

TRADITIONAL BIOLOGICAL KNOWLEDGE, INNOVATIONS AND PRACTICES ACT

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TRADITIONAL BIOLOGICAL KNOWLEDGE, INNOVATIONS AND PRACTICES ACT 200X

An Act to protect the rights of owners of traditional biological knowledge, innovations, and practices.

1 Short title

This Act may be cited as the Traditional Biological Knowledge, Innovations and Practices Act [date].

2 Commencement

This Act commences on [date].

3 Application

(1) Where there is an inconsistency with intellectual property laws, this Act, is to the extent of the inconsistency, to prevail.

(2) Section 9(1) of this Act (Moral rights) has retrospective effect.

4 Definitions

In this Act, unless the context otherwise requires:

biological material means any part of a plant, animal or microorganism.

database means the database of traditional biological knowledge, innovations and practices established under section 7 of the Act;

innovation means traditional biological innovation.

knowledge means traditional biological knowledge.

own in relation to knowledge, innovations and practices, includes the following:

(a) own as a trustee;

(b) own as a custodian;

(c) own as a steward;

and its meaning in any particular context is to be determined according to the history and traditions and customs and usages of the social group which claims ownership over that knowledge, innovation or practice.

practice means traditional biological practice.

social group means a family, clan, tribe, village or similar social organisation.

traditional biological innovation means a product, belonging to a social group, which has resulted from biological material whose usefulness has been enhanced by the application of traditional biological knowledge.

traditional biological knowledge means knowledge whether embodied in tangible form or not, belonging to a social group and gained from having lived in close contact with nature, regarding:

(a) living things, their spiritual significance, their constituent parts, their life cycles, behaviour and functions, and their effects on and interactions with other living things, including humans, and with their physical environment;

(b) the physical environment;

(c) the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life.

traditional biological practice means a process, method or way of doing things, belonging to a social group and gained from having lived in close contact with nature.

Tribunal means the Traditional Ownership Tribunal convened under section 13 of the Act.

5 Competent National Authority

The Competent National Authority for the purposes of this Act is the [insert body] which shall carry out the functions described in this Act.

6 Ownership

(1) For the purposes of this Act, ownership by a social group over an item of knowledge or an innovation or a practice is established according to the history and traditions and customs and usages of that social group.

(2) The [Competent National Authority] may assert ownership over an item of knowledge or an innovation or a practice in either of the following situations:

- (a) where it is satisfied there is no immediately verifiable owner of that knowledge or innovation or practice. The [Competent National Authority] will be considered to be the owner for the purposes of this Act of that knowledge or innovation or practice as trustee on behalf of the eventual owner.
- (b) where it is satisfied, after having made extensive efforts to locate an owner of an item of knowledge or an innovation or a practice, that an owner will not be found. The [Competent National Authority] will be considered to be the owner for the purposes of this Act of that knowledge or innovation or practice as trustee on behalf of [the enacting country].

7 Database of traditional biological knowledge, innovations and practices

(1) The [Competent National Authority] is to establish and maintain a database of knowledge, innovations and practices and shall enter into it such information as it receives or collects pertaining to knowledge, innovations and practices.

(2) An owner may enter its knowledge, innovations and practices in the database.

(3) Where the owner does not specify who can access the information, access will be limited to the owner. The [Competent National Authority] may also access the information for the purpose only of seeking the identity of an owner pursuant to section 10 of this Act.

(4) Any person wanting access to information in the database must write to the [Competent National Authority]. The [Competent National Authority] shall consider the request and may refuse access, grant access unconditionally or grant access with conditions attached.

(5) Any person who knowingly provides false information for entry into the database commits an offence and is liable upon conviction to a fine not exceeding [\$].

8 Economic rights

(1) In addition to any rights available under applicable intellectual property laws an owner of an item of knowledge, an innovation or a practice has the exclusive right to use or to authorise the use of its knowledge, innovation or practice:

- (a) for a commercial purpose, or
- (b) for an activity that is likely to assist in achieving a commercial purpose.

(2) Any person wanting to use an item of knowledge, an innovation or a practice for a commercial purpose, or an activity that is likely to assist in achieving a commercial purpose, must comply with sections 10 and 11 of this Act.

(3) Subsection (2) shall not apply to plant genetic resources for food and agriculture whose collection, holding, transfer and use are covered by a policy approved by the Secretariat of the Pacific Community.

