



Traditional Knowledge Guidelines

Biodiscovery Act 2004



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 has co-developed these guidelines in consultation with First Nations peoples, biodiscovery entities and other stakeholders.

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1. Introduction

Purpose

These guidelines aim to assist biodiscovery entities to meet the requirements of the [Traditional Knowledge 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 biodiscovery entities to engage effectively and in a culturally appropriate manner with First Nations peoples when seeking to use their 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.

Given this purpose, the primary audience for these guidelines is biodiscovery entities. Additional resources to assist First Nations peoples to participate in and/or initiate biodiscovery projects, and to assist First Nations peoples and biodiscovery entities to collaborate are also available on the Department of Environment website.

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 reformed the Act in September 2020 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 and prevents the further use of this knowledge without consent. It also provides for sharing of the benefits of biodiscovery with First Nations peoples.

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>>

Under the Act, traditional knowledge custodians are Aboriginal people or Torres Strait Islanders to whom the traditional knowledge relates. The code outlines a process for identifying the custodians with authority to speak for Country about the traditional knowledge and allows for custodians to request to be engaged through a nominated entity.

A biodiscovery entity is any entity engaged in biodiscovery research, or the commercialisation of native biological material or biodiscovery research products. Where First Nations peoples have a significant role in biodiscovery, they may be a biodiscovery entity.

The guidelines embody the spirit of the Gurra Gurra Framework², 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 5.

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.

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.

Biodiscovery entities should not expect to learn about traditional knowledge prior to establishing a relationship built on mutual trust and respect, which may take some time to achieve. 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. Locally initiated and driven projects by custodians may deliver more culturally and economically relevant outcomes for communities.

² <https://www.des.qld.gov.au/_data/assets/pdf_file/0010/202033/the-gurra-gurra-framework.pdf>

For biodiscovery entities, partnerships can enhance research and commercialisation outcomes. When an entity is trusted, it is more likely that the same or other First Nations peoples may initiate discussions with the entity about ideas for new biodiscovery opportunities.

Traditional knowledge is not static, historic 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, Country 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.³
- **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.⁴
- **Accountability:** Good engagement is built on accountability and transparency. Promising something which cannot be delivered is likely to create problems. If something changes in the biodiscovery project, such as loss of funding or changes in key staff, openness and honesty helps maintain trusting and productive relationships.⁵
- **Resourcing:** The resources available to First Nations communities may vary widely. Some custodians and their communities will require financial or logistical support to make decisions based on customary protocols on the proposed biodiscovery and negotiate benefit-sharing agreements.
- **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.⁶

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

- 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.⁷
- 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.⁸
- 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 people’s 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
 - seek assistance from a cultural broker to improve communication and an understanding of key processes
 - 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.

The *Our Knowledge, Our Way*⁹ 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.

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>>.

⁸ 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>>.

⁹ 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>>.

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 2013–2023¹⁰

Cultural protocols are the customs, lore and codes of behaviour of a particular cultural group and ways of conducting business¹¹. They guide appropriate behaviours when engaging with First Nations communities¹². It is crucial that biodiscovery 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 knowledge¹³.

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.¹⁴ In other communities, protocols may be conveyed verbally or through other methods, such as dance¹⁵.

It is important to discuss cultural protocols early in a relationship, as they will underpin all engagements between a biodiscovery entity and First Nations community.

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.”

¹⁰ 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>>.

¹¹ Moggridge, B 2020, Indigenous Engagement Protocols for Threatened Species Researchers, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxwk/tsr-hub-indig-protocols-report_v6.pdf>.

¹² Moggridge, B 2020, Indigenous Engagement Protocols for Threatened Species Researchers, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxwk/tsr-hub-indig-protocols-report_v6.pdf>.

¹³ 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>.

¹⁴ Secretariat of National Aboriginal and Islander Child Care 2021, ‘Cultural Protocols’, <<https://www.supportingcarers.snaicc.org.au/connecting-to-culture/cultural-protocols/>>.

