



Draft Traditional Knowledge in Biodiscovery Guidelines

Biodiscovery Act 2004

Consultation draft



Acknowledgement of Country

The Department of Environment and Science acknowledges the Country and people of Queensland's First Nations. We pay our respect to Elders, past, present and emerging.

We acknowledge the continuous living culture of First Nations Queenslanders—their diverse languages, customs and traditions, knowledges and systems.

We acknowledge the deep relationship, connection and responsibility to land, sea and sky Country as an integral element of First Nations identity and culture.

This Country is sacred. Everything on the land has meaning and all people are one with it. We acknowledge First Nations peoples' sacred connection as central to culture and being.

First Nations people speak to Country, listen to Country, sing up Country, dance up Country, understand Country and long for Country.

We acknowledge and thank First Nations people for the enduring relationship connecting people, Country and ancestors—an unbreakable bond that safely stewarded and protected the land, waters and sky for thousands of generations.

The Department of Environment and Science is committed to co-developing these guidelines in consultation with First Nations peoples, biodiscovery entities and other stakeholders.

Prepared by: Department of Environment and Science
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The Department of Environment and Science acknowledges Aboriginal peoples and Torres Strait Islander peoples as the Traditional Owners and custodians of the land. We recognise their connection to land, sea and community, and pay our respects to Elders past, present and emerging.

The department is committed to respecting, protecting and promoting human rights, and our obligations under the Human Rights Act 2019.

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1. Introduction

This consultation paper has been prepared to assist the development of the Traditional Knowledge in Biodiscovery Guidelines (the guidelines). Specifically, this paper provides draft guidelines with consultation questions to prompt responses from First Nations people, biodiscovery entities and other stakeholders. Input from these groups will inform and improve the final guidelines document.

Purpose

The purpose of the guidelines is to assist biodiscovery entities meet the requirements of the Traditional Knowledge in Biodiscovery Code of Practice (the code). The code defines the minimum measures to be taken before traditional knowledge can be used for biodiscovery under the *Biodiscovery Act 2004* (the Act). These guidelines provide practical information for engaging effectively with First Nations peoples on traditional knowledge. They also expand on the code with more detailed information on biodiscovery and the use of traditional knowledge. The guidelines should be read in conjunction with the code.

Context

Biodiscovery involves the collection and analysis of native biological material for commercial purposes, such as the development of pharmaceuticals and insecticides. The Act establishes an access and benefit-sharing framework for biodiscovery and was established, in part, to meet the requirements of Article 15 of the Convention on Biological Diversity (the CBD) that relates to access to genetic resources.

A supplementary agreement to the CBD, the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (the Nagoya Protocol)¹ was established in 2014. The Nagoya Protocol provides a framework for the fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge. Access and benefit-sharing under the Nagoya Protocol acknowledges and involves the contributions of Indigenous peoples and local communities.

The Queensland Government has reformed the Act to recognise and protect the traditional knowledge of First Nations peoples and support the growth of the biodiscovery industry in Queensland. By aligning with the Nagoya Protocol, this reform gives biodiscovery entities in Queensland more opportunity to work with overseas partners on research and commercialisation.

The Act's traditional knowledge obligation protects access to, and use of, the traditional knowledge of First Nations peoples in biodiscovery. It requires any entity that wants to use traditional knowledge in biodiscovery to gain the consent of traditional knowledge custodians

¹ Secretariat of the Convention on Biological Diversity, 2011, 'Nagoya protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the convention on biological diversity', <<https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>>

and prevents the further use of this knowledge without consent. It also provides for sharing of the benefits of biodiscovery with First Nations peoples.

Under the Act, traditional knowledge custodians are Aboriginal people or Torres Strait Islanders to whom the traditional knowledge relates. For the purposes of these guidelines, custodians include Aboriginal people or Torres Strait Islanders of a particular clan, family group or individual/s who have inherited traditions, observances, customs or beliefs and who are responsible for speaking for Country about that traditional knowledge. A biodiscovery entity is any entity engaged in biodiscovery research, or commercialisation of native biological material or biodiscovery research products.

The guidelines embody the spirit of the Gurra Gurra Framework, developed by the Department of Environment and Science, which aims to empower First Nations peoples and develop genuine and respectful relationships.

Definitions of terms commonly used in the code and guidelines are listed in Section 4.

How to use the guidelines

The guidelines provide:

- information to assist biodiscovery entities to understand and meet the code's requirements and performance outcomes.
- general principles to support respectful and positive engagements between biodiscovery entities and First Nations peoples.
- advice on best practice in negotiating the use of traditional knowledge and benefit-sharing between biodiscovery entities and First Nations peoples.
- practical considerations and further explanation of concepts, processes and terms in the code.
- links to external resources (see Appendix 1).

The guidelines have been developed for biodiscovery entities, as the organisations that must comply with the Act's traditional knowledge obligation. Biodiscovery entities seeking to go beyond compliance should adopt as many of the actions in the guidelines as possible.

The Department of Environment and Science will provide guidance and assistance for First Nations peoples to help them engage with biodiscovery entities through separate measures.

Consultation question

Is it appropriate for the guidelines to be solely focused on biodiscovery entities, with support for First Nations peoples provided using other mechanisms?

2. Principles for the use of traditional knowledge

The full benefits of biodiscovery will only be achieved if biodiscovery entities and First Nations peoples work in genuine partnership. This means consistently operating in good faith and developing a record of positive, open and inclusive engagement.

Lasting and equitable partnerships between First Nations peoples and biodiscovery entities around the use of traditional knowledge create significant cultural and scientific benefits. For First Nations peoples, biodiscovery projects can be a chance to reconnect with Country and culture and provide economic opportunities. For biodiscovery entities, partnerships can enhance research and commercialisation outcomes.

