CLIMATE CHANGE AND THE CLAIMING OF TINO RANGATIRATANGA

Mihiata Pirini* **and Rhianna Morar****

This article considers what it means to exercise tino rangatiratanga in a climate change context. To date, the involvement of Māori in Crown-led, climate change mitigation law and policy has largely been based on consultation and negotiation. This article invites consideration of a new, Māori-led approach towards climate change; one that is based around explicit acts of tino rangatiratanga. The defining feature of such acts is that they seek to trouble, disrupt, and unsettle established colonial orthodoxies. We describe two specific actions or initiatives that can be framed and claimed as acts of tino rangatiratanga: the establishment of climate-resilient, marae-based hubs; and the bringing of legal proceedings in tort. With these examples, and with our conception of acts of tino rangatiratanga, we hope to encourage reflection on the manner in which Māori can lead in climate change mitigation and adaptation.

This article does not emphasise a gendered approach towards the issue of climate change, however, through the journey of authoring this article together we reflected on our own status as wāhine Māori. We each have legal training, and are each familiar in different ways with the spaces that this article claims as locations for acts of tino rangatiratanga – the marae, and the courtroom. Climate change has a direct impact on Papatūānuku, leading us to consider the significant role that wāhine Māori have played in Māori creation stories that recount the emergence of Te Ao Mārama. This connects with the role that we believe wāhine Māori will play in the acts of tino rangatiratanga we describe. Ultimately, and as we point out in this article, climate change is a collective issue and we have chosen to emphasise this. However, we wish to explicitly stake our claim in the issue as wāhine Māori, who will be looking for ways to exercise tino rangatiratanga in the ways that we have outlined in this article.

* Mihiata is a lecturer based at the University of Otago's Faculty of Law and is Ngāti Tūwharetoa and Whakatōhea descent.

** He uri a Rhianna nō Ngāti Porou, Te Arawa me Inia hoki. I te taha o tōna māmā ko Te Whānau a Ruataupare tōna hapū. I te taha o tōna pāpā ko Tapuika rāua ko Gujarati ōna hapū. The authors wish to thank the peer reviewers for their helpful comments on an early draft of this article.

I INTRODUCTION

Climate change in this article refers to the global warming of the earth and consequent large-scale weather pattern shifts. The scientific consensus is that human activity, in particular the emission of greenhouse gases, is the primary cause of this warming.[1] As a result, we are experiencing shifts in weather, rising sea temperatures and climatic changes that seriously impact the ability of the earth to support many forms of life. Globally, there is consensus among the international community that dangerous and irreversible anthropogenic climate change is insurmountable if global increases in temperature are not kept below two degrees.[2] More urgent and more concerted efforts than ever are required, both to mitigate further temperature increases and to prepare for climate change impacts that are already being felt. In this article we describe some of the ways Māori have been involved in climate change mitigation to date. We argue that, despite some positive developments, Māori do not yet occupy a "seat at the table" when it comes to successive governments' decision-making on climate change mitigation. With that in mind, this article considers an approach towards climate change that is based around explicit acts of tino rangatiratanga, both in climate change mitigation and adaptation. We outline two specific actions that could constitute expressions of tino rangatiratanga: the establishment of climate-resilient, marae-based hubs; and the bringing of legal proceedings in tort. Whilst these two activities appear ostensibly quite different in nature, in this article we argue that both can be seen as acts of tino rangatiratanga, because they challenge and unsettle established colonial orthodoxies.

1 Naomi Oreskes "Beyond the Ivory Tower: The Scientific Consensus on Climate Change" (2004) 306 Science 1686 at 1686.

2 *United Nations Framework Convention on Climate Change* UN Doc A/AC.237/18 (Part II) (9 May 1992); *Kyoto Protocol to the United Nations Framework Convention on Climate Change* UN Doc FCCC/CP/1997/7/Add.1 (11 December 1997); *Paris Agreement* UN Doc FCCC/CP/2015/10/Add.1 (12 December 2015); and see further Richard Allan and others "Summary for Policymakers" in V Masson-Delmotte and others (eds) *Climate Change 2021: The Physical Science Basis* (Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, 2021) 1, which confirms that we must limit the world's temperature increase to 1.5°C if we are to avoid the impacts of catastrophic climate change.

II CLIMATE CHANGE AND ITS IMPACTS ON MĀORI RELATIONALITY WITH THE ENVIRONMENT

A recent research report prepared for Ngā Pae o te Māramatanga – the Centre for Māori Research Excellence describes a range of ways in which climate change affects Māori society, culture, and interactions with the natural environment.[3] The interests of Māori in climate change and responses to it are also complex. For example, billions of dollars of the Māori economy are invested in both forestry and agriculture.[4] Forests play a critical role in helping Aotearoa New Zealand meet its emissions targets,[5] whilst agriculture is a prime contributor to emissions.[6] It follows that Māori will be deeply impacted by how these two sectors will shift or adapt in light of climate change concerns.

One way of understanding the particular impact of climate change on Māori is to consider the cosmological narratives that underpin Māori belief systems. In these belief systems, the universe evolved in three stages, from Te Kore (realm of potential being), through Te Pō (realm of becoming) and on to Te Ao Mārama (realm of being). Prominent Māori scholar Ani Mikaere likens these three stages to "an ongoing cycle of conception, development within the womb, and birth".[7] This enduring cycle reminds humanity of the origins of our existence, in what Dr Rangimārie Rose Pere has described as "the union of the primeval parents", Papatūānuku (earth mother) and Ranginui (sky father).[8] The Kaupapa Māori-based writer and former academic Andrea Tunks describes how the offspring of Papatūānuku and Ranginui play critical roles in "the creation and control of the natural world", including the climate.[9] These include Tāne, responsible for plant, bird and tree life; Tangaroa, responsible for the oceans; and Tawhiri Matea, representing meteorological changes in the atmosphere. All are bound together by whakapapa, or kin relationships. As noted by Mikaere, humans are also bound by whakapapa to the spiritual forces

3 Shaun Awatere and others *He huringa āhuarangi, he huringa ao: a changing climate, a changing world* (Ngā Pae o te Māramatanga and Manaaki Whenua - Landcare Research, LC3948, October 2021).

4 Figure 6: Financial asset base of Te Ōhanga Māori by sector, 2018: Reserve Bank of New Zealand – Te Pūtea Matua T*e Ōhanga Māori 2018: The Māori Economy 2018* (January 2021) at 15; and He Pou a Rangi Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* (May 2021) at 385.

5 He Pou a Rangi Climate Change Commission, above n 4, at 315.

6 At 304.

7 Ani Mikaere *The Balance Destroyed: The Consequences for Maori* (Te Wānanga o Raukawa, Otaki, 2017) at 27.

8 Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Working Paper, University of Waikato, 1982) at 7, cited in Mikaere, above n 7, at 26.

9 Andrea Tunks "Tangata Whenua Ethics and Climate Change" (1997) 1 NZJEL 67 at 71.

that created the world.[10] Tunks observes that human-induced climate change upsets the balance achieved by the offspring of Papatūānuku and Ranginui, and the web of whakapapa that binds them, and us, together. She writes:[11]

> The presence of polluting substances changes the roles and dynamics amongst the atmospheric entities. Each descendant of Rangi and Papatuanuku is forced to absorb the excess emission of pollutants. This impacts upon their abilities to fulfil their functions within the overall web.

