



Traditional Knowledge Code of Practice

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 Minister for the Environment and the Great Barrier Reef and Minister for Science and Youth Affairs has made this code (version 1). The Department of Environment and Science has co-developed this code (version 1) in consultation with First Nations peoples, biodiscovery entities and other stakeholders.

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1. Introduction

Purpose

This code defines the minimum measures to be taken before traditional knowledge can be used for biodiscovery under the *Biodiscovery Act 2004* (the Act). Under the Act, any entity undertaking biodiscovery must take all reasonable and practical measures to ensure it does not use traditional knowledge for biodiscovery unless it has an agreement with the custodians of that knowledge. This code clarifies the circumstances under which a biodiscovery entity is subject to the Act's traditional knowledge obligation. It also outlines principles, performance outcomes and compliance measures to meet the obligation.

Given this purpose, the primary audience for this code is biodiscovery entities.

The following additional materials are available on the Department of Environment and Science website:

- The Traditional Knowledge Guidelines providing:
 - 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.
- Resources to assist First Nations people to participate in and/or initiate biodiscovery projects.
- Resources to assist biodiscovery entities and First Nations peoples to collaborate.

Context

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. Biodiscovery involves the collection and analysis of native biological material for commercial purposes, such as the development of pharmaceuticals and insecticides. The Act's traditional knowledge obligation protects access to and use of the traditional knowledge of First Nations peoples in biodiscovery. It requires the consent of traditional knowledge custodians and provides for benefit-sharing from biodiscovery for First Nations peoples.

Under the Act, traditional knowledge custodians are the Aboriginal people or Torres Strait Islanders to whom the traditional knowledge relates. A custodian may nominate an entity to act as a representative or agent on their behalf about the use of their traditional knowledge in biodiscovery. Where this occurs, a biodiscovery entity is to engage with the nominated entity under the authority of the custodian.

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.

By following the code, a biodiscovery entity will be taken to have complied with the traditional knowledge obligation under section 9B of the Act. An entity may comply in another way if they are able to demonstrate they have satisfied the traditional knowledge obligation. Where the traditional knowledge obligation cannot be met, biodiscovery using traditional knowledge cannot proceed.

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

How to use the code

There are six requirements for meeting the Act's traditional knowledge obligation for biodiscovery:

1. Identify the custodians of traditional knowledge.
2. Obtain free, prior and informed consent (FPIC).
3. Establish a benefit-sharing agreement with mutually agreed terms.
4. Where possible, obtain consent and a benefit-sharing agreement prior to the use of publicly available traditional knowledge.
5. Provide the opportunity for custodianship claimants to consent and negotiate benefit-sharing even after biodiscovery has commenced.
6. Provide evidence to the State of compliance with the code.

Biodiscovery entities seeking to use traditional knowledge that is not publicly accessible should start from Requirement 1. Those using traditional knowledge that is publicly accessible should start at Requirement 4, however, the identification of custodians may then require completion of Requirements 1 to 3.

The code explains how each requirement can be met, incorporating the following:

Principles	The foundational concepts and ideas that should be considered when meeting the traditional knowledge obligation.
Performance outcomes	The results to be achieved to satisfy the traditional knowledge obligation.
Code compliance measures	The minimum measures for complying with the code, reflecting what the Queensland Government, First Nations peoples and industry consider to be reasonable and practical measures.

Scope of the code

This code applies to biodiscovery activities that are subject to the traditional knowledge obligation under the Act. A biodiscovery entity that is not using traditional knowledge is not subject to the obligation, regardless of whether other provisions of the Act apply. The traditional knowledge obligation does not apply retrospectively to the use of traditional knowledge in biodiscovery prior to the traditional knowledge obligation commencing on 30 September 2020. However, the obligation applies if non-commercial research was undertaken using traditional knowledge prior to the obligation commencing, and a commercial opportunity or application is pursued following the commencement of the obligation.

