MEDIATION ETHICS IN AUSTRALIA – A CASE FOR RETHINKING THE FOUNDATIONAL PARADIGM

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I INTRODUCTION

In contemporary Western society, including Australia, professional mediation practice has developed with a specifically defined foundational approach - a problem-solving, facilitative method, in which the mediator's intervention is centred on providing the parties with a series of formal steps to assist their communication and to steer them towards a self-determined and mutually agreeable resolution of the issues in dispute.[1] Facilitative mediation developed, in part, as a response to the adversarial system of law and justice.[2] In that system the parties are said to lose control of their dispute, and a decision is imposed on them which invariably puts one party in a losing position.[3] Facilitative mediation has offered an alternative to this inevitable outcome by offering the parties a democratic, cost-effective, party-centred, empowering, interests-based and principled option for resolving their dispute.[4]

Folberg and Taylor's widely accepted, and often cited, definition of facilitative mediation is an early articulation of the paradigmatic approach. That definition describes mediation as a 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.'[5]

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1 L Boulle, *Mediation: Principles, Process*, Practice, (LexisNexis Butterworths, 3rd ed, 2011); D Cooper, 'The Family Law Dispute Resolution Spectrum' (2007) 18 *Australasian Dispute Resolution Journal* 234.

2 Lon Fuller, 'Mediation – Its Forms and Functions' (1971) 44 *South California Law Review* 305.

3 N Christie, 'Conflicts as Property'(1997) 17(1) *British Journal of Criminology* 1.

4 Fuller, above n 2.

5 J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, (Jossey-Bass, 1984) 7; RA Baruch Bush and JP Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, (Jossey-Bass, revised ed 2005) 8. Bush and Folger define mediation as follows: 'Across the mediation field, mediation is generally understood as an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties

Whilst this model continues to be practised by many mediators in a range of service provision contexts, it would be contentious to claim that it is the dominant or most widely practised model of mediation today. This is because mediation practice has become increasingly nuanced and sophisticated, along with the skills of its practitioners. This is a result of the increasingly wide reach of the process and its broad applicability to the resolution of a range of dispute types in modern society. There is now a spectrum of mediation models and approaches that range from those that continue to be facilitative and process oriented, to those that are therapeutic or based on narrative frameworks, to those that are evaluative and outcome focussed.

Although many diverse models of mediation are now practised, it remains accurate to say that the facilitative model of mediation continues to provide a foundational theoretical paradigm of ethical mediation practice.[6] The key premise of this foundational ethical paradigm is that the mediator assumes an 'outsider-impartial' role,[7] as opposed to an 'insider-partial' role.[8] The ethical requirement of mediator neutrality provides the benefit of, at least theoretically, ensuring that any outcome reached is one that is self-determined by the parties.[9]

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try to reach a mutually acceptable settlement.'

6 Boulle, above n1. See also Lon Fuller, 'Mediation – Its Forms and Functions (1971) 44 *South California Law Review* 305; KK Kovach and L Love, 'Evaluative' Mediation is an Oxymoron (1996) 14 *Alternatives to High Cost Litigation* 31; L Love,'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 *Florida State University Law Review* 937.

7 D Dyck, 'The Mediator as Nonviolent Advocate: Revisiting the Question of Mediator Impartiality'(2000) 18(2) *Mediation Quarterly* 129, 130.

8 Ibid 131.

9 The literature on neutrality in mediation is extensive. A sample includes: LL Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7; SE Bernard et al, 'The Neutral Mediator: Value Dilemmas in Divorce Mediation' (1984) 4 *Mediation Quarterly* 61; S Cobb and J Rifkin, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 11 *Studies in Law, Politics and Society* 69; S Cobb and J Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16 *Law and Social Inquiry* 35; J Forester and D Stitzel, 'Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts' (1989) 5 *Negotiation Journal* 251; C Honeyman, 'Patterns of Bias in Mediation' (1985) *Journal of Dispute Resolution* 141; J Rifkin, J Millen and S Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Mediation Quarterly* 151; L Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?' (2001) 10 *Social and Legal*

A neutral mediator is one who is ostensibly focused on managing only the *process* of mediation, and doing so in an even-handed way, in order to make it possible for the parties themselves to control the *content* of the dispute and the substance of the terms of its resolution.[10] Accordingly, a mediator who is not neutral is unethical because they violate the possibility of party self-determination.[11]

The Australian National Mediator Standards of 2007 acknowledge the increasingly diverse practice of mediation and define the process quite broadly.[12] The

Studies 505. The Australian literature includes, H Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part I' (2000) 11 *Australian Dispute Resolution* Journal 73; H Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part II' (2000) 11 *Australasian Dispute Resolution Journal* 145; H Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social and Legal Studie*s 221; R Field, 'Mediation and the Art of Power (Im)balancing' (1996) 12 *QUT Law Journal* 264; R Field, 'Impartiality and Power: Myths and Reality'(2000) 3(1) *The ADR Bulletin* 16; R Field, 'The Theory and Practice of Impartiality in Mediation' (2003) 22(1) *The Arbitrator and Mediator* 79; K Douglas and R Field, 'Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13(2) *eLaw Journal* 177; D Cooper and R Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an "Independent' Practitioner' (2008) 8(1) *QUT Law and Justice Journal* 158; S Douglas, 'Neutrality in Mediation: A Study of Mediator Perceptions' (2008) 8(1) *QUT Law and Justice Journal* 139.

10 See for example, M Stone, *Representing Clients in Mediation – A New Professional Skill*, (Butterworths, 1998); J Folger, *The Promise of Mediation – Responding to Conflict Through Empowerment and Recognition*, (Jossey-Bass Publishers, 1994).

11 See for example, American Bar Association, American Arbitration Association, Association for Conflict Resolution, *Model Standards of Conduct for Mediators*, August 2005, available at http://www.mediate.com/pdf/ModelStandardsofConductforMediatorsfinal05.pdf (accessed 1 March 2013).

12 In 2007, values for mediation practice were expressed in a National *Practice Standards* document, as part of the National Mediator Accreditation System (NMAS). See D Spencer and S Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials*, (Lawbook Co, 2nd ed, 2009) Chapter 13, and also www.msb.org.au (accessed 1 March 2013). The NMAS is a voluntary accreditation system based on facilitative mediation practice. The *Practice Standards* 'apply to any mediator acting as a third party to support two or more individuals or entities to manage, settle or resolve disputes, or to form a future plan of action through a process of mediation and who voluntarily decides to become accredited under the National Mediator Accreditation Scheme.' National Mediator Accreditation System, *Australian National Mediator Standards: Practice Standards for Mediators Operating under the National Mediator Accreditation System,* 2007 4 available at www.leadr.org.au (accessed 1 March 2013), and also www.msb.org.au (accessed 1

Standards define mediation 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.[13]

This definition of mediation, whilst broad, maintains the focus of the process on maximizing the 'participants' decision making,'[14] or in other words, distinguishes mediation as a process that enables party self-determination. In order to achieve party self-determination the Australian *Practice Standards* of 2007, and the accompanying *Approval Standards*,[15] require mediators to 'conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice.'[16] As a result it can be argued that the neutrality/impartiality paradigm[17] of ethics for Australian mediation practice continues, as the Standards affirm the imperative of mediator neutrality (or impartiality) as necessary for the achievement of party self-determination.[18]

Although mediator neutrality is a paradigmatic ethic of mediation practice, it has also long been recognised as a concept about which there has been much contention and debate. Mediation practitioners and commentators alike cannot agree about what the concept actually means – either in theory or in practice - and there have been calls over many years from academics, practitioners and others in the mediation community to clarify the notion and its meaning in the mediation context. Responses extend from advocating that we abandon the rhetoric of mediator neutrality altogether, to various ideas about how the concept can be re-worked or better contextualized. These are discussed in sec-

March 2013).

