Te Mata Koi
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Whiria te Tāngata

NINA KHOURI*

I INTRODUCTION

E te whānau o Te Mata Koi,

Tēnā tātou katoa,

Greetings Auckland University Law Review (AULR) family. Te Mata Koi is the te reo Māori name of the Review, meaning "the sharp blade".

It is an honour to be speaking with you all this evening. I acknowledge the members of the judiciary who are here tonight, colleagues from the law school and from the profession, and law students. I also acknowledge the Law Review's current Editors-in-Chief Elijah Kasmara and Gulliver MacDonald, as well as former editors in the room, including my father Philip Khouri who was an editor in 1971.

I was an article contributor. The Law Review's 2002 volume published the paper I wrote for my LLB(Hons) seminar in Advanced Contract Law.[1] Tonight I will reflect on what I was learning at law school when I wrote that article and how that still informs my work today as a mediator of civil and commercial disputes. I will also talk about a more recent influence on my mediation work — tikanga Māori — then close with some thoughts about mediation, tikanga Māori and access to civil justice in Aotearoa New Zealand.

II MY LAW REVIEW ARTICLE

My article was about the theory of efficient breach in the law of contract. This theory derives from the Law and Economics tradition. In simple terms, it's the idea that if you can breach a contract in favour of a better opportunity and, through that breach, still make a profit even after paying damages to your original counterparty, the law of contract both does allow that and should allow that.

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1 Nina CZ Khouri "Efficient Breach Theory in the Law of Contract: An Analysis" (2002) 9 Auckland U L Rev 739.

It makes some sense, given that an award of expectation damages — putting the other party in the position they would have been in had the contract been performed — is the primary remedy for breach of contract.

I didn't like this theory. I found examples of contract law that were inconsistent with it (orders for specific performance, the existence of the tort of interference with contractual relations, and so on). Then I argued that contract law has a social and economic utility beyond just economic efficiency. I was lucky to have Professor Tim Dare for my Honours Seminar, and also for Legal Ethics. We were learning how in modern constitutional democracies there is a "plurality of conceptions of the good among citizens". People fundamentally disagree about really important things. We learned about Thomas Hobbes and his vision in 1651 of the social contract where we all submit to the rule of law to avoid a state of nature where life is (remember this?) "solitary, poor, nasty, brutish, and short".[2] And about John Rawls, and his more recent vision "that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines".[3] Professor Dare introduced me to the idea of the rule of law as a *modus vivendi*, a way of living together despite our differences. Contract law to enforce the promises we make to each other — *pacta sunt servanda* — is part of that. You can't just breach because it's economically efficient. (I went on to assess the true transaction costs of a breach of contract from an economic perspective, but that's beyond what I have time to recount here.)

III MY WORK AS A MEDIATOR NOW

So, what remains of that thinking in my work now? These days I make my living as a civil and commercial mediator. I hold a practising certificate as a barrister sole and regard myself as a lawyer. Mediating disputes is how I practise law at the moment.

The mediation process offers parties an opportunity to meet face to face in a flexible and relatively informal setting to resolve their dispute through agreement. The process is:

(a) voluntary — no one in the room has power to make anyone do anything they do not want to; and
(b) confidential — everyone agrees that their discussions and any information they exchange are confidential and privileged, so they can speak freely without having to worry

2 Thomas Hobbes *Leviathan: or the Matter, Forme & Power of a Common-wealth Ecclesiasticall and Civil* (London, 1651) at 78.

3 John Rawls *Political Liberalism* (Columbia University Press, New York, 1993) at xviii.

> that something they say might compromise their formal legal position if the dispute has to progress to court.[4]

Let me explain what the process looks like in my mediation room.[5] The disputes I mediate are almost exclusively within the civil jurisdiction of the High Court — litigated cases where all parties are legally represented and the alternative to a settlement is a High Court trial or an arbitration.

