshine Coast. Please read the attached Research Project Information Sheet and this Consent Form carefully before signing.

Participation in the Study

Your consent to participation in the research means that you consent, for the sole purpose of research, to:

- An unstructured interview with the researcher;
- Recording of the interview by digital recording device;
- Transcription of the interview data to the form of electronic document;
- The presence of the researcher as an observer during nominated mediation sessions;
- Recording of the researcher’s observations of mediation sessions in handwritten form; to be later transposed to the form of electronic document;
- Use of the material collected for the sole purpose of research.

Your consent to participation in the research is given on the clear understanding that:

- You do not have to participate in this research study if you do not want to;
- You can withdraw from the study at any time and do not have to give any reasons for withdrawing;
- If, at any time, including mid-session, you believe that the recording of a mediation session is impeding the process of mediation, you can withdraw consent for the session to be included in the research, and do not have to give any reasons to any person or parties for withdrawing that consent;
- If you do choose to withdraw from the research study at any time, any information received from you or pertaining to you that was obtained during the research will not be used;
- You will not be penalised or treated less favourably or lose any benefit if you do withdraw from the study; and
- Your participation will be dependent upon consent being obtained from the parties to the dispute and the co-mediator involved in the mediation session.

Confidentiality of Information

Your consent to participate in the research is given on the clear understanding that:

- All material collected in the study will be sorted using a non-identifying coding system, in order that participants remain anonymous;
• All material collected in the study will be stored under locked conditions accessible by only the researcher and her supervisors, and will be destroyed on completion of the research;
• Information provided by participants during the research will be used only for the purposes of the research study; and
• Findings of the research will be made available to participants through the University of the Sunshine Coast library.

Statement of Consent (Mediator)
I have read and understand the contents of the Research Project Information Sheet and of this Consent Form, for the research entitled “A Study of the Dynamics of Mediation”.

I agree to participate in the research project and give my consent freely.

I understand that the study will be carried out as described on the Research Project Information Sheet, a copy of which I have kept.

I understand that whether or not I decide to participate is my decision. I also understand that I can withdraw from the study at any time and that I do not have to give any reasons for withdrawing.

Any questions I had about this research project and my participation in it have been answered to my satisfaction.

__________________________________________

__________________
Signature: Date:

__________________________________________

Name: (Please Print)
Memo Re Categories

NATURE OF CATEGORIES:
(Consider: what does it mean to ‘stay close to the data’?)

(In first and second phases (1st reading and annotating in hard copy to find categories/ second reading and transferring segments of transcripts to categories using word processing (cut and paste))):

- The first three categories reflect ‘meanings’ in the literature and were isolated prior to commencement of data analysis as such.

- Further categories were elicited from the interview data in a number of ways:
  - Initially, broad categories were determined, with the anticipation of a number of items falling within them. For example, category (4) Underlying principles/values was captured from analysis of interview A and the participant’s early reference to ‘empowerment’ (p2/19). The breadth of the category was chosen to encompass ‘empowerment’ and to allow room for further items, which the researcher anticipated would surface (given a knowledge of the area - literature search, practice experience (consider objectivity) and the actual interview process)
  - Later categories were more finely drawn to more closely reflect what was actually said by participants (to more accurately reflect the data) and to invert attempts to force the data to fit a category. For example, (21) No vested interest and (26) No bias were nominated as a categories and might otherwise have been subsumed, for example, under (1) Impartiality. Subsuming what was said, ie a direct textual reference to ‘no vested interest’ under (1) may have distorted its meaning as there was no reference to impartiality as such. It was acknowledged that later steps in analysis might see the two categories joined together but that would be dependant on the totality of content found in the categories after completion of this phase for all interviews.

- Consistent with refinement of categories, was the potential for overlap as alluded to above. Subsuming some categories under others as the analysis
proceeded was often tempting but avoided in order to remain as ‘close to the
data’ as possible.

- In naming a category, something of ‘analysis’ rather than mere reflection/
description was evident in choosing ‘a’ concept from what was said to ‘hang’
the data isolated ‘on’. (Here ‘analysis’ is acknowledged as doing something
with or to the data/ what has been said. The extent to which this ‘doing’ is
‘making sense of’ or ‘distorting’ the data is raised (consider objectivity))

- Within categories attempts were made (in the second phase of transposing
from transcripts to categories via word processing) to isolate a key idea in
segments of data, subsumed within a category, in order ‘to make initial sense
of’ the data as well as ordering/ structuring its presentation. This was done as
it became evident that large amounts of text needed to be transposed in order
to ‘remain faithful’ to the data. The key ideas were sometimes notably
descriptive and demonstrating a one to one correspondence with what was said
by a participant – eg within (7) Steps in the process, exploration is used to
denote discussion of this phase in the mediation process as it appeared in a
transcript. Other ‘summarising ideas’ were more complex but remained
attempts to summarise without adding to or detracting from what was said or
indeed without attempt, at this phase, to ‘add sense’ to the data. For example
in (49) Lawyers as representatives of the parties, the following summarising
ideas appear and denote a progressive complexity: Presence of lawyers/ Role
of lawyers v. that of parties/ Role of lawyer as expert.