13 See D Spencer and S Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials*, 2nd ed, (Lawbook Co, 2nd ed, 2009) Chapter 13, and also www.msb.org.au (accessed 1 March 2013).

14 National Mediator Accreditation System, *Australian National Mediator Standards: Practice Standards for Mediators Operating under the National Mediator Accreditation System*, 2007, available at www.leadr.org.au (accessed 1 March 2013), and also www.msb.org.au (accessed 1 March 2013) 5.

15 Ibid.

16 Ibid 8.

17 This distinction is discussed further at section II B below.

18 National Mediator Accreditation System, *Australian National Mediator Standards: Approval Standards for Mediators Operating under the National Mediator Accreditation System,* 2007 available at www.leadr.org.au (accessed 1 March 2013), and also www.msb.org.au (accessed 1 March 2013) 5 and 8.

tion II below.

The problems with the ethic of neutrality indicate that contemporary mediation practice lacks a sufficiently 'developed theoretical structure';[19] and that the practice of the process has 'moved far beyond any parallel development of an appropriate theoretical or philosophical basis.'[20] This has a detrimental impact in terms of the erosion of the credibility of the process, and the stress it creates for mediation practitioners,[21] and, as Astor writes, it is destabilizing for the mediation profession.[22] Instability in a rapidly developing profession with an evolving practice in need of a solid theoretical foundation is a serious issue.

This article argues that there is a clear need to consider the complex issues raised by the neutrality dilemma and to develop a stable, sustainable, relevant and contemporary theoretical and ethical basis on which mediation praxis can grow constructively. In making out a case for rethinking mediation ethics, the article seeks to contribute to creating a foundation for the future credibility and legitimacy of mediation by helping to discontinue the 'neutrality myth'.[23] This is important in terms of sustaining the continuing development of mediation as a successful mode of dispute resolution that is able to provide parties with fair and equitable outcomes in contemporary Australia.

First, some definitions of both ethics and neutrality are discussed, and it is acknowledged that whilst the concept of neutrality is one that retains a strong historical resonance with practitioners, it is a concept that is troublesome, contentious, and even often unhelpful, to the realities of practice of an ethical mediation process.

This article then explores three key arguments for rethinking mediation ethics. The first argument concerns developments in Australian mediation practice and the realities of the demands of the current market for mediation services. This is an issue that has been raised and discussed by Laurence Boulle. The second argument draws on the work of Bernard Mayer entitled *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*. In this work, Mayer calls for the notion of neutrality to be challenged and proposes a new conceptualisa-

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19 Family Law Council, *Family Mediation*, Canberra: AGPS, 1992 3.

20 Ibid 4.

21 Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part I', above n 9 77.

22 Ibid.

23 G Tillet, *The Myths of Mediation,* (The Centre for Conflict Resolution, Macquarie University, 1991).

tion of the role of the dispute resolution specialist.[24] The third argument relates to the relevance of the mediation process to situations of power imbalance, and the real need for mediators to be able actively to address power imbalances between the parties if true party self-determination is to be achieved. The article concludes with a call to the Mediation Standards Board – which has been established to oversee developing approaches to regulating the competency of Australian mediators and the standards of their practice – to take up the issue of rethinking mediation ethics.

II Neutrality as a Key Mediation Ethic

Neutrality has long been acknowledged as a key ethical concept in the process of mediation.[25] Definitions and descriptions of mediation regularly refer to the neutrality of the mediator, and the mediation literature uses terms for mediators such as third-party neutrals,[26] neutral third parties,[27] and 'neutral persons'.[28]

The standing of neutrality as a fundamental defining factor of foundational mediation theory is related to the centrality of the notion's 'important legitimising function for mediation'.[29] That is, mediator neutrality can be said to draw people to the mediation process because it assures the parties of basic protections, such as their fair treatment, the appropriate use of mediator power, and consequently the achievement of party self-determination (which importantly

24 B Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution,* (Jossey-Bass, 2004).

25 For example, Astor refers to neutrality as 'a significant concept in mediation': 'Rethinking Neutrality: A Theory to Inform Practice – Part I', above n 9 73. See also H Astor and C Chinkin, *Dispute Resolution in Australia*, (Butterworths, 2002).

26 See ME Laflin, 'Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) 14(1) *Notre Dame Journal of Law, Ethics and Public Policy* 479; KK Kovach and LP Love, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71.

27 CW Moore, *The Mediation Process*, (Jossey-Bass, 2003). Sir Laurence Street's three fundamental principles of mediation do not, however, include a reference to mediator neutrality: L Street, 'The Language of Alternative Dispute Resolution' (1992) 3 *Australian Dispute Resolution Journal* 144 146.

28 Folberg and Taylor, above n 5 7-8.

29 L Boulle, *Mediation: Principles, Process Practice*, 2nd ed, Australia: LexisNexis Butterworths, 2005 18-19. See also Astor, Rethinking Neutrality: A Theory to Inform Practice – Part I', above n 9 74 referring to S Cobb and J Rifkin, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 11 *Studies in Law and Politics* 69; C Harrington and S Engle Merry, 'Ideological Production: The Making of Community Mediation (1998) 22 *Law and Society Review* 709.

in the mediation context means self-determination for each party in the dispute, not just for one party), as well as a mutually agreeable outcome. Before these elements of the rhetoric of neutrality in mediation can be usefully analysed, a consideration of the meaning of both ethics and neutrality is required.

A. *Ethics*

The National Alternative Dispute Resolution Advisory Council refers to ethics as 'the attitudes and conduct of individual ADR practitioners.'[30] Parker and Evans define ethics as being:

> concerned with deciding what is the good or right thing to do – right or wrong action, with the moral evaluation of our own and others' character and actions. ... In deciding what to do and how to be, ethics requires that we look for coherent reasons for our actions ... . (Ethics) asks us to examine the competing interests and principles at stake in each situation and have reasons as to why one should triumph over the other, or how they can be reconciled.[31]

Ethics and morality are often closely associated.[32] Ethics can be considered as 'the science of morals,' 'a moral system' or as 'rules of conduct.'[33] Whilst professional practice is often comprised of 'a system of rules based on moral principles,'[34] ethics and ethical standards in professional practice contexts are often distinguished from morals. Morals can be considered as concerning 'individual and personal beliefs about what is right and wrong'.[35] In professional ethical decision-making it can be important for personal beliefs to be integrated into, and yet distinguished from, the professional requirements of the particular situation.[36] This is referred to as role differentiation.[37]

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30 See National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for Standards,* 2001, available at www.nadrac.gov.au (accessed 1 March 2013) 110.

31 C Parker and A Evans, *Inside Lawyers' Ethics*, (Cambridge University Press, 2007).

32 B Wolski, *Skills, Ethics and Values for Legal Practice*, Law Book Co, Thomson Reuters, 2nd ed, 2009) 52.

33 CT Onions (ed), *Shorter Oxford Dictionary*, (Clarendon Press,1973) 685.

34 F Nagorcka, M Stanton and M Wilson, 'Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 *Melbourne University Law Review* 448, 451.

