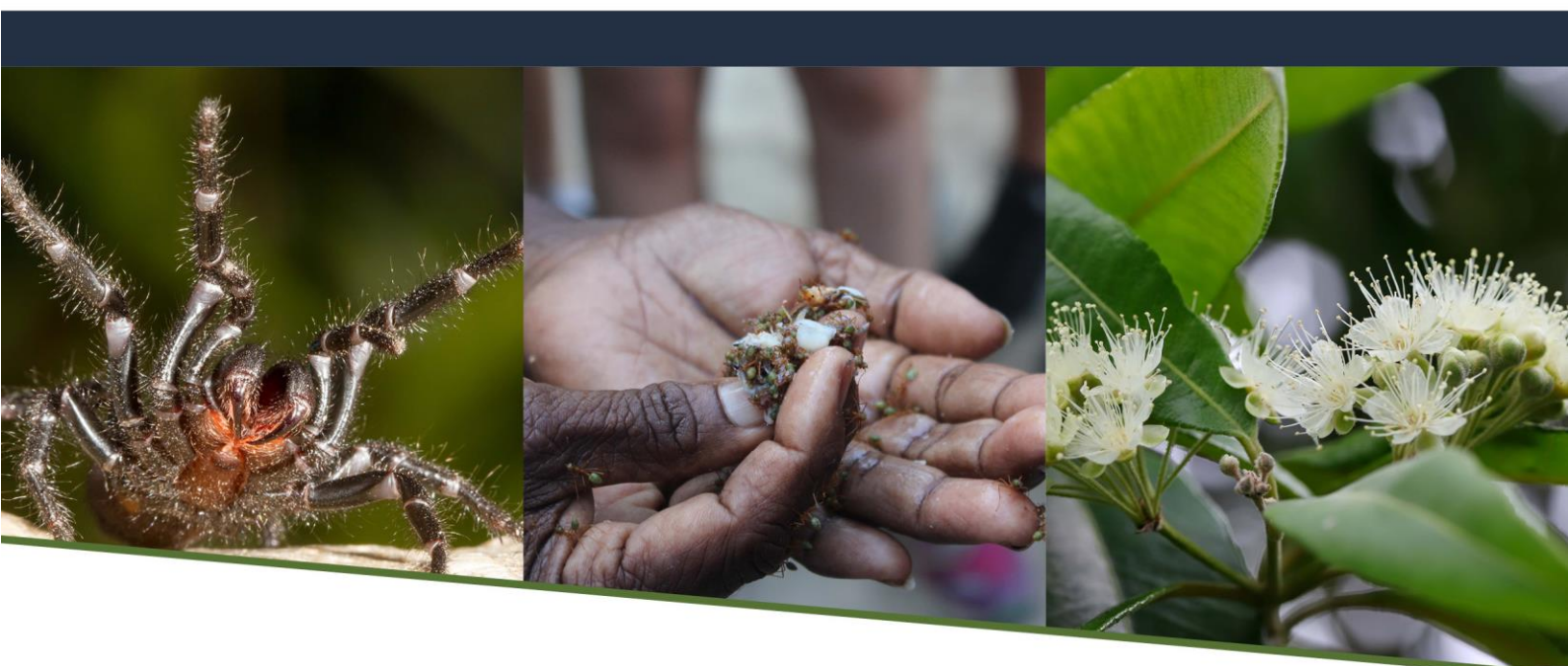




Traditional Knowledge Code of Practice and Guidelines

Biodiscovery Act 2004

Consultation Report



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1. Consultation summary

The Department of Environment and Science (department) released the Draft Biodiscovery Traditional Knowledge Code of Practice (code) and Guidelines (guidelines) for public consultation from 16 April 2021 for six weeks.

During the consultation period, the department also undertook targeted consultation with First Nations peoples and organisations and biodiscovery entities (universities, research institutions and commercial research companies), which included a stakeholder workshop.

This report summarises the results of consultation on the draft code and guidelines and how this feedback was addressed.

The 10 written submissions and feedback received from the stakeholder workshop participants were generally supportive of the code and guidelines. Most of the feedback suggested improvements to the documents, rather than any substantive change to the requirements in the code or the guidance and best practice measures outlined in the guidelines.

The key points raised in the feedback included:

- Stakeholders generally supported the code and guidelines and stated that both documents were fit for purpose.
- Stakeholders supported the consultative process that had been used to develop the draft code and guidelines.
- Additional guidance is needed for biodiscovery entities and First Nations peoples to collaborate effectively, and for First Nations peoples to participate in and/or initiate biodiscovery projects.
- Native title bodies should not have equivalent rights to a traditional knowledge custodian.
- Benefit sharing agreements require additional detail addressing intellectual property (IP) rights.
- Benefit sharing agreements should ensure biodiscovery does not limit the ongoing customary use of traditional knowledge and associated native biological material by the traditional knowledge custodians, their communities and other First Nations peoples.
- Free, prior, informed consent (FPIC) requirements should more clearly indicate the rights of traditional knowledge custodians to say no and that consent is an ongoing process, revisited at agreed points.
- The requirements for late claims to traditional knowledge and disputes arising from this process should be clarified.