In this way, Tunks demonstrates how creation stories are a lens through which to understand climate change. We can look to other scholars' descriptions of creation stories for similar understanding. In *The Balance Destroyed*, Mikaere draws on a range of sources in her description of one of the Māori creation stories for humankind.[12] In the creation story recounted by Mikaere, Tāne Mahuta's attempts to create life proved unsuccessful until Papatūānuku showed him the necessary female element, the uha (essence of femaleness), which he used to breathe life into Hineahuone.[13] It is from the sexual encounters of Tāne and Hineahuone that men and women draw their names.[14] Hinetītama was the first human life, named for the Dawn, the connection between night and day.[15] Upon learning that Tāne was not only her husband but also her father, Hinetītama left Tāne to care for their children in their earthly life and journeyed to Rarohenga where she prepared a place to care for her children in death.[16] Hinetītama has been known as Hine-nui-te-pō, the ancestress to whom all human descendants go upon death. With this creation story Mikaere highlights the significance of he whare tangata (house of humanity, womb, uterus) and makes clear that deities and ancestresses have a role that is embedded in the consciousness of all their descendants.[17] Another example is the important and oft-repeated kōrero that it was Kuramarotini, Kupe's wife, who was the first to identify the cloud cover known to all Polynesians as the

10 Mikaere, above n 7, at 25.
11 Tunks, above n 9, at 81.
12 Mikaere, above n 7, at 28 and 75–81.
13 At 28.
14 At 30.
15 At 30.
16 At 30.
17 At 30.

sign of a large, forested land mass. It was Kuramarotini that said: "He ao! He ao! He Ao-tea-roa! (A cloud! A cloud! A long white cloud!)".[18]

To further demonstrate storytelling as a Māori practice, and the centrality of whakapapa in Māori cosmology, we can look to the Waitangi Tribunal (the Tribunal) inquiry that led to the *Muriwhenua Land Report*.[19] The inquiry related to whether particular land transactions between 1856 and 1865 transferred absolute and exclusive ownership to the Crown, or whether the transactions conferred a limited type of authority over lands according to Māori custom.[20] The validity of the land transactions turned upon whether or not, according to Māori law, the rangatira had authority to transfer absolute ownership to the Crown severing the whakapapa from the land.[21] Ngāpuhi and Muriwhenua leader, Rima Edwards, began his evidence with the creation story of Ranginui and Papatūānuku—tracing his whakapapa to Kupe and the waka Matawhaorua that brought him, Kuramarotini and their children (among others) to Aotearoa New Zealand.[22] In doing so, Edwards discussed the history of how his ancestors arrived in Muriwhenua, the naming of the lands in their rohe and pointed over to the area in which Panakareao met with missionaries to discuss the land which they might use.[23] It was at this point that, according to Justice Joseph Williams (now a Supreme Court Justice, and acting at the time as counsel before the Tribunal), the Tribunal had understood that those land transfers could not possibly have had the legal effect of permanently alienating those interests according to Māori legal traditions.[24] It would be impossible, according to Māori understandings of the world, for Panakareao to

18 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 2.

19 Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997).

20 At 4.

21 Chapter 3 of the *Muriwhenua Land Report*, above n 19, at v and [3.1] deals with pre-Treaty transactions and sets out "[w]hy the first land transactions were not sales, but arrangements securing a personal relationship between Europeans and the hapu — a relationship between land user and the associated community".

22 Joseph Williams "Ka kuhu au kit e ture, hei matua mō te pani" (2018) November Māori LR 3 at 7.

23 At 7–8.

24 At 8. See also Waitangi Tribunal (Wai 45, 1997), above n 19, at 68. Referring to submissions made by Rima Edwards, the Tribunal stated "[w]e substantially agree also with Maori witnesses before this Tribunal who, speaking on different marae at separate times, were consistent in their view that the land transactions with the missionaries, beginning with the Kaitaia mission station and the farm at Te Ahu, were not sales, and could not have been sales. We refer particularly to the Reverend Maori Marsden, Ross Gregory, and Rima Edwards. All three maintained that Panakareao could give no more than he had, and as a rangatira he had no more than the right to allocate land with the intention that the missionaries become part of the local community under his care, protection, and mana."

severe the whakapapa connections from the land. The centrality of whakapapa in Māori relationality shows that authority *derives from* our connections with one another and the land. Once this is understood, we can begin examining how authority is exercised and who has the status to exercise it.

In short, Māori have social, cultural and economic interests in climate change and climate change responses. These interests are complex, varied and interconnected. This interconnectedness is governed by what former Chair of the Waitangi Tribunal and former High Court Justice, Eddie Durie (now Tā Eddie Durie), has described as "conceptual regulators of tikanga", sourced in distinctly Māori legal traditions.[25] Durie and Williams identify a range of these conceptual regulators or core values, including whanaungatanga (kinship and the obligations flowing from it); mana (spiritually sanctioned authority; leadership); and utu (reciprocity or harmony and balance, and the need to maintain it).[26] Williams also includes kaitiakitanga, which he describes as the obligation to care for one's own,[27] and tapu, described as "a social control on behaviour and evidence of the indivisibility of divine and profane".[28] The dynamic and complex relationality indigenous peoples have with land and natural resources cannot be divorced from the cultural context in which they derive.

The ability to exercise authority and control in relation to land derives from the whakapapa relationship between a group and the particular area. This is best expressed through the following whakataukī: "Ka wera hoki i te ahi, e mana ana anō … While the fire burns, the mana is effective".[29] However,

25 ET Durie *Custom Law* (Waitangi Tribunal, 1994) at 4–5 (republished by Treaty of Waitangi Research Unit, May 2013).

26 Durie, above n 25, at 4–8; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 3. A valuable resource for further discussion of the various meanings that the concepts can carry is found in Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 154 (mana); 467 (utu); and 524 (whanaungatanga).

27 Williams, above n 26, at 3; and for further discussion of the concept of kaitiakitanga in particular see Māori Marsden "Kaitiakitanga: A definitive introduction to the holistic worldview of the Māori" in Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Otaki, 2003) 54.

28 Williams, above n 26, at 3.

29 Benton, Frame and Meredith, above n 26, at 180 in which the authors describe this whakataukī as emphasising the link between mana and an active relationship to the land. See further Hirini Moko Mead and Neil Grove (eds) *Ngā Pēpeha a ngā Tīpuna: The Sayings of the Ancestors* (Victoria University Press, Wellington, 2001) at 197 in which Moko Mead describes this whakataukī as from that relationship to the land, the person or group referred to derives mana.

the interrelated aspects of mana and whakapapa encompass rights to exercise control over land, as well as responsibilities to care and provide for the land as an ancestor. Durie uses the term "take" to describe the ancestral source of a right.[30] This may be characterised as a residual right over the lands based on whakapapa. Conversely, Durie uses the term "use rights" to refer to access and use rights which were granted to other groups who did not have ancestral connections to the particular area.[31] These rights are conditional upon the relationship of the particular group with those who possess ancestral rights (as outlined above).[32] The centrality of whakapapa means that descent rights are stronger than purely associational or occupational rights. Nevertheless, Durie cautions that these rights should not be equated with absolute ownership or exclusive possession over land.[33] The complex layers of rights in relation to land should not be divorced from the relational protocols in which they operate according to those conceptual regulators that comprise Māori legal traditions.[34]

However, the recognition of multi-jurisdictional approaches to climate change within the state legal system requires examining the relationship between Māori and state legal traditions. The concept of self-determination, for example, is based on the denial of indigenous sovereignty and therefore the implications of Crown sovereignty without corresponding recognition of Māori law requires careful scrutiny.[35] Our relationality with the land differs depending on how these legal traditions are reconciled with one another, in particular how "rights" of dominion according to state legal traditions can be exercised in accordance with reciprocal "responsibilities" through concepts such as kaitiakitanga and mana.[36]

30 Durie, above n 25, at 66.

31 At 66.

32 At 66–67. Durie explains that use rights were conditional upon contribution to the "common good", such as participation in collective operations, and assistance in making and repaying gifts and tributes, hosting visitors or succoring migrants or refugees. He further explains that these relationships illustrate how tenure is linked to kinship obligations and the principles of reciprocity.

33 At 67.

34 See Rhianna Eve Morar "Kia Whakatōmuri te Haere Whakamua: Implementing Tikanga Māori as the Jurisdictional Framework for Overlapping Claims Disputes" (2021) 52(1) VUWLR 197 for further commentary on the harmonious existence of overlapping rights and interests under Māori law.