35 RJ Lewicki, B Barry and DM Saunders, *Negotiation*, (Irwin McGraw-Hill, 2006) 236.

36 Wolski, above n 32 52.

37 See for example R Wasserstrom, 'Lawyers as Professionals: Some Moral Issues'

A primary modern professional concern is to ensure that ethical standards of practice are maintained.[38] In daily professional practice, it has been said that 'nearly every decision a worker makes, even a technical one, is actually about ethics.'[39] Professional ethics in a practical sense can be taken as referring 'to a collection of rules or standards of conduct expected of a particular professional group.'[40] Professional ethics can often be found articulated in codes or standards of practice, one of the basic purposes of which is to provide a quality benchmark against which a practitioner's conduct can be measured. In the event that a practitioner departs 'to a sufficiently marked degree' from those standards, the profession (as a collective body) is able to hold the practitioner to account through reference to the code. In extreme cases of departure from the code, a practitioner may be excluded from the profession.[41]

It is clear, however, that even 'the best code of professional conduct can provide only partial direction to practitioners grappling with an ethical dilemma.'[42] Levy has said that such codes are 'preambular' because they are not able to reflect the complexity of ethical issues as they arise in practice.[43] Codes are 'helpful but do not (and cannot) provide definitive answers.'[44] For this reason, satisfying standards of professional practice requires practitioners to have the capacity not only to follow rules, but also to 'be able to resolve dilemmas him or herself.'[45]

Walker has said that ethical dilemmas in mediation can be divided into two categories.[46] The first category relates to 'relatively objective and clearly definable dimensions of the mediation process'[47] such as issues of 'confidentiality, cost (fee disclosure), education about the mediation process, informed consent,

(1975) 5 *Human Rights* 1, 4.

38 SC Grebe, K Irvin, and M Lang, 'A Model for Ethical Decision-Making in Mediation' (1989) 7(2) *Mediation Quarterly* 133, 133.

39 Ibid referring to ML Rhodes, *Ethical Dilemmas in Social Work Practice*, (Routledge & Kegan Paul, 1986).

40 J Thomas, *Judicial Ethics*, (LexisNexis Butterworths, 3rd ed, 2009) 9.

41 Ibid.

42 Grebe, Irvin and Lang, above n 38 138.

43 CS Levy, *Social Work Ethics*, (Human Sciences Press, 1976).

44 Grebe, Irvin and Lang, above n 38 146.

45 Ibid.

46 GB Walker, 'Training Mediators: Teaching about Ethical Concerns and Obligations' (1988) 19 *Mediation Quarterly* 33. See also PS Engram and JR Markowitz, 'Ethical Issues in Mediation: Divorce and Labor Compared' (1985) 8 *Mediation Quarterly* 19.

47 Walker, above n 46 35.

conflict of interest, and independent advice and counsel.'[48] This category is relatively easily dealt with through standards and rules of conduct which prescribe certain approaches to these matters.

The second ethical concern relates to other 'more subjective and less tangible matters' of practice, such as mediator behaviour and neutrality, fairness and impartiality.[49] It is this category of ethical concern that requires the use of a mediator's discretion in managing their power in the process appropriately, and the application and maintenance of standards in relation to values of fair practice. Ethical decision-making in relation to this ethical category has been said often to involve an intuitional approach to ethics rather than an analytical one.[50] This article considers Walker's second category of ethical concern by querying the efficacy of the ethic of neutrality as a foundational guiding concept for a mediator's attitude, behaviour and conduct in a process (mediation) that has as its central goal the achievement of party self-determination.

B. *Neutrality and Impartiality*

Neutrality is a foundational concept for liberal legal ideologies and notions of justice and fairness in Western democracies.[51] It is for this reason, arguably, that the term has a legitimising function for mediation as an 'alternative' form of dispute resolution. This section discusses the meaning and use of the term 'neutrality', and considers the distinction that is sometimes made between neutrality and impartiality.

At a vernacular level, neutrality is defined as 'the condition of being inclined neither way; absence of decided views, feeling, or expression; indifference.'[52] A neutral is described as someone who 'takes neither side in a dispute'; who 'belongs to neither party or side'; who occupies a 'middle ground'.[53]

Neutrality and impartiality are very closely related terms. Astor notes how 'dictionary definitions of neutrality and impartiality define them in relation to each

48 Ibid.

49 Ibid.

50 Grebe, Irvin and Lang, above n 38 136.

51 See Thomas, above n 40; G Brennan, 'Australian Values: Some Reflections' (2007) 79(4) *The Australian Quarterly* 7; H Gadlin and EW Pino, 'Neutrality: A Guide for the Organisation Ombudsperson' (1997) 13 *Negotiation Journal* 17; W Lucy, 'The Possibility of Impartiality' (2005) 25 *Oxford Journal of Legal Studies* 3; K Mahoney, 'The Myth of Judicial Neutrality' (1996) 32 *Willamette Law Review* 785;

52 *Shorter Oxford English Dictionary*, above n 33 1399.

53 Ibid 1398.

other.'[54] The Australian Pocket Oxford Dictionary uses the word 'impartial' in its definition of the term 'neutral'.[55] The Shorter Oxford Dictionary defines impartial as 'not favouring one party or side more than another', 'unprejudiced', 'unbiased', 'fair, just, equitable'.[56] This definition is clearly not dissimilar to that of neutrality, above. Further, for example, Shailor refers to 'impartiality' and 'objectivity' as neutrality's 'associated terms';[57] Maute states that 'classic neutrality maintains that the mediator is both impartial and uncommitted as to outcome',[58] and the Index of *The Mediator's Handbook* under the heading 'impartiality, role of mediator' has 'defining neutrality' as its first reference, and then under 'neutrality' a reference to 'impartiality'.[59]

In both general usage, and in mediation contexts also, 'neutrality' and 'impartiality' are related terms that are often used interchangeably, if not in effect conflated as synonyms.[60] It is possible to make distinctions between them but commonly this is not done in the general vernacular.[61]

Notwithstanding the related nature of neutrality and impartiality, one approach to managing some of the contested aspects of the concept of neutrality in mediation has been to distinguish neutrality from impartiality. Boulle has argued that this approach provides a way of accommodating different levels of mediator intervention within the range of mediation models.[62] In Roberts' view this

54 Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' above n 9 223.

55 G Johnston (ed.), *Australian Pocket Oxford Dictionary*, (Oxford University Press, 1976) 527.

56 Ibid 405.

57 JG Shailor, *Empowerment in Dispute Mediation: A Critical Analysis of Communication*, (Praeger, 1994) 8.

58 JL Maute, 'Mediator Accountability: Responding to Fairness Concerns' (1990) *Journal of Dispute Resolution* 347 349.

59 R Charlton and M Dewdney, *The Mediators' Handbook: Skills and Strategies for Practitioners*, (LBC Information Service, 1995) 35, 356.

60 Australian Law Reform Commission, *Review of the Adversarial System of Litigation – ADR – Its Role in Federal Dispute Resolution*, Issues Paper 25, Commonwealth of Australia: AGPS, 1998 113.

61 LM Cooks and CL Hale, 'The Construction of Ethics in Mediation' (1994) 12(1) *Mediation Quarterly* 55 62.

62 Boulle, above n 29 20, 28-30. The four models identified by Boulle are: settlement, facilitative, therapeutic and evaluative. The evaluative model, also discussed below in relation to the literature on mediator ethics, is a model in which the mediator is interventionist. Wolski comments, however, that such analytical frameworks 'can disguise the extent to which all mediators influence the course and outcome of mediations'; B Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12(4) *Australasian Dispute Resolution Journal* 248 249.

distinction 'is not merely a terminological distinction,'[63] it permits recognition of the fact that 'mediators are not neutral, inevitably having their own values, views, feelings, prejudices and interests.'[64]

Boulle argued in the 1996 first edition of his seminal work that neutrality should be 'used to describe a mediator's sense of disinterest in the dispute and its outcome' and the word impartiality should be used to refer to 'an even-handedness, objectivity and fairness towards the parties during the mediation process.'[65] In this way, the terms can be said to have "a different significance."[66] Impartiality can be argued as a core requirement because 'it is inconceivable that the parties could waive the requirement that the mediator act fairly.'[67] Neutrality, on the other hand, can be said to be a less absolute requirement,[68] because it is seen as possible that it '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.'[69]

This argument has achieved some currency. For example, it has been taken up in the work of the National Alternative Dispute Resolution Council (NADRAC),[70] it has influenced the Standards administered by the Mediation Standards Board, and the distinction has also been embraced by senior practitioners seeking a nuanced explanation of their experience of the complexities of practice.[71] Definitions of the mediation process are also developing that refer only to the mediator as impartial rather than neutral.[72]

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63 M Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice,* (Jessica Kingsley Publishers, 2007) 98.