- The category of ‘Neutrality’ came at the end of examining the transcripts
through the first phase and into the second (numbered 50, from second
consideration of interview B and following which A was again considered).
Prior to this, ‘meanings of’ neutrality were identified and became categories.
The fact of neutrality as its own category was not obvious until the second
phase. It was identified to encompass commentary where the word itself was
used. Further, it was thought that keeping specific comments about neutrality
together would enable cross referencing (at a later phase) aimed to limit
distortion of meaning from reducing data/comments into categories (ie from
taking it out of wider context).
NUMBER OF CATEGORIES:
(In first and second phases)
Emergent categories and correspondence with interviews
After initial analysis of six interviews some cross checking between those interviews occurred as a form of quality control and in re orientating to the data after an absence from it. The reality that the process needed to be iterative, rather than linear, became evident. What seems obvious now but was not clear upon commencement, was that each interview would need to be re considered in the light of categories emergent after it had been analysed. For example, where categories (4) – (14) emerged from interview A and were then available for analysis of the next 9 interviews. Categories (36) – (46) emerged in interview I and while available for a first round consideration of interview J, had to be considered for the previous eight interviews by revisiting those interviews. A strategy (of two steps) to achieve this re visiting as economically as possible was devised, viz:
• Annotating (in hard copy) the list of categories with the interview from which the category emerged. This could not be done for interviews B – E as cross checking/ referencing had occurred; and
• In the second phase, on transposing data and re examining it at the same time, looking forward from the interview under examination to categories created after first examination of that interview to see if any were applicable.

CATEGORIES AND RELATIONSHIP TO NEUTRALITY
Each participant was asked a general open ended question about what they considered to be issues in practice. This approach was aimed to reduce bias in their responses (consider objectivity). Where the question of neutrality or related ideas, eg lack of bias, emerged as a result of the general prompt, the researcher was able to pursue this line of discussion with further prompts. Where the issue of neutrality did not emerge as a result of the general prompt, the researcher asked for the participant’s view on this issue directly (how many asked directly?)

A number of findings emerged as a result of the format noted above:
• The issues discussed by participants naturally extend beyond the issue of neutrality
• Across interviews, concepts related to that of neutrality as determined from the literature emerged both with and without reference to neutrality as such (eg discussion of the need for biased responses)

• The free associations, which were prompted at the end of each interview, clearly added concepts in connection with neutrality (as impartiality) beyond those identified in the literature.

A perceived difficulty in analysis was whether to isolate only those responses directly addressing literature based definitions in the general prompt material and the material elicited from direct questions about neutrality (and related literature based concepts)-ie whether to ignore a lot of material as not specific to the focus of neutrality.

The choice of interview protocol was made with awareness that a question of response bias was tied to epistemological issues including that of research objectivity. Where an objective reality is posited such that interview questions can be said to elicit/discover that reality, a protocol which eliminates/limits bias has greater validity/truth. Where reality is conceived as co constructed by researcher and participant, the ‘purity’ of response is less an issue. Yet there remains an attempt to learn what the participants understand by neutrality, not the researcher, even as that understanding unfolds in interaction with the researcher.

(It is noted that collection and analysis of data proceeds from a view that:

• What neutrality is, is not a concrete, static reality awaiting ‘discovery’.

• Reality is co constructed within the interview process/reality and

• Ideas about neutrality may be pre existing and articulated during that process (includes ‘schooled views’ which are relevant but looking for more) and developed in that process.)

A direct question might elicit a biased response according to a positivist framework. At the same time a direct question could limit an exploration of ‘context’ by the participants and hence limit their opportunity to explore meaning during the interview process. It was not the researcher’s view/aim that it was necessary to ‘discover’ how participants viewed neutrality as a static reality or one bounded in time (ie what the
participants thought about neutrality at one particular moment in time). Rather the researcher viewed responses as contributions by the participants (created in interaction with the researcher) to an ongoing process of ‘making sense of/ meaning’ of neutrality for the practice of mediation.

Yet again, a limit to the input/ interaction of the researcher was ‘sensed’ as necessary to a study of participant’s responses/ views. The exercise was not one of self reflection, nor was the aim to impose/ debate a personal view of neutrality, whether that view accorded with the literature or deviated from it. What bounds this researcher input?