Traditional knowledge is not static, historical or fixed in time, but rather continuously evolving, adapting and developing. Recognising this evolution will support stronger and more sustainable research partnerships.

The general principles detailed in this section apply to all interactions between biodiscovery entities and First Nations peoples, including:

- engaging with First Nations peoples
- observing cultural protocols
- visiting Country
- using photography, film and recording
- treating confidential information

Specific principles that apply to each code requirement are detailed in Section 3.

Engaging with First Nations peoples

Key principles for engaging with First Nations peoples include:

- **Respect:** Respect for First Nations peoples and culture is essential. It is important to recognise that earning the respect of First Nations peoples requires time and can only occur through genuine engagement.²
- **Integrity and authenticity:** Engaging with integrity and authenticity helps build mutual respect and trust. First Nations people can recognise when people are not authentic in their intent.³

² Moggridge, B 2020, *Indigenous Engagement Protocols for Threatened Species Researchers*, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxdk/tsr-hub-indig-protocols-report_v6.pdf>.

³ Moggridge, B 2020, *Indigenous Engagement Protocols for Threatened Species Researchers*, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxdk/tsr-hub-indig-protocols-report_v6.pdf>.

⁴ Moggridge, B 2020, *Indigenous Engagement Protocols for Threatened Species Researchers*, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxdk/tsr-hub-indig-protocols-report_v6.pdf>.

⁵ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 2020, 'AIATSIS Code of Ethics for Aboriginal and Torres Straits Islander Research', <<https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-code-ethics.pdf>>.

⁶ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 2020, 'AIATSIS Code of Ethics for Aboriginal and Torres Straits Islander Research', <<https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-code-ethics.pdf>>.

- Accountability: Good engagement is built on accountability and transparency. Promising something which cannot be delivered is likely to create problems. If something goes wrong in the biodiscovery project, such as loss of funding or changes in key staff, openness and honesty helps maintain trusting and productive relationships.⁴
- First Nations leadership: Biodiscovery with First Nations peoples must reflect the rights of First Nations peoples to make their own decisions about matters that affect their rights. They must be able to control the development and transmission of their culture and heritage and the use of their lands and resources.⁵
- First Nations priorities: Biodiscovery should respond to priorities determined by First Nations peoples. It should clearly demonstrate intended benefits and outcomes, at a local level and more broadly.⁶
- First Nations perspectives and participation: Research involving First Nations peoples must engage with First Nations perspectives, worldviews and ways of operating. For example:
 - facilitate direct First Nations involvement in the research, including conceptual development and design, gathering data, writing up results, presenting findings, commercialisation and the introduction of products to market
 - engage with First Nations research and literature, both academic and community based
 - understand First Nations standpoints and methodologies
 - represent First Nations authors and voices in the analysis and communication of research results
 - where there are no First Nations researchers involved in a project, consider building research capability in the relevant First Nations community.⁷
- Culturally appropriate communication: Understand that communication styles may be different between communities. As a general guide:
 - listen without interrupting—be attentive and patient while First Nations peoples are talking
 - avoid jargon and do not expect prior knowledge, as First Nations peoples may not be familiar with scientific and technical terms
 - accept that silence is part of First Nations peoples communication—it may mean that people are listening or waiting for community support
 - understand that some Elders may find direct eye contact disrespectful
 - avoid asking too many questions and particularly avoid questions that require a ‘yes’ or ‘no’ answer (some people may say yes or agree to appease researchers)
 - be sensitive to non-verbal communication cues
 - when talking with Elders, it may be helpful to have a younger person attend to help with explanations
 - Ask your contacts if there are any protocols around who you should or should not talk to in the community, including respecting mens’ and womens’ business.

⁷ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 2020, ‘AIATSIS Code of Ethics for Aboriginal and Torres Straits Islander Research’, <<https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-code-ethics.pdf>>.

The *Our Knowledge, Our Way* guide, prepared by the North Australian Indigenous Land and Sea Management Alliance Ltd and CSIRO, provides an overview of the knowledge systems and governance of First Nations peoples and the concept of Country (see Appendix 1).

Observing cultural protocols

“Agencies often have difficulty in engaging and consulting effectively with Traditional Owners. Time constraints and not knowing who to speak to often result in poor outcomes for everyone.”

Bardi Jawi Indigenous Protected Area Management Plan 2013–2023⁸

Cultural protocols are the customs, lore and codes of behaviour of a particular cultural group and ways of conducting business.⁹ They guide appropriate behaviours when engaging with First Nations communities.¹⁰ It is crucial that biodiversity entities recognise and respect the cultural protocols relating to the use of traditional knowledge in all circumstances. This includes ensuring timeframes and processes to accommodate cultural protocols.

Different protocols will apply in different communities due to their unique biological and cultural diversity, but they tend to cover:

- leadership and decision-making processes
- natural resource management systems, knowledge, innovations and practices
- traditional knowledge, including how it is used, recorded and disseminated
- ways of life, including links between culture, spirituality and customary laws
- rights, responsibilities and duties of the community according to customary, national, and international law
- conditions for granting access to lands, resources and knowledge.¹¹

Whilst every community will have cultural protocols, the format of protocols may vary. Some may be written, setting out clear terms and conditions for engaging with First Nations peoples and accessing traditional knowledge.¹² In other communities, protocols may be conveyed verbally or through other methods, such as dance.¹³

⁸ Kimberley Land Council/Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, 2013, 'Bardi Jawi Indigenous Protected Area Management Plan 2013-2023', <<https://static1.squarespace.com/static/59fecece017db2ab70aa1874/t/5a7bdb8471c10b9941e9f4b9/1518066605569/bardi-jawi-healthy-country-plan.pdf>>.

⁹ Moggridge, B 2020, *Indigenous Engagement Protocols for Threatened Species Researchers*, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxwk/tsr-hub-indig-protocols-report_v6.pdf>.