64 Ibid.

65 L Boulle, *Mediation: Principles, Process, Practice*, Australia: Butterworths, 1996 19.

66 Boulle, above n 29 28.

67 Ibid.

68 Ibid 28-30.

69 Ibid 20, 28-30.

70 See in particular, NADRAC above n 30 114, 108.

71 Personal communications with senior practitioners.

72 CM Currie, 'Breaking the Definition Deadlock: A New Definition of Mediation that Focuses on the Fundamentals' (2000) 24 *SPIDR News* 5 5: 'Mediation is a dispute settlement and problem-solving process facilitated by someone who remains detached from the final substantive outcome, who assists the parties in safely specifying, framing, and confronting the issues, and who fosters disputant self-determination and balanced opportunities for participation, to achieve improved communication, greater understanding, and a significantly enhanced probability

In terms of NADRAC's *A Framework for ADR Standards*, for example, neutrality is used to refer to questions of interest, and impartiality is used to refer to mediator behaviour. The two terms are said to work in an integrated way to allow a practitioner 'to demonstrate independence and lack of personal interest in the outcome,'[73] as well as 'an open mind, free of any preconceptions or predisposition towards either of the parties.'[74]

NADRAC sees the particular responsibilities of the practitioner in relation to neutrality as being 'to identify and disclose any existing or prior relationship between the practitioner and the parties, any interest in the outcome of the dispute, any present or future conflicts of interest and any values, experience or knowledge that may prevent a practitioner from acting impartially.'[75] The responsibilities in relation to impartiality are said to be grounded in retaining the parties' confidence, and ensuring that each party perceives that the practi-

for generating creative options and complete resolution.' ME Laflin, 'Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) 14 *Notre Dame Law, Ethics and Public Policy* 479 483-484: mediation 'is a process whereby the mediator, who has no stake in or power over the outcome, helps the parties identify and evaluate their interests and options as they proceed … to design and craft their own agreement. The hallmark of mediation in this sense is the self-determination of the parties and the impartiality of the mediator.' LL Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7 8: mediation is a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction.' Laue in 1982 defined mediation as '(1) low or no power over the parties, (2) high credibility with the parties, (3) focus on process rather than outcome, and (4) the importance of rationality and good information in achieving settlements.'; JH Laue, Ethical Considerations in Choosing Intervention Roles' (1982) 8 *Peace and Change: A Journal of Peace Research* 29.

73 NADRAC, above n 30 112.

74 Ibid.

75 Ibid 108, 114. For NADRAC 'neutrality' concerns the state of the practitioner's interest in the dispute and requires disclosure to the parties of: 'Any existing or prior relationship or contact between the practitioner and any party. Any interest in the outcome of the particular dispute. The basis for the calculation of all fees and benefits accruable to the practitioner. Any likelihood of present or future conflicts of interest. Personal values, experience or knowledge of the ADR practitioner which might substantially affect their capacity to act impartially, given the nature of the subject matter and the characteristics of the parties. Having made the disclosure, the practitioner must also decide whether they should withdraw, or, with the express permission of all parties, continue.' ibid 112.

tioner is treating them fairly throughout the process.[76] These responsibilities are considered to be demonstrated by, amongst other things, 'an even-handed conduct of the process', and 'avoiding any appearance of partiality or bias through word or conduct.'[77] Drawing a distinction between neutrality and impartiality therefore makes it is possible to justify certain mediator interventions or actions in the mediation process that might strictly contradict an ethic of neutrality, but could be said nevertheless to sit within an ethical conceptualisation of impartiality.[78]

The distinction between the two terms has been found by many to be a useful one. It is particularly useful for those steeped in the dilemmas of the current relationship between the theory and practice of the mediation process who are seeking a nuanced explanation of the mediator's role. Realistically, however, it is unavoidable that there remains a level of overlap in the meaning of the terms, and of understandings of those meanings. The general usage of the terms as interchangeable cannot be ignored.

The distinction could therefore be argued as somewhat artificial. Indeed, the difference between the terms is by no means universally accepted or certain. Some writers simply assert that neutrality means 'being impartial',[79] whilst others say that 'neutrality, by its very nature, must include impartiality'.[80] Astor's view is that distinguishing neutrality and impartiality 'is far from the complete answer,'[81] and that the distinction can in fact create contradictions

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76 NADRAC, above n 30 112-113. 'Any limits on the requirement of impartiality should be clearly explained to and understood by the parties.'

77 Ibid 113. 'Impartiality requires the ADR practitioner to: Conduct the process in a fair and even-handed way. Generally treat the parties equally (e.g. spending approximately the same time hearing each parties' statement or approximately the same time in separate sessions). Not accept advances, offers or gifts from parties. Give advice and allow representation, support or assistance equally to parties. Ensure they do not communicate noticeably different degrees of warmth, friendliness or acceptance when dealing with individual parties. Organise the venue, times and seating in a way which suits all parties.'

78 Boulle, above n 65 19.

79 H Gadlin and EW Pino, 'Neutrality: A Guide for the Organisation Ombudsperson' (1997) 13 *Negotiation Journal* 17 18. Cooks and Hale comment that neutrality and impartiality 'are treated in at least some standards documents as though they are synonymous terms. However, they can (and perhaps, should) be distinguished from each other.': Cooks and Hale, above n 61 62.

80 M Feer, 'Toward a New Discourse for Mediation: A Critique of Neutrality – Commentary' (1992) 10(2) *Mediation Quarterly* 173 174.

81 Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part I above n 9 77:

and problems for mediation theory and practice, rather than resolving them.[82] Even when distinguished, both terms provide 'an index' for actions in practice that will allow a mediator to successfully maintain their role;[83] and they are 'used to account for the success or failure of the mediation process.'[84]

Most importantly perhaps, given that the words are often used synonymously in the vernacular, theoretical distinctions between neutrality and impartiality are not necessarily meaningful for the parties who are seeking a fair and ethical process. The distinction can only really make sense for the parties if it is explored and discussed with them in detail in the preparation, intake and introduction steps of the mediation process. This simply does not occur in practice, and to suggest that it should would simply lead to the inclusion of potentially complicating and confusing definitional discourse in the preliminary stages. For most mediators the distinction is also one that would need to be a focus of their ethical training if it were to inform their ethical practice meaningfully. Again, there is currently no consistent approach to achieving this. The end result is that the credibility of the mediation community is brought into question if we make distinctions about critical ethical concepts that are not made or readily understood by others.[85]

For these reasons, in this article the term neutrality is used in its broad sense, thus including notions of impartiality. This is important and realistic for an analysis of the arguments that support a rethink of the foundational ethics of mediation practice.

The term 'neutrality' is therefore treated here as a multi-dimensional term that is used to convey a variety of meanings. In the discussion below, unless otherwise stated, the term is taken as denoting the following meanings in the context of mediation:

- that the mediator has no conflict of interest with the parties or the issues to be resolved,
- that the mediator is not interested in the outcome of the dispute they are

'The mediator may strive skillfully and carefully to be impartial as between the parties, but the mediator's ideas and approach may influence *both* parties, guiding, persuading or influencing them in a direction they might not themselves have chosen.'