Table 1: Examples of activities within and outside the scope of the traditional knowledge obligation

Within scope
Using, for biodiscovery, traditional knowledge about native biological material collected from any area in Queensland (including all State, private, freehold, and leasehold land, and all Queensland waters).
Using, for biodiscovery, traditional knowledge held by a custodian outside Queensland about native biological material collected from Queensland.
Using, for biodiscovery, traditional knowledge about native biological material from an off-site collection, if the material was originally collected from Queensland.
Out of scope
Using traditional knowledge associated with native biological material collected from outside Queensland.
Using traditional knowledge for non-commercial research activities. Note: if a commercial intent develops, the use may become within scope.

Biodiscovery entities undertaking non-commercial research may wish to follow the code voluntarily, to comply with the Nagoya Protocol (which is not limited to commercial uses) and enable future compliance with the Act should a potential commercial use be identified later, that involves the use of traditional knowledge. The Nagoya Protocol can be found here <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

The State is not a party to agreements between biodiscovery entities and the custodians of traditional knowledge. Where an entity is using native biological material for biodiscovery from State land or Queensland waters and accessing traditional knowledge, separate agreements may be required with the custodians and the State. This includes biodiscovery projects initiated by custodians, other First Nations peoples and organisations.

Further information on benefit-sharing agreements with the State can be found at <https://www.business.qld.gov.au/industries/science-it-creative/science/biodiscovery/agreement>.

Use of traditional knowledge

Under the Act, traditional knowledge means information based on Aboriginal tradition or Island custom. This includes the body of traditions, observances, customs and beliefs of Aboriginal peoples or Torres Strait Islanders generally, or of a particular community or group of Aboriginal peoples or Torres Strait Islanders. It includes any such traditions, observances, customs and beliefs relating to individual people, areas, objects or relationships.

‘Use’ of traditional knowledge means that the:

- biodiscovery entity either intentionally uses the traditional knowledge, or is wilfully ignorant as to the use of the traditional knowledge, and
- traditional knowledge forms the basis of, contributes to, or is deployed to create an advantage in the conduct of biodiscovery.

Table 2: Examples that do and do not constitute the use of traditional knowledge in biodiscovery

Examples of traditional knowledge use
A biodiscovery entity spends time on Country, learns about traditional medicinal applications of a native plant and uses this knowledge to conduct biodiscovery.
A biodiscovery entity works with a First Nations community to learn about the traditional medicinal applications of a native plant. The entity uses this knowledge to explore the medicinal applications of another native plant and conduct biodiscovery with that plant.
A biodiscovery entity reads about traditional medicinal applications of a native plant in a journal article and uses this knowledge to conduct biodiscovery with that plant.
A biodiscovery entity reads about medicinal applications of a native plant in a book, and suspects from the context of the book that the information may be based on traditional knowledge but does not make inquiries to confirm the source of the knowledge. The biodiscovery entity uses the knowledge to conduct biodiscovery with that plant.
A biodiscovery entity uses traditional knowledge to narrow its survey of native species for desired bioactive compounds, thereby significantly accelerating the biodiscovery and delivery of products to market. This applies even if the traditional knowledge does not specifically relate to those compounds or the biodiscovery application.
A biodiscovery entity conducts non-commercial research using traditional knowledge prior to the commencement of the traditional knowledge obligation, then identifies a commercial application of the research after the commencement of the traditional knowledge obligation and starts conducting biodiscovery.
Examples that do not constitute use of traditional knowledge
A biodiscovery entity scans native species for desired bioactive compounds. Traditional knowledge also exists regarding the properties of the plants, but the knowledge is not accessed or used by the entity in their activities. The biodiscovery entity conducts biodiscovery with the identified plants.
A biodiscovery entity works with a First Nations community and learns about the traditional medicinal applications of a native plant. The biodiscovery entity decides not to undertake biodiscovery with that plant or any other native species using that knowledge.
A biodiscovery entity uses traditional knowledge for a purpose other than biodiscovery as defined in the Act.
A biodiscovery entity uses traditional knowledge for biodiscovery prior to commencement of the traditional knowledge obligation and continues that same biodiscovery after the commencement of the traditional knowledge obligation.