¹⁵ 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>>.

Patricia Marrfurra McTaggart, senior Ngen'giwumirri Elder, 2018¹⁶

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 protocols¹⁷. 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). At those times, it may not be possible for custodians to meet or hold discussions off Country either.

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, particularly if it relates to a deceased individual.

Treating culturally restricted and confidential information

Some traditional knowledge may be culturally restricted (such as secret or sacred knowledge, or information which has a specific restriction such as gender specific knowledge, sacred sites and objects) which is subject to conditions under customary law. It is not appropriate to disseminate or publish any traditional knowledge unless consent for that dissemination or publication is granted. Conditions surrounding this information, intellectual property, confidentiality and the attribution, dissemination or publication of traditional knowledge are best established in a benefit-sharing agreement. This includes custodians' right to privacy in negotiations and deliberations.

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.

Where a custodian nominates an entity to act as a representative or agent on their behalf, a biodiscovery entity is to engage with the nominated entity under their authority.

¹⁶ 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>>.

¹⁷ Moggridge, B 2020, Indigenous Engagement Protocols for Threatened Species Researchers, <https://www.nespthreatenedspecies.edu.au/media/kwfpdxdk/tsr-hub-indig-protocols-report_v6.pdf>.

3.1. Requirement 1: Identify the custodians of traditional knowledge

Table 1 below outlines the minimum requirements to be met under the code for identifying the custodians of traditional knowledge. It is crucial that biodiscovery entities identify the custodians with the authority to speak for Country about 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.

Table 1 – Minimum requirements to be met under the code for identifying 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">Performance outcome 1.1: The custodians of traditional knowledge with authority to speak for Country about that knowledge are identified in accordance with customary protocols. Traditional knowledge cannot be used for biodiscovery if the custodians of traditional knowledge that is not publicly accessible cannot be identified, or if agreement on the custodianship of traditional knowledge cannot be reached between multiple custodians.

Principles

Only certain 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 customary 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 and make decisions on the use of traditional knowledge. These individuals are referred to in the code as traditional knowledge holders. 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 FPIC, and benefit-sharing.

Responsibility may be collective

First Nations peoples often share responsibility for caring for and protecting Country. Therefore, decision-making about the use of traditional knowledge needs to respect and

follow each group's customary governance, and cultural protocols. This usually requires collective decision-making by key people, including Elders.¹⁸

Biodiscovery entities should take care to recognise and differentiate between individual, group and collective rights, responsibilities and ownership during all stages of consent, negotiation and benefit-sharing.¹⁹

Nominated entities

Custodians may nominate an entity (the nominated entity) to enter into an agreement with a biodiscovery entity under section 9B of the *Biodiscovery Act 2004* on the custodians' behalf.

A nominated entity's authorisation to act on the behalf of a custodian only extends to the rights given to the nominated entity by the custodians. Biodiscovery entities should satisfy themselves that the nominated entity has been properly appointed by the custodian and is consistently acting in accordance with their authorisation. This is likely to be of particular importance in obtaining the custodians' FPIC.

Biodiscovery entities should also take measures to understand how contracting laws apply to any agreements made with a nominated entity on the behalf of a custodian.

Native Title bodies and registered and/or representative organisations

Registered native title bodies corporate (RNTBCs) have obligations under the *Native Title Act 1993* (Cth) to manage native title and act as an intermediary between third parties and the community in certain areas. These responsibilities do not extend to traditional knowledge under the Act, which is not a native title right or interest.

RNTBCs and other registered and/or representative groups may be able to provide information relating to the identity of a custodian or how to identify a custodian with customary authority to speak for Country about the traditional knowledge. Despite their legal status, RNTBCs should not be assumed to have the rights of a custodian. It is important to consult widely with a variety of individuals, groups and organisations when seeking to identify custodians with the authority to speak for Country about the knowledge.

