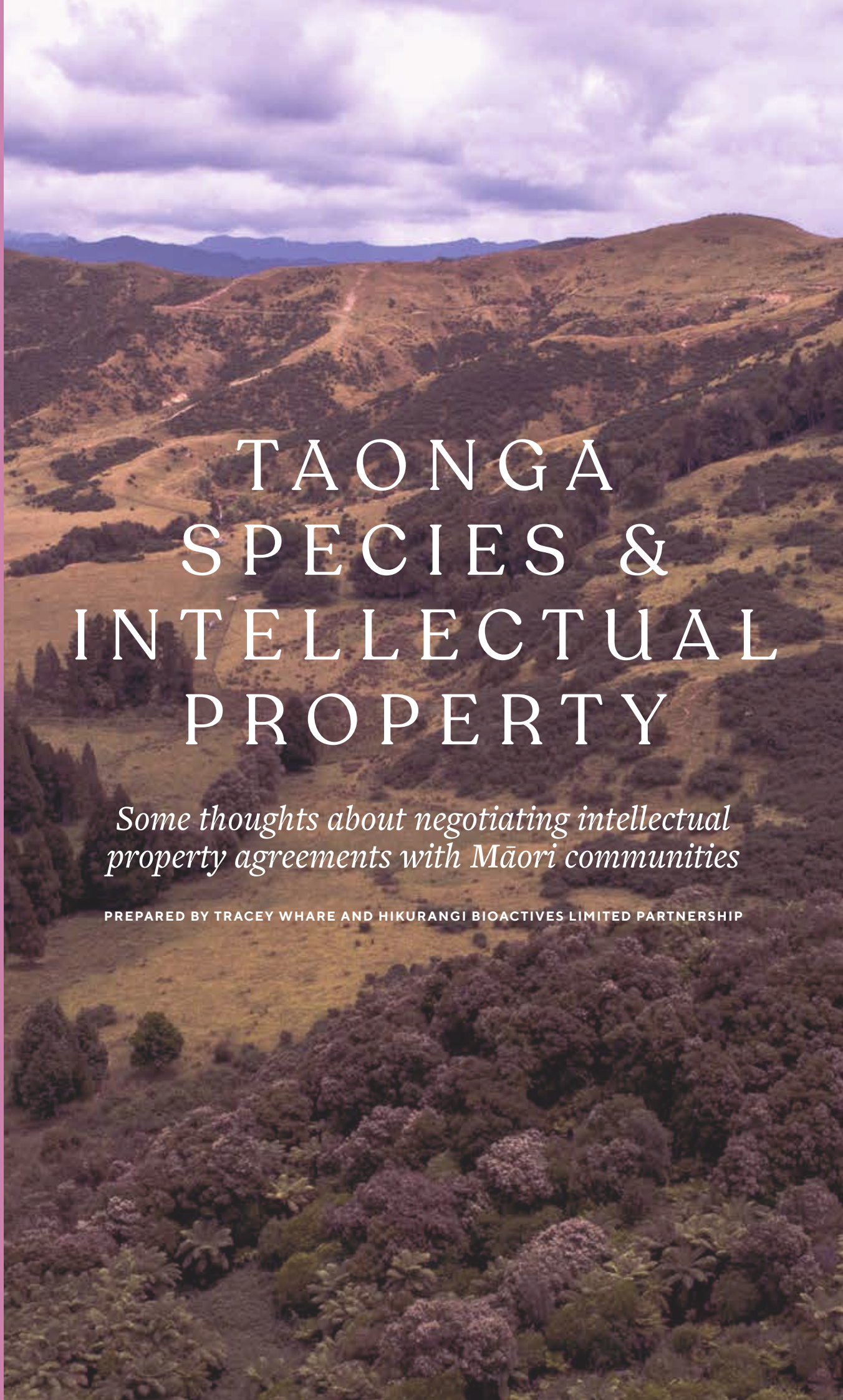

TAONGA SPECIES & INTELLECTUAL PROPERTY

Some thoughts about negotiating intellectual property agreements with Māori communities

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Introduction

The moment you start doing scientific research about the natural health potential of native or taonga species, or begin thinking about how to create a market for products using these species, a whole lot of issues come up. Who owns native plants like kānuka? Is it the landowner on whose block it is growing? Is it Māori people more generally? And what do we mean by that? Whānau? Hapū? Iwi? Or does the ownership question even matter? Is it best to focus solely on the ownership of the newly acquired scientific knowledge? What about concepts like mātauranga Māori (Māori knowledge) and kaitiakitanga (Māori guardianship of land and resources in accordance with tikanga Māori, cultural practices)? Do they relate only to traditional or historical knowledge, or can they apply to newly created knowledge made by non-Māori? And ultimately, who should profit from newly created knowledge: Māori, or those responsible for its discovery?

Starting in 2018, Hikurangi Bioactives Limited Partnership (HBLP) began thinking about what it means to negotiate an intellectual property agreement with kaitiaki of taonga species. HBLP was exploring the bioactive properties of kānuka and kina, with a view to creating natural health products that would create economic development opportunities for Māori landowners and hapū in and around the Waiapū Valley. An initial project agreement had been signed by HBLP and the project stakeholders (a mixture of landowners, hapū and marae trusts) but it did not spell out how intellectual property would be managed. It was necessary to identify what kind of agreement would replace this, and would define the ongoing relationship between HBLP and kaitiaki.

This booklet summarises the process that HBLP went through to negotiate an intellectual property agreement with the Māori entities who are stakeholders in the kānuka and kina projects, and who are, in this situation, the kaitiaki of these taonga species. After careful thought, it has become clear that the most important thing is the process that sits behind the agreement: what happened, when, with whom, and what worked well or didn't turn out as expected. Any successful agreement will evolve from the interactions between the different parties, and its particular form will depend on the circumstances in which it is being negotiated. As a result, this booklet is almost all about process, and doesn't include the final version of the agreement that HBLP ended up creating with its project partners.

The booklet also introduces some general information about intellectual property and its place in state law, and the way it interacts with Māori law and international law. This case study is specific to a time and place, but the booklet has been published to try to identify principles and practices that might be relevant or helpful to others who are also facing questions about intellectual property in their own situations.

What is Intellectual Property?