Authorisation and amendment of the code

Under section 9C of the Act, the Minister may make a code about:

- the circumstances in which the traditional knowledge obligation applies
- processes for identifying the custodians of traditional knowledge
- reasonable and practical measures for obtaining the agreement of the custodians of traditional knowledge
- another matter in relation to complying with the traditional knowledge obligation.

The code takes effect from the date it is approved by regulation (unless it is repealed). The code was tabled in the Legislative Assembly and is published on the Department of Environment and Science website.

Any future amendments to the code will require approval by regulation and tabling in the Legislative Assembly. The Department of Environment and Science proposes to review the code within five years of its initial commencement.

2. Requirements

Table 3 outlines the requirements to be met by a biodiscovery entity before traditional knowledge can be used for biodiscovery.

Table 3: Code requirements

Requirement	Performance outcome
1. Identify the custodians of traditional knowledge	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.
2. Obtain free, prior and informed consent (FPIC)	<p>Performance outcome 2.1: Custodians are not pressured, manipulated, intimidated, coerced or unduly influenced into giving their consent and are free to decide consent.</p> <p>Performance outcome 2.2: Consent is obtained before using traditional knowledge for biodiscovery.</p> <p>Performance outcome 2.3: All relevant information is provided in a format that custodians can understand and use.</p> <p>Performance outcome 2.4: Biodiscovery only proceeds if custodians grant approval for the use of the traditional knowledge for biodiscovery, and only continues so long as consent is confirmed at any agreed points.</p>
3. Establish a benefit-sharing agreement with mutually agreed terms	Performance outcome 3: The biodiscovery entity and custodians agree on terms for fair and equitable benefit-sharing from the use of traditional knowledge.
4. Where possible, obtain consent and a benefit-sharing agreement prior to the use of publicly available traditional knowledge	<p>Performance outcome 4.1: 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.</p> <p>Performance outcome 4.2: 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.</p>
5. Provide the opportunity for custodianship claimants to consent and negotiate benefit-sharing even if biodiscovery has commenced	<p>Performance outcome 5.1: 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.</p> <p>Performance outcome 5.2: 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.</p>
6. Provide evidence to the State of compliance with the code	Performance outcome 6: Provide evidence to the State that the biodiscovery entity has complied with the traditional knowledge obligation prior to using traditional knowledge for biodiscovery, and keep and maintain records of compliance.

Requirement 1: Identify the custodians of traditional knowledge

(Refer to the Traditional Knowledge Guidelines, section 3.1)

Principles

- Engage in good faith with the ‘right people for right country’ when undertaking biodiscovery, consistent with international standards and the traditional knowledge obligation.
- Understand and respect traditional law, customs, protocols, systems of governance and the diversity of these across Queensland when identifying the custodians of traditional knowledge and forming an agreement with them.
- Custodians of traditional knowledge may nominate an entity (the nominated entity) to enter into an agreement with a biodiscovery entity under section 9B of the Act on the custodians’ behalf. Where this occurs, a biodiscovery entity should engage with the nominated entity.

Performance outcome 1.1: Identify the custodians of traditional knowledge

The custodians of traditional knowledge with the 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.

Code compliance measures

A biodiscovery entity seeking to use traditional knowledge for biodiscovery must:

Self-screen:

- If a biodiscovery entity seeks to use publicly accessible traditional knowledge, proceed to **Requirement 4**.
- If use of the traditional knowledge for biodiscovery has already started (since commencement of the traditional knowledge obligation) and there are claims of custodianship to the traditional knowledge being used, proceed to **Requirement 5**.
- In all other cases, complete the requirements below.