¹⁰ Moggridge, B 2020, *Indigenous Engagement Protocols for Threatened Species Researchers*, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxwk/tsr-hub-indig-protocols-report_v6.pdf>.

¹¹ Federal Ministry for Economic Cooperation and development 2012, 'Biocultural Community Protocols', <http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/BCPs/giz2013-en-biodiv-biocultural-community-protocols.pdf>.

¹² Secretariat of National Aboriginal and Islander Child Care 2021, 'Cultural Protocols', <<https://www.supportingcarers.snaicc.org.au/connecting-to-culture/cultural-protocols/#:~:text=What%20are%20Cultural%20Protocols%3F,a%20way%20of%20conducting%20business>>.

¹³ Woodward, E., Hill, R., Harkness, P. and R. Archer (Eds), 2020, *Our Knowledge Our Way in caring for Country: Indigenous-led approaches to strengthening and sharing our knowledge for land and sea management. Best Practice Guidelines from Australian experiences*, <<https://www.csiro.au/en/research/indigenous-science/Indigenous-knowledge/Our-Knowledge-Our-Way/OKOW-resources>>.

Visiting Country

[If you fail to] walk on Country, to learn names of places: billabongs, creeks, hills, the history of that place, what happened there, names of all the plants and animals ... [the ancestors will say to you] you're not welcome here anymore because you haven't visited me."

Patricia Marrfurra McTaggart, senior Ngen'giwumirri Elder, 2018¹⁴

For First Nations peoples, visiting Country is a fundamental element in establishing trust and building positive relationships. First Nations peoples may feel safer and more able to express themselves on Country, where they have the support of their community. Therefore, biodiscovery entities should allow time for visits to Country in project planning and accept invitations to visit Country. Failing to visit Country may be perceived as disrespectful.

Guests are often formally welcomed to Country through various cultural protocols.¹⁵ These may include a smoking or water ceremony, a corroboree (dancing ceremony) and traditional music. There are certain times when it is not appropriate to visit Country, such as during sorry business (cultural practices and protocols associated with death).

Using photography, film and recording

Always seek permission prior to photographing, filming or recording any First Nations peoples. Ensure permission is granted prior to the publication and dissemination of such material.

Treating confidential information

Some traditional knowledge may be secret, sacred and culturally sensitive. Therefore, it is not appropriate to disseminate or publish any traditional knowledge unless consent is granted. Conditions surrounding intellectual property, confidentiality and the publication of traditional knowledge are best established in a benefit-sharing agreement. This includes custodians' right to privacy in negotiations and deliberations.

Consultation questions

- *Are these principles useful?*
- *Should any other principles be included?*
- *Are there additional resources that should be referenced to support best practice engagement with First Nations communities?*

¹⁴ Woodward, E., Hill, R., Harkness, P. and R. Archer (Eds), 2020, *Our Knowledge Our Way in caring for Country: Indigenous-led approaches to strengthening and sharing our knowledge for land and sea management. Best Practice Guidelines from Australian experiences*, <<https://www.csiro.au/en/research/indigenous-science/Indigenous-knowledge/Our-Knowledge-Our-Way/OKOW-resources>>.

¹⁵ Moggridge, B 2020, *Indigenous Engagement Protocols for Threatened Species Researchers*, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxdk/tsr-hub-indig-protocols-report_v6.pdf>.

3. Requirements

This section expands on the traditional knowledge obligation requirements in the code. It includes detailed information on principles underpinning each requirement and actions to help biodiscovery entities achieve best practice.

Requirement 1: Identify the custodians of traditional knowledge

It is crucial that biodiscovery entities identify the rightful custodians of traditional knowledge before commencing biodiscovery. This is known as finding the ‘right people for right Country’. It is important to understand and respect the customary obligations and protocols of First Nations peoples, which often vary between communities.

Principles

Only custodians can speak for Country

Speaking for Country is a modern term used to describe a traditional cultural practice that has continued for thousands of years. Only certain First Nations peoples can speak for Country depending on specific rights, relationships and responsibilities. For example, a story about a specific place may have only been inherited by a particular clan, family group or individual.

First Nations people of a particular clan, family group or individual/s who have inherited traditions, observances, customs or beliefs and who are responsible for speaking for Country about that traditional knowledge are referred to as custodians in the code. Custodians have the customary right to make decisions regarding traditional knowledge.

Other First Nations people may be aware of particular aspects of traditional knowledge but do not have the customary right to speak for Country or make decisions on the use of traditional knowledge. These individuals are referred to in the code as traditional knowledge holders.

Only custodians can speak for Country. Custodians can advise others about what can and cannot be done, including approving and restricting access to certain parts of Country. As such, custodians are the most appropriate parties to engage with for free, prior and informed consent, and benefit-sharing.

Responsibility may be collective

First Nations peoples often share responsibility for caring for and protecting Country. Therefore, the custodians of traditional knowledge may be a group of people or an organisation, which may not be a registered and/or representative organisation. The custodian may also nominate other individuals or groups as the decision-maker for using traditional knowledge in biodiscovery.

Native Title bodies have obligations

Registered native title bodies corporate have obligations under the *Native Title Act 1993 (Cwlth)* to manage native title and act as an intermediary between third parties and the community in certain areas. Biodiscovery entities should take steps to understand their legal obligations when consulting to identify the custodians of traditional knowledge.

<i>Code requirement</i>	<i>Performance outcome</i>
1. Identify the custodians of traditional knowledge	<ul style="list-style-type: none"> • <u>Performance outcome 1.1</u>: Biodiscovery entities identify the custodians of traditional knowledge in accordance with customary protocols. Biodiscovery entities that are unable to identify the custodians of traditional knowledge that is <u>not</u> publicly available do not use the traditional knowledge for biodiscovery. • <u>Performance outcome 1.2</u>: Custodians of traditional knowledge are provided the opportunity to negotiate benefit-sharing, even if use of the knowledge for biodiscovery has already commenced.