Background

Reforms of the *Biodiscovery Act 2004*

Biodiscovery involves the collection and analysis of native biological material for commercial purposes, such as the development of pharmaceuticals and insecticides. The *Biodiscovery Act 2004* (the Act) establishes an access and benefit-sharing framework for biodiscovery in Queensland. Before collecting and using native biological material from State land or Queensland waters for biodiscovery, biodiscovery entities must secure a collection authority and negotiate a benefit-sharing agreement with the State.

In September 2020, the Act was amended through the *Biodiscovery and Other Legislation Amendment Act 2020*. The amendments introduced the traditional knowledge obligation, that requires a person take all reasonable and practical measures to only use traditional knowledge for biodiscovery with the agreement of the traditional custodians of that knowledge. The amendments also included changes to simplify the approvals process and clarify how the Act requirements align with other international access and benefit-sharing instruments.

The amendments were developed following extensive consultation with stakeholders, including an independent statutory review, public consultation on an options paper, workshops with key stakeholders representing biodiscovery entities and First Nations peoples, and public consultation through parliamentary committee consideration of the Biodiscovery and Other Legislation Amendment Bill 2019.

Traditional Knowledge Code of Practice and Guidelines

To assist biodiscovery entities to meet the traditional knowledge obligation, the Act enables the Minister to make a Traditional Knowledge Code of Practice. Under the Act, the code may address: 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; and another matter in relation to complying with the traditional knowledge obligation.

The code's purpose is to define the minimum measures to be taken before traditional knowledge can be used for biodiscovery. These requirements include identifying the custodians of the traditional knowledge; obtaining consent from custodians to use this knowledge; and establishing benefit-sharing agreements with custodians on mutually agreed terms. Requirements are also outlined for the use of publicly accessible traditional knowledge; addressing custodianship claims after biodiscovery has already commenced; and keeping and maintaining records to demonstrate compliance with the code.

By following the code, a biodiscovery entity will be taken to have complied with the traditional knowledge obligation. An entity may comply in another way if it is able to demonstrate it has satisfied the traditional knowledge obligation.

The guidelines provide practical information and best practice advice for biodiscovery entities to meet the code requirements and engage in a culturally appropriate manner with First Nations peoples when seeking to use their traditional knowledge.

Consultation activities

The department has consulted extensively with key stakeholders on the code and guidelines. Public consultation on the draft code and guidelines was undertaken between 16 April and 28 May 2021. Ten submissions were received including: four submissions from First Nations peoples or organisations; three submissions from universities; one submission from a non-government organisation; one private submission from a legal scholar; and one submission from a commercial law firm. Refer to Appendix 1 for a list of submissions on the code and guidelines.

During the public consultation period, a workshop was held with key stakeholders to enable them to provide feedback on the code and guidelines. Workshop participants included members of the existing Ministerial Traditional Knowledge Roundtable and key biodiscovery entities.

Public consultation was communicated to key audiences through a range of activities. These included: targeted stakeholder emails; web content on the Department of Environment and Science and Business Queensland websites; listing on the Queensland Government's 'Get Involved' consultation website; social media posts on the department's Facebook and LinkedIn platforms; a media release; a radio interview with a Traditional Knowledge Roundtable member.

Prior to, and during, public consultation, the department undertook a range of consultation activities to inform development of the documents including:

- Four workshops with key stakeholders comprising First Nations peoples and experts in traditional knowledge and biodiscovery (through the Traditional Knowledge Roundtable) and biodiscovery entities.

These entities included:

- Myuma Group and Dugalunji Aboriginal Corporation
 - Chuulangun Aboriginal Corporation
 - BioCultural Consulting
 - Griffith University (including Griffith Enterprise, Griffith Institute for Drug Discovery and the Pro Vice Chancellor (Indigenous))
 - University of Queensland (including Queensland Alliance for Agriculture and Food Innovation, UQ Law School, Pro Vice Chancellor (Indigenous), Deputy Vice Chancellor of Research and Innovation, and UniQuest)
 - Queensland University of Technology
 - University of the Sunshine Coast
 - James Cook University
 - University of New South Wales
 - QIMR Brehoffer
 - CSIRO
 - Thomson Geer Lawyers
 - Queensland Herbarium
 - Queensland Museum.
- Seventeen small group meetings with these and other stakeholders to discuss specific issues or seek technical advice.
 - Briefings with Queensland Government departments through a Government Reference Group and consultation with the Australian Government and other jurisdictions.

