RAUIKA MĀNGAI

KO TE ARA, KIA TIKA:

A GUIDING DOCUMENT FOR THE CONSIDERATION OF MĀTAURANGA MĀORI IN CONTRACTS.

He aha tēnei tuhinga –
What is this document?

This document is for kaitiaki[1] of mātauranga Māori and taonga Māori (**Mātauranga**) and kairangahau Māori who may be entering into or engaged with research contracts with other entities such as Crown Research Institutes, universities and independent science organisations. It provides guidance on what you should consider in respect of the protection of Mātauranga that forms part of those contracts.

This document should be read in conjunction with: *Wai 262 best practice guide for science partnerships with kaitiaki for research involving taonga.*

This document does not constitute legal advice and, when negotiating contracts to ensure that Mātauranga is protected, legal advice may be required.

He aha te mātauranga Māori me te taonga Māori – What is mātauranga Māori and taonga Māori?

Mātauranga is a body of knowledge that can include te reo me ona tikanga, atua Māori, pūrakau, karakia, mōteatea, waiata, whakapapa, rongoā, and other forms of traditional knowledge[2]. Mātauranga also involves physical/tangible components, for example where there is the use of flora and fauna such as plant species and organisms. Mātauranga will generally be defined by the kaitiaki and therefore will be case specific.

While many of the considerations remain the same for tangible and intangible Mātauranga, there may be some distinct differences in terms of how Mātauranga is protected. Where tangible Mātauranga is concerned, there may need to be further considerations regarding how it is handled, where it is stored, whether it must be returned from where it came, and whether there are restrictions or handling protocols.

1. Kaitiaki may be whānau, hapū and iwi.

2. Royal, Te Ahukaramū Charles. (2019). Mātauranga Māori An Introduction (A 'think piece' report written for the Ministry of Education) at pp 2, 12-25.

He aha te horopaki
– What is the relevant context?

Considering these matters is required because Mātauranga is poorly protected under the current New Zealand Intellectual Property legal framework (**IP system**). Contracts often include standard intellectual property clauses but are often silent on matters relating to Mātauranga or provide poor protection. What that means is that kaitiaki and kairangahau Māori entering into contracts may need to advocate for the protection of their Mātauranga through contractual negotiations. This requires an understanding of what to look for and include in contracts.

Issues with the IP system were among the matters considered by the Waitangi Tribunal in the Wai 262 Indigenous Flora and Fauna and Cultural Intellectual Property Claim (**Wai 262**)[3]. The issues broadly related to the conservation of indigenous plants, the protection of Mātauranga related to their use, the exclusion of Māori from research processes and the benefits of commercialisation, and the failure to consult with or seek consent from Māori in respect of this information.

In terms of Mātauranga, the Waitangi Tribunal stated that although much Mātauranga about taonga species is already published and publicly available, there remains a just claim against those who seek to exploit it for commercial gain without proper acknowledgement of the prior rights of kaitiaki. The Waitangi Tribunal stated that because Mātauranga is the creation of kaitiaki, they should not be deprived of having a say in its commercial exploitation, and that this justifies three rights to kaitiaki:[4]

1. to acknowledgement;

2. to have a reasonable degree of control over the use of Mātauranga; and

3. "any commercial use of mātauranga Māori in respect of taonga species must give proper recognition to the interests of kaitiaki."

3. Waitangi Tribunal. (2011). Ko Aotearoa tēnei: A report into claims concerning New Zealand law and policy affecting Māori culture and identity. Wellington: Waitangi Tribunal (Wai 262).

4. Wai 262, at p 195.

He aha ngā pātai e pā ana ki tēnei kaupapa mā ngā kaitiaki me ngā kairangahau Māori – What are the key questions for kaitiaki and Māori researchers?

Contract negotiations will be fact dependent and will depend on the nature of the Mātauranga shared or made available under the contract and the contract deliverables. Kaitiaki and kairangahau Māori may experience push back through negotiations, by the other contracting party suggesting that Mātauranga is part of the contract deliverables and therefore being 'paid for'. We recommend this be considered on a case by case basis, but note that even if that is the case, protection can still be afforded to Mātauranga.