Actions towards best practice

The following actions can help biodiscovery entities achieve best practice in satisfying the code requirement and performance outcomes above. The actions are in addition to the requirements in the code. They do not need to be followed in order and may not all apply in every circumstance:

- Allow enough time in the planning stage for identifying the custodians—the process may be lengthy, particularly if there are multiple custodians or competing claims.
- Consult widely to identify all possible custodians and obligations, including those relating to native title legislation:
 - engage First Nations peoples or groups at various levels and across the custodial governance hierarchy, including individuals, family groups, clans and clan estates, and community leadership
 - consider the geographic distribution of species to be used for biodiscovery and approach registered and/or representative organisations and other groups associated with these areas
 - publicly notify the proposed biodiscovery project and call for nominations of possible custodians.
- Consult online mapping tools, such as:
 - National Native Title Tribunal map of native title determinations in Queensland:
<https://nntt.maps.arcgis.com/apps/webappviewer/index.html?id=a4fab24b605b43bd9049d3a372d79e62>.
 - Map of Aboriginal and Torres Strait Islander Representative Body Areas in Queensland: http://www.nntt.gov.au/Maps/RATSIB_map.pdf.
 - Cultural Heritage Map:
<https://www.datsip.qld.gov.au/resources/datsima/people-communities/cultural-heritage/heritage-bodies/chb-state-map.pdf>.
 - Queensland Globe, which can show cultural heritage boundaries:
<https://qldglobe.information.qld.gov.au/>
 - Atlas of Living Australia: <https://www.ala.org.au/>
 - Biomaps: <https://qldspatial.information.qld.gov.au/biomaps/index.html>.
- Do not become involved in disputes between custodians or custodians and other community members about who can speak for Country—disputes within and between First Nations communities need to be resolved at the community level.
- Allow time for disputes to be resolved and provide support or information as requested to facilitate dispute resolution.

Box 1: Success story—multiple custodians

When traditional knowledge is held by multiple groups, consensus-based alliances may be appropriate. For example, the Northern Australia Aboriginal Kakadu Plum Alliance (NAAKPA) comprises many Aboriginal companies who benefit from Kakadu Plum products sold in the Australian market. NAAKPA was established to protect First Nations communities who hold traditional knowledge about the Kakadu Plum. The alliance empowers First Nations people through the use of traditional knowledge while protecting their intellectual property. NAAKPA is an excellent example of what can be achieved through the cooperation of First Nations communities who share traditional knowledge. More information is on the NAAKPA website: <https://naakpa.com.au/>.

Consultation questions

- *Do the actions above adequately supplement the minimum requirements outlined in the code?*
- *Are there additional measures an entity could take to achieve best practice?*
- *Do any of the suggested actions require further explanation or guidance?*
- *Are there more resources that could be referenced to support best practice in identifying custodians?*
- *Are there other case studies that demonstrate best practice in identifying custodians?*

Requirement 2: Obtain free, prior and informed consent

Under the code, First Nations peoples have the right to provide or withhold consent to the use of their traditional knowledge in biodiscovery. Biodiscovery entities are required to gain the free, prior and informed consent (FPIC) of traditional knowledge custodians.

FPIC is a specific right under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP article 19)¹⁶. It protects the rights of Indigenous peoples to participate in decision-making processes that affect them. The Nagoya Protocol extends these rights to cover the use of traditional knowledge about genetic resources. It states that traditional knowledge can only be used with FPIC and ensures that any benefits from the use of the knowledge are shared in a fair and equitable way.

Principles

Consent requires trust

Gaining meaningful consent requires an FPIC approach based on mutual understanding and open, ongoing and equitable relationships between stakeholders. Recognising community protocols and respectful engagement are key to building trust.

First Nations peoples are entitled to make independent decisions in a manner suitable to their cultural needs, free from intimidation, time constraints or coercion. Even if a best-practice FPIC process is followed, custodians may still withhold consent. This may mean that the biodiscovery project cannot proceed.

Consent is not fixed

FPIC is not a one-off step to gain consent. It is an ongoing process where consent decisions can be revisited at agreed points, for example when there are significant changes in the biodiscovery project. Biodiscovery entities should be prepared to adapt their approach to meet the needs of custodians.

FPIC needs to be supported

Taking extra steps, beyond the minimum requirements of the code, can deliver advantages. Supporting the custodians and their local community to engage and make decisions can save time and boost a biodiscovery entity's social licence. Integrating and recognising First Nations peoples' scientific knowledge can improve research and commercialisation outcomes, to the benefit of biodiscovery entities and communities.

<i>Code requirement</i>	<i>Performance outcome</i>
2. Obtain free, prior and informed consent (FPIC)	<ul style="list-style-type: none">• <u>Performance outcome 2.1</u>: Custodians are not pressured, manipulated, intimidated, coerced or unduly influenced into giving their consent and are free to decide consent.• <u>Performance outcome 2.2</u>: Consent is obtained before using traditional knowledge for biodiscovery.• <u>Performance outcome 2.3</u>: All relevant information is provided in a format that custodians can understand and use.