Consult widely to identify all possible custodians:

- Seek advice from traditional knowledge holders on the identity of custodians¹ with authority to speak for Country about the knowledge, or how to identify such custodians.
- Seek advice from registered and/or representative organisations² on the identity of custodians with authority to speak for Country about the knowledge, or how to identify such custodians.

- Focus on areas associated with the traditional knowledge, or where the native biological material associated with the traditional knowledge was, or will be, collected.
- If custodians with authority to speak for Country about the knowledge are identified:
 - Seek advice on how to identify other such custodians and continue to consult widely to identify all possible custodians with authority to speak for Country about the knowledge.
 - If only one custodian with authority to speak for Country about the knowledge is identified, check whether this custodian would like to be engaged through a nominated entity and proceed to **Requirement 2**.³

Seek agreement where there are multiple custodians with authority to speak for Country about the knowledge:

- Support consultation between all such identified custodians, to allow them to decide whether custodianship of the traditional knowledge is shared.
- Consider assisting the custodians to use dispute resolution processes to decide custodianship of the traditional knowledge.
- Confirm whether there are custodians that consent to the use of the traditional knowledge but opt out from further involvement in FPIC and benefit-sharing processes.
- Check whether any custodians would like to be engaged through a nominated entity.³
- If agreement on custodianship can be reached proceed to **Requirement 2** with the agreed custodians and any nominated entities.

The traditional knowledge *cannot* be used for biodiscovery if:

- The custodians with authority to speak for Country about the knowledge cannot be identified, or
- Agreement on custodianship of the knowledge between multiple custodians cannot be reached.

1. Note: see the definitions for the difference between a custodian and a traditional knowledge holder.

2. Note: refer to the Traditional Knowledge Guidelines, Box 1, for tools to help identify the relevant registered and/or representative organisations.

3. Note: refer to the Traditional Knowledge Guidelines, section 3.1 for further information about nominated entities, registered and/or representative organisations, and the role they may have in relation to the traditional knowledge obligation.

Requirement 2: Obtain free, prior, and informed consent

(Refer to the Traditional Knowledge Guidelines, section 3.2)

Principles

- Free, prior and informed consent (FPIC) must be obtained before using traditional knowledge for biodiscovery.
- FPIC is continuing and iterative, aimed at building a series of good-faith engagements, empowering communities, and fostering lasting relationships between the biodiscovery entity and custodians.
- Custodians have the right to say 'no' to the proposed use of traditional knowledge in biodiscovery, prior to the start of the project and at any agreed points when consent must be reconfirmed.
- The boundaries and conditions under which consent is given must be recognised.
- Customary rights and enduring custodial obligations must be respected, in addition to existing legal rights.
- FPIC requires that the institutions, representation and decision-making of First Nations peoples be fully respected (UN Declaration on the Rights of Indigenous Peoples article 19, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>).

Performance outcome 2.1: Free consent

Custodians are not pressured, manipulated, intimidated, coerced or unduly influenced into giving their consent and are free to decide consent.

Code compliance measures

A biodiscovery entity seeking to use traditional knowledge for biodiscovery must:

- Confirm that the people engaging in the consent process are the custodians of the traditional knowledge and are willing to engage in this process.
- Notify the custodians of their right to say 'no' to all or parts of the biodiscovery.
- Notify the custodians and community members impacted by the biodiscovery about the planned consent process.
- Ensure custodians are not coerced or manipulated, and timeframes are not arbitrarily shortened or used as a mechanism to pressure custodians into making decisions.

Performance outcome 2.2: Prior consent

Consent is obtained *before* using traditional knowledge for biodiscovery.

Code compliance measures

A biodiscovery entity seeking to use traditional knowledge for biodiscovery must:

- Give the custodians the information they need to make a decision and seek the custodian's consent before using the traditional knowledge for biodiscovery.
- In consultation with the custodians, agree on a process for deciding consent that recognises relevant customary law and community protocols, including decision-making timeframes.