Intellectual property law is an area of law that recognises and protects certain kinds of human knowledge and innovation.

It provides protection for this knowledge by using Western concepts of property rights. What this means in practice is that for a certain period of time, the creator or discoverer of such knowledge is able to maintain and control its use to the exclusion of all others. This is considered beneficial to society because it encourages innovative and creative thinking, and provides incentives for people to invest in the development and commercialisation of intellectual property. Once the time period has expired, the knowledge becomes publicly available for the benefit of society more widely.

Intellectual property is a Pākehā concept, and there are other ways of thinking and knowing about the issues addressed by this idea. Indeed, other concepts taken from different legal systems raise different questions, or frame the issues in a different way. To make this abstract idea more concrete and specific, here are some views as to how different legal systems address this issue in relation to kānuka.

Who Owns Kānuka?

THE VIEW OF STATE LAW

The ownership of kānuka is not easy to determine when it comes to state law, i.e. the statutes created by Parliament, as well as the common law which is developed by judges. There is a lack of legal clarity about ownership of all native or taonga species, including kānuka. Part of the issue is that all native species are considered ‘non-rival’, meaning you cannot prevent others from enjoying it, and ‘non-excludable’, meaning it is difficult or impossible to exclude others from using it.

The general state law position is that no one owns kānuka as a species. There are some exceptions to this: for example, the state is likely to claim ownership of specimens located on land it claims to own. As no one owns kānuka as a species, it is the landowner who will control property rights in the kānuka growing on their land.

Who Owns Kānuka?

THE VIEW OF MĀORI LAW/TIKANGA MĀORI

Māori law or tikanga Māori takes a completely different starting point from state law in that it focuses on the relationship between people and the environment, and does not equate such relationships with Western concepts of exclusive ownership. For example, land and resources could traditionally be used by different Māori collectives at the same or different times for different purposes, such as gardening and gathering. This means that Māori legal understandings of control and ownership exist but they stem from a different basis than Western understandings of ownership.

Unlike state law, Māori law has no centralised depository but is derived from oral traditions such as waiata (songs), pūrākau (stories), whakataukī/whakatauākī (proverbs, significant sayings), pēpeha (sayings of the ancestors) and kīwaha (colloquialisms), and can be found in written records such as Māori Land Court records, historical archives, books and family writings. Māori law can also be found in the practice of tikanga and the values that underpin tikanga: for example, manaakitanga, kaitiakitanga and whānaungatanga. Māori law is also specific to different places, meaning it can be understood and practised differently, as between Māori collectives.

Given that Māori understandings of land and resources are relational, Māori law does not provide a clear-cut answer on the issue of ownership. However, it does provide examples and principles by which tika or pono (both words can be translated as correct) solutions can be realised. In essence, Māori law is about finding a solution by looking to oral tradition, tikanga, and the advice of elders for inspiration and guidance. In relation to kānuka, the following questions should be considered when determining how Māori law might approach these issues:

- → How was kānuka referred to in oral tradition and within tikanga practices?
- → Historically, how did Māori negotiate with others, such as commercial entities?
- → What values underpinned those negotiations and relationships?
- → How were benefits shared amongst different groups?
- → How were disputes settled?

In addition to Māori law or tikanga Māori, both He Whakaputanga o te Rangatiratanga o Nu Tireni 1835 (The Declaration of Independence) and te Tiriti o Waitangi 1840 recognise and affirm tino rangatiratanga (Māori authority) in relation to land and taonga. As such, both documents uphold Māori forms of ownership of taonga species.

WAI 262

The Waitangi Tribunal has also considered intellectual property rights. The Waitangi Tribunal is a commission of inquiry established by Parliament with a mandate to investigate and make recommendations on claims brought by Māori relating to Crown breaches of te Tiriti o Waitangi and the Treaty of Waitangi.

In 2001, the Waitangi Tribunal released its report, *Ko Aotearoa Tenei*, which addresses intellectual property rights, including intellectual property rights in native species. The Tribunal found that Māori knowledge of native species is a form of taonga over which Māori were guaranteed tino rangatiratanga, and that state law and government practice has not respected tino rangatiratanga over Māori knowledge. The Tribunal proposed that this breach be addressed by allowing Māori to exercise control over taonga in the form of kaitiakitanga.

To date, the government has not formally responded to the Tribunal's report, though it is in the process of finalising a whole-of-government approach called Te Pae Tawhiti. Cabinet was expected to take a decision on government work programmes by the end of 2019. However, this timeframe has been extended, and future updates should be posted to this webpage (https://www.tpk.govt.nz/en/a-matou-kaupapa/wai-262-te-pae-tawhiti).

Who Owns Kānuka?

THE VIEW OF INTERNATIONAL LAW

Unlike state law, international law provides clarity on the intellectual property rights of Indigenous peoples but also requires consideration of state sovereignty.

The UN Declaration on the Rights of Indigenous Peoples 2007 (the Declaration) is the most comprehensive international instrument to address Indigenous peoples' rights. (https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html)

New Zealand endorsed the Declaration in 2010. The Declaration provides for the ownership, use, development and control of lands, territories and resources in the hands of Indigenous peoples, as well as the intellectual property deriving from them. It also provides that states shall recognise and protect these rights. As such, the Declaration supports and affirms Māori ownership of intellectual property rights in taonga species.

Another international legal instrument that was drafted prior to the Declaration takes a different stance. It is premised on the principle that states have rights over natural resources within their borders. The Convention on Biodiversity 1992 (the CBD) is a legally binding international treaty that commits states to the triple objective of conserving biological diversity, using natural resources sustainably, and fairly and equitably sharing benefits deriving from the use of genetic resources. (https://www.cbd.int/) New Zealand has ratified the CBD.

In addition to the CBD, states have developed an international regime on access to biological material, and sharing benefits in return for allowing access. This is called the Nagoya Protocol 2010. (https://www.cbd.int/abs/) The Nagoya Protocol addresses traditional knowledge associated with genetic resources, with provisions on access, benefit-sharing and compliance. It also addresses genetic resources where Indigenous and local communities have the established right to grant access to them. States are to take measures to ensure these communities' prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures as well as customary use and exchange. The Nagoya Protocol also provides for joint ownership of intellectual property rights. New Zealand has neither signed nor ratified the Nagoya Protocol.