The question of what to do with responses about issues in practice but not explicitly about neutrality remained. It was considered that the free associations conducted at the end of each interview provided good ‘reason’/ evidence of the broad contextual meaning associated with ‘neutrality’ and justify an approach which broadens analysis to at least concepts thus identified. For example, ideas such as being non judgmental, being attentive and being detached were elicited and are not mirrored in the literature about neutrality. The following strategy was devised to distinguish a variety of types of response, viz:

In the first and second phases, identify all issues raised. This would enable data to be transposed into categories and then examined for meaning with an opportunity provide context for responses that relate to neutrality. At the same time the data could be examined with a view to distinguishing responses:

- About neutrality and elicited in response to a general prompt
- About neutrality in response to a direct question
- About neutrality as understood from the literature
- About neutrality as different from the literature
- About ‘other things’ but significant in context as relevant to neutrality
- About ‘other things’ and not significant as relevant to neutrality.

The latter two types will need to be justified according to how determined as relevant or not.
The significance of the distinctions overall will depend on a developing view of ‘researcher objectivity’.

DEVELOPMENT:

Re Nature of Categories

In the second phase of analysis and after having attempted transposition of data to categories via word processing:

- *The role of memo’s for each interview was refined.* Before analysis began, it was thought that memo’s would serve to record commentary and threads of analysis to be later developed and synthesised. It order to ‘stay close to the data’ and give context to themes elicited from it, summaries of the main points of each interview were recorded.

- *But see above page 2:* The tension between fitting the data to preconceived (and literature based) categories v. those given by the actual language of participants was resolved in favour of the latter (as much as possible). Literature based posited as more likely categories in 3rd phase where categories would be collapsed.

- Found sometimes hard not to place data in categories not mentioned in the transcripts by participants but understood by researcher…especially re even handedness and equidistance (see interview E)

- Used memo’s re each interview to draw out some initial analysis (with eg headings conceived by researcher drawing on data.)
Memo Re Interview 1_E

Main issues raised by respondent:

- **Neutrality identified: (50/10/23)**
  
  *Identified immediately in response to general prompt:*
  
  “Within the process itself I think those issues of neutrality are extremely important. I think those active listening skills are extremely important. That you can encourage people to look at different perceptions of the same event. I guess that focuses in neutrality.” (E/3/31)

- **Neutrality explained: (50/24)**
  
  Just to expand on any of those, what do you understand of the meaning or the concept as neutrality?
  
  “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.” (E/4/35-36)

- **Voluntary nature: (4/30)**
  
  *And compared to court ordered:*
  
  “Overall branch practice I personally feel that the voluntary nature of coming to that. That voluntary nature certainly has an impact. On the area that with the court ordered ones is a bit less than with the ones that are brought by a person and the voluntary nature of that.”
- **Flexibility of process: (40/24)**

*And community outreach*

“The way that we do community mediation is there are some issues that are perhaps less than salubrious shall we say or less conducive to the mediation process. But I think that's part of the adaptability. As a community service…” (E/3/32)

**You mean venues other than this building?**

“Yes, venues other than this building. I mean we do that for the clients if people are out in the suburbs then we will go and visit the venue, the community or neighbourhood centre that is close to them. While that may not have everything that we normally have I think its important to be flexible and remember than we are serving the clients.” (E/4/33-34)

- **Neutrality and outcome, access and evenhandedness: (50/2/13/31)**

*So you are conscious of monitoring yourself as you …*

“Yes I think so. Particularly with that seeking for solutions but also in the way that you approach the parties. I think it's really important to be (tape glitch @133) … in to them in the same manner. That also goes into making sure that they have the same airtime. Sometimes some people tend to be a bit dominant. The other person to also be expressing themselves plus keeping that balance of neutrality.” (E/4/38)

- **Equidistance and power imbalances (comparative disadvantage)**

*(2/3/20/25)*

*How imbalances perceived 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. Sometimes there might be some sort of far more
dominant in the more emotional sense. I am thinking maybe in spousal mediations
where one person ( _ outright) or you know you seem to speak quite a bit on that
subject can we allow so and so to respond to that.” (E/5/40)

• Power imbalance, vetting at intake and private session: (20/19/7)

“Part of that is perhaps done in intake particularly in spousal mediations we always
suggest that they get legal advise so that they have a good knowledge of their rights
and responsibilities before they actually go into the mediation. So part of that's dealt
within the intake as I said. That's one of the regular questions that we ask with spousal
mediations whether in fact they can negotiate on their own behalf. When it actually
gets to the mediation those sorts of issues are less. So I guess I see that side of it in the
intake process. But if it were to happen in the mediation that there would be ( ) as we
perceived imbalance there I think possibly (tape glitch @184) other than deal with
that in the open forum which might not be appropriate. We would probably look at
having a private session.” (E/5-6/41-42)