Performance outcome 2.3: Informed consent

All relevant information is provided in a format that custodians can understand and use.

Code compliance measures

A biodiscovery entity seeking to use traditional knowledge for biodiscovery must:

- Provide custodians with accurate, unbiased, clear, consistent and transparent information, including the scope, location, purpose, duration, benefits and risks of the biodiscovery and the personnel involved.
- Consult with custodians on the likely impact of the biodiscovery on their community, including social, cultural, economic and environmental aspects.
- Explain but not exaggerate the possible benefits of the biodiscovery for custodians or First Nations communities.
- Explain to the custodians that dependent on their level of involvement in biodiscovery, the custodians may be considered as a biodiscovery entity under the Act.
- Agree on ways to manage confidential information disclosed in the consent process.
- Document key discussions and decisions and make these freely available to all custodians, relevant community members and stakeholders.
- Ensure information is provided in a format that is accessible and understood by the community.

Performance outcome 2.4: Consent granted

Biodiscovery only proceeds if custodians grant approval for the use of the traditional knowledge for biodiscovery, and only continues so long as consent is confirmed at any agreed points.

Code compliance measures

A biodiscovery entity seeking to use traditional knowledge for biodiscovery must:

- Ensure there is clear agreement with the custodians on the meaning, conditions and extent of consent.
- Ensure there is clear agreement with the custodians on the triggers for, or points during the biodiscovery when, consent must be revisited, re-negotiated or confirmed.
- Document and keep evidence of consent in formats understood by all parties.
- Provide for the review of consent documents by custodians at agreed intervals.

If any custodian does not grant approval for the use of the traditional knowledge or does not reconfirm consent at any of the agreed triggers or points during the biodiscovery, the biodiscovery entity *cannot* use the traditional knowledge for biodiscovery.

Requirement 3: Benefit-sharing on mutually agreed terms

(Refer to the Traditional Knowledge Guidelines, section 3.3)

Principles

- Using traditional knowledge for biodiscovery is subject to fair and equitable benefit-sharing on mutually agreed terms (in line with the Nagoya Protocol).
- Mutually agreed terms can only be finalised once consent has been obtained and are based on good faith and transparent negotiations that are free from intimidation, time constraints or coercion.
- Ensure custodians have a clear understanding and realistic expectations about the possible benefits of the biodiscovery.
- Biodiscovery entities should approach benefit-sharing negotiations with an open mind, ready to adapt standard agreements to meet the needs of custodians.
- Updated information should be provided to custodians during negotiations, especially when it affects the mutually agreed terms (such as the emergence of a new commercial application of the traditional knowledge).

Performance outcome 3: Benefit-sharing

The biodiscovery entity and custodians agree on terms for fair and equitable benefit-sharing from use of the traditional knowledge.

Code compliance measures

A biodiscovery entity seeking to use traditional knowledge for biodiscovery must agree on the terms for its use with custodians, including benefit-sharing arrangements. The terms must include:

- A description of the proposed biodiscovery, including:
 - its purpose
 - where relevant, the species, quantity and location (if known) of native biological material to be collected
 - the traditional knowledge being used.
- The term of the agreement.
- Benefit-sharing arrangements, including:
 - types of benefits to be shared
 - timing of benefits to be shared
 - mechanisms for sharing benefits
 - the parties who will receive benefits.
- Intellectual property rights generated through the biodiscovery, including publications, and ownership of patents and plant breeders' rights (if applicable).

- Implications of the agreement or biodiscovery project for the ongoing customary use of the traditional knowledge and associated native biological material by the custodians, their community, and other First Nations peoples.
- Any third-party use or disposal, including obligations and benefit-sharing from third parties.
- How information, including confidential information and data is shared between the parties to the agreement, and how this information is stored and accessed.
- Circumstances for revisiting the mutually agreed terms, including the:
 - conditions under which consent is revisited or reconfirmed
 - process to be followed should there be late claims made to custodianship of the traditional knowledge.
- Arrangements for either party about terminating the agreement.
- A dispute resolution process including, at minimum:
 - a method for either party to give notice about a dispute
 - a requirement that the parties confer at least once to try and resolve the dispute or agree on a method to resolve the dispute
 - a requirement that all parties attempt to settle the dispute using a culturally appropriate mediator before recourse to arbitration or litigation.