(4) Any person who contravenes subsection (2) commits an offence and is liable upon conviction to a fine not exceeding [\$].

9 Moral rights

(1) Owners of knowledge, innovations and practices have the following moral rights:

- (a) the right of attribution of ownership in relation to their knowledge, innovations or practices;
- (b) the right not to have ownership over an item of knowledge, an innovation or practice falsely attributed to them; and
- (c) the right not to have their knowledge, innovations and practices subject to derogatory treatment.

(2) Any person who, upon the commencement of this Act, contravenes subsection (1) commits an offence and is liable upon conviction to a fine not exceeding [\$].

10 Identity of owner and prior informed consent

(1) A prospective user wanting to use an item of knowledge, an innovation or a practice for a commercial purpose, or an activity that is likely to assist in achieving a commercial purpose, must in all cases apply to the [Competent National Authority] in the form prescribed by the [Competent National Authority].

(2) The [Competent National Authority] must give a copy of the application to the social group they believe to be the owner of the knowledge, innovation or practice applied for and at the same time publicise the application locally, or where warranted, overseas.

(3) Any social group claiming ownership must identify itself to the [Competent National Authority] within 30 days from the date the application is publicised and satisfy the [Competent National Authority] of its claim to ownership.

(4) Where the [Competent National Authority] is satisfied as to the identity of an owner it must inform the prospective user of the identity, publicise the identity nationally and enter it into the database along with the information used to prove ownership.

(5) After the expiration of twenty one days from the time the prospective user is informed of the identity of the owner he must ensure the owner is fully informed of the use proposed to be made of its knowledge, innovation or practice.

11 Access and Benefit Sharing Agreement

(1) Where the owner gives its prior informed consent to the proposed use, an agreement between the owner and the user, to be known as an Access and Benefit-Sharing Agreement, must be negotiated under the supervision of the [Competent National Authority] setting out the terms under which use is permitted and having regard to the following matters, amongst others:

Knowledge, innovations and practices:

- (a) restrictions on using knowledge in any other material form
- (b) restrictions on reproduction, publication, translation, or broadcasting of knowledge
- (c) restrictions on the quantity of an innovation to be obtained
- (d) requirement for progress reports to be supplied at each stage of testing of an innovation
- (e) rights regarding anything derived from research on an innovation.

General:

- (a) fees or compensation for using the knowledge, innovation or practice
- (b) obtaining of relevant permits
- (c) duration of the Agreement
- (d) choice of law upon breach of a term of the Agreement
- (e) options upon breach of a term of the Agreement
- (f) limits on transfer to third parties
- (g) restrictions on fixation through any process such as making a sound recording or taking a photograph
- (h) intellectual property rights
- (i) recognition of moral rights
- (j) benefit sharing, monetary and non-monetary, on the successful commercialisation of any aspect of the knowledge, innovation or practice

(2) The [Competent National Authority] is to ensure that the Agreement is not to the detriment of the owner.

(3) Nothing in subsection (1) is to be construed as preventing the promulgation of more detailed access and benefit regimes for knowledge or for innovations or for practices or for any combination of these elements.

12 Ownership enquiry

(1) Any person may lodge an enquiry at any time with the [Competent National Authority] regarding ownership of an item of knowledge, an innovation or a practice. He must specify the owner of as well as the knowledge, innovation or practice being enquired about and the basis for the enquiry. He may present such other submissions as he considers relevant.

(2) The owner being challenged is to be given a copy of the enquiry by the [Competent National Authority] and must within thirty days provide a written reply along with any other submissions it considers relevant to the [Competent National Authority] and to the enquiring party.

- (3) The [Competent National Authority] will publicise the enquiry in summary form and invite submissions from the public.
- (4) The [Competent National Authority], acting as mediator, after it has considered all submissions and when it is satisfied that the issues in dispute have been clarified, must call a conference between the parties at which the following matters are to be discussed:
 - (a) whether there is any merit in the enquiry and if not, then the enquiring party is to be requested to withdraw its enquiry and where this is done then the enquiry will terminate upon the entry of that information in the database.
 - (b) whether the parties are owners of different items of knowledge, innovations or practices and if the parties agree that this is the case then the enquiry will terminate upon the entry of that information in the database.
 - (c) whether the parties are co-owners of the knowledge, innovation or practice in dispute and if the parties agree that this is the case then the enquiry will terminate upon the entry of that information in the database.
 - (d) whether only one of the parties is the owner of the knowledge, innovation or practice in dispute because the other party agrees that this is the case or does not answer the enquiry then the enquiry will terminate and the appropriate information entered in the database.
 - (e) such other matters as the [Competent National Authority] or parties consider relevant.