35 Claire Charters "A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making" (2010) 17(2) Int J Minor Group Rights 215 at 230; and John Borrows "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37(3) Osgoode Hall L J 537 at 576.

36 This critique is based on Locke's basis for natural rights as the preservation of property, see John

One of the consequences of territorial sovereignty being the dominant mode of jurisdiction is that it denies the existence of other jurisdictions, particularly those of indigenous peoples.[37] Conceptualising jurisdiction as territorial sovereignty reduces the need to think about where indigenous legal traditions meet state legal traditions. Therefore, exercises of indigenous jurisdiction are mere considerations to be incorporated within the prevailing state legal system as something less than law, such as custom or culture.[38] As a result, Māori have been displaced from key sites of power which include prevailing political systems and governments, jurisdiction over land and natural resources, economic development, as well as ecosystem-based and sustainable environmental management.[39] However, Māori cosmology shows us the distinct constitutional status of indigenous peoples, particularly in relation to the environment. Māori possess inherent jurisdiction which confers legal and political authority over an area by virtue of inheritance or connection to the land – of being indigenous peoples.[40] Authority is embedded in whakapapa to indigenous culture, place and political systems.[41]

Moreover, state legal traditions recognised the continuation of Māori jurisdictional autonomy in He Whakaputanga o Te Rangatiratanga o Niu Tireni | the Declaration of Independence of the United Tribes of New Zealand 1835 and Te Tiriti o Waitangi 1840. Although declarations and treaties are not strictly binding unless incorporated into domestic law, both are constitutional covenants which are renewed over time, influencing how the Crown recognises indigenous rights codified internationally.[42] For instance, the modern

Locke *Second Treatise of Government* (C B Macpherson (ed), Hackett Publishing, Indianapolis, 1980); and see also Roger Merino "The Land of Nations: Indigenous Struggles for Property and Territory in International Law" (2021) 115 AJIL Unbound 129 at 130–131 in which Merino outlines the ways in which the right to exploitation is essential to Locke's conception of sovereignty in that property rights are only granted where that land is cultivated or improved therefore producing the "maximum value" for their property.

37 Shaunnagh Dorsett and Shaun McVeigh *Jurisdiction* (Routledge, London, 2012) at 103.

38 At 104.

39 Robert Joseph and others *Stemming the Colonial Environmental Tide: Shared Māori Governance Jurisdiction and Ecosystem-Based Management over the Marine and Coastal Seascape in Aotearoa New Zealand – Possible Ways Forward* (National Science Challenge Sustainable Seas Ko Ngā Moana Whakauka and Te Mata Hautū Taketake the Māori and Indigenous Governance Centre, Te Piringa Faculty of Law, University of Waikato, 2020) at 14–15.

40 At 46.

41 See generally Durie, above n 25; and Hirini Moko Mead *Tikanga Māori (Revised Edition): Living by Māori Values* (3rd ed, Huia Publishers, Wellington, 2019) at 303–317.

42 Robert A Williams Jr *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (Routledge, New York, 1999) at 61; and Claire Charters "Māori and the United Nations" in Maria

concept of self-determination is concerned with the legitimacy of exclusive jurisdictional authority.[43] The Waitangi Tribunal in *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* found that He Whakaputanga was entered into to protect Māori jurisdictional authority.[44] It follows that article two of Te Tiriti o Waitangi 1840 preserves Māori jurisdictional authority through the guarantee of tino rangatiratanga.[45] The recognition of Māori jurisdiction therefore implied the continuation of Māori legal traditions and dispute resolution processes.[46]

It is with this legal and spiritual consciousness in mind that Māori seek recognition of their own jurisdiction in responses to climate change, therefore disrupting established colonial orthodoxies. This article considers tikanga Māori as an independent jurisdiction with an established legal order that is capable of governing areas, such as climate change, exclusively governed by the state legal system. The exclusivity of the state law jurisdiction requires Māori to become more dynamic in exercising diverse forms of rangatiratanga. We explore specific examples of disruption in Part IV.

III CLIMATE CHANGE, MĀORI AND THE CROWN

Across the globe, nation states are taking steps to respond to the threat posed by climate change; at the time of writing, many of these steps are being discussed at the United Nations 2021 Climate Change Conference hosted in Glasgow. In Aotearoa New Zealand, the Crown's response to climate change commenced in 1988 with the establishment of the New Zealand Climate Change Programme, a group of government agencies that would research, consult and publish on climate change.[47] Three working groups were established. They focused on climate change predictions, impacts and policy.[48] A fourth group was established in 1990, "to advise the Programme of Maori concerns and matters relevant to Maori and ensure that the Programme is in accordance with its

Bargh (ed) *Resistance: An Indigenous Response to Neoliberalism* (Huia Publishers, Wellington, 2007) 147 at 151.

43 Joseph, above n 39, at 164.

44 Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 520–521.

45 At 526–527.

46 Joseph, above n 39, at 91.

47 Vernon Rive "New Zealand Climate Change Regulation" in Alastair Cameron (ed) Climate Change Law and Policy in New Zealand (LexisNexis, Wellington, 2011) 165 at 167.

48 Tunks, above n 9, at 86.

obligations under the Treaty of Waitangi".[49] That group emphasised the need for Māori participation, but also suggested that establishing a viable economic base and achieving constitutional change might be more pressing priorities for Māori than the impacts of climate change.[50]

Over the decades since, the Crown has considered and implemented a range of regulatory measures to address climate change. The legislative framework for many of these measures is located in the Climate Change Response Act 2002. Measures have included setting targets for carbon dioxide emissions;[51] proposals to tax emissions;[52] encouraging the use of renewable energy;[53] and the introduction of the Emissions Trading Scheme, through which emissions can be priced as units and traded.[54] The Crown has established agencies tasked with working in the area, such as the Energy Efficiency and Conservation Authority in 1992[55] and, more recently, the independent Climate Change Commission.[56] The Crown has remained involved in the international community, ratifying international climate change agreements such as the United Nations Framework Convention on Climate Change and the Kyoto Protocol.[57]

In 1997, Tunks reviewed Māori participation in climate change policy at the domestic level and found it severely lacking. There had been no formal

49 B Williams *Climate Change: the New Zealand Response* (Ministry of Environment, 1988) at 218, as cited in Tunks, above n 9, at 87; and see also Naomi Johnstone "Negotiating Climate Change: Māori, the Crown and New Zealand's Emissions Trading Scheme" in Randall S Abate and Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, Gloucestershire, 2013) 508 at 516.

50 B Williams, above n 49, at 215 as cited in Tunks, above n 9, at 88. As Tunks notes, the Māori Working Group produced a summary of the impacts of climate change on Māori.

51 Rive, above n 47, at 177.

52 At 171.

53 At 191–199.

54 See Alistair Cameron and Vernon Rive "Emissions Trading: Setting the Scene" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 215 at 227–238 for an overview of the New Zealand Emissions Trading Scheme.

55 Rive, above n 47, at 199. Sections 20–22 of the Energy Efficiency and Conservation Act 2000 gave the Energy Efficiency and Conservation Authority an expanded role.

56 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5A established the Climate Change Commission. Section 5B provides that the purposes of the Climate Change Commission are to provide independent, expert advice to the government on mitigating climate change (including through reducing emissions of greenhouse gases) and adapting to the effects of climate change; and to monitor and review the Government's progress towards its emissions reduction and adaptation goals.

57 Vernon Rive "International Framework" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 49 at 51–53.

Crown–Māori dialogue on the issue of climate change since 1990.[58] In her assessment:[59]

> the Government has not brought Tangata Whenua on board as meaningful participants in the climate change debate; nor has it adequately ascertained the impacts upon Maori communities and subsequently attempted to empower them to avoid the negative effects of climate change.