2. Analysis of submissions

General feedback

Feedback on the code

- There was a high level of support for the purpose of both the code and guidelines and stakeholders considered the documents fit to achieve those purposes. For example, a biodiscovery entity stated that the institution *“welcomes the Traditional Knowledge Code of Practice and respective guidelines. Both documents meet the intended purpose to assist biodiscovery entities to meet the requirements of the Biodiscovery Act 2004 with respect to access and utilisation of Traditional Knowledge. The code clearly defines the minimum measures to be taken before Traditional Knowledge can be disclosed, accessed and used for Biodiscovery, and guidelines provide practical information for engaging effectively with First Nations Peoples on Traditional Knowledge. Together they enable both, custodians of Traditional Knowledge and biodiscovery entities, to follow the required steps of identifying the Right People for Right Country, obtaining Free Prior Informed Consent, and sharing benefits from Biodiscovery through Benefit Sharing Agreements.”* A First Nations submitter stated that *‘the purpose of the code is supported and well-articulated.’*
- Submitters and workshop participants commented that the documents were clear, concise and consistent, providing enough information without being overwhelming for the reader.
- A number of submitters commented positively on the consultative process in developing the draft code and guidelines. For example, one submitter noted that *“It is clear that DES has worked to incorporate much of the feedback already received”*. Another submitter stated that they *“would like to commend ... the Strategy, Policy and Evaluation Team for your consultative and deliberative approach to developing these documents”* [the code and guidelines].
- Both First Nations peoples and biodiscovery entities emphasised the need for additional resources to support the capacity of both First Nations peoples and biodiscovery entities to engage in genuine partnerships and to ensure that benefit sharing is fair and equitable.
- A biodiscovery entity outlined concern about the relative inexperience of both biodiscovery entities and First Nations peoples in the field of access and benefit-sharing for traditional knowledge. Many noted the imbalance in financial and other resources between custodians and biodiscovery entities. For example *“Genuine partnership needs to acknowledge that although the financial and commercial investment of one party may exceed the other’s, that the terms for arriving at decisions and moving forward occur from a source of equality”*.
- Some submitters expressed a position that the code should also include an equivalent set of principles for First Nations peoples engaged in biodiscovery and supporting material focusing on how custodians can initiate their own biodiscovery projects or more actively seek project partners. For example *“there would be benefit from the future development of guidelines that specifically assist traditional knowledge custodians and knowledge holders on how to participate in and/or initiate biodiscovery activities (including, for example, how to determine intellectual property etc)”*.
- Some First Nations submitters and workshop participants stated that the code (and guidelines) framed traditional knowledge custodians as passive parties to the biodiscovery, rather than active project partners or as biodiscovery entities. For example

“the tendency of the documents to assume that the biodiscovery entities will necessarily be non-First Nations established and that First Nations peoples are the passive participants (rather than initiators of the sharing of knowledge)”.

- First Nations peoples outlined a need to more strongly acknowledge that traditional knowledge has been used and made publicly accessible without consent and that consent is a foundational principle for the use of traditional knowledge.
- A biodiscovery entity suggested a dispute resolution process to address situations where an entity believes it is not using traditional knowledge, but a custodian claims that the traditional knowledge obligation applies.
- A biodiscovery entity stated that *“Expectations—including timelines for decision making and negotiations and potential and actual benefits from Biodiscovery—need to be managed on both sides.”*
- Both First Nations submitters and biodiscovery entities requested that the code better reference where to find supporting information in the guidelines, especially with respect to the ‘actions towards best practice’ for each of the code requirements.

Response to feedback

- The department is developing capacity strengthening resources to assist First Nations peoples and biodiscovery entities to collaborate, and to support First Nations peoples to participate in and/or initiate biodiscovery projects. The department intends to release these resources through a phased approach, with initial resources released at the same time as the final code and guidelines. The department will continue to use networks to build awareness of the traditional knowledge obligation and provide support to First Nations peoples and biodiscovery entities in relation to initiating biodiscovery projects that seek to use traditional knowledge.
- The code has been amended to acknowledge that First Nations peoples can be biodiscovery entities. The guidelines reflect more accurately the nature of the partnerships between biodiscovery entities and First Nations peoples.
- The code and guidelines have been amended to provide stronger acknowledgement that traditional knowledge has been used and made publicly accessible without consent. They also include more explicit consent provisions throughout Requirements 1 to 5.
- If a dispute arises about whether traditional knowledge has been used without the consent of the custodian, the department would investigate this as a compliance action. To reduce uncertainty and disputes, the code provides examples of activities within and outside the scope of the traditional knowledge obligation and examples of what does and does not constitute the use of traditional knowledge.
- References have been inserted in the code directing readers to the corresponding section of the guidelines for each of the code requirements.