13 The Traditional Ownership Tribunal

- (1) In the event that a consensual decision pursuant to section 12, or any other additional means, is not reached either of the parties may then request the [Competent National Authority] to convene a body, to be known as the Traditional Ownership Tribunal, to adjudicate on the dispute.
- (2) Where, pursuant to subsection (1), a party requests the [Competent National Authority] to convene the Tribunal, the [Competent National Authority] shall do so within 30 days.
- (3) The Tribunal shall consist of three people with expertise in the area under dispute.
- (4) The Tribunal shall:
 - (a) select a chairperson;
 - (b) model its rules of procedure as closely as practicable to those of the [principal] Court;
 - (c) hear all such evidence as it considers necessary to hear;
 - (d) consider the evidence and dispose of the dispute by deciding:
 - (i) that there is no merit in the enquiry, or
 - (ii) that the parties are owners of different items of knowledge, innovations or practices, or
 - (iii) that the parties are co-owners of the knowledge, innovation or practice, or
 - (iv) that only one of the parties is the owner of the knowledge,

innovation or practice, or
 (v) that none of the foregoing decisions can be made and that the matter will be referred back to the [Competent National Authority], and shall have all such powers as are required to carry out these functions.

(7) The [Competent National Authority] shall make available all documents in its possession or control pertaining to the dispute to the Tribunal and shall act as the secretariat to the Tribunal.

14 Appeal

A party may, within twenty one days of having received the decision of the Tribunal, appeal against the decision to the principal [Court] whose decision shall be final.

15 Legal proceedings

(1) The [principal] Court shall have full jurisdiction to hear and determine any proceedings for infringement or otherwise relating to knowledge, innovations and practices in [the enacting country], and may grant in addition to any other relief any one or more of the following remedies:

- (a) an injunction;
- (b) damages;
- (c) a declaration that a right has been contravened;
- (d) an order for a public apology;
- (e) an order that any false attribution or derogatory treatment cease or be reversed;
- (f) an order for an account of profits;
- (g) an order for the seizure of any object made contrary to this Act;
- (h) an order for the impounding and destruction of any object used in the commission of an offence under this Act.

(2) The [principal] Court in deciding what relief is to be granted may take into account all or any of the following factors:

- (a) whether the defendant was aware or ought reasonably to have been aware of the rights of the owner;
- (b) the effect on the reputation of the owner resulting from the unauthorised use;
- (c) anything done by the defendant to mitigate the effects of the unauthorised use;
- (d) any cost or difficulty that may have been associated with identifying the owner;
- (e) any cost or difficulty in ceasing or reversing any false attribution of ownership, or derogatory treatment of the knowledge, innovation or practice;
- (f) whether the parties have undertaken any other action to resolve the dispute.

16 Offence by a company

Where a company commits an offence under this Act, any officer, director, employee or agent of the company who directed, authorised, assented to, or acquiesced in the commission of the offence is a party to and guilty of the offence, and is personally liable to the punishment provided for the offence, whether or not the company has been prosecuted or convicted.

17 Reciprocal agreements

In accordance with reciprocal agreements entered into with other countries or territories, this Act may provide the same protection for knowledge, innovations and practices originating in those countries or territories as it provides for knowledge, innovations and practices originating in [the enacting country].

18 Regulations

The [insert] acting upon the advice of [insert] may make regulations for giving full effect to the provisions of this Act and for its due administration.

This Act is administered in the [Competent National Authority]

NOTES TO THE ACT

GENERAL FEATURES OF THE REVISED VERSION

The previous version that was distributed to Forum member countries in 2002 resulted in responses from the following countries: Australia, Cook Islands, Federated States of Micronesia, Fiji, Marshall Islands, New Zealand, Palau, Samoa and Vanuatu. Their comments are gratefully acknowledged.

All comments were of value even though they sometimes conflicted. Most changes were therefore made according to the “least common denominator”, ie, where one country disagreed with the majority view, the minority view was adopted, eg, as regards points 3, 4, and 5 (retrospectivity not to extend to economic rights), below.