Naomi Johnstone's 2013 review of Crown–Māori engagement in the climate change space indicated some shifts in the preceding years.[60] For example, political negotiations between the National Party and the Māori Party within the 2009 government resulted in some changes to climate change policy: the Climate Change Response Act 2002 was amended to include a legislative provision referring to the Treaty of Waitangi,[61] and Māori formed part of the New Zealand delegation to international climate change negotiations during the term of the coalition National Party/Māori Party government.[62] The Crown also engaged in high-level discussions with the Iwi Leaders Group.[63] Iwi have also pursued action at local government level, for example through iwi management plans.[64]

We have also seen the filing of claims with the Waitangi Tribunal seeking to challenge particular aspects of the Crown's approach to climate change. In 2011, a claim (Wai 2347) was filed with the Waitangi Tribunal, focusing on a specific aspect of the emissions trading scheme (namely, the processes for Māori landowners to obtain an exemption from scheme).[65] The Tribunal declined to inquire into the claim urgently, in part because the claimants had a reasonable alternative available to them, which meant an urgent Tribunal inquiry was not necessary.[66] Another claim was filed in 2016 (Wai 2607), this time of a

58 Tunks, above n 9, at 89.
59 At 89.
60 Johnstone, above n 49, at 515–520.
61 At 519; and see the Climate Change Response Act 2002, s 3A.
62 Johnstone, above n 49, at 519.
63 At 518–519.
64 See for example Ngāi Tahu *The Cry of the People: Te Tangi a Tauira* (Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan, 2008), cited in Johnstone, above n 49, at 518; and see Te Rūnanga o Ngāi Tahu *Te Tāhū o te Whāriki: Anchoring the Foundation – He Rautaki mō te Huringa o te Āhuarangi, Climate Change Strategy* (August 2018).
65 Statement of claim (21 November 2011) Wai 2347, Doc #2.5.5, cited in Johnstone, above n 49, at 525.
66 Waitangi Tribunal "Decision on Application for Urgency" (Wellington, 2012) Wai 2347, Doc #2.5.5, cited in Johnstone, above n 49, at 525. Johnstone observes that, in its decision declining urgency, the

more global nature. There, the claimants asserted that the Crown had failed to implement adequate policies to respond to climate change, and this would have a detrimental impact on Māori and their use of land and resources.[67] Again, the Tribunal declined to inquire urgently, on two main grounds. First, Crown policy was in development, with opportunities for Māori participation, rendering an urgent inquiry unnecessary.[68] Secondly, the issues raised would be of interest to many parties, and were complex. Accordingly, it would be better to hear them with other claims as part of the Tribunal's kaupapa inquiry into environmental issues.[69]

In 2019, the claimants in Wai 2607 tried again: they applied to the Tribunal for their claim, and others relating to climate change, to be given priority for hearing during or soon after 2020.[70] However, by that stage, legislation had been introduced that touched on a key plank of the Wai 2607 claim.[71] Under its establishing statute, the Tribunal does not have jurisdiction to inquire into issues that are the subject of a Bill before the House of Representatives.[72]

In effect, the claims will likely not be heard for many years, because of the large queue of claims waiting to be heard by the Tribunal. The indication is that the claims will be heard as part of the Tribunal's kaupapa inquiry into "Economic development", which will examine "Carbon taxation, emissions trading scheme, impact on Māori forestry".[73] That inquiry is not a priority; as

Tribunal noted that the claimants could make a late application for exemption from the scheme. Also, the issues raised by the claim had been examined by an independent panel, to which the government was shortly to respond; the Tribunal said it would be premature for it to inquire into the claim before that had happened: at 525–527.

67 Statement of claim (30 May 2016) Wai 2607, Doc #1.1.1. The claimants filed their claim in 2016, and in 2017 filed an application for it to be heard urgently: Application by claimants for an urgent inquiry (16 June 2017) Wai 2607, Doc #3.1.3.

68 Waitangi Tribunal "Decision on Application for an Urgent Hearing" (17 October 2017) Wai 2607, Doc #2.5.4 at [47].

69 At [48].

70 Application by Claimants for Priority Hearing (19 December 2019) Wai 2607, Doc #3.1.11.

71 Waitangi Tribunal "Memorandum-Directions of the Chairperson on an Application for a Priority Hearing of a Claim Concerning Climate Change Mitigation and the Emissions Trading Scheme" (18 June 2020) Wai 2607, Doc #2.5.6 at [8]–[9].

72 Treaty of Waitangi Act 1975, s 6(6).

73 Waitangi Tribunal "2021 kaupapa inquiry programme – appendix" (January 2021). The Tribunal's kaupapa inquiry programme groups together thematically similar claims that are currently with the Tribunal and will hear them over the coming years. For the current approach to groupings and the order of hearings see Waitangi Tribunal "Memorandum of the Chairperson Concerning the Kaupapa Inquiry Programme" (27 March 2019).

at January 2021, it is listed tenth in the queue of 13 kaupapa inquiries (five of which have been completed or are underway).[74]

Johnstone observes that, Tribunal claims notwithstanding, Crown–Māori engagements on climate change have proceeded primarily on the basis of direct dialogue, high-level discussions and consultations, particularly with iwi representatives.[75] The Climate Change Commission's recent recommendations promote a continuation of this consultative and discussion-based approach; it has recommended that government, both central and local, work in "partnership with Iwi/Māori" to develop strategies and mechanisms that ensure "an equitable transition" to low emissions.[76]

A consultative approach has no doubt achieved some gains in terms of recognition of Māori interests, as described above. We also note the references made in some recent government reports to Māori creation stories, values and perspectives.[77] However, it is still far from clear that we have reached a point where "Maori and their ethics [are] having a *meaningful* and *effective* role in forming climate change policy."[78] The Wai 2607 claim filed in 2019 focused on the Crown's failure to involve Māori in decision-making on climate change.[79] Recent work on the National Climate Change Risk Assessment makes clear that the Crown is pursuing a consultative approach, rather than enabling Māori to lead on identifying matters of concern to Māori.[80]

In short, the Crown's approach to climate change has not engaged with questions of power, authority and control. This can be contrasted with those areas of law and policy where the Crown–Māori conversation is shifting to include questions of power, authority and control, such as in the provision of health services,[81] in the design of a system for care and protection of tamariki

74 "2021 kaupapa inquiry programme – appendix", above n 73.

75 Johnstone, above n 49, at 516; and see also Linda Te Aho "Crown Forests, Climate Change and Consultation – Towards More Meaningful Relationships" (2007) 15 Wai L Rev 138.

76 Climate Change Commission, above n 4, at 326 and ch 19.

77 See for example Ministry for the Environment and Statistics New Zealand *New Zealand's Environmental Reporting Series: Our atmosphere and climate 2020* (2020) at 6.

78 Tunks, above n 9, at 68 (emphasis added).

79 Waitangi Tribunal "Memorandum of counsel in support of application by claimants for priority hearing" (19 December 2019) Wai 2607, Doc #3.1.12.

80 Ministry for the Environment National Climate Change Risk Assessment for New Zealand: Main report (August 2020) at 33.

81 See the Crown's recent announcements about the establishment of a Māori Health Authority and associated reforms that will "empower Māori to shape care provision, and give real effect to Te Tiriti o Waitangi": Department of Prime Minister and Cabinet *Our health and disability system: Building a stronger health and disability system that delivers for all New Zealanders* (April 2021) at 7.

Māori,[82] and in the control of freshwater.[83] Those conversations are not occurring in respect of the status and involvement of Māori in, or alongside, Crown climate action. And, despite the urgency of climate change as an issue, the Waitangi Tribunal has thus far declined to prioritise inquiring into how the Crown is responding to it. The Tribunal's decision in 2017 to decline to inquire urgently into Wai 2607 is particularly disappointing. Arguably, the Tribunal's rationale for declining to inquire urgently into Wai 2607 could be made in respect of other claims into which the Tribunal has, nonetheless, proceeded to inquire under urgency.[84]

In this context, we argue in favour of Māori taking an approach towards climate change adaptation and mitigation that is based around explicit acts of tino rangatiratanga. The acts we discuss in the next section challenge and unsettle established colonial orthodoxies, while also seeking to stem global temperature increases and build Māori capacity to withstand the impacts of those increases.