It could be argued that the CBD and the Nagoya Protocol provide for state ownership of natural resources, while the Declaration provides for Indigenous peoples' ownership. One way of reconciling these differences is to interpret the CBD and the Nagoya Protocol consistently with the Declaration, because in international law there is an expectation of maximum compliance with international declarations.

This understanding also aligns with the fact that the Declaration contains the minimum standards for the survival, dignity and wellbeing of Indigenous peoples, meaning a lack of compliance with the Declaration is likely to lead to further injustices and rights violations.

The Challenge for Commercial Entities to Recognise Māori Rights

Some background about Hikurangi Bioactives Limited Partnership might be useful here. HBLP was established in 2017 as a joint venture between Hikurangi Enterprises Limited (HEL) and New Zealand Nutraceuticals Limited (NZN). HEL is a charitable company established in 2016 to create economic opportunities for the Ruatōria district. NZN is a private company established in 2015 to develop natural health products. One of the business activities of HBLP is research into the bioactive properties of indigenous organisms.

In 2018, HBLP initiated two projects involving kānuka and kina. As both required sources of taonga species (native birds, plants and animals of special cultural significance and importance to Māori), HBLP entered into agreements with project partners to harvest kānuka from their land blocks and kina samples from their rohenga moana. If the kānuka and kina samples led to the discovery of bioactive properties that were commercially viable, HBLP committed to sharing some of the benefits with participating project partners; this is the right thing to do, and HBLP exists to create economic development opportunities within Te Tairāwhiti. As part of the existing agreements between the parties for the harvest of kānuka and kina, there was a general clause which noted that in the future the parties would negotiate agreements in relation to these matters. Effectively, the question of intellectual property was postponed, but HBLP knew it would have to be addressed at some point, and this would be a complicated process to get it right.

In November 2018, HBLP wrote a position paper that laid out all the issues and aspirations it had for a future intellectual property agreement with project stakeholders. The text included the following statements:

Before HBLP creates any intellectual property, we want to have sorted out these issues and know what ownership means and where we want that to be vested. So far we haven't commercialised anything that gets in the way of having this discussion, but we are creating intellectual property that needs to be assigned ownership/kaitiaki.

HBLP wants to be part of developing the next steps from WAI 262 and articulating what comes next now that this report by the Waitangi Tribunal has been issued. We don't want to work within the terms of the report, but imagine what emerges from the platform of the report. Our intellectual property arrangements should be the fruit of WAI 262.

What does HBLP need to do the job? We should dispel the drive to get as much share of ownership as possible, which is the default business setting. The intellectual property system favours corporates, so we need to work hard to overcome this built-in privilege. A lot is said about stopping inappropriate use of mātauranga Māori and taonga species. There are a number of fundamental questions:

- **What is a fair reward for what HBLP has put in?**
- **What is required to ensure the commercialisation can go ahead and be done well?**
- **How is mātauranga defined, held, protected and organised?**
- **What can be done to encourage the appropriate use of mātauranga and taonga species?**
- **What mātaturanga/intellectual property is off-limits to HBLP?**

The private ownership at the heart of HBLP (in the form of NZNL and to a lesser extent HEL) makes dealing with these questions tricky.

HBLP recognises that collective rights need to be sorted out, and that this is a complex area and something that is likely to be determined by every group holding collective rights in a way that works for them. It isn't right for a company representing only some interests to try to own things that are owned collectively – not just within existing communities but past and future generations. While we wait for these issues to be worked through within and between Māori collectives, HBLP can also work within intellectual property systems to define our position, protect and grow our investment; and we will be open to negotiating collective rights at the point when these discussions take place.

HBLP is a partnership between Māori and Pākehā. It wouldn't exist without the Pākehā contribution. But this partnership means that HBLP will not seek to have control beyond what is required for business. Pākehā in this scenario use their privilege to support Māori in a particular region; they do not enrich themselves just for the sake of generating private investor

wealth; it is also about raising the wellbeing and opportunities for participating communities.

Does the way HBLP operates provide mechanisms that allow those with kaitiaki responsibilities to be able to fulfil their obligations and responsibilities as kaitiaki?

How can intellectual property arrangements reflect whakapapa and tino rangatiratanga of the kaitiaki of taonga species? How does HBLP honour this, but still be able to do its job in commercialising bioactives taken from taonga species?

What if HBLP agrees that Māori own taonga species, and they own mātauranga Māori, and it is not right or necessary for HBLP to own either? Perhaps our intellectual property arrangements could emerge from this belief.

How do we manage the HBLP model if it is built on kaitiaki deliberately not being involved in the commercialisation process?

The 2018 position paper also noted questions that had come up from project stakeholders, including:

- **What can be done to encourage the appropriate use of mātauranga and taonga species?**
- **What is the status of new knowledge generated by HBLP projects? Is newly created knowledge (e.g. the results of scientific testing) part of mātauranga Māori? Who owns this? Who controls it? Who protects it? Is control and protect the same?**
- **The kina project is not a partnership in the sense that it doesn't involve shared decision-making. What does this mean for creating a fair and robust intellectual property agreement with kaitiaki?**
- **Where does the hapū fit in the relationship between HBLP and landowners?**

Making Sense of the Questions and Challenges

HBLP was aware that standard commercial intellectual property agreements often provide for the ownership of bioactive research to be held by the commercial entity, with local communities playing a minimal or passive role in the commercialisation activities. Standard agreements may provide some benefits: for example, financial compensation, and the provision of infrastructure or employment opportunities. HBLP did not consider this model was useful. It failed to address more substantive questions, such as recognising the authority of Māori; their relationship to taonga species; the ongoing effects of colonisation and its severe impacts upon the ability of Māori to exercise tino rangatiratanga, including carrying out their own commercialisation activities; and how the rights of Māori could be upheld and implemented within a commercial intellectual property agreement. HBLP wanted to do things differently; it wanted to ensure that Māori rights in taonga species and their status as tangata whenua were recognised and provided for in the intellectual property agreement in tangible ways. In summary, HBLP wanted to use this opportunity to fully provide for Māori rights in taonga species.