• Neutrality and personal preference/ bias: (50/2/17/25)

Addressed through process and evenhandedness/ equidistance: “Perhaps you can like
a person or the way that they behave so that’s something you need to be really aware
of as well. I don’t think I've actually had people comment that they haven't put
anything like that. We haven't been overtish. But it is something I always try to be
aware of in a mediation because sometimes it can creep up on you a little bit.”
(E/6/44)

“Just even a slight thing like greeting them and sitting them down and through that
first statement phase they are allowed to speak and I think that helps to establish that
neutrality. They might ask you for advise or try and get you on their side. Even if I'm
aware of it. It's all through the mediation but its established right from the very beginning.” (E/6-7/46)

- **Neutrality and being non-judgmental/ being seen to be: (50/15/8/17)**

  (Neutrality as the context of discussion):

  “You can't judge in the mediation or allow it to be seen that you are judging people. I guess in your head you might be.” (E/7/47)

  **Do you think that there is a difference? Do you think that being seen and what's actually happening like what's going on in your mind and what's occurring. If that's sufficient to just be seen to be neutral.**

  “I'm not sure about that to be honest. I think many times you are seen to be and you are. I think occasionally you may not be but you're seen to be and maybe that is enough. Maybe you're not going to be absolutely neutral every time. Maybe it's not possible.” (E/7/50)

  “I mean there would be some issues where you couldn’t compromise your own values and judgments. But if you can be seen to be neutral.” (E/8/52)

  “To be completely neutral, but I personally don't think that's possible in every circumstance.” (E/8/54)

- **Expertise of mediators/ knowledge base: (16/4/30)**

  *Comparing court ordered mediations with traditional (for DRC):*

  “To mediate I don’t think you need particular skills…. Even though we use the same process I'm not sure and there is some debate about this. The question is what you are trying to achieve. Is it a true mediation process because they are not there voluntarily often anyway. The basic foundation with mediation for the branch is that you are there on a voluntary basis. When it's ordered by the court they are not.” (E/10-11/78)

- **Legal representation: (49)**
“Often this is certainly the view in the beginning when we first started doing them that intake would speak to the client and explain to them about mediation and the role of the solicitor is supposed to be as a support role. They are supposed to be there as legal advisers but not to actually argue a case on their client's behalf. That's our understanding of what happens but I do believe that it varies from case to case. Sometimes the client's view is that they have asked for a solicitor to represent them and they don’t always have an understanding of what this is about. It is very difficult for them to actually advocate on their behalf if they don’t have an understanding of what it's about.” (E/11/80)

- Models of mediation and parties ownership: (9/24)

The abbreviated mediations, in what sense are they abbreviated?

“They are much shorter. What we do is we go down to the Minor Debts Court and the Small Claims Tribunal on the day that the magistrate or the referee is appointed to hear the case. We sort of offer our services to people to see if they want to try mediation and see if they can resolve it prior to seeing the magistrate. I guess the way we settle that is that they will have an input then into the decision that's made. Whereas if they go in front of a magistrate they just have to abide by that decision. That might be happy with it they might not. Whereas at least if they are talking about it they will have some input to that decision.” (E/12/83)

- Mediator assessment-presenting and underlying problems: (9/16/24)

“I guess from my own personal experience I've found that there (to Ab-Med) are some issues that go there that are purely commercial. They just want their money and that's it. Often there are other underlying issues like some personal relationship or dispute and all of a sudden they don't pay their bills and they don't know why they won't talk
All those sorts of issues are often underlying.” (E/12/84) “… they don’t always resolve but at least they get an opportunity to talk about that.” (E/13/90)

- **Neutrality and value in co-mediation: (50/9)**

Identifies checks/balance in co-mediator presence, plus opportunities to listen and confer: “It's (the co mediation model) something I particularly like and I think it actually helps with that (neutrality). To be aware of your own biases or the way it's coming across. Whereas if you have another mediator there… (E/15/116) “If there is someone else there. Yes being able to confer. Or sometimes even just listening to a co-mediator that may be (operating) in a certain way and its sort of interesting. I wouldn’t necessarily have picked that.” (E/15/118)

- **Models of mediation, theory and professional development: 9/53**

“There is a number of models for mediation as well out there. We use only one. Maybe it's worth looking at in a wider sense. Other models and the more theoretical side of it to see if there are any improvements that can be made. I have great faith in our process. I have seen it work many many times. But that's not to say that it’s a static (model).” (E/15/112)

- **Professional development and standards: (E/14/104) 53/54**

- **Debriefing: (E/16/124) 7**

- **Panel size and professional development: (E/16-17/127) 53**

- **Being part of an organizational culture: (E/17-18/129-135) 52**

NB references to 53/54 made during NVivo coding.