IV TINO RANGATIRATANGA AND CLIMATE CHANGE

Tino rangatiratanga carries a variety of meanings.[85] Here, we focus on our conception of "acts" of tino rangatiratanga in the climate change space. Our starting point is the conceptualisation of two spheres of authority, one of tino rangatiratanga (Māori authority and control) and one of kāwanatanga (the Crown's authority and control). The idea of these two spheres of authority is referred to by the Waitangi Tribunal.[86] The spheres have been visually represented

82 See the statements of the Waitangi Tribunal recommending the establishment of a Māori Transition Authority that will transition care and protection of tamariki into the hands of Māori: Waitangi Tribunal *He Pāharakeke, He Rito Whakakīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 187–192.

83 See the statement of claim lodged recently by Ngāi Tahu in the Christchurch High Court, seeking recognition of rangatiratanga over freshwater in the Ngāi Tahu takiwā: Ngāi Tahu "Ngāi Tahu Rangatiratanga over Freshwater" (2 November 2020) <www.ngaitahu.iwi.nz>.

84 Compare, for example, the Tribunal's decision in 2020 to urgently inquire into Crown legislation, policy and practice concerning Māori children in state care. Although the inquiry would involve many parties and the filing of much evidence, and in a context where other inquiries into the same issues were concurrently underway, the Tribunal decided to conduct an urgent inquiry given this was "a pressing national issue for many Māori and there is a risk of significant and irreversible prejudice to whānau, hapū and iwi": Waitangi Tribunal "Decisions on Application for an Urgent Hearing" (25 October 2019) Wai 2915, Doc #2.5.1 at [123]. The same point can be made about climate change.

85 For a sense of these different meanings, see Mason Durie "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu, and David Williams *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Oxford, 2005) 3.

86 For a recent reference, see Waitangi Tribunal (Wai 2915, 2021), above n 82, at 19; and see also Waitangi Tribunal *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at 527.

in various indicative constitutional models created by the independent Māori constitutional working group Matike Mai.[87]

The spheres have also been taken up by He Puapua, the Crown-established working group tasked with developing a pathway towards the realisation of the United Nations Declaration of the Rights of Indigenous Persons in Aotearoa New Zealand.[88] The common theme across He Puapua and Matike Mai is the call for the two spheres of tino rangatiratanga and kāwanatanga to be put on an equal footing. This requires an expansion of the tino rangatiratanga sphere, as visually represented within the report of He Puapua drawing from the work of Matike Mai:[89]

Diagram 1: Rangatiratanga/Joint/Kāwanatanga Spheres

The claiming of tino rangatiratanga by Māori is not new. But the models put forward by Matike Mai provide a powerful, concrete visualisation of power-sharing between the Crown and Māori. They provide a useful starting point as we begin to unpack what the tino rangatiratanga sphere might look like when it comes to the issue of climate change.

Dr Maria Bargh's discussion of how tino rangatiratanga is practised in relation to water is helpful here.[90] Dr Bargh points out that many in Māori

87 Matike Mai Aotearoa *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (2016) at 104–112.

88 Claire Charters and others "He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" (November 2019) (Obtained under the Official Information Act 1982 Request) at vi.

89 At vi. The report was released by the Government only in response to a request under the Official Information Act 1982. There does not appear to be a publicly accessible version of the report that does not contain a watermark on each page noting that the report was released under that Act.

90 Maria Bargh "Tino Rangatiratanga: Water under the Bridge?" (2007) 8(2) He Pukenga Kōrero 10 at 10.

communities are already actively engaged in acts of tino rangatiratanga. Tino rangatiratanga is evident within "a plethora of diverse hapū and iwi activities".[91] This is so even though that fact may be unknown to many in Aotearoa New Zealand.[92] Dr Bargh describes hapū and iwi involvement in water management, and water restoration projects led principally by hapū and iwi and based on Māori conceptions of water and the environment.[93] Importantly, these activities occur within the modern state system. This fact does not render them non-expressions of tino rangatiratanga. Rather, as Dr Bargh notes, it demonstrates the dynamic nature of tino rangatiratanga itself, which has had to evolve to take account of a colonising power.[94] We suggest that it follows, therefore, that acts of tino rangatiratanga can employ the mechanisms and tools of the state for their own ends.

When we combine Dr Bargh's conception with the model above, we find therefore that the tino rangatiratanga sphere is made up not of one circle, but of many circles, representing a number of actors exercising tino rangatiratanga. While Dr Bargh focuses on hapū and iwi, we would argue that other social communities, not bound by kin, can also be included – for example, urban marae. This view finds support within the Waitangi Tribunal, which has previously found that the application of the Tiriti principle of rangatiratanga is not limited to tribes and that rangatiratanga can be exercised by Māori groups or within Māori communities.[95] We suggest that, by emphasising the multiplicity of actors in the tino rangatiratanga sphere, we can better account for the range of interests and identities within Māori communities. Relatedly, we suggest that it may not serve us to try and reproduce, in the tino rangatiratanga sphere, the monolithic authority that the Crown exercises in its kāwanatanga sphere.

The point that acts of tino rangatiratanga can occur within the purview of the state also bears making explicitly. Indigenous scholars have pointed out both the possibilities and limits of indigenous action through state structures and have queried whether such action serves merely to reinforce the coloniser's power.[96] We see this as a legitimate and worthwhile inquiry, while also making

91 At 15.
92 At 10
93 At 13.
94 At 10.
95 Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at xxiv.
96 See for example Glen Sean Coulthard *Red Skin, White Masks* (University of Minnesota Press, Minneapolis, 2014) at 25–49; and Borrows, above n 25.

clear that our approach is based on Dr Bargh's analysis that acts of tino rangatiranga can take place within the purview of the state.

Finally, and perhaps most significantly, we raise for consideration the unsettling or disruption of established colonial orthodoxies as a requisite feature of an act of tino rangatiratanga. We draw here, for example, on commentary by Dr Tyler McCreary and Jerome Turner, and Dr Leah Temper, about the resistance of indigenous communities to pipeline development.[97] The authors describe how enactments of indigenous authority through resistance camps and blockades may serve to disrupt, unsettle and complicate the settler state's authority in this space. At the Unist'ot'en Camp, for example, before people could enter Talbits Kwah territory they had to say who they were, where they were from, how long they planned to stay if allowed to enter, and what was the purpose of their visit and how it would benefit Unist'ot'en.[98] Dr Temper observes:[99]

> In this newly reclaimed space, the Unist'ot'en camp members have been able to assert their own legal understandings, and to live their concept of justice through practice, through enactment and through antagonistic politics that disrupt the economic and social logic and production of settler-colonial power.

The assertion of control by the act of regulating and, in some cases, excluding entry was recently evident in Aotearoa New Zealand, when some Māori communities set up COVID-19 checkpoints to monitor who was coming into and out of the community.[100] Dr Bargh and Luke Fitzmaurice characterise these as acts of rangatiratanga.[101] In effect, they can be seen as assertions of hapū control over territory, and as such, they trouble the orthodoxy within

97 Tyler McCreary and Jerome Turner "The contested scales of indigenous and settler jurisdiction: Unist'ot'en struggles with Canadian pipeline governance" (2018) 99(3) Stud Political Econ 223; and Leah Temper "Blocking pipelines, unsettling environmental justice: from rights of nature to responsibility to territory" (2019) 24(2) Local Environ 94.