A custodian may request to be engaged through an RNTBC or another registered and/or representative organisation as their nominated entity. The ability for an organisation to act as a nominated entity will depend on the compatibility of this role with its functions, whether statutory or otherwise. Note that when acting as a nominated entity, RNTBCs are doing so outside their responsibilities under the *Native Title Act 1993* (Cth).

Actions towards best practice

The following actions can help biodiscovery entities achieve best practice in satisfying the code requirements and performance outcomes above. The actions are in addition to the

¹⁸ 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>>.

¹⁹ 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>>.

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. It may not be appropriate to designate an expected completion date or timeline.
- Consult widely to identify all possible custodians and obligations:
 - engage First Nations peoples at various levels and across the custodial governance hierarchy, including individuals, family groups, clans and community leadership.
 - consider the geographic distribution of species to be used for biodiscovery and approach registered and/or representative organisations associated within these areas.
 - in some cases, an Elders Council or law bosses might be the appropriate authority but access to such bodies may require a community contact²⁰.
 - publicly notify the proposed biodiscovery project and call for nominations of possible custodians.
 - consider consulting or engaging a historian or anthropologist who has an understanding of the traditional knowledge of interest. RNTBCs may be able to identify anthropologists and other experts.
- Utilise online mapping tools and databases to help identify which registered and/or representative organisations are located within the geographic area of the species to be used for biodiscovery (see Box 1 below). Cultural mapping consultants may also be able to assist with identifying custodians.
- Support, but do not become involved in disputes between custodians or custodians and other community members about who can speak and make decisions 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 easy to understand information to facilitate dispute resolution
 - be prepared to provide other support measures, such as funding or logistical support for First Nations peoples to meet and seek independent advice.
- If engaging through a nominated entity, consistently check the nominated entity is acting in accordance with their authority from the custodians. To understand the terms of the authorisation, a biodiscovery entity may request to see a formal agreement addressing matters such as:
 - the functions to be performed by the nominated entity in relation to the traditional knowledge
 - the nature of any consultation with, or other role for, the custodians of the traditional knowledge
 - the replacement of the nominated entity where the custodians of the traditional knowledge wish the nominated entity to be replaced, or the termination of the authorisation in certain circumstances
 - any other matters in relation to the traditional knowledge.

²⁰ 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>>.

Box 1: Mapping tools that may help identify traditional knowledge custodians	
National Native Title Tribunal 2021, 'Representative Aboriginal/Torres Strait Islander Body Areas'	http://www.nntt.gov.au/Maps/RATSIB_map.pdf
Registered Aboriginal corporations in Qld	Refer to the search function under Find a Corporation (Public Register) on this page: https://www.oric.gov.au/
National Native Title Tribunal map of native title determinations in Queensland (Includes RNTBCs)	https://nntt.maps.arcgis.com/apps/webappviewer/index.html?id=a4fab24b605b43bd9049d3a372d79e62
Cultural Heritage Map	https://www.datsip.qld.gov.au/resources/datsima/people-communities/cultural-heritage/heritage-bodies/chb-state-map.pdf
Cultural Heritage bodies	https://culturalheritage.datsip.qld.gov.au/achris/public/home
Queensland Globe, which can show cultural heritage boundaries	https://qldglobe.information.qld.gov.au/
Land trusts	https://www.resources.qld.gov.au/data/assets/pdf_file/0003/108723/land-trusts-map.pdf
Atlas of Living Australia	https://www.ala.org.au/
Biomaps	https://qldspatial.information.qld.gov.au/biomaps/index.html
Government organisations, such as the Indigenous Land and Sea rangers	https://www.qld.gov.au/environment/plants-animals/conservation/community/land-sea-rangers/about-rangers
National Indigenous Australians Agency	https://www.niaa.gov.au

3.2. Requirement 2: Obtain free, prior and informed consent

Table 2 below outlines the minimum requirements to be met under the code for obtaining free, prior and informed consent (FPIC) for the use of traditional knowledge in biodiscovery.

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 FPIC from traditional knowledge custodians.