¹⁶United Nations, 2007, 'United Nations declaration on the rights of Indigenous peoples', <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

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- Performance outcome 2.4: Custodians grant approval to use traditional knowledge for biodiscovery.
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Actions towards best practice

The following actions can help biodiscovery entities achieve best practice in satisfying the code requirement and performance outcomes above. The actions are in addition to the requirements in the code. They do not need to be followed in order and may not all apply in every circumstance:

- Contact custodians and their community as early as possible—start FPIC discussions in parallel with scoping and development of the biodiscovery, allowing the custodians to provide input into biodiscovery project design.
- Plan and allow time for the consent process, which may take longer in communities with less established protocols and governance structures, or where there are many custodians (see Box 2 below).
- Clearly articulate and explain any time-constraints for the biodiscovery and how they can be accommodated in the decision-making process.
- Confirm the timeline and budget for the FPIC process with the custodians and document them in an agreed format, ensuring the custodians' requirements are also discussed—the *Our Knowledge, Our Way* guidelines present an example of a timeline for FPIC.
- Support the custodians to make decisions according to their customary protocols and ensure protocols are included in biodiscovery planning:
 - determine the community decision-making process—this may be captured in a community protocol or it may require consultation.
 - if a community does not have developed protocols, consider supporting them to develop protocols as part of benefit-sharing.
 - respect customary protocols for running meetings and discussions—for example, who will speak and for how long and how differences will be resolved.
 - agree on the format to formalise consent—for example, this may be through a written contractual agreement, verbal or non-verbal indications (such as voting with hands), or ritual or ceremonial means.
 - confirm that custodians and community members understand the decision-making process.
- Establish a feedback and complaints mechanism for custodians, which should address concerns promptly and fairly, using a transparent and culturally appropriate process that is readily accessible to stakeholders and avoids costs to custodians (see the FAO FPIC guidelines¹⁷ for further advice on how to establish a feedback and complaints mechanism).

¹⁷ Food and Agricultural Organisation of the United Nations, 2016, 'Free, Prior and Informed Consent: An indigenous peoples right and a good practice for local communities – Manual for project practitioners', <<http://www.fao.org/3/a-i6190e.pdf>>.

Box 2: Factors that can impact FPIC timeframe, resources and complexity

- Scale and stage of the proposed biodiscovery project (e.g., early-stage research or full-scale commercialisation).
- Distribution and extent of the species relating to the traditional knowledge.
- Number and size of First Nations communities that could be custodians and the relationship between these groups.
- Expected impact on the First Nations community's rights, resources, lands and territories.
- Past grievances or conflicts related to misuse of traditional knowledge.
- Characteristics of affected First Nations communities, such as language, culture, native title status, level of community protocol development, history with research and commercial entities, and levels of education.
- Availability of support from NGOs or others to assist communities and build capacity.
- Level of First Nations community organisation, including relations, power structures, governance arrangements, representative bodies, and documented policies and processes.
- Biodiscovery entity's ability to engage and negotiate with First Nations communities, including cultural capability and resourcing to support capacity building.
- Whether the biodiscovery entity has a pre-existing relationship with the custodians or relevant First Nations community.

Consultation questions

- *Do the actions above adequately supplement the minimum requirements outlined in the code?*
- *Are there additional measures an entity could take to achieve best practice?*
- *Do any of the suggested actions require further explanation or guidance?*
- *Are there more resources that could be referenced to support best practice in gaining FPIC?*
- *Are there case studies that demonstrate best practice in gaining FPIC?*

Requirement 3: Benefit-sharing on mutually agreed terms

First Nations peoples rightfully expect that biodiscovery using their traditional knowledge will benefit them in a meaningful way. Biodiscovery entities using traditional knowledge must have a benefit-sharing agreement with custodians on mutually agreed terms.

Mutually Agreed Terms are a fundamental inclusion of the Nagoya Protocol. Under the protocol, benefits from the utilisation of genetic resources and associated traditional knowledge should be shared fairly and equitably, based on mutually agreed terms.

Principles

Agreements should be fair and equitable

Negotiating mutually agreed terms is about being open to the position of the custodians and co-designing the biodiscovery to meet their needs. Benefit-sharing should be fair and equitable within and between relevant groups, and take account of community-level procedures, customary protocols and the local context.

Negotiate from a place of trust

Mutually agreed terms should be negotiated in a way that builds trusting relationships and supports the confidence of the custodians. A successful agreement and benefit-sharing depends on both parties negotiating in good faith. Negotiating mutually agreed terms in parallel with the FPIC process is often helpful.

Look beyond the code

Biodiscovery entities and custodians are not limited by the minimum requirements in the code when establishing a benefit-sharing agreement. Merely satisfying the code may not result in the best possible outcomes for either party.

Biodiscovery is uncertain and dynamic

Biodiscovery benefit-sharing agreements are often negotiated in a more uncertain environment than other agreements because they are negotiated before the biodiscovery starts, when the outcomes of biodiscovery projects can be highly uncertain. To manage this, discuss possible development or commercialisation scenarios. It may help for agreements to have clear touch points at key commercialisation or research milestones when consent and benefit-sharing arrangements must be reconfirmed.

There may be a significant time lag between access to traditional knowledge and identification of a clear commercialisation option. Ensure the custodians understand that the benefits of commercialisation may take considerable time and that profits do not arise quickly. The possible economic outcomes of the biodiscovery should not be inflated.

It is also possible that the traditional knowledge being used may be very different to the final commercialised product. It is important to be able to trace the link between the traditional knowledge and the product.

Agreement complexity should reflect the project

The complexity of benefit-sharing agreements may vary to suit the stage and complexity of the biodiscovery project. In the early stages, agreements may be simple and informal. Biodiscovery projects with more likely or immediate commercial outcomes may need more detailed and formal agreements.

As the biodiscovery project develops over time, the mutually agreed terms should be renegotiated and updated.

Consider all possible benefits

Benefit-sharing need not be limited to financial measures. For many communities, the non-financial benefits may be just as significant, if not more significant, as any royalties. Non-financial benefits can also aid the development of genuine partnerships between biodiscovery entities and First Nations communities. Annex 1 of the Nagoya Protocol (see Appendix 1) gives examples of monetary and non-monetary benefits.

Consider benefits that strengthen the First Nations community, such as participation in research, technology transfer and training. It is also important to consider short, medium and long-term benefits, ensuring custodians understand the likelihood of various benefits.