98 McCreary and Turner, above n 97, at 224.

99 Temper, above n 97, at 107.

100 See for example Donna-Lee Biddle "Coronavirus: Tourists turned away at Far North checkpoints" Stuff (26 March 2020) <www.stuff.co.nz>; and Catherine Groenstein and Paul Mitchell "Coronavirus: Isolated East Cape community takes matters into its own hands" Stuff (22 March 2020) <www.stuff.co.nz>.

101 Luke Fitzmaurice and Maria Bargh *Stepping Up: COVID-19 checkpoints and rangatiratanga* (Huia Publishers, Wellington, 2021).

Aotearoa New Zealand that territorial authority cannot be shared by more than one entity.[102]

The examples given just above exhibit assertions of authority over territory, and the concomitant ability to exclude people who wish to enter, or to regulate their entry. This troubles the orthodoxies that tell us this role is the exclusive prerogative of the colonial state. When it comes to climate change, however, we suggest that territorial assertions of authority are not the most productive direction to focus our efforts. Climate change creates lands that are overheated, underwater, constantly flooded and besieged by storms, and otherwise unable to sustain agriculture and people. Unlike pipeline development, or COVID-19, the negative impacts of climate change cannot be avoided by excluding or regulating the physical entry of individuals or corporations. As we will explore in the next section, this suggests that acts of tino rangatiratanga to address climate change may need to look somewhat different and be undertaken on a range of fronts.

In summary, our conception of an act of tino rangatiratanga is one that seeks to unsettle established colonial structures and orthodoxies. Such acts can be undertaken by many different social actors, including those not bound by kinship. Further, acts of tino rangatiratanga are no less so because they occur within the purview of the state, or because they use the mechanisms of the state to achieve a particular goal. In the remainder of this article, we apply this conception of tino rangatiratanga to the climate change space. We look at a form of community-based action that challenges the dominant conception of private property, and we consider the potential of court proceedings that challenge established aspects of tort law, in order to sheet back responsibility to large greenhouse gas emitters.

V CLIMATE-RESILIENT MARAE COMMUNITIES

Marae have been described as sitting "at the heart of climate change problems and solutions".[103] That is, marae will be some of the hardest hit by the impacts of climate change but may also be in a strong position to help people deal with those impacts. In this section we consider why this might be, and we explore the idea of climate-resilient marae-based hubs, positioned deliberately as a place for climate action and response. We suggest in this section that the

102 Andrea Tunks "Pushing the sovereign boundaries in Aotearoa" (1999) 4 ILB 15 at 16.

103 Merata Kawharu et al "Submission: Climate Change Commission 2012 Draft Advice for Consultation" at 3-8.

ongoing establishment of such hubs is an act of tino rangatiratanga because it is a rejection of (and therefore a challenge to) the liberal concept of private property.

The concept of the marae is both *social* and *physical*. Ngahuia Te Awekotuku observes that "wherever Maori people gather for Maori purposes and with the appropriate Maori protocol, a marae is formed at that time, unless it is contested".[104] Hence, a marae may conceivably be any space where Māori are embracing values, such as manaakitanga (care and hosting of others), whanaungatanga (kinship, sense of familial connection), and similar kinds of values that support "Māori ways-of-being".[105] The term marae is also frequently used to describe the collection of buildings that might also be called the pā or papakāinga (such as the wharenui – meeting house, wharekai – dining hall, and wharepaku – ablution block).[106] Hence, as Aikman notes, the marae includes both the physical complex and the people who are bound to it by whakapapa.[107]

Marae are distinctively Māori. They "provide the paramount focus to every tribal community throughout the country."[108] They are a "dynamic, Māori-ordered, metaphysical space".[109] In addition marae perform different roles, for different kinds of community. As noted, they form the focal point of identity for the whānau and hapū that affiliate by whakapapa to the specific marae. In the form of "urban marae", they provide a space in towns and cities where Māori with diverse whakapapa affiliations can "be Māori".[110] Marae may typically also perform a wider community role in terms of the provision of social services and physical spaces for community gatherings.[111] Another key role of marae becomes evident during times of disaster or difficulty; marae played a critical disaster relief and response role during the 2004 Manawatū flooding[112]

104 Ngahuia Te Awekotuku "Maori: People and Culture" in Dorota Starzecka (ed) *Maori Art and Culture* (British Museum Press, London, 1996), cited in Pita King and others "When the Marae Moves into the City: Being Māori in Urban Palmerston North" (2018) 17 City & Community 1189 at 1196.

105 King and others, above n 104, at 1196.

106 Pounamu Jade William Emery Aikman "Within the fourfold: Dwelling and being on the marae" (2015) 12(2) SITES: New Series 1 at 7–8.

107 At 8.

108 Paul Tapsell "Marae and Tribal Identity in Urban Aotearoa/New Zealand" (2002) 25 Pacific Studies 141 at 141.

109 At 142.

110 King and others, above n 104, at 1197.

111 See for example the range of services provided by Kōkiri Marae in Lower Hutt, Wellington: Kōkiri Marae "About Us" <www.kokiri.org.nz>.

112 J Hudson and E Hughes *The role of marae and Maori communities in post-disaster recovery: a case study*

and the 2010 Christchurch earthquakes.[115] Hence, we can conceive of marae as community hubs, serving communities that take shifting forms depending on the circumstances, but with the work they do is always underpinned by Māori values such as manaakitanga and whanaungatanga.

Work is already underway in Aotearoa New Zealand to explore and increase the capacity of marae to become more resilient in the face of a changing climate. Project Kāinga is a five-year research project working with seven marae across te Ika a Māui (the North Island), to help those marae build resilience to climate change impacts such as flooding, droughts, changing biodiversity and rising seas.[114] Its goal is to build "tikanga-based, economic and community-relevant responses to climate change."[115] Consistent with the role of the marae, Project Kāinga emphasises community, and considers the ways in which marae can help build community resilience. The work is ongoing and funded until 2024.[116]

It has not been possible to engage in detail with the emerging research outcomes of Project Kāinga, since that work is still underway. But we suggest that this work sets the foundations for what we would describe as an act of tino rangatiratanga in the climate change space: specifically, the growth and expansion of climate-resilient, marae-grounded community hubs. These hubs, with the marae at their centre, would be positioned as a focal point for shifting and diverse forms of community action. Without necessarily being prescriptive about what such hubs might do, they could equip families and whānau with knowledge and skills relating to climate change, its impacts, and actions that can be taken to mitigate or avoid those impacts. These kinds of hubs, that operate on a local scale and emphasise collective, local knowledge and capabilities, enact a form of what Dr Steele and others have coined "quiet activism".[117] Far from being viewed as conservative or ineffective, quiet activism

(GNS Science Report 2007/15, April 2007).

113 Hudson and Hughes, above n 112; and Christine Kenney and Suzanne Phibbs "Shakes, rattles and roll outs: The untold story of Māori engagement with community recovery, resilience and urban sustainability in Christchurch, New Zealand" (2014) 18 Procedia Econ 754.

114 Project Kāinga "Home" <www.projectkainga.co.nz>.

115 Project Kāinga, above n 114.

116 "Kainga and climate change – Project Kainga and climate change team" University of Otago <www.otago.ac.nz>.

