

Best Practice Guidelines for the Collection and Transfer of Genetic Resources

INTRODUCTION

Australian law in relation to the collection, transfer, and use of genetic resources is piecemeal, fragmented, and incomplete. This creates problems for researchers, access providers, and Indigenous Australians.

The aim of these Guidelines is to overcome these problems and to develop a common standard across Australia that reflects best practice. The Guidelines go beyond existing laws and procedures¹ to adopt and apply a uniform and consistent approach across Australia that:

- Recognises the interests of access providers;
- Facilitates the access, use, and transfer of genetic resources;
- Recognises Indigenous Australians' historical and ongoing stewardship of genetic resources;
- Ensures compliance with international, national, and local laws and regulations;
- Minimises the administrative and legal burdens of access and benefit sharing measures; and
- Creates a predictable environment for the collection, use, and transfer of genetic resources.

These Guidelines apply when:

- you collect genetic resources;
- someone collects genetic resources on your behalf;
- you receive genetic resources from someone else (an intermediary); or
- you transfer genetic resources to a third party.

The Guidelines do not cover Indigenous Traditional Knowledge (which will be covered in separate Guidelines).

Collecting in New South Wales

Under New South Wales law, a permit is required to collect plants classified as 'protected native plants' from State land. Separate permits exist depending on whether the collection is for research or commercial purposes.

Collecting Protected Species from State Land

Under the *Biodiversity Conservation Act 2016* (NSW), a 'protected native plants licence' must be obtained from the New South Wales Department of Planning and Environment to collect plants which are classified as "protected" from State land for research purposes. The process for obtaining this scientific licence is outlined [here](#).

If protected species are collected from State land for commercial purposes, a commercial licence is required. The process for obtaining this permit is outline [here](#).

Protected species are native species which are listed as threatened plant species in [schedule 1](#), plants from threatened ecological communities in [schedule 2](#), or protected plant species in [schedule 6](#).

¹ For example, while there is no formal legal requirement to enter into Benefit Sharing Agreements with access providers in Victoria, the Guidelines recommend that researchers do so.

This permit is only required if the collection occurs on public land.

If collecting non-protected plants you require permission from the area manager if collecting in National Parks/ Conservation areas.

1. Best Practice Requirements when Collecting Genetic Resources in Australia

REQUIREMENT 1: IDENTIFY WHO HAS THE AUTHORITY TO GRANT ACCESS

The first task that needs to be completed is to work out who has the authority to grant access to the land where the genetic resources are to be collected. In many cases it will be relatively straightforward to work out who has the authority to grant access, such as where genetic resources are collected from private land or National Parks. In other cases, such as when collecting from leasehold land or land subject to native title, it is important to identify who has the appropriate authority to grant access.

When collecting from land in which there is an Indigenous interest (even if the interest does not include a formal legal right to control access to genetic resources which is sometimes the case with land subject to native title), it is important to obtain prior informed consent from the relevant Indigenous Communities (along with a Benefit Sharing Agreement). This may mean negotiating with two (or more parties) such as the freeholder and the Indigenous Community.

REQUIREMENT 2: SATISFY COLLECTION OBLIGATIONS

When genetic resources are collected in Australia it is necessary to comply with different laws. The legal obligations that arise depend on:

- the genetic resources being collected,
- where the resources are collected from (The Commonwealth, the States, and the Territories have their own requirements), and
- the reason why the resources are collected.

REQUIREMENT 3: OBTAIN PRIOR INFORMED CONSENT

When genetic resources are collected from the wild (natural *in situ* habitats), prior informed consent should be obtained from the relevant access provider. In doing so, the access provider should be contacted in advance of collection and provided with enough information (detailed below) for them to decide whether to allow the collection to occur.

Where genetic resources are collected from public lands or waters in Commonwealth areas or in any Australian State or Territory, the requirement to obtain prior informed consent *may* be satisfied when permits are obtained from the relevant authorities (listed in Requirement 2). Where there is doubt about whether there is prior informed consent to use the genetic resources, prior informed consent should be obtained from the access provider who has the authority to grant access. It is important that the person who gives the consent has the authority to do so and that the consent is in writing.

When seeking prior informed consent, the access provider should be informed about:

- the genetic resources being collected,
- the quantity of the resources being collected,
- the purpose/s of the collection (eg for research, commercial use, wild harvesting),
- what the genetic resources will be used for, and
- what and how benefits will be shared (detailed below).