Support dispute resolution

Disputes may occur between the biodiscovery entity and the custodians, within First Nations groups, or between different First Nations groups. Well-managed disputes can have positive outcomes for partnerships, while poorly managed disputes can stop a biodiscovery project. Resolving disputes requires all parties to act in good faith and demonstrate patience.

Using alternative dispute resolution processes (which involve an independent person helping resolve the dispute without going to court) may help maintain positive relationships. Mediation and conciliation use a professional to help the parties identify issues, develop options, consider alternatives and try to reach an agreement. These processes are likely to be more flexible and culturally open than law courts and allow First Nations peoples to voice their interests and concerns in a safe space.¹⁸ Appendix 1 outlines services in Queensland designed to address disputes out of court, in a way tailored to First Nations peoples.

<i>Code requirement</i>	<i>Performance outcome</i>
3. Establish a benefit-sharing agreement with mutually agreed terms	<ul style="list-style-type: none">• <u>Performance outcome 3</u>: The biodiscovery entity and custodians agree on terms for fair and equitable benefit-sharing from the use of traditional knowledge.

Actions towards best practice

The following actions can help biodiscovery entities achieve best practice in satisfying the code requirement and performance outcomes above. The actions are in addition to the requirements in the code. They do not need to be followed in order and may not all apply in every circumstance:

- Agree at the outset on the process, location and timeframe for negotiating, including expected timing for the process and commitments by both parties to timely and successful negotiations.
 - Use simple, clear and easily interpreted materials and contracts as the basis for negotiations—mutually agreed terms should be as simple and concise as possible, and the complexity of the agreement should suit the stage and complexity of the biodiscovery (see the templates in Box 3).
-

- The benefit-sharing agreement should:
 - define terms in clear and specific language.
 - clearly state the obligations that apply to each party.
 - specify the consequences and actions if a party fails to meet its obligations.
 - identify opportunities for the custodian and their community to participate in research and commercialisation.
 - clarify how the agreement or biodiscovery project may change the future use of the traditional knowledge by the custodian and their community.
 - establish a dispute resolution process that emphasises informal and collaborative approaches in the first instance, such as discussions between the parties and mediation.
 - establish transparent systems to monitor and track the use of the traditional knowledge and the sharing of benefits.
- Discuss different commercialisation scenarios with the custodian, and how they may impact the agreement, benefit-sharing and the obligations of each party.
- Consider non-financial benefits such as community capacity-building and participation in biodiscovery (Annex 1 of the Nagoya Protocol provides a detailed list of monetary and non-monetary benefits).
- Agree on a process for amending the agreement should the project or benefits change.
- Tailor the agreement’s format to the needs of the community—First Nations communities may prefer other forms (such as audio files) over written agreements, which can be accommodated under modern agreements (such as e-agreements).
- Use informal dispute resolution processes where possible—biodiscovery entities should:
 - encourage the use of informal processes and allow sufficient time for resolution.
 - work through issues in partnership before seeking legal resolution.
 - consider culturally appropriate ways to support dispute resolution (such as meeting on Country).¹⁹
 - consider resourcing an appropriate independent person or body to resolve the dispute through mediation, conciliation or arbitration, without going to court (see Appendix 1).²⁰
 - avoid becoming involved in disputes between First Nations groups.
- Consider assisting custodians with access to independent legal advice, if requested.

¹⁸ Australian Heritage Commission, 2000, ‘Ask First – A guide to respecting Indigenous heritage places and values’,

<https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ask_first.pdf>.

¹⁹ Australian Heritage Commission, 2000, ‘Ask First – A guide to respecting Indigenous heritage places and values’,

<https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ask_first.pdf>.

²⁰ Australian Heritage Commission, 2000, ‘Ask First – A guide to respecting Indigenous heritage places and values’,

<https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ask_first.pdf>.

Box 3: Templates for benefit-sharing agreements

The ABS Contract Tool: Version 2.0	< http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/Contract_Tool/Contract_Tool_-_ABS-I_-_201909.pdf >
Toolbox for drafting mutually agreed terms (useful for simple and complex agreements)	< https://biodiversity.scnat.ch/abs/toolbox >

Consultation questions

- *Do the actions above adequately supplement the minimum requirements outlined in the code?*
- *Are there additional measures an entity could take to achieve best practice?*
- *Do any of the suggested actions require further explanation or guidance?*
- *Are there example projects or contractual templates that could be referenced to support best practice in benefit-sharing?*
- *Are there case studies that demonstrate best practice in benefit-sharing?*

Requirement 4: Publicly available traditional knowledge

Traditional knowledge may be available to the public in many ways, such as journal articles, books, artwork, museum or gallery displays, conference presentations, talks and songs. Much of this publicly available traditional knowledge has been used by researchers without consent. For example, some studies and books contain the medicinal qualities of Australian native plant species without referencing the custodians of the knowledge. Some scientists and researchers assume that traditional knowledge can be freely accessed, used or taken.²¹

Principles

The traditional knowledge obligation still applies

The Act's traditional knowledge obligation also applies to knowledge that is publicly available. This is to prevent the use of traditional knowledge without agreement and recognises the harm caused by making knowledge publicly available without consent and benefit-sharing. When the custodians of traditional knowledge cannot be identified, biodiscovery entities may use publicly available traditional knowledge without the agreement of a custodian, provided they comply with the requirements in the code.

Using publicly available traditional knowledge without agreement carries risks

In the absence of an agreement with custodians, the traditional knowledge may be inaccurate and cannot be verified. Biodiscovery may also be interrupted or halted if a custodian is identified later. Without an agreement, biodiscovery entities will be unable to demonstrate compliance with the Nagoya Protocol, which could limit opportunities to collaborate or sell products overseas. Uncertainty about intellectual property rights may also make it harder to secure investment and sponsors.