Requirement 4: Publicly accessible traditional knowledge

(Refer to the Traditional Knowledge Guidelines, section 3.4)

Principles

- The traditional knowledge obligation applies to all traditional knowledge, including publicly accessible knowledge.
- Protection of publicly accessible traditional knowledge is vital, to acknowledge that this knowledge may have been shared without the consent of custodians, and to ensure that the benefits of using traditional knowledge are shared fairly and equitably with First Nations peoples.
- Biodiscovery entities that make agreements with the custodians of publicly accessible traditional knowledge can demonstrate compliance with international standards (such as the Nagoya Protocol) and benefit from greater commercial opportunities.

Performance outcome 4.1: Custodians can be identified

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.

Code compliance measures

A biodiscovery entity seeking to use publicly accessible traditional knowledge for biodiscovery must:

- Follow the steps in **Requirement 1** to identify the custodians with authority to speak for Country about the knowledge.
- Where custodians are identified, comply with **Requirements 2 and 3**.
- Where custodians cannot be identified, proceed to **Performance Outcome 4.2**.

Performance outcome 4.2: Custodians cannot be identified

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.

Code compliance measures

If a biodiscovery entity seeking to use publicly accessible traditional knowledge for biodiscovery has followed the steps in Requirement 1 but cannot identify a custodian with authority to speak for Country about the knowledge, the biodiscovery entity may use the traditional knowledge for biodiscovery.

If the biodiscovery entity chooses to use the traditional knowledge, the entity must:

- Document and retain evidence of the measures undertaken to find the custodians.
- As a minimum, retain the percentage of gross commercialisation receipts received from biodiscovery each year—as set out in 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. This can be achieved by directing these funds to capacity-building projects demonstrated to achieve the desired outcomes, through projects identified by:
 - the Queensland Government, or
 - the biodiscovery entity and endorsed by the Queensland Government.

The model agreement is available on the Department of Environment and Science website.

Requirement 5: Claims of custodianship after biodiscovery has commenced

(Refer to the Traditional Knowledge Guidelines, section 3.5)

Principles

- Biodiscovery entities that undertake a robust and thorough process to identify custodians may reduce the chance of any claims to traditional knowledge or disputes after the biodiscovery has commenced.
- When claims of custodianship are received after the biodiscovery has commenced, biodiscovery entities should confirm whether the claimant is a custodian as soon as possible. This is to avoid the potential use of the traditional knowledge without the consent of the custodians and benefit-sharing from the use of that knowledge in biodiscovery.

Performance outcome 5.1: Additional custodianship claims to traditional knowledge

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.

Code compliance measures

If a biodiscovery entity receives claims that there is an additional custodian of the traditional knowledge being used for biodiscovery, after having already established terms of use with another custodian, the biodiscovery entity must:

- Support consultation between the existing custodians and those claiming to be custodians with authority to speak for Country about the knowledge, to allow them to decide whether custodianship of the traditional knowledge is shared.
- Check whether any custodians would like to be engaged through a nominated entity.
- Once custodianship of the traditional knowledge has been agreed, defer further biodiscovery using the traditional knowledge until:
 - all agreed custodians' consent to the continued use of the traditional knowledge in accordance with Requirement 2 (excluding Performance Outcome 2.2), and
 - either
 - the additional agreed custodians' consent to the use of the traditional knowledge but opt out from further involvement in FPIC and benefit-sharing processes, or
 - all agreed custodians are included in the existing benefit-sharing agreement to the satisfaction of all parties in the agreement, or
 - a separate benefit-sharing agreement is entered into with the additional agreed custodians in accordance with Requirement 3.