82 Cooks and Hale, above n 61 63.

83 Shailor, above n 57 9 referring to GWK Zetzel and S Wixted, *A Trainer's Manual for Parent Child Mediation*, (The Children's Hearings Project, 1984).

84 Shailor, above n 57 9.

85 Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' above n 9 227.

mediating,

- that the mediator is not biased towards or against either party,
- that the mediator generally lacks detailed prior knowledge of the dispute and/or the parties,
- that the mediator is fair and even-handed in their practice of the process,
- that the mediator is fair and even-handed in their treatment of the parties,
- that the mediator will not make a judgment about the dispute or the parties, and
- the mediator will not make a decision for the parties.[86]

III The Neutrality Dilemma

One of the most important promises of fairness made in relation to the mediation process in the current ethical paradigm is that the achievement of party self-determination is made possible through the neutrality of the mediator. The achievement of party self-determination is associated with respect for party autonomy and for party empowerment. As Greatbatch and Dingwall acknowledge in relation to the mediation process, client control ranks 'among the great unquestioned goods of our time,'[87] not least because it is 'both more efficient and morally superior to determination by some public authority.'[88]

The apparent simplicity of the ethical relationship between mediator neutrality and party self-determination is appealing and easy to promote convincingly to parties. That is, a mediator who is free of favouritism, prejudice or bias makes it possible for the parties to reach their own, uncoerced agreement. A mediator who favours one party over another, or who is prejudiced or biased towards a particular party, does not. A mediator is ethically required to uphold party self-determination; a mediator is therefore ethically required to be neutral.

Why then is the concept of neutrality in mediation so widely acknowledged as troublesome?[89] The principal difficulty with the ethic of neutrality is that, as an ethical premise that aims to guide the mediator's role in the process, it is

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86 See for example, Astor and Chinkin, above n 25 102.

87 D Greatbatch and R Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' (1989) 23(4) *Law and Society Review* 613 639.

88 Ibid 614.

89 See Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part I' above n 9 74.

relatively easily shown to be unworkable and unrealistic. The ethical requirement of neutrality aims both to make the process fair and credible, and also to make self-determination possible for each party. If, however, a mediator acts neutrally in their practice, they will allow existing power dynamics between the parties (and any power imbalances) to play out. The result is likely to be an outcome dominated by the party who is, on balance, more powerful. In such a case, the process cannot be seen as ethical, fair or just as only one party achieves self-determination.

In addition, claims of neutrality can be established as, in reality, imperfect.[90] Mediators, as human beings, inevitably bring their individual and personal values and beliefs to their facilitation of the process, and are inevitably affected by their own 'set of cognitive and motivational biases.'[91] There is also evidence that mediators influence the content and outcomes of the disputes they mediate.[92]

The aspiration of fulfilling the ethical requirement of neutrality places mediators in a stressful and conflicted professional position. Indeed, as Marshall's recent Australian study has revealed, one of the key stressors mediators face in practice relates to trying to support the achievement of party self-determination, at the same time as fulfilling an ethic of mediator neutrality.[93] The enduring nature of this ethical problem is evidenced by the fact that it was first articulated in Bush's US study of ethical dilemmas experienced by mediators in practice in 1994. In that study, the conflict between mediator neutrality and the practical need to support party self-determination 'was more reported than any other' type of dilemma.[94]

The problems with the ethic of neutrality have resulted in a number of sug-

90 See the literature on neutrality in mediation, above n 9. See also, G Tillet, *The Myths of Mediation*, (The Centre for Conflict Resolution, Macquarie University, 1991); G Kurien, 'Critique of Myths of Mediation' (1995) 6 *Australian Dispute Resolution Journal* 43.

91 K Gibson, L Thompson, MH Bazerman, 'Shortcomings of Neutrality in Mediation: Solutions Based on Rationality' (1996) 12 *Negotiation Journal* 69 76.

92 See R Dingwall and D Greatbatch, 'Who is in Charge? Rhetoric and Evidence in the Study of Mediation' (1993) *Journal of Social Welfare and Family Law* 365; Greatbatch and Dingwall, above n 87. See also, SS Silbey, 'Mediation Mythology' (1993) 9 *Negotiation Journal* 349.

93 P Marshall, 'Political Competence and the Mediator: A New Strategy for Managing Complexity and Stress' (2008) 8(1) *QUT Law and Justice Journal* 176 177.

94 RA Baruch Bush, 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications' (1994) 1 *Journal of Dispute Resolution* 1 22.

gestions as to how they might be resolved or overcome. These suggestions range from abandoning the notion of neutrality,[95] to re-contextualising[96] or re-conceptualising it in order to make it more relevant to the realities of mediation practice.[97] The most scholarly and well-defended proposal has come from Hilary Astor who has articulated a way of 'doing neutrality' based on a situated, contextual approach that moves practice from a binary construct of mediator neutrality to a broader concept of legitimizing mediation through a focus on notions of consensuality and 'maximizing party control.'[98]

Whilst these suggestions constitute a valuable contribution to the mediation literature, none has yet gained strong traction in terms of current practice. The default position of asserting to parties in the mediator's opening statement that a mediator will be neutral and/or impartial in their facilitation of the process remains in place. Although there is some recognition that the ethic of neutrality is not "realistic",[99] mediation theory and scholarship has not yet provided a widely accepted answer to the problem. A key ethical assertion of the mediation process therefore remains largely aspirational and practically unachievable.

It is not within the scope of this article to offer a new ethical paradigm for mediation. Rather, the focus of this article is simply to outline a persuasive case for the *need* to rethink mediation ethics. The following sections of the article

95 See, for example, D Gorrie, 'Mediator Neutrality: High Ideal or Sacred Cow?' in L Fisher (ed), *Conference Proceedings, Famcon '95*, Third National Family Mediation Conference, Sydney, 1995 30; R Field, 'Neutrality and Power: Myths and Reality' (2000) 3(1) *The ADR Bulletin* 16. Indigenous models of mediation also offer approaches to mediation where neutrality on the part of the mediator is not fundamental to the legitimacy of the process. See for example, M Sauve, 'Mediation: Towards an Aboriginal Conceptualisation' (1996) 3 *Aboriginal Law Bulletin* 10; L Behrendt, *Aboriginal Dispute Resolution,* (Federation Press, 1995).

96 D Bryson and D Winset, 'A New Conciliation Model: Mediating Within the Law' in T Fisher (ed), *Proceedings of the 4th National Mediation Conference* La Trobe University, Melbourne, 1998, 275.

97 See for example, A Taylor, 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process' (1997) 14 *Mediation Quarterly* 215; S Douglas, 'Neutrality in Mediation: A Study of Mediator Perceptions' (2008) 8(1) *QUT Law and Justice Journal* 139.

98 H Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part II' above n 9. On the importance of consensuality see also: B Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15 *Australian Bar Review* 213.

99 DT Weckstein, 'In Praise of Party Empowerment – And of Mediator Activism' (1997) 33 *Willamette Law Review* 501 510.

argue that mediation ethics should be rethought on three grounds: first, on the basis of developments in Australian mediation practice and the realities of the demands of the current market for mediation services; second, on the basis of the persuasive arguments offered in the 2004 work of Bernard Mayer which challenge the notion of neutrality;[100] and third, on the basis of the real need for mediators to be able actively to address power imbalances between the parties if true party self-determination is to be achieved. These arguments are now explored in turn.