The following table provides some matters that kaitiaki and kairangahau Māori should consider when reviewing and negotiating contracts that include the sharing or use of Mātauranga. These considerations and questions are not exhaustive but provide a starting point for what to think about when entering contracts and undertaking research.

While not exhaustive, the table identifies matters that would be expected in a contract that are important for the protection of Mātauranga. The aim of the table is to assist those entering into or engaging with research contracts to understand how each of the matters identified are relevant to the protection of Mātauranga and what can be considered under each matter when reviewing contracts or advocating for protection.

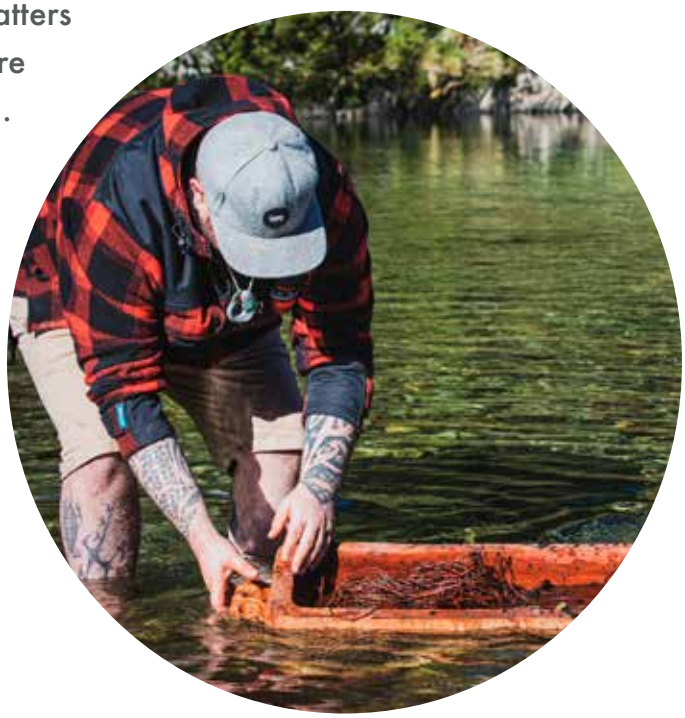

Table of Considerations

Matter	Description	Examples
Parties	One important consideration is who the parties to the contract are, and how Mātauranga clauses will work in practice. For example, if the contracting party is an individual, but the Mātauranga is held by a broader group (hapū or iwi), will the clauses include an obligation on the individual contract holder to seek the views (and approval) from a broader group for use? Parties could include a range of entities such as trusts, companies, incorporated societies as well as individuals. Further, the kaitiaki may or may not be party to a contract. If kaitiaki are not a party to the contract, you should seek to ensure the provisions work from a practical perspective and that Mātauranga is appropriately protected. For example, if kaitiaki are not a party how are the Mātauranga provisions enforced and what occurs if there is a breach? Also consider fundholder arrangements, where entities are holding funds on behalf of often unincorporated groups of people.	Not applicable.
Definitions: What is the Mātauranga that is relevant to the contract? Is Mātauranga defined, if so, is it defined accurately?	How Mātauranga is defined will depend on the relevant kaitiaki (whether individual(s), whānau, hapū or iwi) and the nature of the contract and deliverables. It is important that any contract accurately reflects the Mātauranga that will form part of the contract and that those who hold it and are responsible for its care, are comfortable with the definition.	**Mātauranga** means the collectively owned body of knowledge, methods, and practices which give rise to cultural property which is either individually or collectively owned by groups of Māori. For the purposes of this Agreement all Māori cultural property is included in the term "Mātauranga", including taonga works, te reo Māori, and all cultural information.