Feedback on the guidelines

- Submitters suggested that the guidelines should reflect traditional knowledge custodians as initiators of projects and that information related to building genuine partnerships with custodians be expanded upon. One biodiscovery entity also suggested that a separate document be developed to explain how First Nations peoples could leverage the Act for the benefit of their communities.
- Submitters and workshop participants generally supported the principles for the use of traditional knowledge including those principles for engaging with First Nations peoples.
- Many biodiscovery entities, First Nations submitters and workshop participants raised the need for additional support measures and resources for how biodiscovery entities could improve engagement with First Nations peoples. This included recognising sorry business; treating confidential information appropriately; specifying processes for the attribution, dissemination and publication of traditional knowledge; acknowledging the

importance of discussing cultural protocols early in the relationship; and ensuring culturally appropriate engagement with First Nations peoples.

- First Nations submitters and some workshop participants also suggested biodiscovery entities may be expected to provide additional support to ensure genuine partnerships and fair and equitable benefit-sharing. For example *“one of the major limitations to First Nations people meeting, making an assessment, and coming to a decision on the use of traditional knowledge is the lack of funding”*.

A non-government organisation stated that *“Importantly, guidelines for First Nations peoples need to be appropriate for the various levels of organisational capacity within First Nations groups and individuals”*.

A biodiscovery entity noted that *there is a “lack of legal expertise in the fields of Biodiscovery, FPIC and Benefits Sharing Agreements, which may lead to further imbalance and prolonged negotiations”*.

- A biodiscovery entity stated that *“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.”*

Response to feedback

- A principle has been added to the section on ‘Engaging with First Nations peoples’ about appropriately resourcing First Nations peoples to make decisions based on customary protocols.
- Many of the suggested support measures and resources have been outlined throughout the guidelines. For example, funding or providing logistical support for traditional knowledge custodians to meet; recommending the use of cultural brokers and First Nations consultants and facilitators to facilitate culturally appropriate and productive engagement and information dissemination; engaging with historians or anthropologists to help identify custodians; and funding custodians to access independent advice, if requested.
- The capacity strengthening resources to be released by the department will also add to the body of support material that will be available to biodiscovery entities and First Nations peoples.

Scope of the Code

Feedback on the code

- A First Nations submitter stated that *“The Primary Substantive Rights of Traditional Custodians should be at the forefront of the scope of the Code and discussions on biodiscovery”*, with reference to United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 31, which concerns the rights of Indigenous people to maintain, control, protect and develop their cultural heritage, Indigenous knowledge and traditional cultural expressions.
- Several submitters suggested additional examples of activities within the scope of the traditional knowledge obligation including clarity on its geographical scope.
- Some workshop participants sought clarification on the involvement of traditional knowledge custodians living outside Queensland but who were custodians for material collected inside Queensland.

- Several First Nations submitters and workshop participants raised questions regarding the retrospectivity of the traditional knowledge obligation including traditional knowledge that is publicly accessible and traditional knowledge used for non-commercial research or biodiscovery prior to the commencement of the traditional knowledge obligation.
- A First Nations submitter also suggested that a point be added for biodiscovery entities to consider building in the traditional knowledge obligation into future work, particularly if the biodiscovery was already underway at the time of commencement of the obligation.

Response to feedback

- The department acknowledges the importance of recognising the primary substantive rights of First Nations peoples. The code aligns with these rights by requiring the ongoing consent of the custodian and benefit-sharing on fair and equitable terms. Custodians are treated as key project partners in the code and guidelines affirming their primary substantive rights.
- The code has been amended to state that the traditional knowledge obligation does not apply retrospectively. Further examples were added as to what does and doesn't constitute the use of traditional knowledge in biodiscovery in the section 'Use of Traditional Knowledge'. Biodiscovery entities may voluntarily comply with the measures in the code.
- The code has the same scope as the traditional knowledge obligation and thus applies to traditional knowledge that is sourced from anywhere in Queensland, not just State lands or Queensland waters. The custodians of this traditional knowledge do not have to be located in Queensland.
- The examples of activities within scope of the traditional knowledge obligation have been amended to clarify that the obligation applies to:
 - native biological material accessed from a collection outside of Queensland if the material in the collection was originally sourced from Queensland, and
 - traditional knowledge held by a custodian outside of Queensland if the knowledge relates to native biological material within Queensland.