HBLP realised it didn't have the skills or knowledge to manage either the legal or cultural questions that are at the heart of creating a robust and ethical intellectual property agreement. It also recognised that the process would benefit from having someone who was independent. HBLP approached Tracey Whare, a legal academic at Auckland law school, to assist with researching intellectual property ideas, and to act as the lead facilitator and drafter of an intellectual property agreement.

The objective of the project was to draft and execute an intellectual property agreement that recognises who owns the intellectual property from bioactive research, and sets out how any financial benefit from that bioactive research will be shared. These two issues were fundamental to the project, requiring much discussion, drafting of papers, countless further questions, and multiple solutions, as well as consensus building.

THE FIRST STEP, IN AUGUST 2018, WAS TRACEY WHARE'S RESPONSE TO HBLP'S INITIAL QUESTIONS.

You have asked me to provide advice on a series of questions relating to your bioactive research. In particular, you have asked me what kind of relationship(s) could or should exist as between yourselves and kaitiaki Māori who engage with you in this work. These questions have arisen because of your interest in exploring best practices in relation to access to genetic resources, the potential mātauranga Māori associated with those resources as well as how you might share the benefit with kaitiaki Māori from any successful commercial use of those resources. I have collated your questions and provided a response to each.

1. WHAT KIND OF ARRANGEMENTS SHOULD HBLP HAVE WITH THE VARIOUS STAKEHOLDERS?

The kinds of arrangements HBLP should have with various stakeholders will depend on the kind of activity you are undertaking, what each party is contributing and what stage of the project you are at.

There is no specific legal framework that governs relations between stakeholders in the bioactive industry, meaning it is up to the individual parties to reach their own agreement. Given the lack of a coherent legal framework, you may want to invite stakeholders to 'come on a journey with you', meaning you agree at the very outset on some core principles that will underpin your relationship during each stage of the project. This could be formalised through a Memorandum of Understanding/Statement of Intent and could include such principles as acting in good faith, open and timely communication and confidentiality.

For other arrangements such as the collection of species through to potential commercial exploitation of a species, I would suggest using a rights based approach. By this I mean providing for rights that recognise Māori decision making institutions and the protection of mātauranga Māori.

The most useful documents to consider would be Te Tiriti o Waitangi and the UN Declaration on the Rights of Indigenous Peoples. First, Te Tiriti, because it affirms and upholds tino rangatiratanga and Māori relationships with taonga and second, the UN Declaration on the Rights of Indigenous Peoples because it is the most comprehensive international instrument on indigenous peoples' rights and it establishes a universal framework of minimum standards for the survival, dignity and well-being of indigenous peoples, including Māori.

2. WHO OWNS THE KĀNUKA PLANTS THAT WE IDENTIFY AS MOST PRODUCTIVE? THE LAND OWNERS? LOCAL HAPŪ? IWI?

The general legal position is that no one owns kānuka plants. There are some exceptions to this for example, the Crown is likely to claim ownership of specimens located on Crown land. As no one owns kānuka plants, it will be the landowner upon whose land certain kānuka grows, who will control property rights in that kānuka. This definition of ownership is likely to differ from how Māori hapū and iwi define their relationship with kānuka.

3. HOW DO WE ACKNOWLEDGE THE TIKANGA MĀORI DIMENSIONS IN THIS SITUATION? FOR EXAMPLE, WHAT DIFFERENCE DOES THE WHAKAPAPA OF KĀNUKA MAKE ON THE INTELLECTUAL PROPERTY ARRANGEMENTS?

Legally, you are not required to acknowledge such matters. However, if you want to provide for tikanga, I would suggest doing so in two ways first, in your processes and second, substantively. For example, in order to acknowledge tikanga in your processes, you may choose to engage not only with land owners but also with whānau,

hapū, iwi and other Māori entities. You could also use Māori venues for hui and Māori forms of decision-making to reflect tikanga practices in your working processes.

In terms of substantive realisation of tikanga, this will depend on each circumstance and is likely to require a more nuanced approach. For example, before engaging with Māori about a specific species, I would suggest clearly setting out what kind of knowledge you are interested in for the purposes of your research and making it clear that information beyond that, is best retained by the holders of such knowledge i.e. your interest lies in the practical knowledge of a species borne out by long-term observation as opposed to conceptual knowledge such as the whakapapa of kānuka. While this may not always be possible, at least those you are planning to work with will be clear about your intentions and what knowledge you are seeking from them.

You may also want to consider how HBLP will store such knowledge once is it disclosed and who will have access to it. These kinds of issues are best addressed by drafting policies for HBLP and making them available to potential stakeholders.

4. HOW DO WE SHARE INTELLECTUAL PROPERTY WITH STAKEHOLDERS BUT ALSO PROTECT THE COMPETITIVE ADVANTAGE THAT SUCH KNOWLEDGE GIVES TO HBLP, AND ENABLES IT TO CREATE A VIABLE BUSINESS?

In situations where there is real potential for commercial exploitation, you may want to consider the principle of fair and equitable sharing and what that might look like. Again, there is currently no legal requirement for this to occur though the principle is reflected in two international instruments, the Convention on Biological Diversity and the Nagoya Protocol on Access and Benefit-sharing and Traditional Knowledge.

There are a number of ways this could be accommodated however, it will depend on how you view your relationship with stakeholders. Is the relationship solely defined by the specific transfer of knowledge? Would you prefer to share the benefits in proportion to the contributions of specified groups or individuals? Given pre-existing socio-economic inequalities do you want to share benefits to implement an equitable distribution?

Set out below is a non-exhaustive list of the kinds of things that could be included in an access benefit sharing agreement:

- Recognition of the plurality of knowledge systems, in order to provide for the equal treatment and representation of different ways of comprehending the world. This would allow for different conceptual understandings of things like plants and benefits to be equally represented in a dialogue so that no one world-view dominates another;
- Inclusion of tikanga and/or Māori law;
- The right to be left alone if stakeholders do not want to be involved;
- Defining together what benefit sharing looks like;
- Financial compensation;
- Capacity building;
- Scholarships;
- That any patent application disclose the origin of the source of the genetic resources and/or the traditional knowledge utilised, thus creating a legal liability for compliance with access benefit sharing conditions;
- Identification of the risks and benefits of disclosing traditional knowledge, including definitions and project milestones;
- Open and clear communication about the aims, strategies and management of the project;
- Formation of a commercial or non-commercial partnership coupled with a contract or collaborative agreement to ensure the protection of sensitive traditional knowledge or practices;
- Confidentiality/non-disclosure for both sides before commercial in-confidence or sensitive traditional knowledge is shared;
- Practical opportunities for engagement and learning;
- Indigenous peoples' rights being recognised particularly in relation to lands, natural resources and indigenous knowledge;
- A clear start and end point for benefit-sharing obligations; and
- Developing clear standards for the valuation of such resources.