FPIC is a specific right under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP article 19)²¹. It protects the rights of Indigenous peoples to participate in decision-making processes that affect them and is considered integral to the exercise of the right to self-determination. 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.

Table 2 – Minimum requirements to be met under the code for obtaining FPIC

²¹ United 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>.

<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. • <u>Performance outcome 2.4</u>: Biodiscovery only proceeds if custodians grant approval to use traditional knowledge for biodiscovery, and only continues so long as consent remains.

Principles

Right to refuse

Custodians have the right to say ‘no’ to the use of their traditional knowledge. If a custodian does not want to share their knowledge, a biodiscovery entity must respect this decision – the traditional knowledge cannot be used for biodiscovery.

Where a custodian is also a biodiscovery entity, they must still obtain the consent of any additional custodians to the use of the traditional knowledge.

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.

If the custodians do not reconfirm their consent at any agreed points, the biodiscovery entity cannot continue to use the traditional knowledge for biodiscovery.

Consent requires trust

Gaining meaningful consent requires an FPIC approach based on mutual understanding and open, ongoing and equitable relationships. Recognising community protocols and respectful engagement are key to building trust. Respectful engagement and the recognition of community protocols, customary law and practice are essential to building trust. It is important to acknowledge that there has been the use of traditional knowledge without consent and that there are grievances related to this when seeking to build trust with the community.

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 not grant consent.

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 discuss whether 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* guidelines²² provide an example of a timeline for FPIC.
- Provide easy to understand and culturally appropriate information to custodians on the proposed biodiscovery activity. Language and other cultural factors may present barriers. A cultural broker may be helpful to ensure that all parties understand what is (or is not) being consented to. Information should be provided in understandable terms throughout the project to confirm the custodian's ongoing consent.
- Support the custodians to make decisions according to their customary protocols and ensure protocols are included in biodiscovery planning and implementation:
 - to determine the decision-making process as early as possible in the relationship—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.
 - 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 agreement, including a 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.
 - provide resources to support custodians to participate in decisions-making processes. This could include funding or providing logistical support for the custodians to meet and for the preparation of culturally appropriate and easy to understand material, and funding independent advice. First Nations consultants and facilitators such as a communications company or cultural brokers could also be used to support productive engagement activities.
- 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

²² 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>>.

(see the FAO FPIC guidelines²³ for further advice on how to establish a feedback and complaints mechanism).

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.

3.3. Requirement 3: Benefit-sharing on mutually agreed terms

Table 3 below outlines the minimum requirements to be met under the code for establishing a benefit-sharing agreement with 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.

Table 3 – Minimum requirements to be met under the code for establishing a benefit-sharing agreement with mutually agreed terms

Code requirement	Performance outcome
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 use of the traditional knowledge.

²³ 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>>.

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 research or commercialisation 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. Nor should the economic outcomes be underestimated so as to reduce mutual benefits from the biodiscovery.

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 and discuss this with custodians.

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 provides examples of monetary and non-monetary benefits.

Consider benefits that strengthen the First Nations community, such as participation in or leading 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.

Value and respect the intellectual property of First Nations peoples

Traditional knowledge contributes significantly to research in Australia, but these contributions are not always acknowledged or valued appropriately. Recognise traditional knowledge as an evolving body of knowledge developed by First Nations peoples over millennia, that represents significant innovation, creativity, and scientific effort.

First Nations peoples' cultural and intellectual property may not fit neatly within existing legislative intellectual property protections. Traditional knowledge is likely to be communal and have been developed and passed down over generations, while current intellectual property protections focus on individual rights holders or creators.

Biodiscovery entities have a responsibility to understand the interaction of knowledge systems and relevant legal systems in research practice, including international standards. Biodiscovery entities should support custodians to determine how their traditional knowledge should be protected through legislated protection measures including patent law, trademark law, copyright, design legislation and plant breeder's rights. As a default, recognise custodians as equal inventors and joint owners of intellectual property generated through the biodiscovery. Avoid limiting the ongoing use of the traditional knowledge and associated native biological material by First Nations peoples.