They are usually scheduled for a one-day mediation (sometimes two or three). The process starts a few weeks (sometimes months) before the mediation day itself. I host a planning call between counsel where we identify the issues and put in place a plan to have the right people, with the right information, there on the day. This often begins to shift the working dynamic between the lawyers from the adversarial, letter-writing interaction they have usually had up to this point to a more collaborative focus on how to settle the case.

Closer to the mediation I speak with each party privately. We talk about what to expect from the process and what is important to that party. Come mediation day, everyone (including me) knows the issues for discussion, the key facts and supporting evidence and the legal arguments. As mediator, I also know the private priorities of each party.

The mediation day usually starts in joint session, discussing what happened (the facts), understanding the competing expert opinions[6] and debating the legal analysis, predicting how a court is likely to decide the case. This is where the "shadow of the law"[7] comes in; we need good legal precedents to make this possible. It is like a mini-trial of the case over the course of a few hours.

We talk about what happens next in the litigation if the parties do not settle: the procedural steps,[8] the likely timeframes to trial and judgment; and the likely costs. Seeing their lawyers agree across the table what the alternative to settlement looks like is often eye-opening for the parties.

Then we pivot to exploring potential solutions. This typically takes the form of a negotiation with settlement offers and counter-offers. We work flexibly using joint sessions, private caucuses, counsel-only meetings in the corridor and so on.

There will only be a settlement if that settlement makes more sense to every party than their other options. The process is driven by strategic and informed decision-making, with me as the independent helper.

The settlement outcomes negotiated in my mediations are often straight payments of money from defendant to plaintiff. This type of settlement is usually

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4 There are limits to that protection — misleading and deceptive conduct will not be protected by confidentiality and privilege, for example — but the law provides a broad degree of protection to enable effective settlement discussions in mediation: Evidence Act 2006, s 57.

5 On the understanding that mediators differ in their approaches to the mediation process.

6 In the past year my mediations have involved opinions from various experts such as structural and geotechnical engineers, building and quantity surveyors, IT experts, fire cause and origin experts, valuers, forensic accountants and health professionals.

7 Robert H Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950 at 968.

8 The discovery process, interlocutories, setting down for hearing, briefing evidence, trial and judgment and appeals.

a proxy for a damages award, reflecting the likely outcome in court but without litigation's uncertainties and downsides (cost, delay, distraction from more productive work and publicity). Sometimes the settlement outcome is fundamentally different to what a court could order. Examples I have seen include: (a) a new licensing and funding arrangement for a renewable energy generator; (b) a dairy farmer and their bank cooperating to sell farm assets before calving season to avoid receivership; and (c) a family tourism business agreeing a succession plan. In the latter case I heard recently that the father has now passed away and the sons are able to grieve together and cooperate because the path forward is clear.

IV THE MEDIATION PROCESS IN JUSTICE TERMS

So, how might we articulate this mediation process in justice terms? Well, the litigation process, with its rules of civil procedure and evidence, is designed to resolve disputes according to the law's objective standards through the recognition and enforcement of legal rights and obligations. Its purpose is to enable all members of society to have equal access to the protection of the law, regardless of power imbalances, with like cases being treated alike. This is constitutionally essential to the rule of law, and the social contract that helps us avoid Hobbes' state of nature (where life is "nasty, brutish and short").

In contrast, and sitting *alongside* the litigation process (never in *substitution* for it), the mediation process gives disputing parties the chance to choose the terms on which they resolve their dispute, according to their own subjective standards. In the cases I mediate, settlement choices are guided by the law, in the sense of predicting how a court is likely to decide the case (hence the concept of settling "in the shadow of the law") and aiming for a better outcome than that. They are also guided by factors that are not legally relevant, such as the parties' commercial priorities or personal and interpersonal needs.[9] More examples I've seen: (a) the multi-million-dollar estate dispute with allegations of historical sexual abuse and siblings who have not been in the same room as each other for years; (b) the defendant who logs into Xero and pushes the laptop across the table, saying: "Take a look. We can't pay you any more than this. If you keep suing us we'll go into liquidation."; and (c) what it is like for a family to live in an earthquake-damaged home for years where the kids have not been able to decorate their bedroom walls because the cracks need to remain visible for the insurance inspectors.