IV Developments in Australian Mediation and the Demands of the Contemporary Dispute Resolution Market

The practice of mediation in Australia has undergone significant change and development since its inception in the 1970s. Boulle identifies this process of development as having passed through a series of phases.[101] The first phase involved great enthusiasm and passion for the potential of a new, positive, more humane process offering an alternative to litigation. Boulle describes this phase as involving 'unbounded optimism about the new pursuit, an idealised vision of what it can provide, and an enthusiastic conviction in its capacities to deal with both individual and societal issues.'[102]

In Australia it is increasingly acknowledged that in this stage of the development of mediation some exaggerated claims were made about the process and its strengths as an alternative to litigation.[103] These claims were made not only by individual practitioners but also by service providers and government.[104] Mediator neutrality was one such optimistic assertion. Apart from the claim of mediator neutrality, the ethics of mediator behaviour, and the practice of the mediator's role were otherwise comparatively ill-developed in this first phase of enthusiasm and hope. Even references to mediator neutrality were usually only to assert the need for it, rather than to explore, and give guidance on, what it meant in practical terms.

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100 B Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution,* (Jossey-Bass, 2004).

101 Boulle, above n n 29 284.

102 Ibid 283.

103 Ibid 284.

104 For example, the Commonwealth Government's *Access to Justice Report* of 1994 is an example of assumptions made about the desirability of mediation as an alternative to litigation without supporting evidence or argument: see the Access to Justice Advisory Committee, *Access to Justice – An Action Plan (The Sackville Report*), 1994 at 71.1. See also, Boulle, above n 29 284.

Notwithstanding these fairly superficial origins, the ethic of neutrality has continued as a central tenet well past the first phase of the development of the process. The discussion in section 2 above suggests that this is because there is a deep connection between neutrality and perceptions of mediation as fair, appropriate and ethical, and because no viable alternative has yet been accepted by the mediation community.

This initial (relatively uncritical and enthusiastic) phase of the development of mediation was followed in the 1990s and 2000s by some more measured perspectives.[105] The growth of a scholarly Australian literature critiquing the process and its benefits and disadvantages has been an important aspect of these developments. The literature analysing and questioning mediator neutrality has been a part of this.

Mediation is now in a phase, after decades of practice, where it has become entrenched as a form of dispute resolution in Australia, and is highly institutionalised.[106] Mediation practice and scholarship have matured, particularly in relation to an appreciation of the strengths and weaknesses of the range of mediation models, the nuanced nature of the role of the mediator, and the capacity of the process to assist effectively with the resolution of a broad range of disputes. What have been described as the 'singular beginnings' of Australian mediation have now become 'exceptionally diverse' forms of application.[107] These developments have meant, as was noted above, that the facilitative model, whilst providing the traditional paradigm of practice, is now only one amongst a range of increasingly diverse models of mediation that are practised.

From these issues arises a strong argument in support of the analysis of mediation ethics offered in this article. In terms of the development of the process in Australia, it is now timely for the neutrality ethic to be rethought and replaced with a logical and viable alternative ethical framework. The entrenched and institutionalised nature of mediation practice makes it important that the process is grounded by realistic, achievable ethical methods, as opposed to merely aspirational principles of ethical practice. The mediation community now has, or at least should have, greater capacity to accept more realistic and critical perspectives about the process, without fears that the process will, as a result, be rejected or discontinued. These are fears that were almost certainly part of the earlier developmental phases of mediation.[108] Many experienced mediators

[105] Boulle, above n 29 284.
[106] Ibid 323 – 328.
[107] Ibid 323.
[108] This comment is based on the author's personal communications with practising

are now prepared to acknowledge freely that they are unable to claim neutrality honestly, and that the demands of the complex practice of mediation often require them to move into interventionist, active approaches that far exceed the ethical process limitations of the traditional neutrality paradigm.[109] This is an acknowledgement that, again, many were reluctant to make in the past.[110]

Further, mediation theory must respond to the realities of developments in the dispute resolution market. That market has accepted, and indeed calls for, a greater range of process options and models, including transformative and evaluative approaches. Whilst neutrality-informed models of mediation have set the basic framework for generic conceptions of practice, and are often used in mediator training, the shift to a greater use of, for example, evaluative and settlement models[111] calls for a rethinking of mediation ethics.

A fresh, contemporary approach to mediation ethics is therefore justified by these market-driven developments. It cannot be considered appropriate to have a theory of mediation ethics that centralises a neutral role for the mediator, when the neutrality claim is flawed and much of the reality of practice has shifted towards other active and interventionist approaches.[112]

V Mayer's Beyond Neutrality: Confronting the Crisis in Conflict Resolution

A second significant justification for the argument to rethink neutrality as an ethic of mediation arises from Mayer's 2004 work, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*.[113] Mayer is a recognised scholar and leader in the international conflict resolution field. He is an experienced

mediators since 2000, particularly on the issue of the place of neutrality in the theory and practice of mediation. These conversations occur, for example, at the bi-annual National Mediation Conference.

109 See for example, M Brandon & T Stodulka, 'A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practice Across Both Processes' (2008) 8(1) *QUT Law and Justice Journal* 194; L Fisher, 'What Mediators Bring to Practice: Process, Philosophy, Prejudice, Personality' (2000) 5(4) *ADR Bulletin* 60.

110 See comments above.

111 Boulle, above n 29 328. See also J Rothfield, 'What (I Think) I Do as the Mediator' (2001) 12(4) *Australasian Dispute Resolution Journal* 240; RA Baruch Bush, 'Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What it Means for the ADR Field' (2002) 3 *Pepperdine Dispute Resolution Journal* 1.

112 See for example Fisher, above n 109.

113 Mayer, above n 100.

practitioner, trainer and consultant, as well as a highly respected and published academic.[114]

Mayer wrote *Beyond Neutrality* in 2004 as a response to his anticipation of dramatic developments in the conflict resolution field before 2020,[115] and as a constructive contribution to addressing the imperatives of what he termed a 'crisis in our field.'[116] In the preface to the work he writes of the need to learn from crisis, and work on our weaknesses' in order for the field to grow.

For Mayer the crisis for the conflict resolution field is first, that practitioners have 'fallen too easily into a limited set of roles and purposes;'[117] and second, that the field has not taken 'a hard and unflinching look at the reasons for the limits we've encountered, the questionable nature of some of our most common assumptions, or the mixed results of our efforts.'[118] In particular, Mayer believes mediators need to 'get past' the third party neutral role and envisage a broader range of roles that are not necessarily neutral.[119]

Mayer acknowledges the importance of neutrality as a concept in conflict resolution, particularly, as was noted above, as a source of the credibility of the process as an alternative to litigation.[120] A practitioner's commitment to being neutral is recognised as the way in which they currently convey their values and ethics.[121] Neutrality offers 'a clear message to the public about who we are or what we do. It simplifies our presentation of our values and our role.'[122] Mayer notes that this is a key reason why the label of 'third-party neutral' has continued,[123] even though neutrality is 'a hard concept to nail down', and 'has different meanings in different cultural contexts.'[124]

Mayer's work reflects, however, that the move beyond neutrality is important for a number of reasons. First, in the current paradigm of practice 'the conflict resolution field has not reached its potential to have an impact on how conflict

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114 Ibid 305.
115 Ibid 281.
116 Ibid 280. In Mayer's view the root of this crisis is a failure to engage in the purpose of the field seriously: ibid 3.
117 Ibid x.
118 Ibid.
119 Ibid xi.
120 Ibid 29.
121 Ibid 30.
122 Ibid.
123 Ibid 29.
124 Ibid 83.