- Consider assisting the custodians to use dispute resolution processes to decide custodianship of the traditional knowledge and/or the terms of a benefit-sharing agreement.

Note: As per Performance Outcome 2.4, if any agreed custodian does not grant approval for the use of the traditional knowledge or does not reconfirm consent at any agreed triggers or points during the biodiscovery, the biodiscovery entity cannot continue to use the traditional knowledge for biodiscovery.

Performance outcome 5.2: Custodianship claims to publicly accessible knowledge

Custodians of publicly accessible traditional knowledge are given the opportunity to grant or refuse consent and negotiate benefit-sharing, even if biodiscovery using the knowledge has already commenced.

Code compliance measures

If a biodiscovery entity receives claims that there is a custodian of publicly accessible traditional knowledge, which is being used for biodiscovery in accordance with Performance Outcome 4.2, the biodiscovery entity must:

- Meet:
 - **Requirement 1** to identify the custodians with authority to speak for Country about the knowledge, and
 - **Requirement 2** (excluding Performance Outcome 2.2) to seek the consent of the custodians.
- The biodiscovery entity may continue the biodiscovery while completing Requirements 1 and 2.
- Defer further biodiscovery until:
 - a benefit-sharing agreement is entered into with the custodians in accordance with Requirement 3, or
 - the custodians consent to the use of the traditional knowledge but opt out from further involvement in FPIC and benefit-sharing processes.

The biodiscovery entity may cease retaining commercialisation receipts to build the capacity of First Nations peoples under Performance Outcome 4.2 once a benefit-sharing agreement with the custodians has commenced.

Note: As per Performance Outcome 2.4, if any agreed custodian does not grant approval for the use of the traditional knowledge or does not reconfirm consent at any of the agreed triggers or points during the biodiscovery, the biodiscovery entity cannot continue to use the traditional knowledge for biodiscovery.

Requirement 6: Evidence of compliance with the code

Principles

Biodiscovery entities provide evidence to the State of a benefit-sharing agreement with custodians when using traditional knowledge for biodiscovery.

Performance outcome 6: Evidence of compliance

Provide evidence to the State that the biodiscovery entity has complied with the traditional knowledge obligation prior to using traditional knowledge for biodiscovery, and keep and maintain records of compliance.

Code compliance measures

Prior to using traditional knowledge for biodiscovery, a biodiscovery entity must:

EITHER

- Provide the State with a document co-signed by the biodiscovery entity and the custodians of the traditional knowledge confirming:
 - the biodiscovery entity has made reasonable and practical efforts to confirm they are engaging with the custodians of the knowledge
 - FPIC has been obtained from the custodians
 - mutually agreed terms for benefit-sharing have been negotiated with the custodians.

OR

- If using publicly accessible traditional knowledge, that the custodians of which cannot be identified, provide the State with evidence of the measures taken to identify the custodians of that knowledge.

In addition, an entity using traditional knowledge for biodiscovery must keep, and provide to the State upon request, documentation on (where applicable):

- The identities of the custodians of the traditional knowledge and how they were identified.
- The process undertaken to obtain FPIC to use the traditional knowledge.
- The mutually agreed terms for use of the traditional knowledge.
- If retaining commercialisation receipts from the use of publicly available traditional knowledge:
 - information on the amounts retained and used to benefit First Nations peoples
 - governance and administrative arrangements in place to manage the retention and use of commercialisation receipts to benefit First Nations peoples.

3. Definitions

Biodiscovery	Under the <i>Biodiscovery Act 2004</i> , biodiscovery includes biodiscovery research or 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 for 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 may assist 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 • 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) • representative body (such as a non-government organisation, council, or corporation) • 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 or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.</p>
Traditional knowledge holder	<p>A First Nations person who is aware of particular aspects of traditional knowledge but is not a custodian.</p>
Traditional knowledge obligation	<p>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.</p>