Support dispute resolution

Disputes may occur between the biodiscovery entity and the custodians, within First Nations groups, or between different First Nations individuals and 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 or body helping resolve the dispute without going to court) may help maintain positive relationships. Mediation and conciliation using a professional may 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 supportive than law courts and allow First Nations peoples to voice their interests and concerns in a safe space.²⁴ Appendix 1 outlines services in Queensland designed to address disputes out of court, in a way tailored to First Nations peoples.

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:

²⁴ <<https://www.ipaustralia.gov.au/>>

- Agree at the outset on the process, location and timeframe for negotiating, including expected timing for the process and commitments by all 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).
- Tailor the agreement’s format to the needs of the community—Custodians may prefer other forms (such as audio files) over written agreements, which can be accommodated under modern agreements (such as e-agreements).
- 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.
 - provide for the equal recognition of custodians as ‘inventors’ and joint owners of any intellectual property generated through the biodiscovery, including publications, patents, and plant breeders’ rights. Seek advice from IP Australia²⁵, from AIATSIS (the Australian Institute of Aboriginal and Torres Strait Islander Studies), First Nations lawyers and other experts on intellectual property protocols and laws.
 - outline how the agreement or biodiscovery project may affect the ongoing customary use of the traditional knowledge and associated native biological material by the custodians, their community and other First Nations peoples.
 - establish transparent systems to monitor and track the use of the traditional knowledge and the sharing of benefits.
 - specify how and where information, including confidential information and data is stored and shared between the parties to the agreement, and how this information is stored and accessed. Seek advice from AIATSIS (the Australian Institute of Aboriginal and Torres Strait Islander Studies) on data management protocols.
 - specify processes in relation to the attribution, dissemination and publication of traditional knowledge.
 - establish a dispute resolution process that emphasises informal and collaborative approaches in the first instance, such as discussions between the parties and mediation.
- 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 when negotiating benefit sharing agreements (Annex 1 of the Nagoya Protocol provides a detailed list of monetary and non-monetary benefits)²⁶.
- Agree on a process for amending the agreement should the project or benefits change, including the conditions under which consent must or may be revisited or

²⁵ <<https://www.ipaaustralia.gov.au/>>

²⁶ 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>>

reconfirmed, and the process to be followed should there be late claims made to custodianship of the traditional knowledge.

- 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)²⁷.
 - provide resourcing an appropriate independent person or body to resolve the dispute through mediation, conciliation, or arbitration, without going to court (see Appendix 1).
 - avoid becoming involved in disputes between custodians or custodians and other community members or between First Nations groups.
- Support custodians’ access to independent advice, if requested. This may include informing custodians of available support, such as pro bono legal services, or by funding advice. Independent advice may be required on multiple topics, such as legal, financial and/or business advisors.

Box 3: Templates and tools for developing benefit-sharing agreements	
Benefit-sharing agreement toolkit	The Department of Environment and Science is developing a bespoke toolkit for benefit-sharing agreements under the traditional knowledge obligation. When ready, the toolkit will be available on the department’s website.
The ABS Contract Tool: Version 2.0	http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/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

3.4. Requirement 4: Publicly accessible traditional knowledge

Table 4 below outlines the minimum requirements to be met under the code for obtaining consent and a benefit-sharing agreement where possible, prior to the use of publicly accessible 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 accessible 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

²⁷ 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>.

and researchers incorrectly assume that traditional knowledge can be freely accessed, used, or taken²⁸.

Table 4 – Minimum requirements to be met under the code for obtaining consent and a benefit-sharing agreement where possible, prior to the use of publicly accessible traditional knowledge.

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

Principles

The traditional knowledge obligation still applies

The Act’s traditional knowledge obligation also applies to knowledge that is publicly accessible. This is to prevent the use of traditional knowledge without agreement and recognises the harm caused by making knowledge publicly accessible without consent and benefit-sharing. Consider whether publicly accessible 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.