If it is defined, is the term located elsewhere in the contract such as in an "intellectual property" clause or in a confidentiality clause? Should there be separate defintions of intellectual property and Mātauranga?	Not all Māori information will be defined as Mātauranga. Therefore getting the definition right is important.	*All contracts will be unique to the parties and therefore the definition of Mātauranga will need to reflect the particular circumstances of the case. We do not recommend simply using clauses from other contracts without considering whether amendments are needed to reflect the particular context.*
Kaitiakitanga: who is responsible for or holds the Mātauranga? This document identifies 'kaitiakitanga' as that more accurately reflects tikanga Māori. However, when reviewing contracts it is important to look for "ownership", "owner", and "own" as these are the terms commonly used in respect of IP.	Ownership of Mātauranga may be important because it will carry associated rights and obligations such as the right to use and share the Mātauranga and control how others use and share the Mātauranga. This might also be expressed as the relevant individual, whānau, hapū or iwi acting as kaitiaki of the Mātauranga, rather than being expressed as 'ownership'. It is important to identify the relevant kaitiaki in the contract clearly as many of the protective provisions identified in this table will refer to the kaitiaki of the Mātauranga. It is also important to consider succession issues and whether kaitiaki are named individuals, or a whānau, hapū or iwi group. If the terms own, owner and ownership are used, the relevant kaitiaki can seek to amend the contract to use the terms kaitiaki and kaitiakitanga in respect of Mātauranga.	Mātauranga could be held as kaitiaki by individuals, whānau, hapū or iwi. However, it could also be expressed as "ownership". An example clause is as follows: *Notwithstanding any other provision of this Agreement all Mātauranga recorded, utilised and produced in connection with this Agreement shall remain in the ownership of the individuals and/or tangata whenua groupings from which it is sourced.*

Table of Considerations

MATTER	DESCRIPTION	EXAMPLES
Recognition: how will the kaitiaki and the cultural significance of the Mātauranga be recognised?	Recognition can be achieved by identifying the kaitiaki of the relevant Mātauranga as well as requiring the kaitiaki to be acknowledged everytime the Mātauranga is used or shared. Acknowledgement is discussed under "Use".	The Waitangi Tribunal identified that kaitiaki relationships with their Mātauranga vary, meaning that what constitutes 'proper recognition' will also vary and will need to be determined on a case-by-case basis. It stated that in some cases it will be up to kaitiaki to determine themselves, others will require partnership arrangements and for some, consultation will be sufficient.[5] To exercise an appropriate level of constraint, the Waitangi Tribunal recommend that access remains open unless users plan to exploit Mātauranga for commercial gain. Where users seek to commercialise Mātauranga, they need to either consult with kaitiaki or seek their consent before doing so. The Waitangi Tribunal also suggested that user guidelines could be co-developed with kaitiaki about what uses would infringe on their rights, which is discussed under "Use" below.[6] Recognition could be addressed through a standalone clause that recognises the significance of the Mātauranga to the contract or addressed via use (discussed below
Use: how can the Mātauranga be used or shared and are there restrictions on such use? A key question here is how the kaitiaki would like the Mātauranga protected.	It is important to consider whether there are any restrictions on the use of the Mātauranga (i.e., are there matters for which it can never be used, matters where consent may be required, and matters where it can be used without consent).	**Consultation:** consultation with the kaitiaki is required to use or share Mātauranga. **Consent:** consent required to use or share Mātauranga. **Acknowledgement:** acknowledgement of kaitiaki every time the Mātauranga is used or shared.

Further questions include: • Where does the Mātauranga come from and where is it going? • Have you protected the ability to reuse and prescribed how it can be reused?	When considering the restrictions on use, it's important to consider the benefit of sharing and specifically that the coming together for a common goal pre-empts that some information will be shared. In the spirit of benefit sharing, a key consideration for the kaitiaki is to determine the necessary restrictions that will enable the kaitiaki to carry out kaitiakitanga at the same time as allowing the other contracting party to use and share the Mātauranga flexibly in accordance with the purpose for which the Mātauranga was shared.	*It is important to understand that standard Intellectual Property clauses often include an exclusive, irrecovable and royalty free licence for parties to use newly created Intellectual Property. We reccomend this is carefully considered in the context of Mātauranga and would reccomend specific use clauses are inserted for Mātauranga, rather than relying upon standard clauses. This is also why Mātauranga will need to be defined separately to Intellectual Property.*
Duration: how long will the protection and/or restrictions on use last?	Restrictions on use and the ability to share information can be limited to a period of time, after which the contracting party will be able to share without seeking consent from or needing to consult with the kaitiaki. Given the significance of Mātauranga, we would recommend providing that the protections and restrictions last in perpetuity (forever). This will require 'survival' clauses in the relevant contract. A survival clause ensures that the clause remains enforceable, even when the contract comes to an end. Contracts currently have 'survival' clauses, such as indemnities. It will be important to check those clauses, and to make sure the protections and/or restrictions are included.	Notwithstanding any termination of this Agreement/ Contract, clauses [enter relevant clauses] (and any necessary definitions) will continue independently from the other obligations of the parties and survive termination of this Agreement/Contract.