Requirement 1: Identify custodians of traditional knowledge

Feedback on the code

- Several First Nations submitters and workshop participants noted that the individuals or groups with customary and cultural authority for knowledge may not be represented by native title bodies, with some expressing a reluctance to involve representative bodies under native title legislation. One submitter commented that "*We have serious doubts about Native Title Rep Bodies or other representative organisations not composed of custodians having anything to do with any part of this process beyond the identification stage. They should definitely have no influence in this process as it progresses*".
- Several First Nations submitters and workshop participants sought clarification on the role of registered native title bodies corporate (RNTBCs), stating that these bodies could not be custodians in their own right. However, submitters and participants suggested native title bodies could be leveraged to help find the right people to engage. A First Nations submitter stated that "*A native title body corporate, on its own, does not meet that definition [of the Act] and can only be considered a 'custodian' if nominated by the custodian. Therefore, this step should clarify that a traditional knowledge custodian would need to request, or nominate, their involvement. This can also be broader than a native title body—to include Land Councils, Land Trusts, PBCs/RNTBCs, Cultural Heritage bodies, Health bodies or other Aboriginal corporations (e.g. as defined in the*

glossary as a Registered and/or representative organisation)—any organisation at the request or consent of the knowledge holder.”

- A submitter suggested that the pathway under the Native Title (Prescribed Bodies Corporate) Regulation 1999 could be used as a model for consent in the code.
- Some workshop participants stated that biodiscovery entities need to consider that traditional knowledge can vary subtly or significantly between clan groups because the beneficial properties of the genetic resource can vary with a change in soils or other environmental factors or cultural practices.
- A biodiscovery entity raised a question about whether biodiscovery can continue while any custodianship claims are being resolved concerning the use of the traditional knowledge.

Response to feedback

- The department acknowledges comments and concerns about the role of native title bodies in the identification of custodians and consent processes.
- The code makes it clear that a custodian is the person with the customary authority to speak for Country about the knowledge.
- The process for identifying custodians has been amended to remove reference to RNTBCs being treated as custodians. It introduces a new concept of a ‘nominated entity’, which allows custodians to nominate an RNTBC or another registered and/or representative organisation to represent them. It also clarifies that RNTBCs and other registered and/or representative organisations may aid in the identification of custodians.
- In response to the variation in traditional knowledge between clan groups, the code (and guidelines) addresses the custodianship of traditional knowledge by multiple groups.
- The new Requirement 5 has been added to address claims of custodianship that arise after the biodiscovery has commenced, instead of incorporating these aspects in Requirements 1 and 4. This is intended to improve clarity around these requirements.
- The process for identifying custodians has been simplified overall to aid understanding. It no longer includes discrete steps reflecting the non-linear nature of the process.

Feedback on the guidelines

- Comments across submissions sought practical guidance on how to identify custodians and noted the complexity and uncertainty involved in the process.
- A non-government organisation stated that “*Guidance will be needed to help entities understand when a dispute is considered resolved. More guidance is also needed to ensure entities understand how to ‘provide support or information as requested to facilitate dispute resolution’, yet not become involved in disputes*”.
- A First Nations submitter stated that the guidelines should emphasise that attempting to impose timeframes on resolving any disputes related to determining traditional knowledge custodianship can contravene FPIC. The submitter stated that biodiscovery entities should “*Allow time for disputes to be resolved by removing expected completion dates or timelines on decisions. In addition to providing easy to understand information to facilitate dispute resolution, consider offering support through the funding of independent counsel.*”
- Biodiscovery entities requested further guidance on how much time to allocate for identifying custodians.

Response to feedback

- Further information has been added about how to identify custodians including consulting with Elders Councils, historians, anthropologists and RNTBCs and utilising online mapping tools or engaging cultural mapping consultants.

- The guidelines have been revised to make it clear that native title bodies do not have the same rights as traditional knowledge custodians. However, they can be consulted with to help identify custodians and may also be ‘nominated entities’ that represent custodians at their request.
- The department has not provided information about when a dispute is considered resolved to respect the self-determination of First Nations peoples. Requirements 1 and 3 address dispute resolution, with additional support measures included for biodiscovery entities to facilitate dispute resolution, if considered appropriate.
- Information has been added in relation to the planning stage for identifying custodians, stating that it may not be appropriate to designate an expected completion date or timeline for identifying custodians.
- The guidelines recognise that the time taken to identify and confirm traditional knowledge custodianship will vary on a case-by-case basis dependent on many variables.

Requirement 2: Free, Prior and Informed Consent (FPIC)

Feedback on the code

- Several workshop participants suggested that the principles of FPIC are fundamental requirements for every stage of the process.
- Workshop participants and a First Nations submitter suggested the ability to say ‘no’ should be more prominent throughout the process and the ongoing nature of consent should be better reflected.
A submitter suggested that *“Additional wording be added to this section to set out the Code requirements, understand that the concept of consent is not fixed and may need to be continuing, depending on the biodiscovery activity.”*
- A submitter suggested clarifying that project timeframes or dispute resolution processes should not be used to pressure customary decision-making processes.