REQUIREMENT 4: NEGOTIATE A BENEFIT SHARING AGREEMENT

Once prior informed consent has been obtained, a Benefit Sharing Agreement should be negotiated between the access provider and the collector of the resources. A Benefit Sharing Agreement is a

contract that sets out the benefits that will be provided in return for access to the genetic resources. Benefits can be non-monetary and/or monetary.

Non-monetary benefits may include educational and employment opportunities, attribution of credit, co-authorship, or involvement in the research project.

Monetary benefits may include royalty shares, direct payment, or ownership of intellectual property.

Format of the Benefit Sharing Agreement

The format that a Benefit Sharing Agreement takes will depend on:

- the type of genetic resources being collected,
- where the resources are collected from, and
- whether the resources are collected for commercial or non-commercial purposes.

(i) Format of Benefit Sharing Agreement in jurisdictions with biodiversity laws

Commonwealth

When genetic resources are to be collected from Commonwealth land and waters for commercial research, the Benefit Sharing Agreement should be based on the [model agreements developed by the Commonwealth government](#). Where genetic resources are to be collected from Commonwealth land and waters for non-commercial research, a [statutory declaration](#) should be made stating that the collected resources will not be used or transferred to others for commercial purposes.

Queensland

When genetic resources are to be collected from Queensland State land and waters for:

- biodiscovery research (the analysis of molecular, biochemical or genetic information about native biological material for the purpose of commercialising the material), or
- the commercialisation of native biological material or a product of biodiscovery research.

The Benefit Sharing Agreement should be based on the [model agreements developed by the Queensland government](#). In all other cases where genetic resources are to be collected, notably in relation to non-commercial research or the collection and use of genetic resources from non-State land, the recommended Benefit Sharing format detailed below should be followed.

In Queensland, plants listed in [Annex 1 of the Plant Treaty](#) that are to be collected for food or agriculture purposes are excluded from the Queensland biodiscovery law. In this situation, you do not need to use the format that is required under the Queensland biodiscovery law. Instead, you should use the [Standard Material Transfer Agreement](#) developed under the *Plant Treaty*.

Northern Territory

When genetic resources are to be collected anywhere in the Northern Territory for research, the Benefit Sharing Agreement should be based on the model agreements developed by the Northern Territory government.

Model agreements for plant genetic resources are [here](#).

(ii) Recommended Benefit Sharing format

In situations where a specific format is not required, parties have the freedom to adopt whatever format they want for their Benefit Sharing Agreement. In these cases, the agreement does not have to be a formally drafted legal contract. For instance, a legally binding Benefit Sharing Agreement could be made by email. All Benefit Sharing Agreements should include certain information. At minimum, it is recommended that the agreement should specify:

- the names and contact details of the parties,
- the genetic resource being collected,
- the quantity of the resource being collected, and
- the benefits to be shared with the provider.

Examples of recommended Benefit Sharing formats for commercial and non-commercial research are [available here](#).

2. Best Practice Requirements when Receiving Genetic Resources from Intermediaries

When you receive genetic resources from intermediaries such as herbaria, traders, nurseries, or culture collections, whether they are in Australia or overseas, you should inquire about whether the genetic resources are compliant with access and benefit sharing requirements: that is, that they were collected with the prior informed consent of the access provider *and* that there is a Benefit Sharing Agreement in place.

(i) Receiving genetic resources from intermediaries that are ABS compliant, where the intended use falls within the existing agreement

Where genetic resources were collected with prior informed consent and under a Benefit Sharing Agreement, you should adhere to the terms and conditions that were agreed to when the resources were initially collected.

(ii) Receiving genetic resources from intermediaries that are ABS compliant, where the intended use does not fall within the existing agreement

If you are wanting to use genetic resources in a way not agreed on by the access provider, you should negotiate a new agreement with the access provider for that use. For example, if the initial agreement did not include commercialisation and you want to commercialise, a new Benefit Sharing Agreement that covers commercial uses should be negotiated. Alternatively, it would be possible for you to obtain the genetic resources from a new provider so long as the new provider has the authority to grant access.

(iii) Receiving genetic resources from intermediaries that are *not* ABS Compliant

When you receive genetic resources from a third party that are not ABS compliant (because they were collected without prior informed consent and a Benefit Sharing Agreement), you should make reasonable best efforts to identify the access provider of those genetic resources.

Where you have *identified* the access provider you should:

- obtain their consent to use the resources, and
- enter into a Benefit Sharing Agreement with them.

Where the access provider is not willing to provide their retrospective consent to access the resources and you are unable to finalise a Benefit Sharing Agreement, you should *not* use the resources.