5. HOW DO WE ENSURE OUR INTELLECTUAL PROPERTY ARRANGEMENTS ARE RESPONSIVE TO THE LEGAL AND SOCIAL CHANGES THAT WILL COME WITH THE RESOLUTION OF THE WAI 262 CLAIM?

My sense is that given the lack of a comprehensive response from the government to the report since it was released in 2011, it may be some time before the government addresses it, if at all. What is more likely to happen is that the government will address issues in a piecemeal way and continue to take a conservative view in relation to Māori rights in this area.

My suggestion is therefore to create your own framework that is rights compliant. By this I mean creating a framework that recognises those rights set out in Te Tiriti o Waitangi as well as those affirmed in the UN Declaration on the Rights of Indigenous Peoples. By using a rights based approach, you have an opportunity to set benchmarks and create practices that go beyond what the government is likely to propose. This could mean you are over compliant however, it could place you in the unique position of being able to influence how others in the industry carry out their activities as well as how government develops law and policy.

6. WHEN THERE ARE MULTIPLE KAITIAKI FOR MĀTAURANGA WHAT HAPPENS WHEN SOME WANT TO USE OR SHARE IT AND OTHERS DON'T WANT IT USED OR SHARED?

If there is more than one type of kaitiaki for a specific taonga you may find that different kaitiaki view the taonga in different ways. What will need to be ascertained is what kind of mātauranga each kaitiaki holds and whether such knowledge is necessary for your research. In such situations the right of free, prior and informed consent is highly relevant and can be realised through robust, open-ended and transparent processes allowing kaitiaki to become familiar with your work, what you want to achieve, how their contribution will impact the project and what benefit they or their community could receive.

It may also be necessary to ask kaitiaki to deliberate amongst themselves in order to determine their common ground or lack thereof. You could support these kinds of processes by providing meeting venues and written information.

7. WHAT IF ALL KAITIAKI GROUPS DON'T GIVE THEIR CONSENT?

Given the role of kaitiaki is likely to be practised by many different individuals and entities, you may find it difficult to gain unanimous support for your work. Having said that, processes which support the right of free, prior and informed consent are critical.

As noted in question 6, providing space and time for kaitiaki to deliberate amongst themselves is a key component to informed decision-making and should be encouraged. It is also important to note that the right to free, prior and informed consent is not an absolute right and must be considered alongside other rights such as, the right of others to engage as well as the right to development.

8. WHO GETS TO DETERMINE WHO THE APPROPRIATE KAITIAKI ARE FOR GENERIC/GENERAL TAONGA OR MĀTAURANGA?

Again, there are no legal criteria to determine this. By taking a rights based approach, both self-identification as a kaitiaki and recognition of that person as kaitiaki from the collective such as the whānau, hapū or iwi would be good measures to use.

THE PROCESS

HBLP recognised the importance of conducting their work in accordance with tikanga Māori, meaning that both the process and the substantive outcome had to be tika. In practice, this meant adopting Māori ways of working in order to reach an agreement. A tikanga Māori approach was understood as the most appropriate way of ensuring Māori stakeholders engaged in the process and supported its outcomes. For example, hui needed to be held in the community and key HBLP people had to attend all such hui.

In preparation for the community hui, HBLP held their own preparatory meetings to agree upon the best way forward. What eventuated was a series of three community hui held over a period of four months; these were facilitated by Tracey Whare. The hui began with a brainstorming session to identify the issues and questions from the community. At subsequent hui, discussion papers were tabled in order to answer community questions, pose further questions and provide options for discussion. Consensus decision-making was adopted to ensure the project moved at a pace that allowed everyone to come to terms with what was being considered and provided ample opportunities for discussion.

The team (Ruihana and Bella Paenga, Damian Skinner and Tracey Whare) met to consider the best approach in rolling out a series of hui with the stakeholders in the kānuka and kina projects. HBLP gave due consideration to the variety of ways in which Māori organised themselves and had engaged with the project, while not overcomplicating and duplicating hui in the process.

As local hapū members and known community workers, Ruihana Paenga and Bella Paenga had built strong relationships with participating groups, some prior to these projects and others through clear communication throughout these projects.

The project team felt that despite the fact that two distinct research projects were underway, the process of achieving a shared intellectual property agreement could be facilitated at one time. Therefore, intellectual property hui (particularly the first hui) could be held with both kina and kānuka participating groups attending together; and Ruihana Paenga and Bella Paenga could risk manage issues such as:

- clarity of hui purpose, by communicating directly with participating groups who had queries or concerns;
- confidentiality of results, by clarifying that groups were not required to share results; the dissemination of results and draft agreements would be managed separately by Bella and Ruihana for their respective project participants;
- understanding of kaupapa and issues, by noting questions for clarification by HBLP and/or Tracey Whare.

The team maintained a degree of flexibility based on how participants responded to the first hui. One hui would be held prior to Christmas 2018, and three hui held in the new year 2019. The first hui would be by invitation only, with Ruihana and Bella making sure all the project participants were invited. Subsequent hui would be open to a wider public with a stake in HBLP/kaitiaki relationships.

Communications, led by Bella Paenga and Ruihana Paenga, were key in ensuring:

- project participants were aware of the intended outcomes and process for the intellectual property hui;
- each project maintained its own level of autonomy and participant focus;
- the hui were open to wider whānau, hapū and affected landowners/shareholders;
- written information noting progress made and next steps was circulated to appropriate participants after each hui.

The discussion papers written by Tracey Whare after each hui, and circulated to participants before subsequent hui, were an extremely useful tool in this process. Firstly, they provided a clear and permanent record of what happened at each hui, creating a narrative of the process and how understandings and conclusions were reached. Secondly, they were a place where ideas and solutions could be presented and evaluated. Having the discussion paper to read through, and refer to, provided an important structure for later hui that were dealing with complex issues and fine details.