It helps to understand what caused the dispute in the first place before it was translated into a pleaded case, and what is important to the parties now in resolving it.

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9 Carrie Menkel-Meadow "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo LJ 2663 at 2685 ("nonlegally relevant facts").

As such, in *justice* terms, the mediation process reflects a commitment to the Western liberal concept of the autonomous individual in a democracy who can make their own decisions, using the law of contract to create new rights and obligations.

It also reflects a certain discomfort at black and white answers to disputes, even a postmodern scepticism about the possibility of discerning the truth through the litigation process. It lets the disputing parties find that answer for themselves in a properly supported way.[10]

Looking back at my AULR article, I see Hobbes and Rawls in the work I do now, I see *pacta sunt servanda* and the social and economic utility of contract law, and I see the driving normative force of the idea that we as lawyers work to create a society where people can co-exist despite profound differences between them.

V TIKANGA MĀORI

One significant change for me since the early 2000s, however, is my own awareness of the principles, values, and practices of tikanga Māori.[11] At Law School we had compulsory modules on the Treaty of Waitangi in Public Law and Jurisprudence (I don't remember calling it te Tiriti). I didn't take any of the available elective courses. Emeritus Professor Jane Kelsey was scary and wonderful at the same time. Professor Khylee Quince and Emeritus Professor David Williams kindly helped me write my pepeha to take with me to New York when I studied for my LLM. But if I'm honest it felt — to this Pākehā at least — that understanding tikanga Māori was a "nice to have" and not a "need to have" for a legal career in Aotearoa New Zealand. Now, however, I am finding tikanga Māori useful in my mediation practice, for cases involving Māori land or Māori participants (often post-settlement governance entities managing assets arising out of Treaty settlements) *but also* for my other general civil and commercial cases.

To start, let me say that I am not tangata whenua. I am a fifth generation New Zealander of Lebanese descent on my father's side (my father's family came to Aotearoa from Lebanon in the 1800s) and first generation Swedish on my mother's side. But I am a proud member of *Ngāti Aotearoa* and I care about this country. Saying that makes me think of Ruby Tui (the rugby player, currently

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10 See further Carrie Menkel-Meadow "The Trouble with the Adversary System in a Postmodern, Multicultural World" (1996) 38 Wm & Mary L Rev 5 as cited in Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge (UK), 2010) at 84.

11 See Law Commission *He Poutama* (NZLC SP24, 2023) at [3.16] and following; and Wiremu Doherty, Hirini Moko Mead and Pou Temara "Appendix 1: Tikanga" in Law Commission *He Poutama* (NZLC SP24, 2023). See also New Zealand Law Society *Practice briefing: tikanga Māori and Rules 3, 3.1, and 3.9 of the Rules of Conduct and Client Care* (July 2025) at 1: "In this practice briefing, where we use the term 'tikanga' we are referring to tikanga Māori and its principles values, and practices. This phrase reflects the place of tikanga within te ao Māori as well as a source of principles, values, and practices that inform legislation and the common law."

BBC broadcaster) when asked how she felt about doing the haka on the rugby field when she is not Māori herself. She said:[12]

> I represent New Zealand. And Māori culture is part of the culture of the country I'm representing. How can I not respect that and educate myself about that culture? When I take that field, it has absolutely nothing to do with myself. It's our responsibility as kaitiaki or [guardians] of this that we understand we're representing the whole of New Zealand.