is conducted.'[125] Second, people often do not trust in a mediator's neutrality.[126] Whilst neutrality is a source of process credibility, it is also a source of 'mistrust and doubt.'[127] Mayer's view is that although neutrality may at times be essential, if less emphasis were placed on this aspect of the practitioner's role 'we might actually be trusted more.'[128]

Third, 'neutrality is not what people embroiled in conflict are usually looking for.'[129] It is Mayer's experience that 'people often want advice, recommendations, and evaluations of their case; assistance in persuading others; or vindication of their actions and positions.'[130] People often 'want or need something other than the intervention of third-party neutrals.'[131] Fourth, neutrality does not always help address the particular needs of people in conflict, for example, their need for 'power, protection, and good solutions.'[132]

Fifth, neutrality offers a limited role for the conflict resolution professional.[133] Although a commitment to neutrality may result in 'a safe, flexible, informal, and creative forum for interchange', it does not necessarily create 'sufficient opportunities for voice, justice, vindication, validation, or impact.'[134] Therefore, the ability of practitioners 'to assist people in conflict can be seriously constrained by the neutral role.'[135] Sixth, 'neutrality makes sense only as a statement of intention, not of behaviour.'[136] Mayer openly acknowledges that practitioners 'bring with us a set of beliefs, values, and interests to every conflict we enter, no matter how firmly we are committed to neutrality.'[137] The actions and decisions of practitioners in a process reflect these beliefs and val-

125 Ibid xi.
126 Ibid 17.
127 Ibid 29.
128 Ibid 17: 'We tend to rely heavily on a neutral stance to obtain trust and credibility, whereas disputants are more inclined to accept the procedural help of a non-neutral who brings other resources to bear and to doubt the practical usefulness of someone who is genuinely neutral.'
129 Ibid.
130 Ibid 6.
131 Ibid 30.
132 Ibid 16.
133 Ibid 13: 'As important as the neutral can be, it is only one role, and often a very limiting one in conflict.'
134 Ibid 29.
135 Ibid 83.
136 Ibid 30.
137 Ibid.

ues, 'and the disputants we work with are sensitive to this'.[138] In this way, an assertion of neutrality, whilst appearing to clarify the practitioner's role, can also 'obfuscate or distort the real nature of what we have to contribute.'[139]

In Mayer's view the response to the 'crisis in the field', a crisis largely centred on the ethic of neutrality, can take one of two possible directions. Either the field 'can deny or avoid the challenges confronting us, or we can adapt to them and emerge as a stronger field'.[140] To deny or avoid the challenges will, in his view, result in having 'to accept a very encapsulated role for our field.'[141] For Mayer, the choice must be made to face the current limits of, and challenges to, practice and acknowledge that 'some of our operating assumptions are wrong or at least limited.'[142] Neutrality is the critical limitation he believes must be dealt with.

In moving dispute resolution practice beyond the limitations of neutrality, Mayer proposes three things. First, that the field maintains a focus on the core values of conflict resolution practice. Second, that the role of the dispute resolution professional is re-conceptualised. And third, that clearer standards of accountability for practice are developed. These are discussed briefly in turn below with reference to the ways in which this article provides a response to Mayer's proposals.

First, in relation to the core values of conflict resolution Mayer identifies the following: 'being hard on the problem, easy on the people; empowering disputants; respecting diversity, believing in communication; promoting social justice; valuing creativity; maintaining optimism.'[143] These can be further summarised as: 'empowerment, self-determination, participatory democracy, and nonviolence.'[144] In addition, conflict resolution is identified as offering 'a focus on the integrative potential of conflict',[145] a needs-based approach, and a focus on communication, process and systems.[146]

In moving beyond neutrality to a new paradigm of practice, there is no suggestion or implication that these values and characteristics must be abandoned

[138] Ibid.
[139] Ibid.
[140] Ibid 280.
[141] Ibid.
[142] Ibid.
[143] Ibid 290-1
[144] Ibid 21.
[145] Ibid 35.
[146] Ibid 35-38.

or changed. However, if these values are to be achieved, dispute resolution practitioners have to be more than 'third-party neutrals.'[147] This article aims to support Mayer's call to move beyond neutrality by calling on the Australian mediation community to 'strengthen the clarity that practitioners share about the heart of what they have to offer and providing services accordingly.'[148]

Second, in relation to reconceptualising the dispute resolution practitioner's role, Mayer has said: we need 'to include a greater emphasis on assisting people in engaging in conflict', and define the practitioner's role more broadly.[149] In order to achieve this, the field must 'revisit what our purpose is, what our knowledge base is, what our defining values are, and what is at the heart of what we have to offer.'[150]

Mayer particularly advocates for an active role for the mediator in empowering disputants. By 'enabling disputants to handle their own conflict',[151] practitioners assist them to productively engage in the conflict in order to take on their own decision making. However, when parties are unable to do this, Mayer's view is that the practitioner's role shifts to more active assistance with the aim of minimising 'the degree to which they must cede power to others to deal with their issues.'[152] A practitioner's active facilitation of the empowerment of the parties will be achieved in different ways for different parties. It does, however, require that practitioners no longer see themselves in the limited role of third party neutral, but rather in an expanded role as specialists in conflict engagement who 'are defined by their knowledge of conflict and the variety of ways in which it can be approached.'[153] For Mayer, when practitioners face 'the question of who we are if we are not neutrals,'[154] there is a challenge but also a timely opportunity for growth.[155] He suggests that practitioners will find answers 'from a deeper understanding of and belief in what we have to

147 Ibid 291.
148 Ibid 34.
149 Ibid 281. 'Our field should seek to define itself more by its understanding of conflict and its ability to translate that understanding into practical ways of intervening in conflict – or helping other individuals or groups to intervene – from a number of different roles or stances.': ibid 13.
150 Ibid 281.
151 Ibid 290.
152 Ibid 290.
153 Ibid 12.
154 Ibid 290.
155 Ibid 3.

offer.'[156]

In relation to developing better accountability for dispute resolution standards of practice, Mayer has said: 'We need clear standards of accountability as we move forward for ethical and practical reasons.'[157] Stronger accountability is a requirement of the increasing institutionalisation of conflict resolution processes, and a necessary response to society's acceptance and valuing of such processes and their 'important ongoing role.'[158] For Mayer, it is critical in moving beyond neutrality that 'the bounds between neutrality and advocacy' are not loosened in a dangerous way. [159] The field must be careful.[160]

Mayer reminds us that it is important to remember that 'we are not inventing an entirely new field, but recognising changes that need to occur in an existing profession.'[161] Taking care in reconceptualising the dispute resolution practitioner's role means, therefore, also respecting many of the existing standards that 'will continue to be valid for an expanded role, including standards about the boundaries between the roles we might play in our work and about disclosure and confidentiality.'[162] This article asks the mediation community to engage in the 'healthy' but 'troubling' work of facing the ethical dilemmas and challenges that neutrality poses.[163]

In summary, the work of Mayer provides some clear and important justifications for rethinking neutrality as an ethic of mediation. Mayer's call for a re-examination of who mediators are, what mediators do, why they do it, and how they think about it is provocative.[164] This concern is related to the next additional justification for rethinking neutrality as an ethic of mediation which is the need for the process to be better able to address issues of power imbalance.

VI The Issue of Power Imbalances in Mediation

A third key justification for rethinking neutrality relates to Mayer's concern to ensure that the potential in mediation for achieving party empowerment is realised. It is a justification for a reconsideration of the ethical framework of

156 Ibid 3.
157 Ibid 287.
158 Ibid 19.
159 Ibid 287.
160 Ibid.
161 Ibid 288.
162 Ibid.
163 Ibid 289.
164 Ibid xi.

mediation based on the problems associated with effectively addressing power imbalances between the parties in the facilitative, neutrality-centred paradigm of practice.