5. Wai 262, at pp 194-195.

6. Wai 262, pp 540-541.

MATTER	DESCRIPTION	EXAMPLES
Availability and/ or previous use of Mātauranga: what Mātauranga is included (i.e., is this information already publicly available or subject to other forms of protection such as a Plant Variety Right)	Some of the Mātauranga may already be publicly available . If this is the case, it may be able to be freely used. However, a kaitiaki may still seek to limit the use and sharing of Mātauranga in the context of a new contract by ensuring the inclusion of contractual clauses that identify the relevant, publicly available Mātauranga and providing that this is still subject to the protections and restrictions provided for in the contract. Another matter to consider is whether the Mātauranga has been used within other research contracts and what protections/restrictions, if any, are present in those contracts.	Notwithstanding that Mātauranga might not constitute Confidential Information, clauses [enter clause details] still apply, OR The definition of Mātauranga might include a reference to that information being in the public arena, or not.
Benefit sharing: how will the benefits derived from Mātauranga be shared? What is the benefit to the kaitiaki?	The contract should consider how benefits will be shared with kaitiaki of Mātauranga. Considerations include:[7] • kaitiaki determining for themselves what benefits they want to see out of the research; • ensuring that benefits for kaitiaki are the research project's primary goal(s); • developing benefit-sharing agreements and protocols to ensure the benefits to kaitiaki are delivered; and • contracting parties being clear and honest about the expertise they are contributing and what benefits they can help kaitiaki to achieve. Any clauses in respect of benefit sharing should consider commercialisation of Mātauranga.	This will be highly fact dependent, so specific example clauses are difficult.

Confidentiality: how will the confidentiality of Mātauranga be protected?	Most contracts will have a confidentiality clause or clauses to address unauthorised disclosure and use or sharing of information. It is important to ensure that any such clauses capture the disclosure and use or sharing of Mātauranga and/or that there are clauses that address disclosure of Mātauranga.	An example clause is as follows: If any output or report (including training material) is to contain any reference to potential Mātauranga, any party wishing to disclose that Mātauranga must obtain the written prior informed consent of the appropriate iwi, hapū, or whānau contributors and/or holders of the Mātauranga for permission for use and if required the disclosure of the Mātauranga, prior to use or disclosure.
Collection and storage of Mātauranga: how will Mātauranga be collected and stored to ensure its protection? If physical samples are taken, how will the Mātauranga be collected and stored to uphold its cultural integrity and consistency with the tikanga of the kaitiaki? Is there a timelimit on storage and must the samples be returned to the kaitiaki? If returned, in what manner?	Ensuring culturally appropriate collection and storage of Mātauranga will assist in its protection and prevent the misuse and appropriation of Mātauranga. Best practice includes: • co-developing a cultural and intellectual property plan to ensure all consents for access to and use of taonga, including possible commercial exploitation, have been sought, discussed and agreed to in advance; • co-developing protocols for data storage, protection and access; and • co-developing protocols for the sharing of project details with others.	An example clause is as follows: • Each party agrees that they must: • take all requested steps to keep Mātauranga secure from any unauthorised access or use; • abide (subject to legislative requirements regarding official information and records) by any restrictions placed upon its disclosure or use by the appropriate iwi, hapū, or whānau holders of the Mātauranga; • not transfer or use any material containing any Mātauranga outside of New Zealand (excluding digital storage) without the consent of the appropriate iwi hāpu or whānau contributors and/or holders of the Mātauranga; and • not to use or disclose the Mātauranga to any other person without the written permission of the appropriate iwi hapū or whānau contributors and/or holders of the Mātauranga.

7 .Rauika Māngai. (2022), *A Wai 262 Best Practice Guide for Science Partnerships with Kaitiaki for Research involving Taonga* (**Best Practice Guide**), at p 34.

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