I do not hold myself out as any sort of expert in tikanga and I acknowledge all the risks of Pākehā tokenistically adopting tikanga or unduly straining its meaning.[13] There is also an emerging practice of tikanga-informed mediation in disputes involving Māori land, including under the Farm Debt Mediation Act 2019[14] and in Te Kooti Whenua Māori | the Māori Land Court.[15] I simply wish to share how starting to think in terms of tikanga Māori is helping me with the civil and commercial cases I mediate. The Law Society also reminded us just six weeks ago that considering tikanga Māori is a requirement in meeting our competence and client service obligations under the Lawyers: Conduct and Client Care Rules, so it is a "need to have" for a legal career in Aotearoa New Zealand now.[16]

Happily, the Law Commission has made life easier for Ngāti Aotearoa lawyers like me with its 2023 *He Poutama* report.[17] This is a comprehensive account of what tikanga Māori is and how tikanga and state law might best engage with each other. It is a herculean effort reflecting wide research and consultation, led by Whata J. I commend the report to anyone who wants to learn about tikanga or deepen their understanding.

In the report, the Law Commission identifies a "core group of concepts" that it says are "central to tikanga as a system".[18] They are explained in plain English with helpful examples. We heard from Whata J this evening about some of them.[19] Some of those core concepts are helping me in my mediation work.

For example, we can think about the mediation process in terms of kawa,[20] what processes and procedures are appropriate for the given case. Without being flippant, that is the easy stuff: who will host and how? Will we open and close with karakia? (Who will lead it? What words are appropriate? Will we translate for the benefit of those in the room who do not speak te reo Māori?). How will

12 Interview with Ruby Tui, rugby player and broadcaster (Miriam Margolyes, Miriam Margolyes Discovers New Zealand, BBC, 2025).

13 See Annette Sykes "The myth of Tikanga in the Pākehā Law" (Nin Thomas Memorial Lecture 2020, University of Auckland, 5 December 2020); and Law Commission, above n 11, at [3.150].

14 See Ministry for Primary Industries *The Farm Debt Mediation Scheme* (August 2020).

15 See, for example, the relatively new mediation provisions in Te Ture Whenua Maori Act 1993, incorporated by Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, pt 3A.

16 New Zealand Law Society, above n 11.

17 Law Commission, above n 11.

18 At [3.16].

19 See Christian Whata "Mana of Law" (2025) 31 Auckland U L Rev 1.

20 Law Commission, above n 11, at [3.128] and following.

we greet each other? You work through that, and try to encourage lightheartedness when one person expects to shake hands and the other to hongi and it turns into an awkward half kiss with someone you've never met before.

That is process. We can think about the substantive outcomes of mediation in terms of tikanga too. In mediation parties have the freedom and flexibility to choose the outcome that is tika (correct) for them. I mentioned earlier that the outcome is often different to what a court could order. It is a way to restore utu (balance, not revenge)[21] and to get to a point where all affected parties can say to each other and to the world "kua ea", which means "it is settled".[22]

In terms of underlying concepts, I am thinking in terms of kaitiakitanga and the responsibility of guardianship.[23] This is often talked about in the context of the connection between people and the natural world but kaitiakitanga is wider than that. I feel guardianship obligations in my legal and ethical duties to run a safe mediation process for the parties and support them to make well-informed decisions that are right for them.

So, for example, I require the parties to my mediations to be legally represented (the lawyers are guardians too) and will adjourn a mediation if I consider a party has lost decision-making capacity (for example, if it is late at night and they are too tired to think clearly).[24]

I am also thinking about mana in the mediation process, and manaakitanga,[25] the responsibility to care for the mana of the parties I work with. At a practical hospitality level, it is making sure everyone has their own breakout room that is warm and private where they can speak freely with their lawyers. Having food for everyone throughout the day to keep their energy levels up. No ham and cheese croissants at morning tea for Hindu, Muslim, Jewish or vegetarian parties.