117 Wendy Steele and others *Quiet Activism: Climate Action at the Local Scale* (Palgrave Macmillan, Cham (Switzerland), 2021) at 3.

emphasises the transformative potential of "intimate and embodied acts of collective disruption, subversion, creativity and care at the local scale."[118]

Climate change is an issue that can *only* be addressed by a collective response. The ethic of inclusiveness and generosity that underpins the marae has the potential to knit together the wider community in ways that are critically important in the climate change context. Because marae are socially and physically situated within the community, they are well-positioned to lead local action. Local action on climate change, rather than state-led or internationally negotiated initiatives, is the focus of growing interest among those who study social responses to climate change.[119] Marae can take advantage of their local positioning as a forum through which it is possible to implement these adaptive, localised, collective acts across the community. Notably, marae also act as repositories of knowledge, handed down through generations. In many cases this will include the kind of "indigenous environmental knowledge" that is increasingly being appealed to, as a form of knowledge that can help communities adapt to climate change impacts.[120]

There are constraints and caveats to this approach. Not all marae will wish to be involved. Adequate resourcing will be critical. Financial support will be needed from the community and from local and central government. In addition, care must be taken not to conflate the various roles of a marae, which will and should always remain spaces for Māori to "be Māori", and to operate according to Māori values. This latter fact was emphasised in the aftermath of the Manawatū flooding, by participants in Dr Hudson's and Dr Hughes' research. There, the marae had to balance its civil defence role, and its relationship with the local "official" civil defence, with the need to ensure its response was consistent with its own values and practices.[121]

In what way is the establishment of marae-based, climate change-resilient hubs an act of tino rangatiratanga? First, this work connects to the guarantee of tino rangatiratanga over kāinga, the ancestral home, within article two of Te Tiriti o Waitangi. The Waitangi Tribunal has recently said that it considers

118 At 2.

119 Susie Moloney, Hartmut Fünfgeld and Mikael Granberg "Climate change responses from the global to local scale: an overview" 1 at 1-9 in Susie Moloney, Hartmut Fünfgeld and Mikael Granberg (eds) *Local Action on Climate Change: Opportunities and Constraints* (Routledge, Abingdon, 2018).

120 Maxine Burkett "Indigenous environmental knowledge and climate change adaptation" in Randall S Abate and Elizabeth Ann Kronk *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, Gloucestershire, 2013) 96 at 96.

121 Hudson and Hughes, above n 112, at 30.

this guarantee to be "nothing less than a guarantee of the right to continue to organise and live as Māori", fundamental to which is "the right to care for and raise the next generation."[122] Secondly, and returning to our conception of an act of tino rangatiratanga discussed earlier in the article, we posit that such hubs act as a direct challenge to the liberal orthodoxy of private property. As many scholars have pointed out, the notion of private property is built on the ability to exclude others and exercise control over chattels or realty, and property can be problematised as giving rise to the nation-state and its assertion of dominion over land and people.[123] Marae-based values and practices operate in direct contrast to this, being drawn from ideas of care, connectedness, and community, in the form of kaitiakitanga, manaakitanga, and kotahitanga. Thus, a marae-based response to climate change, which is based on these values, can itself be seen as a challenge to the pervasive orthodoxy of private property.

Furthermore, the very concept of private property may be said to lie at the heart of climate change, because of the way it enshrines choice:[124]

> Private property, through securing choice to its holders, instantiates a physical-spatial relationship, … playing a role in climate change for which it was not designed and with which it is therefore ill-equipped to cope. Seen in this way, choice – enshrined by law in the concept of private property – lies at the heart of human-caused climate change.

Thus, it can be argued that challenging the orthodoxy of private property amounts to an act of tino rangatiratanga. But also, we must challenge the idea of private property, and reformulate the ways we live, if we are to actually *address* climate change.

This section has given only a brief sketch of what it might look like to take action in this space, and it is clear that issues of resourcing and capacity will need to be addressed. Our overarching argument is that directing our efforts

122 Waitangi Tribunal (Wai 2915), above n 82, at 12.

123 See for example James Tully "Aboriginal Property and Western Theory: Recovering a Middle Ground" in Ellen Frankel Paul, Fred D Miller and Jeffrey Paul (eds) *Property Rights* (Cambridge University Press, Cambridge, 1994) 153; Joel Colón-Rios "On the Theory and Practice of the Rights of Nature" in Paul Martin and others (eds) *The Search for Environmental Justice* (Edward Elgar Publishing, Gloucestershire, 2015) 120; and Klaus Bosselmann "Environmental trusteeship and state sovereignty: can they be reconciled?" (2020) 11 TLT 47.

124 Paul Babie "Idea, Sovereignty, Eco-colonialism and the Future: Four Reflections on Private Property and Climate Change" (2010) 19 Griffith LR 527.

towards establishing these kinds of community marae-based hubs would be a legitimate and potent form of climate action and an act of tino rangatiratanga.

VI LEGAL PROCEEDINGS IN TORT

In this section of the article, we suggest that another act of tino rangatiratanga in the climate change space would be the bringing of legal proceedings in tort. Such proceedings, when it comes to the tort of negligence, would seek to unsettle, and raise for inquiry, the orthodoxy of the "but for" connection when it comes to the actions of large greenhouse gas emitters. Moves have already been made in this direction in common law jurisdictions, including in Aotearoa New Zealand in the recent High Court proceedings in *Smith v Fonterra Cooperative Group* (discussed further below).[125] Recent legal developments in the area, plus the increasingly pressing need for effective legal responses to major greenhouse gas emitters, mean that we should not resile from this approach.

Critical to any successful claim in the tort of negligence is for the plaintiff to establish a connection or relationship between the conduct of the defendant and the harm suffered by the plaintiff. This link is an important part of what, conceptually, makes it appropriate to hold the defendant liable. To date, in the common law of Aotearoa New Zealand, the courts have traditionally relied upon the "but for" test to establish this link. Wylie J has described this test as follows:[126]

> The but for test poses the question whether the plaintiff would have suffered the damage without the alleged negligence. If it is more likely than not that, absent the negligence, the plaintiff would have avoided the damage, then there will be causation in fact.

This traditional "but for" analysis is a hurdle to successful climate change litigation. Even if a large greenhouse gas emitter was to cease its emissions, this alone would not be enough to stop climate change, and the damage complained of will still occur. Successful claims in negligence depend, therefore, on taking aim at, and unsettling, the traditional "but for" analysis within the tort of negligence.

Māori have led in this space already. In the 2020 proceeding, *Smith v*

125 *Smith v Fonterra Cooperative Group* [2020] NZHC 419, 2 NZLR 394.
126 At [83].

Fonterra Cooperative Group, Mike Smith (Ngāpuhi, Ngāti Kahu) brought a claim in tort against seven large corporations which either emit greenhouse gases or supply products that emit gases when burned.[127] Mr Smith claimed on behalf of his whānau in Northland, who own coastal land that will be flooded by climate change-induced rising sea levels. The claim in negligence was struck out by the High Court, with Wylie J adopting an orthodox analysis to the causal relationship between the defendant's conduct and the harm alleged by Mr Smith:[128]

> the defendants cannot protect Mr Smith from [the damage of climate change]. Even if they stop emitting greenhouse gases … the science (on which Mr Smith relies) suggests that it is likely that the damage will nevertheless eventuate.

Whilst the claim in negligence was struck out,[129] this ought not to be the end of Māori efforts to hold climate change emitters responsible via the common law. As noted earlier in this article, measures adopted by the Crown to date have provided little space for Māori to lead on identifying matters of concern to Māori. Hence, acts founded in tino rangatiratanga are required on all fronts, including through the courts.

Dr Maria Hook and others note that tort law *evolves* to find solutions to new problems.[130] Unfortunately, the approach of many courts to date, when confronted with the issue of causation in the climate change and negligence context, has been to fall back on the orthodox "but for" test, rather than engaging with what might be framed as the core question: Can, and should, the law develop to hold emitters liable for an issue to which they are *clearly* contributing?[131] There is reason to take heart, however, that courts, in certain overseas jurisdictions, may be increasingly willing to approach the issue in a new way. Most significantly, the environmental group Friends of the Earth

127 At [1]–[2].

128 At [82].

129 At [103]. The High Court struck out the causes of action founded in nuisance and negligence, but allowed the third cause of action to proceed, which was based on what the High Court described as an "inchoate duty" that "makes corporates responsible to the public for their emissions". However, the third cause of action was struck out on appeal: *Smith v Fonterra Co-operative Group Ltd and Others* [2021] NZCA 552 at [126].

130 Maria Hook and others "Tort to the environment: a stretch too far or a simple step forward? Smith v Fonterra Co-operative Group Ltd and Others [2020] NZHC 419" (2021) JEL 195 at 203.