1. The Act is now more in the character of a domestic law than a regional treaty. The only indication of its regional dimension is section 16 (reciprocal agreements). Section 5 also uses the term “competent national authority” in anticipation of a time when a regional agreement may be concluded.
2. The Act is now more in line with the “*Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*”. The distinguishing feature between the two is that this Act targets infringements of a commercial nature while the latter targets infringements arising through non-customary uses.
3. The State is no longer bound by this Act, given that the Act charts new territory and the extent of State liability needs to be properly assessed beforehand.
4. There are no longer penalties of imprisonment for any of the offence provisions. The penalties are all by way of monetary fines.
5. The Act only has retrospective effect regarding moral rights, not economic rights. Commercial interests established before the Act will therefore be unaffected. While this is not an entirely satisfactory resolution from the viewpoint of traditional peoples the infringement of a moral right may often be the more distressing injury. As a moral right infringement will often not be in dispute and as infringers will more likely than not feel morally obliged to rectify the infringement, a retrospective civil sanction has been considered appropriate.

EXPLANATORY MEMORANDUM

PREAMBLE

1. Article 8(j) of the Convention on Biological Diversity (CBD) uses the phrase “knowledge, innovations and practices” which is followed in this Act.
2. The Act encompasses not only knowledge, but products (ie, innovations) and practices, thus differing from Peru’s recent law (2002) which focuses only on knowledge.
3. The term “biological” is used in preference to “ecological” which has a narrower meaning and has less usage in the provisions of the CBD.

SECTION 3 Application

1. The Act extends to knowledge, innovations and practices in the so called “public domain”. It is generally thought that anything in the public domain is not subject to ownership rights and can therefore be used by anyone. Despite this there are instances where European, Japanese and US legislators have each found occasion to extend intellectual property protection to information in the public domain in order to secure protection over databases, architectural designs and publications, respectively (B. Tobin, 2000). In addition, the French concept of *domaine public payant* requires payment of royalties for the use of literary and musical works in the public domain (K. Puri, 2000). There are therefore precedents upon which rights may be attached to knowledge in the public domain.

2. The Act prevails over IPR laws when there is an inconsistency between the two. The previous version of this Act included suggested amendments to copyright, patent and trademark legislation, however these have been omitted from this version. Their implementation will have to be left to a later time. New Zealand in recent years has amended its copyright and trademark laws to take into account the concerns of their indigenous people and it would be useful if they could share their experience with the region. Pending such developments however, the supremacy formula should serve as a useful stopgap measure. It may not have affect the status quo as severely as first impressions may suggest given that most “abuses” (from the viewpoint of Pacific island countries) of copyright right and patent law are perpetrated in jurisdictions outside of the Pacific region to which this law will have no application.

3. The Act is not retrospective regarding economic rights, only as regards moral rights. There is no criminal sanction (see section 9(2)) only a civil one. Further, the mitigating factors in section 14(2) should alert a plaintiff to seek a non-legal resolution regarding the infringement of a moral right prior to commencing legal action.

SECTION 4 Definitions

1. “*Traditional biological innovation, means a product...*”. The focus of the Act is not only plants (eg, kava) but includes animals and microorganisms. The Act, which is partly inspired by the Third World Network’s Community Intellectual Rights Act 1994 is therefore broader inasmuch as the focus of the latter is solely plant varieties.

2. The need for a generational time span has been dispensed with allowing recent yet still traditional knowledge, innovations or practices to be protected by the Act.

SECTION 6 Ownership

1. All knowledge, innovations and practices are owned, so foreclosing any argument that any item of any of these elements may be ownerless.

2. The Act does not extend to individual ownership as such. Individuals may own knowledge, innovations or practices only to the extent that they do so on behalf of a social group.

3. A trust instrument will set out the terms of the trust: its purpose, holding and distribution of trust funds, rights of beneficiaries, duties of trustees etc. Trustee duties will include safeguarding the knowledge, innovations or practices by legal action where necessary. Most jurisdictions also have Trustees Acts which set out in detail the duties of trustees.

SECTION 7 Database

A database is used in preference to a register for these reasons:

- A register is formal. Owners who have reservations about disclosing their knowledge may be totally discouraged if there are too many requirements to be complied with. It may be that certain knowledge has become fragmented and different people will come forward with different pieces of the puzzle: a formal system may not cope well with such a piece-meal situation.
- A register is open. Owners may not wish to reveal their information but merely to record it for their descendants.
- A register imparts legitimacy. An adversarial ownership process at the outset will again discourage owners from coming forward with their information.