But it is also about mana holistically too:

(a) Treating all parties in the mediation with dignity and respect regardless of their social status or the legal merits of their position.
(b) How you help with language barriers or disabilities.
(c) Allowing everyone to speak without interruption.
(d) Facilitating a sincere apology that increases the mana of both the apologiser and recipient.[26]
(e) Supporting the parties to choose their own solutions together, in the face of an alternative where a stranger (a judge or an

21 At [3.60] and following.
22 At [3.64] (emphasis omitted).
23 At [3.116].
24 I have written separately about the obligations of counsel and the mediator to protect the parties against bad decisions made under pressure: see Nina Khouri "Mediation" [2018] NZ L Rev 101 at 102.
25 Law Commission, above n 11, at [3.120] and following.
26 See further Nina Khouri "Sorry Seems to be the Hardest Word: The Case for Apology Legislation in New Zealand" [2014] NZ L Rev 603 at 609.

> arbitrator) will decide the outcome for them, having to choose one party's arguments over the other's.[27]

And finally, there is whanaungatanga, a concept the Law Commission describes as "foundational", providing the "underlying normative frame" for tikanga Māori.[28] Whata J earlier tonight described it as the "one norm to rule them all".[29] It "reflects the importance in te ao Māori of all things being connected"[30] and focuses us on relationships and our interdependence.

Mediation involves two, three, four, or sometimes many parties (or whole communities) working together through a structured process to find a settlement everyone can live with. Sometimes that settlement enables relationships to continue; for example in construction disputes where the build is still happening or the parties are working together on other projects. Sometimes the settlement opens the possibility of healing a relationship, not right now but perhaps in the future; I see this in family trust and estate disputes. And sometimes the parties will not interact again but the dispute is resolved in a way that enables everyone to move on with their lives and businesses peacefully within our wider community.

Kua ea — it is settled.

Whanaungatanga also resonates in good working relationships (often long-term relationships) between counsel, and between counsel and the mediator. These relationships are astonishingly important in helping a dispute settle at mediation.

VI ACCESS TO CIVIL JUSTICE

I said I would close with some thoughts about mediation, tikanga Māori and access to civil justice in Aotearoa New Zealand. As an academic I have written for years about how we are unique in the common law world for the way we so

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27 A good settlement can increase the mana of both parties, especially if they conduct themselves honorably through the process. Even where's no settlement, a good mediation process can increase the mana of both parties if they leave the mediation with a better understanding of reason for each other's position. The increased respect that comes from that understanding often lays the foundation for agreement in the future.

28 Law Commission, above n 11, at [3.22].

29 Whata, above n 19, at 4.

30 Law Commission, above n 11, at [3.22] citing Doherty, Mead and Temara, above n 11, at [3.7]. See also Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 4: "So whanaungatanga might be said to be the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world — flora, fauna, and physical resources — and the spiritual world — the gods and ancestors".

comprehensively exclude mediation from our formal civil procedure rules. Australia, England, Canada and the United States all have mechanisms that recognise the dialogic relationship between litigation and settlement: in all jurisdictions the vast majority of proceedings settle before trial — the judicial system would collapse otherwise — but some cases need to go to trial to clarify the law and enable all the others to settle.[31]

Everyone else actively builds that into their civil justice procedures, whether by court-annexed mediation, pre-action protocols, cost sanctions for unreasonable refusals to mediate or a discretionary power for the court to order parties to attend mediation.[32] My mediator colleague Mark Kelly has recently completed a comprehensive and persuasive research project about this if you are interested in learning more.[33]

The one advantage we have here in Aotearoa New Zealand, being *slow followers,* is the opportunity to learn from comparable jurisdictions and build something uniquely fit for purpose here.

For my part, I am seeing signs of a possible change in approach: I am thinking about the District Court's transformative Te Ao Mārama initiative (literally "the world of light"). Working with iwi and local communities and drawing in part on tikanga Māori, this is a holistic solution-focused approach to enhance the accessibility of the Court for all Court users (not only Māori).[34] I am also thinking about the upcoming changes to the High Court Rules 2016. In January 2026, the overriding objective of the High Court Rules will change

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31 See further Nina Khouri "Civil Justice Responses to Natural Disaster: New Zealand's Christchurch High Court Earthquake List" (2017) 36 CJQ 316 at 325 and the articles cited there.