Code requirement	Performance Outcome
4. Where possible, obtain consent and a benefit-sharing agreement prior to the use of publicly available traditional knowledge	<ul style="list-style-type: none">• Performance outcome 4.1: Publicly available traditional knowledge is used for biodiscovery only after: reasonable and practical measures are taken to identify the custodians of the knowledge; FPIC is obtained; and terms are agreed for its use.• Performance outcome 4.2: Where reasonable and practical measures have been taken but the custodians of the publicly available traditional knowledge cannot be identified, biodiscovery entities direct a fair portion of the proceeds of commercialisation to build the capacity of First Nations communities to engage in biodiscovery.

²¹Okediji, R 2018, *Traditional knowledge and the public domain*, Centre for International Governance Innovation Papers.

Actions towards best practice

The following actions can help biodiscovery entities achieve best practice in satisfying the code requirement and performance outcomes above. The actions are in addition to the requirements in the code. They do not need to be followed in order and may not all apply in every circumstance:

- Consider whether publicly available information may be traditional knowledge, even if it is not explicitly disclosed as such—if in doubt, inquire further to determine whether it is likely to be traditional knowledge.
- Try to identify the community that holds the traditional knowledge, even if it is not provided in the source documents, with the help of:
 - geographical location of the information source
 - geographical distribution of any species referred to
 - broad public notification.
- Be aware that a custodian may not have given their consent to the publicly available traditional knowledge or may not have agreed to subsequent uses of the knowledge.
- Understand that the custodian may refuse consent
- Remain open to benefit-sharing as if the information had not been publicly available.
- Acknowledge the use of traditional knowledge in any relevant works or publications, even when a custodian cannot be identified.

When the custodian cannot be identified

The following actions apply when a biodiscovery entity uses publicly available traditional knowledge but is unable to locate the custodian of the knowledge:

- Retain a set percentage of the commercialisation receipts received from biodiscovery each year—as set out in Appendix 1 of the code.
- Use these funds to build the capacity of First Nations peoples to use, or negotiate the use of, their traditional knowledge for the benefit of their communities.
- Direct these funds to:
 - projects identified by the Queensland Government
 - projects identified by the biodiscovery entity and endorsed by the Department of Environment and Science.
- Consider the types of projects a biodiscovery entity may finance (if supported by the community), which may include:
 - developing and documenting community protocols.
 - training and educating First Nations communities on:
 - engaging and negotiating with researchers and commercial entities
 - participating in research projects
 - managing intellectual property.
 - developing or refining model contracts for access and benefit-sharing.
 - identifying the custodians of publicly available traditional knowledge and publishing this information on a public database that respects the cultural protocols of the custodians.
 - assisting the work of entities such as the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

Consultation questions

- *Do the actions above adequately supplement the minimum requirements outlined in the code?*
- *Are there additional measures an entity could take to achieve best practice?*
- *Do any of the suggested actions require further explanation or guidance?*
- *What additional guidance would help biodiscovery entities develop and invest in capacity-building projects for First Nations peoples?*
- *What capacity-building projects would you recommend as examples for biodiscovery entities?*

4. Definitions

Biodiscovery	Under the <i>Biodiscovery Act 2004</i> , biodiscovery includes biodiscovery research and the commercialisation of native biological material or a product of biodiscovery research.
Biodiscovery entity	Under the <i>Biodiscovery Act 2004</i> , a biodiscovery entity is an entity that engages in biodiscovery.
Custodians of traditional knowledge	<p>Under the <i>Biodiscovery Act 2004</i>, custodians of traditional knowledge are the Aboriginal people or Torres Strait Islanders to whom the traditional knowledge relates.</p> <p>For the purposes of this code, custodians include Aboriginal people or Torres Strait Islanders of a particular clan, family group or individual/s who have inherited traditions, observances, customs or beliefs and who are responsible for speaking for Country about that traditional knowledge.</p> <p>They include decision-makers nominated by a custodian.</p>
Customary rights	Rights established under customary laws that define custodianship, responsibilities or other obligations over traditional knowledge and the preservation, use and passing on of that knowledge to future generations. These rights are not limited to, but include rights that focus on how traditional knowledge is managed.
First Nations peoples	A collective term for Aboriginal people and Torres Strait Islanders. Under the <i>Acts Interpretation Act 1954</i> , Aboriginal people are people of the Aboriginal race of Australia, and a Torres Strait Islander is a person who is a descendant of an Indigenous inhabitant of the Torres Strait Islands.
Mutually agreed terms	Terms agreed between a biodiscovery entity and a custodian, which form the basis of a benefit-sharing agreement. Under the agreement, a custodian confers upon a biodiscovery entity the right to use their traditional knowledge for biodiscovery with agreed terms for its use.
Nagoya Protocol	<i>Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity</i> (also known as the Nagoya Protocol on Access and Benefit Sharing).
Native biological material	Under the <i>Biodiscovery Act 2004</i> , native biological material is: <ul style="list-style-type: none">• a native biological resource, or• a substance sourced, whether naturally or artificially, from a native biological resource, or• soil containing a native biological resource.

Publicly available	Information that has been published, broadcast or otherwise made accessible for public consumption or is accessible to the public on request.
Registered and/or representative organisation	May include but is not limited to a: <ul style="list-style-type: none">• registered native title body corporate• representative Aboriginal or Torres Strait Islander body• prescribed body corporate• officially identified party or exclusive possession native title holder (such as native title body or cultural heritage body)• representative body (such as a non-government organisation, council or corporation)• community interface panel• non-exclusive possession native title holder (through their representative body)• registered native title claimant• previous native title claimant or holder.
Registered native title body corporate	A prescribed body corporate whose name and address are registered on the National Native Title Register under paragraph 193(2)(e) or subsection 193(4); or a body that is recognised under section 203AD <i>Native Title Act (Cwlth) 1993</i> .
Representative Aboriginal or Torres Strait Islander body	A body that is recognised under section 203AD <i>Native Title Act (Cwlth) 1993</i> .
Traditional knowledge	<p>Under the <i>Biodiscovery Act 2004</i>, traditional knowledge means information based on Aboriginal tradition or Island custom.</p> <p>Under the <i>Acts Interpretation Act 1954</i>, Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.</p> <p>Under the <i>Acts Interpretation Act 1954</i>, Island custom means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.</p>
Traditional knowledge holder	A First Nations person who is aware of particular aspects of traditional knowledge but is not a custodian.
Traditional knowledge obligation	Under the <i>Biodiscovery Act 2004</i> , a person engaging in biodiscovery or preparing to engage in biodiscovery must take all reasonable and practical measures to ensure the person does not use the traditional knowledge for biodiscovery other than under an agreement with the custodians of the knowledge.