Response to feedback

- The code has been amended to confirm and emphasise that:
 - custodians have the right to say ‘no’ to a project at the start and at any agreed points when consent must be reconfirmed (as described in a benefit sharing agreement)
 - biodiscovery can only continue so long as consent is confirmed at any agreed upon points.

Feedback on the guidelines

- A workshop participant stated that the guidelines will help to resolve concerns about the process of reaching FPIC.
- A First Nations submitter stated that the guidelines should make it clear that custodians have the right to refuse the use of the traditional knowledge and that consent is iterative and continuing. The guidelines should also outline additional factors that can impact FPIC timeframes and to clarify that timeframes should not be used to contravene the FPIC process.
- Several First Nations submitters recommended the use of cultural brokers, anthropologists or Indigenous consultants to support engagement. Other examples to support effective participation and to support custodians make informed decisions included being compensated for participation in consultation processes and funding independent advice.
- A First Nations submitter stated the need for biodiscovery entities to ensure that assisting custodians with decision making does not compromise their self-determination.

Response to feedback

- Information has been added to the guidelines to emphasise the right of custodians to say 'no' to the use of traditional knowledge; that consent is not fixed but ongoing; the important role that trust plays in the consent process.
- Additional examples of support for custodians to participate and make informed decisions have been included such as using cultural brokers, providing easy to understand and culturally appropriate information and funding independent advice.
- Additional information was not considered necessary regarding factors that can impact FPIC timeframes as performance outcome 2.1 already refers to custodians not being pressured, manipulated, intimidated, coerced or unduly influenced into giving their consent and are free to decide consent. However, the guidelines also state that any time constraints should be explained and discussed as to whether, and how, they can be accommodated.
- The code and guidelines embody the principle of self-determination for First Nations peoples for decisions regarding the use of traditional knowledge in biodiscovery.

Requirement 3: Benefit-sharing on mutually agreed terms

Feedback on the code

- Submitters generally supported the proposed requirements for benefit-sharing within the code.
- Several First Nations submitters stated that the code could do more to address and affirm the rights of Indigenous people to maintain, control, develop and protect their cultural heritage, Indigenous knowledge and cultural expressions. This is especially applicable to benefit sharing agreements, which should not restrict the ongoing customary use of traditional knowledge. Submitters suggested that this be addressed with specific reference to UNDRIP Article 31.
- Several First Nations submitters and workshop participants stated that the code should do more to adequately address IP rights for custodians ensuring that the assignment of IP does not impact on the continuing traditional use of biological resources by First Nations peoples. For example *"It is important that traditional custodians can continue customary practices despite the commercialisation of a product, and that intellectual property does not impact on customary use."*
- A workshop participant suggested that biodiscovery entities should ensure proper consultation processes, with reasonable timeframes required to adequately identify the complex traditional knowledge networks and the necessary intersections with scientific innovation processes (such as IP law).
- A biodiscovery entity stated that *"Further detail is necessary in order to guide biodiscovery entities negotiating agreements where collectively held traditional knowledge is differentiated from individually owned or assigned IP"*.
- A First Nations submitter stated that the terms for benefit-sharing should include *"any permissions and processes in relation to attribution, dissemination and publication of traditional knowledge"*.
- Workshop participants sought clarification on the need for biodiscovery entities to have separate benefit-sharing agreements with the State and custodians where traditional knowledge is used in relation to native biological material collected from State land or Queensland waters.
- A First Nations submitter suggested that the minimum terms should be aligned with the Australian Biodiscovery Conservation Strategy (ABCS).

Response to feedback

- The code affirms the principles of UNDRIP Article 31 through the consent and benefit sharing requirements.
- The code compliance measures have been adjusted to require benefit-sharing agreements to:
 - include ownership of any IP, including publications, patents and plant breeders' rights
 - address any implications of the agreement or biodiscovery project for ongoing customary use of the traditional knowledge and associated native biological material by the custodians, their community, and other First Nations peoples
 - outline how information, including confidential information and data, is stored, accessed and shared between the parties to the agreement.
- Clarification was provided during the workshop that, where traditional knowledge is associated with material taken from State land and Queensland waters, the biodiscovery entity would be required to enter into separate agreements with the State and with the custodians of traditional knowledge. The policy intent was to minimise government involvement and support First Nations peoples' self-determination in negotiating their benefits confidentially. If multiple agreements are required these could be negotiated in parallel.
- The department recognises that Australia's Strategy for Nature, which replaces the ABCS, includes objectives aimed at facilitating involvement of First Nations peoples and ensuring their knowledge is shared and maintained to benefit biodiversity. The department did not consider any changes necessary to align with this strategy.