32 See, for example, Nina Khouri "Mediation*"* [2021] NZ L Rev 169 at 184 and following. Helen Bowskill, Chief Justice of Queensland (speech to International Academy of Mediators Conference, Gold Coast, 27 May 2025): "The *Uniform Civil Procedure Rules* were enacted in 1999. They included rules about Alternative Dispute Resolution Processes, which followed the introduction of provisions for court-annexed mediation and case appraisal about four years earlier. That had been thought to be quite revolutionary at the time – to formally incorporate such a process into the court system. 26 years on, you might wonder what all the fuss was about – it is what you might call a 'no brainer'."

33 Mark Kelly *Mediation and the Senior Courts: Should New Zealand's Senior Courts Have Greater Powers to Encourage, or Order, Parties to Civil Disputes to Mediate? An Access to Justice Opportunity? (incorporating a survey of comparable overseas jurisdictions)* (14 February 2025).

34 District Court of New Zealand "About Te Ao Mārama" <www.districtcourts.govt.nz>; and see District Court of New Zealand *Te Ao Mārama Best Practice Framework: "Enhancing justice for all"* (20 December 2023).

from the "just … *determination*" of proceedings to the "just *resolution*" of proceedings "by proportionate means".[35]

I wonder if the time is coming where, thinking both creatively and critically, we might adopt a more holistic solution-focused (*resolution*-focused) approach to civil justice here. If we were to seek a *Lex Aotearoa*[36] for civil justice, perhaps both tikanga Māori and mediation have something to offer.

If so — and this is where I will finish — how do we reconcile the relational concept of whanaungatanga with the Western liberal concepts of the autonomous individual and the laws of contract that I said earlier are fundamental to mediation? Well, I'm a mediator so I'm allowed to accept both ideas as truthful. Because they're both useful. We are all connected with each other. We are connected in ways that are sometimes beautiful and sometimes terrible.[37] Our essential challenge — here and generally around the world — is to figure out a way to co-exist despite our differences. That is what Hobbes and Rawls were seeking.

A couple of years ago I was given this cup. It has a beautiful glaze — matt cream on the outside and a glorious orange on the inside. And it has these words: *whiria te tāngata*. They are a Māori whakataukī (proverb), which means "weave the people together". This cup sits on my work desk. I drink my tea from it, and I thought about these words as I prepared tonight's address. It seems to me that this is the promise of the rule of law: to weave us all together despite our differences. Our challenge *as lawyers committed to the rule of law* is to nurture the beautiful connections and to cope with the terrible ones, weaving and binding society together in useful and peaceful ways in our daily work.

There is an Auckland University Law Review connection between us here in this room — judges, students, lawyers and legal academics. This connection is one of the beautiful ones. It is a taonga, and it deserves to have us here tonight celebrating it.

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35 High Court (Improved Access to Civil Justice) Amendment Rules 2025, r 4 (emphasis added); and High Court Rules 2016, r 1.2 (emphasis added). Currently High Court Rules, r 1.2 reads:

> **1.2 Objective**
> The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.

From January 2026 this rule will read:

> **1.2 Overriding objective**
> (1) The overriding objective of these rules is to secure the just resolution of any proceeding or interlocutory application by proportionate means, including by securing its speedy and inexpensive determination.

See further Rules Committee Improving Access to Civil Justice (November 2022); and see generally at Courts of New Zealand "Improving Access to Civil Justice" (14 October 2025) <www.courtsofnz.govt.nz>.

36 Williams, above n 30.

37 Clay Nelson, Reverend (sermon to Auckland Unitarian Church, Auckland, August 2021).

So thank you to the Editors-in-Chief, Elijah and Gulliver, for organising today's events. Thank you all for coming along and honouring your connection with the AULR. And thank you for listening.

Nō reira, tēna tātou katoa.