The first discussion paper laid out the kinds of intellectual property that are involved in the kānuka and kina projects, and suggested some possible options for how intellectual property generated by the projects could be managed.

Given the confusing and contradictory ideas about the ownership of kānuka and kina, and whether they can or should be owned at all, it is no surprise that addressing the ownership of intellectual property that is derived from bioactive research is also challenging.

It is important to clarify that there are different types of knowledge about taonga species and that such knowledge is held by different people or entities. For example, project participants (excluding HBLP) own the intellectual property about the location of kānuka and kina and their harvesting processes. This intellectual property is critical to this project.

Project participants also hold knowledge about the whakapapa of these taonga species, the many ways in which they have and continue to be used and the varied relationships they have with them. This intellectual property or mātauranga Māori is wholly owned by the project participants (excluding HBLP). It remains with them and does not need to be disclosed for this project.

Similarly, the scientists who conduct the bioactive research have arrangements with HBLP regarding the intellectual property that relates to what they do. For example, the Cawthron Institute own the intellectual property that relates to the extraction process for kina because they created this process. They have granted a licence to HBLP to use that knowledge. In contrast, the research analysis on kānuka that is being undertaken by Victoria University of Wellington is owned by HBLP because HBLP is paying for that analysis.

On the following page is a table detailing the ownership of different kinds of intellectual property rights that relate to this project.

- Location of kānuka and kina, and related harvesting practices: Owned by the project participants.
- Whakapapa of kānuka and kina, historical and current usage and kaitiaki relationships: Owned by the project participants, remains with project participants, not relevant to this project.
- Extraction process for kina: Owned by Cawthron Institute, licence granted to HBLP to use it.
- Analysis of kānuka and kina: Completed by various scientists and experts, but paid for and owned by HBLP and project participants.
- Research outcomes of kānuka and kina: Completed by Cawthron Institute, Victoria University and Massey University, but paid for and owned by HBLP and project participants.

The ownership of intellectual property that comes from the outcomes of the research is a critical issue because this is what the potential commercialisation of the intellectual property will be based on. Below is a non-exhaustive list with potential options.

POTENTIAL OPTIONS	EXPLANATION	BENEFITS	CHALLENGES
HBLP	HBLP owns all the intellectual property generated by the projects.	Acknowledges financial and capital contribution of HBLP.	Not consistent with existing agreements between HBLP and project participants. May not uphold tino rangatiratanga, and relies on the goodwill of HBLP to share with the other project participants. Not compliant with indigenous rights, te Tiriti or He Whakaputanga.
Project participants	Māori individuals and entities either individually or collectively own the intellectual property.	Affirms tino rangatiratanga and supports a rights-based approach.	Would require project participants to recompense HBLP for their contribution which could be prohibitive. May require project participants to create a new entity to legally protect the intellectual property. Could create competition between project participants and within participant groups.
HBLP and project participants	Joint ownership of the intellectual property.	Affirms tino rangatiratanga and HBLP's contribution.	May require project participants to create new joint entities to represent them. Requires clear agreements on who will hold what intellectual property, and who has the right to commercialise it. Needs a high level of trust.
Species itself	Kina and kānuka own their own intellectual property.	Treats the taonga species independently. Similar to how the Whanganui River has been legally recognised. Places three groups in the process, HBLP, project participants and kina/kānuka.	Who represents kina? Who represents kānuka? Who decides how intellectual property will be used? How do the benefits flow back to the species themselves?
Tangaroa or Tane Mahuta	Tangaroa owns the intellectual property of kina. Tane Mahuta owns the intellectual property of kānuka.	Treats the taonga species independently. Provides for the relationships as between the taonga species, ngā atua and the wider environment. Places four groups in the process, HBLP, project participants, kina/kānuka and ngā atua.	Who represents kina, kānuka and ngā atua? Who decides how intellectual property will be used? How do the benefits flow back to Tangaroa and Tane Mahuta?

In order to determine the division of any financial benefits, there needs to be agreement about what criteria are used to determine such a division i.e. what concepts of fairness and justice should underpin the division of any potential financial benefits. Below is a non-exhaustive list. It should also be noted that more than one criteria can be used to determine division.

POTENTIAL OPTIONS	EXPLANATION	ADVANTAGES	COMMENT
Principle of deserved benefit	Each party is compensated for their actual contribution.	HBLP is compensated for its human and financial contribution. Project partners are compensated for their human contribution and the value of the organisms they contributed.	Relatively easy to quantify contributions. The value of contributions by project participants are relatively minor, as kina could have been sourced from the commercial quota, and any private landowner with kānuka on their property could have contributed samples of their plants.
Distributive justice	Each party is compensated on the basis of their right or entitlement.	HBLP, on the basis of state law, is entitled to share in the commercial success of the business activities they have risked time and money to make happen. Project partners are entitled to a division on the basis of their contributing kānuka and kina samples for analysis, and their rights as tāngata whenua as affirmed by Te Tiriti, He Whakaputanga, the Declaration and Māori law.	Provides a fairer basis for division.
Equitable	In order to address existing inequalities, division should be based on fundamental needs, protection of resources and entitlements.	Accounts for the legacy of colonisation by supporting a greater division for project partners.	Who are the beneficiaries, those involved in the project or does the scope need to increase to include others in order to be truly equitable?

The Challenge of Joint Ownership

After two hui, a few things had become clear about the question of who owns the intellectual property arising from the bioactives research, and how any potential commercial benefits should be shared. While there was no consensus for any one option in relation to ownership, it was clear that:

- Ownership of intellectual property by HBLP solely was not acceptable.
- Ownership of intellectual property by Māori individuals and entities either individually or collectively had some support.
- Joint ownership between HBLP and landowners/hapū of intellectual property had broad support.
- Ownership of the intellectual property by the taonga species itself was too onerous because it would require greater levels of governance.
- Ownership of the intellectual property by ngā ātua was too onerous because it would require greater levels of governance.

There was greater consensus around the division of financial benefits. For kānuka there was broad agreement that landowners who were participating in the project should derive a benefit, along with other landowners and potentially hapū. For kina there was agreement that hapū should derive a benefit.