Feedback on the guidelines

- Several First Nations submitters and some biodiscovery entities suggested that the guidelines provide further information on the IP rights for custodians, and that the assignment of IP does not impact the customary use of traditional knowledge. For example, a request that the *"actions towards best practice include further explanation and consideration of intellectual property ownership arising from biodiscovery. The ability for traditional custodians to have intellectual property rights in addition to Biodiscovery rights is critical."*
- A First Nations submitter and some workshop participants stated that the guidelines should more adequately address how confidential information (and data) is treated and stored.
- Some submitters and workshop participants requested further information on how to assist First Nations peoples obtain independent legal advice and how to provide funding to support them in negotiations.
- A First Nations submitter and some workshop participants suggested that benefit sharing templates would be useful to assist negotiations and minimise the legal costs of each party to negotiate an agreement.

Response to feedback

- Information has been added on valuing and respecting the IP of First Nations peoples. This includes stating that biodiscovery entities have a responsibility to understand the interaction of traditional knowledge and the IP system and, as best practice, to treat custodians as inventors or joint owners of any IP generated.
- The guidelines have also been amended to state that the agreement or biodiscovery project should avoid limiting the ongoing use of the traditional knowledge and associated native biological material by First Nations peoples.
- Additional information has been added on dealing with confidential information and data.

- Additional suggestions have been added on how to support custodians to access legal advice such as through pro bono legal services.
- The guidelines contain links to some existing template agreements. Further checklists and template agreements are intended to be developed as part of the department's ongoing capacity strengthening work to support First Nations peoples to engage in biodiscovery.

Requirement 4: Publicly accessible traditional knowledge

Feedback on the code

- There was general support from workshop participants and some submitters for the requirements outlined in the code for the use of publicly accessible traditional knowledge.
- Some First Nations submitters suggested that the minimum royalty rates in Appendix 1, which are based on those in the State's model benefit-sharing agreement, be increased. The comments appeared to be assuming use of these rates for agreements between custodians and biodiscovery entities.
- Some workshop participants asked whether the rates represented the standards across relevant industries. Other workshop participants stated that the rates in Appendix 1 generally align with industry benchmarks.
- A First Nations submitter stated that *"just because traditional knowledge might be 'publicly available' does not make it 'freely available' for anyone to use without the consent of, or benefit to custodians and traditional knowledge holders."*

Response to feedback

- Appendix 1 was intended only for those instances where a biodiscovery entity was required to retain funds for capacity building projects such as where the custodians of publicly accessible traditional knowledge could not be identified. It was not intended as a benchmark to indicate the minimum royalty rates for agreements between biodiscovery entities and First Nations peoples. To reduce the risk of this unintended use, the rates have been removed from the code and reference has been inserted to the royalty rates in the State's model benefit-sharing agreement, which will be made available on the department's website.
- The term 'publicly available' has been changed to 'publicly accessible' in the code. This reflects that although the knowledge that can be accessed by the public, it is not necessarily freely available to use without first making reasonable efforts to identify the custodian.

Feedback on the guidelines

- There was general support for the guidance outlined, with one submitter stating that *"We agree that the actions listed for this requirement adequately supplement the minimum requirements outlined in the code and emphasise that evidence of compliance is essential"*.
- First Nations submitters indicated a need to emphasise that 'publicly available' knowledge does not mean it is freely available for anyone to use without the consent of traditional custodians.
- Submitters suggested that the guidelines required more information on measures an entity must take to find the custodians of publicly accessible knowledge before its use in biodiscovery.
- First Nations submitters also raised the following points:

- greater acknowledgement that using traditional knowledge without agreement carries risks
- a concern that using public consultation periods to notify of the intent to use traditional knowledge is ineffective.
- A non-government organisation suggested biodiscovery entities may invest in *“the creation of a grants program to support access to Country to maintain the inter-generational transmission of traditional knowledge as well as investing in supporting independent legal advice and Indigenous legal scholarships/traineeships/mentorships”*.

Response to feedback

- Stronger reference has been made to the public release of traditional knowledge without the consent of the traditional knowledge custodians and the risks associated with using publicly accessible knowledge. This includes the potential commercial impacts if claims to the knowledge arise after commencement of the biodiscovery and the entity is required to stop biodiscovery.
- The new Requirement 5 includes the principle that biodiscovery entities should support the timely resolution of custodianship claims made after biodiscovery has commenced to avoid any continued use of traditional knowledge without the consent of the custodians and benefit-sharing from the use of that knowledge in biodiscovery.
- Additional information has been added for identifying custodians including measures such as using historians, anthropologists and consulting RNTBCs.
- The guidelines have been amended to include examples of the types of projects a biodiscovery entity may finance in order to support access to Country to maintain the inter-generational transmission of traditional knowledge.
- Public notification is suggested as only one voluntary step a biodiscovery entity may take to identify custodians of traditional knowledge. The guidelines also provide other strategies that can be used.