Appendix 1—Additional resources

Below are links to useful resources for meeting each requirement of the Act’s traditional knowledge obligation.

Requirement 1: Identify the custodians of traditional knowledge

Resource	Access link
Moggridge, B 2020, <i>Indigenous Engagement Protocols for Threatened Species Researchers</i>	< https://www.nespthreatenedspecies.edu.au/media/kwfpdxdk/tsr-hub-indig-protocols-report_v6.pdf >
Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 2020, ‘AIATSIS Code of Ethics for Aboriginal and Torres Straits Islander Research’	< https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-code-ethics.pdf >
National Native Title Tribunal, ‘Visualising native title matters’	< http://www.nntt.gov.au/assistance/Geospatial/Pages/NTV.aspx >
National Native Title Tribunal 2021, ‘Representative Aboriginal/Torres Strait Islander Body Areas’	< http://www.nntt.gov.au/Maps/RATSIB_map.pdf >
Office of the Registrar of Indigenous Corporations, ‘Dispute resolution’	< https://www.oric.gov.au/run-corporation/dispute-resolution >
Office of the Registrar of Indigenous Corporations, ‘Dispute resolution factsheet’	< https://www.oric.gov.au/sites/default/files/documents/09_2017/17_0079_Dispute-resolution_web-A4.pdf >
Woodward, E., Hill, R., Harkness, P. and R. Archer (Eds), 2020, <i>Our Knowledge Our Way in caring for Country: Indigenous-led approaches to strengthening and sharing our knowledge for land and sea management. Best Practice Guidelines from Australian experiences</i>	< https://www.csiro.au/en/research/indigenous-science/Indigenous-knowledge/Our-Knowledge-Our-Way/OKOW-resources >
Indigenous Governance Toolkit, ‘Dispute resolution principles and skills’	< https://toolkit.aigi.com.au/toolkit/8-2-how-to-deal-with-disputes-and-complaints >

Requirement 2: Obtain free, prior and informed consent (FPIC)

Resource	Access link
Food and Agricultural Organisation of the United Nations, 2016, ‘Free, Prior and Informed Consent: An indigenous peoples right and a good practice for local communities – Manual for project practitioners’	< http://www.fao.org/3/a-i6190e.pdf >.
Ninti One, ‘What is Free, prior and informed consent? briefing paper’	< https://www.nintione.com.au/resource/BP7_Free-Prior-Informed-Consent.pdf >
Rainforest Alliance 2020, ‘Free, Prior and Informed Consent (FPIC) Processes’	< https://www.rainforest-alliance.org/business/wp-content/uploads/2020/06/Annex-11-Free-

Resource	Access link
	Prior-And-Informed-Consent-FPIC-Processes.pdf

Requirement 3: Benefit-sharing on mutually agreed terms

Resource	Access link
The ABS Capacity Development Initiative 2019, 'The ABS contract tool: Version 2.0'	https://absch.cbd.int/api/v2013/document/s/B1C6A46D-5EC6-E5BA-45A2-2F3E406DCB49/attachments/ABS_Contract-Tool_EN_ANSICHT.pdf
International Institute for Sustainable Development (IISD) 2007, 'ABS Management Tool: Best Practice Standard and Handbook for Implementing Genetic Resource Access and Benefit-Sharing Activities (ABS)'	https://www.iisd.org/system/files/publications/abs_mt.pdf
What Can We Do? A Conflict Analysis Tool, Indigenous Governance Toolkit (AIGI)	https://toolkit.aigi.com.au/wp-content/uploads/2012/04/What-can-we-doConflict-analysis-tool_final.pdf
Australian Institute of Aboriginal and Torres Strait Islander Studies 2006, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation'	https://aiatsis.gov.au/sites/default/files/research_pub/bauman-2006-ifamp-teport_2.pdf
Australian Mediation Association 2021, 'Indigenous Dispute Resolution'	https://ama.asn.au/indigenous-dispute-resolution/
Australian Disputes Centre 2015, 'First Nations' Mediation Panel'	https://www.disputescentre.com.au/first-nations-mediation-panel-helps-business-and-communities/
Secretariat of the Convention on Biological Diversity, 2011, 'Nagoya protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the convention on biological diversity'	https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf (See annex 1 for list of monetary and non-monetary benefits)
Australian Heritage Commission, 2000, 'Ask First – A guide to respecting Indigenous heritage places and values'	https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ask_first.pdf

Requirement 4: Publicly available traditional knowledge

Resource	Link
IP Australia 2020, 'Indigenous Knowledge Project (IP Australia)', https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/indigenous-knowledge/indigenous-knowledge-project .	https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/indigenous-knowledge/indigenous-knowledge-project

Resource	Link
Orr M, Kenny P, Gorey IN, Dixon T, Mir A, Cox E, Wilson J. 2009. <i>Aboriginal Knowledge and Intellectual Property Protocol: Community Guide</i> . 2nd Edition. Ninti One Limited, Alice Springs.	http://www.nintione.com.au/resource/Aboriginal-Knowledge-and-IP-Protocol-Community-Guide-booklet-A5.pdf?