When the custodians of traditional knowledge cannot be identified, biodiscovery entities may use publicly accessible traditional knowledge without the agreement of a custodian, provided they comply with the requirements in the code.

Using publicly accessible 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.

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:

²⁸ Okediji, R 2018, Traditional knowledge and the public domain, Centre for International Governance Innovation Papers, <<https://www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf>>.

- Identify the community that holds the traditional knowledge, even if it is not provided in the source documents. See the actions towards best practice listed for Requirement 1, and consider:
 - the geographical location of the information source
 - the geographical distribution of any species referred to
 - broad public notification
 - a historian or anthropologist who has an understanding of the traditional knowledge of interest. RNTBCs may be able to identify anthropologists and other experts.
- Be aware that a custodian may not have given their consent to the traditional knowledge being publicly accessible or subsequent uses of the knowledge.

When the custodian cannot be identified

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

- Acknowledge the use of traditional knowledge in any relevant works or publications.
- As a minimum, retain the percentage of gross commercialisation receipts received from biodiscovery each year—with reference to the State’s model benefit-sharing agreement.
- 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. The funds should be used for these purposes as soon as practicable after being retained.
- 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.
 - scholarships, traineeships and/or mentorships
 - supporting access to Country to maintain the inter-generational transmission of traditional knowledge
 - developing or refining model contracts for access and benefit-sharing
 - identifying the custodians of publicly accessible 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 AIATSIS (the Australian Institute of Aboriginal and Torres Strait Islander Studies)
 - supporting partnerships between custodians and other First Nations peoples as biodiscovery entities with institutions towards initiating biodiscovery projects.
- Contact the Department of Environment and Science at QLDScience@des.qld.gov.au to discuss the proposed project, including enquiring about projects identified by the Queensland Government or seeking endorsement for an alternative project proposal. The department may consult relevant First Nations peoples to determine the suitability of the project.

3.5. Requirement 5: Claims of custodianship after biodiscovery has commenced

Table 5 below outlines the minimum requirements to be met under the code for addressing custodianship claims to the traditional knowledge being used that are made after the biodiscovery has commenced.

<i>Code requirement</i>	<i>Performance Outcome (pending)</i>
5. Provide opportunity for custodianship claimants to consent and negotiate benefit-sharing even if biodiscovery has commenced	<u>Performance outcome 5.1</u> : Custodians of traditional knowledge, are given the opportunity to grant or refuse consent and negotiate benefit-sharing, even if a benefit sharing agreement has already been established. <u>Performance outcome 5.2</u> : Custodians of publicly accessible traditional knowledge are given the opportunity to grant or refuse consent and negotiate benefit-sharing, even if biodiscovery using their knowledge has already commenced.

Principles

Support the timely resolution of custodianship claims

Custodians who could not be identified prior to the commencement of a project may still wish to claim custodianship of the traditional knowledge being used for biodiscovery. These claims should be treated as legitimate and reasonable.

Although biodiscovery may continue while custodianship is being confirmed, seek to resolve the claim as soon as possible. This will avoid any continued use of traditional knowledge without the consent of the custodians and benefit-sharing from the use of that knowledge in biodiscovery. It will minimise damage to the relationship, which could be a barrier to continuation of the biodiscovery.

Once the custodians are confirmed, recognise that custodians may refuse consent to the continued use of the traditional knowledge or may seek different benefits from any already agreed to with existing custodians.

Actions towards best practice

Refer to the actions towards best practice for Requirements 1 to 3.