Requirement 5: Claims of custodianship after biodiscovery has commenced

Feedback on the code

- Some submitters and workshop participants sought more clarity on how the code’s requirements around claims of custodianship made after the biodiscovery had commenced, applied in specific circumstances.
For example, a biodiscovery entity stated that the code should *“provide additional clarity as to whether biodiscovery can continue while consultation is underway between existing custodians and those seeking to join negotiations, and before a determination is made in relation to shared custodianship. Additionally, what actions should be taken if new claimants to custodianship refuse consent for biodiscovery?”*
- A workshop participant asked if there was an existing Indigenous regional governance process in Queensland that could provide a dispute resolution role.

Response to feedback

- Requirement 5 was added to the code to deal with custodianship claims that arise after biodiscovery has commenced. Previously these processes were included in Requirement 1 (Identifying the custodians of traditional knowledge) and Requirement 4 (publicly accessible traditional knowledge). This change is intended to improve clarity.
- The requirement includes separate performance outcomes for resolving a claim if already in a benefit-sharing agreement with a custodian or if using traditional knowledge

without an agreement with a custodian. It has been made clearer that biodiscovery may continue until custodianship is resolved, however, it must stop while consent and benefit-sharing is being addressed.

- A specific dispute resolution mechanism to resolve custodianship claims has not been included in the code on the understanding that disputes over custodianship of traditional knowledge are best resolved by First Nations peoples using cultural and customary processes.
- The code has been amended to clarify that where consent is not provided or re-confirmed, the biodiscovery entity cannot continue to use the traditional knowledge for biodiscovery.

Feedback on the guidelines

- No feedback was received on this element.

Response to feedback

- Information was added to reflect the new Requirement 5 for late claims, which also reflects the changes to the code to address feedback regarding custodianship claims after biodiscovery has commenced.

Requirement 6: Evidence of compliance

Feedback on the code

- A First Nations submission requested clarification about how the process for custodianship claims for publicly accessible traditional knowledge lodged after biodiscovery has commenced relates to the requirement to provide evidence of compliance to the State.

Response to feedback

- Requirement 6 includes processes for providing evidence to the State, depending on the source of the traditional knowledge. For publicly accessible knowledge, a biodiscovery entity must provide evidence outlining the steps taken in attempting to identify the traditional knowledge custodian and confirm that they will retain a portion of commercialisation revenues to benefit First Nations peoples. If there is a claim after the biodiscovery has commenced and custodianship is confirmed, the entity would be required to comply with Requirement 6 by providing a co-signed document confirming FPIC and benefit-sharing with the custodian, before re-commencing biodiscovery.

Definitions/other

Feedback on the code

- Several First Nations submitters sought clarification on the role of RNTBCs (see Requirement 1 above).
- A submitter stated that the definition of custodian did not align with the definition in the Act, and this may create confusion.
- A submitter suggested that the *Therapeutic Goods Act 1989* (Cth) be added to the list of legislation relevant to biodiscovery and the use of traditional knowledge in biodiscovery.

Response to feedback

- The definition of a custodian was amended to reflect the one in the Act to avoid confusion. Where relevant, the code and guidelines have been amended to clarify that the requirements aim to identify and subsequently engage the custodian with the customary authority to speak for Country about the knowledge.
- A definition for 'nominated entity' was added to recognise the ability for RNTBCs (and other registered and/or representative organisations) to be nominated by a custodian to act on their behalf. The role of a nominated entity must be compatible with an organisation's other functions whether statutory or otherwise. When acting as a nominated entity, an RNTBC is doing so outside its responsibilities under the *Native Title Act 1993* (Cth).
- The definition of registered and/or representative organisations was updated to clarify that these organisations can aid in the identification of custodians.

Feedback on the guidelines

No feedback was received on this element.

Response to feedback

- Amendments were made to the definitions in the guidelines to align with changes to the code (outlined above).
- The *Therapeutic Goods Act 1989* (Cth) was included in the list of legislation relevant to biodiscovery and the use of traditional knowledge in biodiscovery. The list of legislation and international standards has been moved to the guidelines.
- Case studies have been removed from the guidelines and are intended to be included as part of the capacity strengthening resources the department is developing. These will be made available on the department's website.

3. Appendix 1: List of submissions

1.	Bulganunna Aboriginal Corporation
2.	Chuulangun Aboriginal Corporation
3.	Central Queensland University
4.	Dugalunji Aboriginal Corporation
5.	Griffith University
6.	Thomson Geer Lawyers
7.	University of Queensland
8.	NRM Regions Queensland
9.	Dr David Jefferson
10.	James Hill on behalf of the Yirendali Traditional Owners