The division of benefits reflected the following views: that those who had and continue to be involved in the gathering of kānuka and kina must be recognised in the division of any benefit; that any benefit should be shared among the wider Māori community located in Te Tairāwhiti; and that the relationship with HBLP is based on trust and must continue to be so.

Having considered the above matters, the plan was to draft an agreement that reflected joint ownership, given this had broad support. However, having drilled down into the detail of what must be done to commercialise the intellectual property, it had become clear that a joint ownership approach was potentially problematic. A common understanding of ownership assumes that an owner of something can do whatever they want with it, but in this case there were multiple owners who might not agree or might have different ideas about what they want to do with the intellectual property they own. A group of entities representing much larger groups of shareholders would likely struggle to reach consensus. The risk of any one co-owner holding veto over the others would be unattractive to any serious investors interested in helping commercialise the intellectual property. And if the intention was that joint ownership means all parties must be actively involved in the commercialisation activities, then this would not work from HBLP's perspective.

Moving forward, one entity or individual or group needed to be responsible for managing, controlling and using the intellectual property: for example, making decisions about what products, for which markets, strategic partners and investors, methods of growing, harvesting and extraction, and brand development. From the start, HBLP had indicated it would like to be the commercialising entity and undertake this process on behalf of all. But this would mean that the landowners and hapū were handing over the decision-making to HBLP, and giving it permission to decide how to use the intellectual property in making products for sale. If the parties agreed on this model, landowners and hapū would not get an equal say in how the intellectual property was used.

Another challenge with the intellectual property from the kānuka and kina projects was that it would be a trade secret, which means it is not protected by state law, but only by keeping it a secret. (Examples are the recipes for Coca-Cola or for KFC, which are valuable because no competitors know them.) Maintaining the kānuka and kina intellectual property as a trade secret would work only if the knowledge was limited to those who need to know it. With a large group of co-owners who may be privy to the information, there is a very high risk that information could be shared with others who are not parties to the agreement. If this were to happen, it would potentially ruin the competitive advantage that supports the commercialisation of the intellectual property. This means that the co-owners of the intellectual property would not necessarily be able to know what it is; and if HBLP became the commercialising entity, it would restrict the intellectual property to those individuals and groups who need to know it to make products for sale.

This dilemma was disappointing, given the ideas canvassed were intended to frame both ownership and benefits within a Māori paradigm. A true joint control ownership model may have been possible had the parties created an entity that was rights based and commercially experienced prior to engaging in this mahi. However, that was not the case in this situation.

THERE WERE FIVE POTENTIAL OPTIONS MOVING FORWARD, AND THESE WERE PRESENTED TO PROJECT STAKEHOLDERS AT THE NEXT HUI.

OPTION 1:

Sole ownership with HBLP

Ownership of all intellectual property vests in HBLP; landowners and hapū receive a financial benefit once the intellectual property is commercialised.

One way of making this option work would be to use Trust law so that HBLP is recognised as the legal owner but it holds the intellectual property in trust for the benefit of HBLP, the landowners and hapū. This means the landowners and hapū may enjoy all the benefits derived from the intellectual property without actually owning it, and HBLP is bound to use it for the benefit of itself, landowners and hapū.

Advantages: HBLP retains the intellectual property within a small group of people; they can use, control and manage the intellectual property efficiently, and engage in its commercialisation as they see fit.

Disadvantages: No agreement amongst landowners and hapū for this option; it may not be consistent with existing intellectual property agreements between HBLP and landowners and hapū; it may not uphold tino rangatiratanga; and may not be rights-compliant because landowners and hapū ownership rights are not provided for.

OPTION 2:

Joint ownership with HBLP having an exclusive right to commercialise

The intellectual property is to be jointly owned between HBLP and landowners/hapū with agreed divisions of benefits, and with agreement that HBLP has the exclusive right to commercialise the intellectual property, including entering into additional legal arrangements with third parties to use the intellectual property, co-invest, and so on..

Advantages: Broad agreement amongst landowners and hapū for joint ownership. Option 2 supports this and allows HBLP to engage in commercialisation. This might be acceptable if landowners and hapū understand the need for HBLP to pursue commercialisation without their direct engagement and control. The option allows HBLP to use, control and manage the intellectual property efficiently and engage in its commercialisation.

Disadvantages: There is ownership in name but in practice there are different kinds of ownership. This doesn't align with how ownership is commonly understood, though it is similar to a situation where shareholders in a company are co-owners but do not control the commercial activities of the company (where strategies and directions are decided by the elected – or appointed – board, and implementation is the responsibility of management).

OPTION 3:

Joint ownership with a governance group and HBLP having an exclusive right to commercialise

The intellectual property is to be jointly owned between HBLP and landowners/hapū. A governance group comprising two representatives from HBLP and two representatives from landowners and hapū could set general policies around how the intellectual property can and cannot be used, what the priorities and purpose of commercialisation is, who it should benefit, and so on. HBLP is then charged with commercialising the intellectual property within the parameters set by the governance group.

Advantages: Broad agreement amongst landowners and hapū for joint ownership. This option could ensure landowners and hapū contribute to the overall commercialisation strategy and set the values that underpin the commercialisation process. It also provides opportunities for landowners and hapū to engage in and experience the commercialisation process, although this will be limited to a few people. It allows HBLP to use, control and manage the intellectual property efficiently and engage in its commercialisation.

Disadvantages: Similar disadvantages as Option 2. In addition, landowners and hapū will need to decide amongst themselves who will sit on the governance board, how those individuals will make their decisions, and how they will account to all landowners and hapū.

OPTION 4:

Equal joint ownership

Joint ownership and control between HBLP and landowners and hapū, with no restrictions on how any of the co-owners can use the intellectual property.

Advantages: Broad agreement amongst landowners and hapū for joint ownership.

Disadvantages: This option will not provide for the efficient use, control and management of the intellectual property because of the large number of entities involved and their rights to use the intellectual property in whatever way they wish. It will be impossible to keep trade secrets private and therefore commercially valuable. It is also unlikely to lead to any viable commercial enterprise.

OPTION 5:

Sole ownership with landowners/ hapū and HBLP having a licence to commercialise

Ownership of all intellectual property vests in landowners for kānuka and hapū for kina, and HBLP is given an exclusive licence to commercialise the intellectual property.