In addition, if a biodiscovery entity is using publicly accessible traditional knowledge without having identified any existing custodian, under Performance Outcome 4.2 of the code:

- Consult with the claimant prior to custodianship being confirmed. Discuss any planned or ongoing projects with the claimant during the process of resolving custodianship. This may reduce the chances of conflict or disruption to a project if the claimant is confirmed as a custodian.
- Consider how any unspent funds are used, including:
 - offering the funds to the custodian as part of their benefits under a benefit sharing agreement, or
 - continuing a project that is in planning stages.
- Consider options for any ongoing projects, including:

- asking the custodian whether they would like the project to continue as part of their benefits under the benefit sharing agreement,
- continuing the project in addition to any benefits agreed with the custodian, or
- consulting with the communities involved in the project to develop a plan to wind up the project.

4. Relevant legislation and international standards

Aboriginal Cultural Heritage Act 2003 (Qld)

Biodiscovery Act 2004

Biodiscovery and Other Legislation Amendment Act 2020

Forestry Act 1959

Human Rights Act 2019 (Qld)

Nagoya Protocol on Access and Benefit Sharing

Native Title Act 1993 (Qld)

Native Title Act 1993 (Cth)

Nature Conservation Act 1992

Therapeutic Good Act 1989

Torres Strait Islander Cultural Heritage Act 2003 (Qld)

United Nations Declaration on the Rights of Indigenous Peoples

5. 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.
Biodiscovery research	Under the <i>Biodiscovery Act 2004</i> , biodiscovery research means the analysis of molecular, biochemical or genetic information about native biological material for the purpose of commercialising the material
Custodians of traditional knowledge	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.
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 to 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.
Nominated entity	Is an entity nominated by the custodians of traditional knowledge to enter into an agreement with a biodiscovery

	entity under section 9B of the <i>Biodiscovery Act 2004</i> on the custodians' behalf.
Publicly accessible	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	<p>Are entities that may hold information that assists a biodiscovery entity in identifying the custodians of traditional knowledge, which the biodiscovery entity proposes to use for biodiscovery, which include but may not be limited to a:</p> <ul style="list-style-type: none"> • common law holder of native title, within the meaning of the <i>Native Title Act 1993</i> (Cth), for the area to which the traditional knowledge relates • former common law holder of native title, being an individual who previously held native title in the area to which the traditional knowledge relates but whose native title has been extinguished • member of a claim group for a registered native title claim, within the meaning of the <i>Native Title Act 1993</i> (Cth), for the area to which the traditional knowledge relates • member of a claim group for a formerly registered, but unsuccessful, native title claim for the area to which the traditional knowledge relates • registered native title claimant, within the meaning of the <i>Native Title Act 1993</i> (Cth), for the area to which the traditional knowledge relates • registered native title body corporate, within the meaning of the <i>Native Title Act 1993</i> (Cth), for the area to which the traditional knowledge relates • representative Aboriginal/ Torres Strait Islander body, within the meaning of the <i>Native Title Act 1993</i> (Cth), for the area to which the traditional knowledge relates • representative body (such as a non-government organisation, council, or corporation) • registered Aboriginal or Torres Strait Islander cultural heritage bodies under the <i>Aboriginal Cultural Heritage Act 2003</i> (Qld) and the <i>Torres Strait Islander Cultural Heritage Act 2003</i> (Qld) • community interface panel
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</p>

	or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.
Traditional knowledge holder	A First Nations person who is aware of 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
Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 2020, 'A Guide to applying The AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research'	https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-guide-applying-code-ethics_0.pdf
National Native Title Tribunal, 'Visualising native title matters'	http://www.nntt.gov.au/assistance/Geospatial/Pages/NTV.aspx
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

Resource	Access link
Rainforest Alliance 2020, 'Free, Prior and Informed Consent (FPIC) Processes'	https://www.rainforest-alliance.org/business/wp-content/uploads/2020/06/Annex-11-Free-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/documents/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-report_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 <i>(See Annex 1 for list of monetary and non-monetary benefits)</i>
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
IP Australia 2020, 'Indigenous Knowledge Project (IP Australia)'	https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/indigenous-knowledge/indigenous-knowledge-project
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?

Resource	Access link
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
Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 2020, 'A Guide to applying The AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research'	https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-guide-applying-code-ethics_0.pdf