Inspired by the writing of Astor in the 1990s about the problems arising for victims of domestic violence in mediation, the issue of power imbalances in the process has long has been a concern of this author's writing.[165] My concern has been that it is problematic that mediators claim neutrality and yet also claim to be able to do things that are incompatible with an asserted neutral persona, for example, redress power imbalances between the parties.[166] If a me-

[165] See for example: R Field, 'Mediation and the Art of Power (Im)balancing' (1996) 12 *QUT Law Journal* 264; 'Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part' (1998) 14 *QUT Law Journal* 23; 'Convincing the Policy Makers that Mediation is Often an Inappropriate Dispute Resolution Process for Women: A Case of Being Seen But Not Heard' (2001) *National Law Review* (January); 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Family Violence' (2004) 20 *The Australian Feminist Law Journal* 65; 'Using Lawyers as Advocates for Participants who are Victims of Family Violence in a Feminist Model of Mediation' (2005) Autumn Edition, *Newsletter for the Family Violence and Incest Resource Centre, Victoria* 3; 'Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution' (2005) 5 *QUT Law and Justice Journal* 28'; Using the Feminist Critique of Mediation to Explore 'The Good, The Bad and The Ugly' Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20(5) *Australian Journal of Family Law* 45; Women and ADR' in P Easteal (ed) Women and the Law, (Butterworths, Lexis Nexis, 2010); 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (2010) 21(3) *Australasian Dispute Resolution Journal* 185; K Douglas, and R Field, 'Looking For Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13(2) *eLaw Journal* 177; R Field, and J Crowe, 'The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis' (2007) 27 *The Australian Feminist Law Journal* 97; D Cooper and R Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an 'Independent' Practitioner' (2008) 8(1) *QUT Law and Justice Journal* 158.

[166] See for example, R Charlton and M Dewdney, *The Mediators' Handbook: Skills and Strategies for Practitioners,* (LBC Information Service, 1995); S Gribben, 'Violence and Family Mediation: Practice' (1994) 8 *Australian Journal of Family Law* 22; AM Davis and RA Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' (1984) 6 *Mediation Quarterly* 17; D Neumann, 'How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce' (1992) 9(3) *Mediation Quarterly* 227. See also, L Lerman, 'Stopping Domestic Violence: A Guide for Mediators' in H Davidson, L Ray and R Horowitz (eds),

diator intervenes by increasing the power of a weaker party or reducing that of a stronger party, they are making and acting on personal value judgments that are likely to affect the outcome of the dispute, and this is not neutral behaviour. It is important that such activity is done ethically. However, the neutrality ethic in fact offers mediators no guidance on this point.

The issue of redressing power imbalances has been considered a major issue in mediation theory and practice for some time.[167] The seriousness of the issue is that assertions of mediator neutrality within the current paradigm are contradicted by interventions to address power imbalances, and therefore claims of neutrality effectively misrepresent what it is that mediators are doing in the process. Mediators do have some effective tools and strategies to address power imbalances.[168] However, these sorts of interventions are not neutral and involve significant skill and competency to achieve effectively in practice. A more interventionist role for mediators in this context also involves significant trust on the part of the parties that the mediator will not abuse their power. This issue therefore highlights Mayer's concern for the field to develop more accurate explanations of the practitioner's role, particularly in terms of what they have to offer parties where there is a significant power imbalance.

Problematically, claims within the current paradigm that mediators are able to redress power imbalances in mediation do not adequately acknowledge the unavoidable ethical conflict that arises with assertions of neutrality. For example, Davis and Salem in their 1984 article entitled 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' detail an 11 point approach. This approach, whilst useful in many ways, avoids addressing the key difficult ethical issues, and reflects a relatively superficial understanding of the dynamics of some forms of power imbalance, for example, those created by a history of domestic or family violence.[169] The 11 points are: do not make unnecessary assumptions about existing power relationships, exploit mediation's innate ability to address power imbalances, encourage the parties to share knowledge, use the parties' desire to settle as a lever, compensate for low-level negotiating skills, interrupt intimidating negotiating patterns, make accommodations for language differences when the parties speak different languages, respect the

Alternative Means of Family Dispute Resolution, American Bar Association, 1982 at 429 - 43; also L Marlow and S Sauber, *The Handbook of Divorce Mediation*, (Plenum Press, 1990).

167 Boulle, above n 1 196-204.

168 See references above.

169 Davis and Salem, above n 166; Neumann, above n 166.

needs of young parties, watch to see that one party does not settle out of fear of violence or retaliation, conduct mediation in a context that offers information and support to the parties, and do not rush settlement.[170] In their articulation of these eleven points there is no real explanation given as to how a mediator might remain true to their ethical claim of neutrality whilst enacting these steps to actively assist a disadvantaged party.

The consequence of failing to acknowledge the reality of the intersection of these issues is serious because it impacts on the credibility and legitimacy of the process, and also on the potential for fair and just outcomes to be achieved. It is also an issue which impacts on the well-being and possible safety of mediators and also the parties.[171]

There is no doubt that the mediation process has the potential to address power imbalances between the parties. With great skill and competence, and with attention to ethical, integrated practice, this can be done well and result in appropriate and just outcomes.[172] However, it is not accurate to claim neutrality alongside claims that power imbalances can be effectively addressed. As commentators such as Mayer and Astor have said, the issue of party empowerment is a critical one that provides a serious imperative for a reassessment of the concept of neutrality.

VII Conclusion

This article argues that the problems associated with a continued reliance on aspirational notions of mediator neutrality in mediation ethics must be addressed. Whilst the concept of neutrality has been of central importance to the development and acceptance of the mediation process to date, particularly as a legitimizing factor for the recognition of mediation as an appropriate alternative to litigation, the concept of neutrality is increasingly lacking relevance to contemporary models of mediation and the realities of the demands of the mediation room. The practice of mediation has now developed beyond its theoretical foundations. The current ethical theory for the process is not only

[170] Davis and Salem, above n 166 18 - 23.

[171] For analysis of negative impacts on mediators in relation to professional stressors see Marshall, above n 93.

[172] See, for example, the Coordinated Family Dispute Resolution (CFDR) process currently being trialled by the Australian Federal Attorney- General as a way of using mediation safely and effectively in matters where there is a history of family violence. The CFDR approach was developed by Women's Legal Service, Brisbane with Rachael Field. The pilot of CFDR was launched by the Attorney-General, The Hon. Robert McClelland MP on 24 March 2011.

unsustainable, it is also unrealistic.

The argument of this article is important because the contemporary dispute resolution environment is one in which mediation is fast becoming an institutionalised dispute resolution option in many contexts, and an option of first resort for many parties. The article responds to the crisis in the dispute resolution field that neutrality has created and seeks to re-open discussion in the mediation community about a way of reconceptualising the importance and relevance of their practice.

The Australian Mediator Standards Board has a critical role to play in moving this issue forward. The Australian Mediator Standards Board (MSB) was established in September 2010,[173] and is part of developments in the voluntary National Mediator Accreditation System (NMAS) which support a move to establish a professional infrastructure for mediators. The purpose of the MSB is to take responsibility for the administration and enforcement of standards of practice under the NMAS. In other words the MSB is an emergent professional regulatory body. This Board has the capacity to play an important and influential role in the rethinking of mediation ethics for contemporary mediation practice, and in the development of professional ethics and standards of practice for the mediation field in Australia into the future. This article calls on the Board to take up the opportunity to reconceptualise mediation ethics for contemporary practice.

[173] See information regarding the Mediator Standards Board available at www.msb.org.au (accessed 1 March 2013).