HBLP agrees to vest the ownership of the intellectual property in the landowners/hapū in exchange for an exclusive licence to commercialise the intellectual property. In addition, a governance group would be established comprising two representatives from HBLP and two representatives from landowners and hapū. This governance group could set general policies around how the intellectual property can and cannot be used, what the priorities and purpose of commercialisation are, who it should benefit, and so on. The terms of the exclusive licence would include a review clause so that landowners/hapū could at some future point buy back the licence and undertake commercialisation themselves.

Advantages: This option treats kaitiakitanga as akin to ownership. It affirms the relationship Māori have with taonga species and provides for it in a substantive way. It is consistent with the Treaty of Waitangi guarantee in relation to ownership and control of taonga species. It is also consistent with Indigenous peoples' rights in that it recognises Māori rights to own, control and manage natural resources. This option also allows HBLP to retain the intellectual property as a trade secret so that it can use, control and manage it efficiently and engage in its commercialisation within the parameters set by the governance group. This option provides an opportunity for landowners/ hapū to use the intellectual property to generate wealth, engage in the commercialisation process themselves and buy back the licence in the future.

Disadvantages: Landowners and hapū will need to decide amongst themselves who will sit on the governance board, how those individuals will make their decisions, and how they will account to all landowners and hapū. In the future, landowners and hapū will also need to work collectively should the option to buy back the licence be taken up.

As it turned out, Option 5 generated a great deal of excitement and was greeted enthusiastically – by HBLP as well as the project stakeholders. The decision was made to have Tracey Whare draft up an intellectual property agreement based on this model, which would then be presented to kaitiaki for their consideration.

The Outcome

Key Parts of the Intellectual Property Agreement

HBLP has completed negotiations with the Māori landowners involved in the kānuka project, and a final version of the intellectual property agreement has been approved. It borrows from standard commercial intellectual property agreements but also contains a number of differences. For example, the agreement begins with a lengthy background section detailing the relationship of the parties and a timeline of the community hui. It also annexes the discussion papers and summary documents from these hui. Detailing the background ensures there is a complete record of the history of the project to explain how the agreement was arrived at.

The purpose, scope and objectives of the agreement also mirror the priorities of both parties, as well as the values underpinning the agreement. For example, the agreement recognises the inherent authority of Māori landowners, their relationship as kaitiaki and the values that underpin the relationship, as well as the impacts of colonisation on Māori relationships to kānuka.

The agreement also records that the Māori landowners are the owners of the kānuka bioactive research, and that the licence to exclusively commercialise intellectual property is held by HBLP. It details how profit will be shared, as well as a process by which the landowners can reacquire the licence. HBLP wanted to acknowledge that while it is currently in a position to carry out commercialisation activities, it might be possible for the Māori landowners themselves to engage in bioactive commercialisation in the future. The agreement establishes a governance group, one of the purposes of which is to provide training opportunities for the landowners to learn about commercialisation activities, and to become familiar with the products and opportunities created from the intellectual property, with the intention that they are able to manage and operate any businesses based on the licence.

Another significant difference is that the law governing the agreement includes both state law and the laws of tikanga of Te Tairāwhiti. Should a dispute arise, the parties will work together to involve a mediator or other third party in the resolution of the dispute who has knowledge of the laws of the tikanga of Te Tairāwhiti.

Some Reflections

LOOKING BACK, IT IS CLEAR THAT THE FOLLOWING ELEMENTS WERE AN IMPORTANT PART OF THE PROJECT.

HAVING A PROJECT MANAGER

The project was managed by Damian Skinner, managing director of HBLP, who liaised with all parties, attended all community hui and was actively engaged in the drafting of the intellectual property agreement. Someone needs to keep the project on course.

APPOINTING AN INDEPENDENT FACILITATOR

Drawing on the academic expertise of Tracey Whare allowed the project to consider and ultimately adopt solutions that were creative and made sense for those involved.

SECURING FINANCIAL SUPPORT

Community engagement requires financial resources to make it work, as well as to demonstrate to the community that the project is worth their attention and effort. HBLP is grateful to Trust Tairāwhiti who provided essential funding for the project.

SETTING A REALISTIC TIMEFRAME

Providing for community engagement in a timely manner is important. Ample time for all participants to meaningfully engage is critical.

LISTENING TO COMMUNITY AND TRANSLATING THEIR CONCERNS INTO POTENTIAL SOLUTIONS

Taking the time to really listen to what people said and didn't say helped to steer the development of the discussion as well as brainstorm solutions.

USING COMMUNITY DECISION-MAKING PROCESSES AND HOLDING HUI IN THE COMMUNITY

Hui were held on marae, in community halls and personal residences. This is a tikanga approach which was necessary given the project is taking place in a rural community. Making the hui accessible for Māori rights-holders was a priority.

MAINTAINING CLEAR COMMUNICATION WITH MĀORI STAKEHOLDERS

Ensuring people knew who was involved and what the next steps were helped to create trust and ensure ongoing engagement.

PRODUCING DISCUSSION PAPERS

These were sent to participants prior to the hui. They were used as the basis for discussion. They also helped to frame the issues in a systematic way and provided for some deep discussion amongst the hui participants.

INDEPENDENT LEGAL ADVICE

The agreement provided for Māori landowners to seek independent legal advice prior to signing the agreement. HBLP facilitated and financed this. The outcome of this advice was new wording to simplify the agreement and HBLP providing further information on the commercialisation plan.

Conclusion

What this project demonstrates is the ability of entrepreneurs to engage in commercial activities while also recognising and providing for Māori rights. Creative solutions can be found if those involved are open to different ways of thinking, and are committed to spending time and energy listening to the community and developing solutions that meet their rights and needs. This project demonstrates that business can and should respond to more substantive issues of justice and equity when developing projects. In doing so, Māori rights are realised and a much richer and nuanced story evolves. This ultimately adds greater value not only to the relationships that are formed but also to the commercial products that are created.

TRACEY WHARE

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HIKURANGI BIOACTIVES LIMITED PARTNERSHIP

Hikurangi Bioactives Limited Partnership is a majority community owned business exploring the commercial potential of native bioactives.

https://hikurangibioactives.co.nz/

You can contact Damian Skinner, Managing Director, at: damian@hikurangibioactives.co.nz