Where after reasonable best efforts you are unable to *identify or locate* the relevant access provider, the collection and use of the genetic resources will be governed by the [Public Benefit Sharing Declaration](#). This provides that in recognition of the custodianship of Indigenous Australians and of the importance of genetic resources that signatories commit to undertake the following public benefit sharing activities:

- Share research outputs widely and openly;
- Acknowledge Indigenous Australians' historical and ongoing stewardship of genetic resources in publications and other communications;
- Deposit samples of the genetic resources at relevant *ex situ* collections for conservation and sustainable use, if the genetic resources are not already publicly available;

- Commit to share a reasonable percentage of any profits arising from the use of the genetic resources with relevant organisations such as Indigenous Australian groups, environmental conservation organisations, or community organisations, and
- Where possible provide annual scholarships and other education and training programs for Indigenous students.

If the access provider is subsequently identified, reasonable efforts should be made to conclude a Benefit Sharing Agreement with them.

3. Best Practice Requirements when Transferring Genetic Resources to a Third Party

Where you are transferring genetic resources to a third party, it is important that the third party adheres to the same terms and conditions that were agreed to when the resources were initially collected.

ABS compliant genetic resources should only be transferred to third parties who agree to comply with the terms and conditions that the resources were initially collected under.

Non-ABS compliant genetic resources should only be transferred to third parties who agree to comply with the [Third Party Public Benefit Sharing Declaration for the Transfer of Genetic Resources](#).

Where third parties do not agree to comply with the initial terms and conditions or the *Third Party Public Benefit Sharing Declaration for the Transfer of Genetic Resources* as is relevant, the genetic resources should *not* be transferred to that third party.

Best Practice Guideline: Permits - Collecting in New South Wales June 2024

These Guidelines are for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. They are not tailored to any particular fact, situation or specific requirements and should not be relied on as legal advice.

This document is intended to evolve with changes in the law. If you come across an error or a situation which is not covered by these Guidelines, please email carol.ballard@uq.edu.au.

DEFINITIONS

The following definitions are used in the Guidelines.

'ABS': Access and Benefit Sharing.

'ABS compliant genetic resources': genetic resources that were collected with prior informed consent and under a Benefit Sharing Agreement (or Standard Material Transfer Agreement).

'Access provider': the person or organisation who has the authority to grant permission to access and use genetic resources within their control. An access provider may be a public entity, a private landholder, leaseholder, or custodian of the land.

'Genetic resources': any biological material derived from plants, animals, and microorganisms, including seeds, tissues, germplasm, or the compounds contained in these resources.

'Intermediary': a person or institution who transfers genetic resources but who is not the authorised access provider of the genetic resource. Examples of intermediaries include nurseries, museums, arboretums, seed traders, herbariums, or microbiome culture collections.

'Nagoya Protocol': The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is an international supplementary agreement to the United Nations' Convention on Biological Diversity. The Nagoya Protocol entered into force on 12 October 2014.

'Non-ABS compliant genetic resources': genetic resources that were not collected with prior informed consent and under a Benefit Sharing Agreement (or Standard Material Transfer Agreement).

'Plant Treaty': The International Treaty on Plant Genetic Resources for Food and Agriculture. The Multilateral System of the Plant Treaty offers a legal mechanism for the access, use and transfer of the genetic resources of 64 food and forage crop species that are listed in Annex 1 of the Treaty. The Treaty entered into force on 29 June 2004.

'Public Benefit Sharing Declaration': a signed non-confidential document declaring the signee's intention to deliver public benefit sharing in exchange for the access and use of genetic resources which cannot be retrospectively made ABS compliant.

'Reasonable best efforts': where a genuine effort has been made to identify where and when the genetic resources were collected and who the relevant access provider was. What counts as 'reasonable best efforts' will depend on the circumstances of each case including the nature and purpose of the use of the resources, the availability and accessibility of provenance data or other information sources, whether public benefit is likely to accrue from the research, and the capacity available for verifying the provenance of the resources. In exceptional cases, where a very large number of genetic resources are being accessed and the collection is being made to further public benefits (such as through ecological or environmental research), it may be reasonable not to seek to identify who has the authority to grant access, so long as the researcher complies with the Public Benefit Sharing Declaration.

'Standard Material Transfer Agreement (SMTA)': The SMTA is a standard, non-negotiable access and benefit sharing contract that has been developed under the Plant Treaty for the transfer and use of plant genetic resources for food and agriculture.