On the other hand, a database primarily records information and there is a great need to record as much traditional knowledge as quickly as possible before it become unobtainable. This means few formal requirements and an assurance of confidentiality. A detailed examination as to the veracity of ownership can be raised later but only when a challenge is brought or an enquiry by a prospective user made.

The urgent need to record the information it is felt overrides the possibility of a flood of spurious claims being made because of the initial lack of formal requirements. The task of sorting out the chaff from the wheat will be made later.

2. The offence provision is needed to deter individuals from bringing spurious or false claims. Who will bring the prosecution? A prosecution is almost always brought by the Police through the laying of an information or charge. Citizens can also lay an information but instances of this happening are rare. Government departments often prosecute offences in a subordinate court under an Act it administers, eg, the Environment Department prosecuting an infringement of the Environment Act in the Magistrates Court. More serious offences under an Act are handled by lawyers in the government legal office. Depending on the amount of the fines proposed under this Act the [Competent National Authority] may be the most appropriate body to bring prosecutions.

SECTION 8 Economic rights

1. There are two economic rights. No definition of commercial purpose is attempted to keep that term as open as possible.

2. The exception in subsection (2) is made because plant genetic resources for food and agriculture are dealt with under a specific regime. Other exceptions may be added to this subsection in due course.

3. How effective is enforcement against an offender that resides or has fled overseas? Although subsection (4) is in the nature of a criminal sanction, extradition of the offender will not be possible unless:

- there exists an extradition treaty between the two countries involved;
- within the treaty the offence needs to be referred to either explicitly or by reference to length of imprisonment (eg, not less than 12 months) - usually only the more serious offences are covered;
- the offence needs to be recognised as such in both countries.

In some jurisdictions however, judgment can be given in the accused's absence (eg, Vanuatu: Criminal Procedure Code, sections 34-36 and 44; and Samoa: Criminal Procedure Act 1972, section 42) if the punishment is a fine only, or a period of imprisonment of not more than 3 months.

Although the threat of imprisonment has great deterrent value, this Act adopts the fine as the only sanction. A fine alone is more easily imposed by judges than a term of imprisonment. A fine against an overseas offender still represents a moral victory and has the added advantage that an offender that has repented can still return to the country, pay the fine and start afresh.

SECTION 9 Moral rights

See the discussion under Section 3 above, on the retrospective effect of this Act regarding moral rights.

SECTION 10 Identity of owner and prior informed consent

1. This procedure needs to be complied with even where prior informed consent has already been obtained.

2. Subsection (5) requires a 21 day wait in case an enquiry is brought in response to the publicised information.

SECTION 11 Access and Benefit Sharing Agreement

Subsection (3) recognises that separate work may be in progress regarding knowledge or innovations or practices. For example SPREP, WWF (South Pacific) and FIELD have held Access and Benefit-sharing workshops regarding genetic resources in Samoa, the Cook Islands and Vanuatu with more workshops planned for the Solomon Islands and the Federated States of Micronesia. A model law on access to genetic resources, (whether associated with traditional knowledge or not) has been drafted which details the procedures and requirements that need to be met by a potential user.

SECTION 12 Ownership enquiry

No time bar exists regarding the lodging of a challenge.

SECTION 15 Legal proceedings

Civil proceedings are always available in addition to criminal prosecutions. Some national laws make this explicit, eg, section 172 of Samoa's Criminal Procedure Act 1972 provides "No civil remedy for any act or omission shall be suspended by reason that such act or omission amounts to an offence".

The aim of civil proceedings might be to prevent continued non-compliance, to seek damages for wrongful use (conversion) of the knowledge, innovation or practice or alternatively to request that the monetary gain by the offender be surrendered to the owner (account of profits).

The owner would be expected to bring a civil action in contrast to the [Competent National Authority] which would be expected to initiate prosecutions.

Which office should administer this Act?

- a Department of Culture has expertise in traditional knowledge and may provide expert and impartial advice in ownership disputes;
- a Department of Environment has expertise on biological materials, Access and Benefit Sharing laws and the Convention on Biological Diversity;
- a Department of Justice looks after intellectual property matters, has experience with registration procedures, and may facilitate dispute resolution through the Court system.