131 At 205.

Netherlands recently mounted a successful argument based in duty of care, targeted at the greenhouse gas giant Royal Dutch Shell.[132] The court ordered that Shell must reduce its carbon output immediately to bring it into line with the Paris climate agreement, in order to avoid being in "imminent violation of the reduction obligation".[133]

There are also recent, helpful obiter comments from the United Kingdom Supreme Court about the *involvement* of a person or entity in harm someone has suffered:[134]

> it seems appropriate to describe each person's involvement as a cause of the loss. Treating the 'but for' test as a minimum threshold which must always be crossed if X is to be regarded as a cause of Y would again lead to the absurd conclusion that no one's actions caused the [relevant outcome].

While these statements were made in a context of numerous entities' responsibility for financial loss, it is clear how they could be applied to the climate change context: many emitters are each involved in the loss that we will all suffer, as a result of climate change.

There is additional, local context to our argument in favour of bringing proceedings in negligence to destabilise orthodox approaches to causation; namely, the general move towards greater recognition and incorporation of Māori values and concepts into the common law. A recent and prominent example is *Ellis v R*, in which the Supreme Court is considering the extent to which Māori values ought to shape the law on continuance of appeals after the death of the appellant.[135] Another recent example is Palmer J's reference to mana when delivering a judicial review remedy. In *Sweeney v Prison Manager*, Palmer J (without providing a definition of mana) observed that:[136]

> [u]pholding a successful plaintiff's mana, to vindicate their rights as is fundamental to the rule of law, can be a good reason for New Zealand courts to make a declaration in a judicial review case.

132 *Milieudefensie v Royal Dutch Shell* (C/09/571932 / HA ZA 19-379) (26 May 2021) (English translation from the Dutch).

133 At [4.5.8].

134 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [184].

135 *Ellis v R* [2020] NZSC 89. The appellant in the case, who is now deceased, was not Māori. The relevance of Māori values to the law, if any, was raised by the Supreme Court itself, which asked counsel to make submissions on the matter: see *Ellis v R* [2020] NZSC Trans 19.

136 *Sweeney v Prison Manager* [2021] NZHC 181 at [76].

Courts' "taking seriously" of Māori law can be understood as a complicating of the foundations of our legal system and the settler colonial authority that established them.[137] References to tikanga within the courts are described as influencing the development of state law,[138] which has been said to hold tikanga Māori as "part of [its] values".[139] More recently, the Supreme Court has unanimously affirmed that tikanga must be taken into account as "other applicable law" by the Environmental Protection Authority in deciding whether or not a marine consent application should be approved under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[140] It has been argued that tikanga is *transforming* the nature of state law itself.[141] With that in mind, we argue that the tortious law of negligence provides an excellent space to explore this further unsettling. This can be done, in particular, by drawing on tikanga Māori concepts. Tikanga is a source of law that has the ability to change how state law responds to global and complex issues such as climate change. The underpinning ethos of tikanga Māori is essentially relationship; as humans we are all in relationship with each other, as well as with the natural and spiritual worlds. Might we encourage the court to take this as its starting point, when considering the relationship between the defendant's acts and the harm suffered?

Several critiques could be made about climate change litigation as a strategy to achieve change. Rogers describes the "awfulness of lawfulness" in the climate change context, which might be said to reinforce the very systems that enable and facilitate climate change, and can be contrasted with the power of direct action (such as protest).[142] There will also be those who say that the problem of climate change is more appropriately left to Parliament, and sits outside

137 McCreary and Turner, above n 97, at 237.

138 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 131.

139 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ.

140 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [9]. Reasons are given at [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ. Williams J at [297] (with whom Glazebrook J agreed at n 371) wished to make explicit that these questions must about what is meant by "existing interests" and tikanga as "other applicable law" must be considered not only through a Pākehā lens, as those interests of iwi with mana moana in the specified area are the "longest-standing human-related interests in that place".

141 Williams, above n 26.

142 Nicole Rogers "Climate Change Litigation and the Awfulness of Lawfulness" (2013) 38(1) Alt LJ 20 at 20, cited in Nicole Rogers "'If you obey all the rules you miss all the fun': Climate change litigation, climate change activism and unlawfulness" (2015) 13(1) NZJPIL 179 at 180.

the purview of the courts. The point was made by the High Court in *Smith v Attorney-General*; Wylie J observed that recognising a liability in negligence would "require the Courts to engage in complex polycentric issues, which are more appropriately left to Parliament".[143] Nonetheless, recent common law developments both locally and abroad suggest that the ground is shifting more than usual, in terms of what courts will be prepared to consider in the climate change litigation space. Furthermore, it has been noted even unsuccessful climate litigation action can have power to shift debate around key concepts in the legal system.[144] The bringing of proceedings may also have value in terms of keeping the issue of climate change in the public consciousness and on the political agenda.[145] Māori ought to be prepared to bring proceedings that push the court to reflect on its role in the climate change area, and that test the feasibility of fit-for-purpose, carefully scoped legal tests to make the tort of negligence (or other relevant torts) ones that serves us in the climate change space. We might speculate, for example, on how the courts might approach these issues if tort proceedings were brought on behalf of Te Awa Tupua (the Whanganui River), which has the status of a legal person.[146] Also, bringing court proceedings is expensive. Pro bono assistance is likely to be needed, including from organisations such as Te Hunga Roia Māori (The Māori Law Society) and Lawyers for Climate Action NZ.[147]

Pursuing litigation for climate change mitigation purposes is undoubtedly challenging, and those who do so will grapple with the limitations of the law in its current form. However, such litigation is necessary to draw attention to these limitations, so that they might be addressed. Furthermore, climate change litigation provides a space for Māori to lead on these matters, in a way

143 *Smith v Fonterra Cooperative Group*, above n 125, at [98(f)].

144 Rogers, above n 142, at 185.

145 Peter A Buchsbaum "The role of judges in using the common law to address climate change" in Fennie van Straalen, Thomas Hartman and John Sheehan (eds) *Property Rights and Climate Change: Land Use under Changing Environmental Conditions* (Routledge, London, 2017) 132 at 142.

146 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. We wish to thank one of our anonymous peer reviewers for raising Te Awa Tupua for consideration. We have not had scope in this article to reflect on this matter in depth. But one question we might ask is whether, by bringing a tortious claim in nuisance on behalf of Te Awa Tupua, it becomes easier to establish the "special damage" element of that tort: see relevant discussion in *Smith v Fonterra Cooperative Group*, above n 125, at [64].

147 See Māori Law Society "Our People" <www.maorilawsociety.co.nz>; and Lawyers for Climate Action "About Us" <www.lawyersforclimateaction.nz>.

that we suggest amounts to an act of tino rangatiratanga, conducted through the vehicle of the courts.

VII CONCLUSION

In this article, we made the case for Māori-led acts of tino rangatiratanga, aimed at both mitigating and adapting to climate change. The defining feature of such acts is that they seek to trouble, disrupt and unsettle established colonial orthodoxies. Aotearoa New Zealand's current constitutional arrangements do not recognise tino rangatiratanga as an equal sphere of authority over issues such as climate change. It is worth noting explicitly that the examples we have discussed aim to reconceptualise how power and authority is located and exercised within the prevailing state legal system. We have provided two examples, one focused on the marae and one that would take place in law courts, each constituting acts of tino rangatiratanga that we argue are necessary to mitigate, and adapt to, climate change impacts.

Climate change has been described as "a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible."[148] It would be easy, in the face of such a problem, to feel hopeless, or to feel that the scale and nature of the problem is beyond one that we can address as Māori working both individually and in community, with our whānau, hapū and iwi. With this article, we hope to encourage reflection on the manner in which we as Māori can frame, and claim, diverse forms of conduct, both as acts of tino rangatiratanga and as acts that address climate change.

148 Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41(1) Env'l L Rep 1 at 4.