Biodiscovery and Other Legislation Amendment Bill 2019

Explanatory Notes

Short title

The short title of the Bill is the Biodiscovery and Other Legislation Amendment Bill 2019 (the Bill).

Policy objectives and the reasons for them

In Queensland, biodiscovery is the take and use of minimal quantities of native biological material from State land or Queensland waters for molecular, biochemical or genetic analysis for commercial purposes (e.g. pharmaceuticals or bioplastics).

Queensland was the first jurisdiction in Australia to introduce legislation to govern biodiscovery (the *Biodiscovery Act 2004* (the Act)). The Act establishes an access and benefit sharing framework for use of the State's native biological material and was established in part to meet the requirements of Article 15 of the Convention on Biological Diversity (the CBD), which deals with access to genetic resources.

The biodiscovery industry has since grown and the international regulatory context for access and benefit sharing has changed, particularly with the introduction of a supplementary agreement to the CBD, the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (the Nagoya Protocol) in 2014. The Nagoya Protocol provides a framework for the fair and equitable sharing of benefits arising from the utilisation of genetic resources and including the use of traditional knowledge associated with genetic resources. Access and benefit sharing in accordance with the Nagoya Protocol acknowledges and involves the contributions of Indigenous peoples and local communities.

Australia signed the Nagoya Protocol in 2012, and while Australia has yet to ratify, over 120 countries have, including many of Queensland's trading and scientific partners. These partners often require demonstrated compliance with the Nagoya Protocol before negotiating research or commercialisation partnerships.

The Act cannot align with the Nagoya Protocol without providing for First Nations peoples to consent to and negotiate benefit sharing for the use of their traditional knowledge. Therefore, biodiscovery entities in Queensland are unable to demonstrate Nagoya level compliance and are at risk of being denied international collaborations and access to the global market. Furthermore, without formal recognition and legal protection, First Nations peoples can do little to prevent further use of traditional knowledge or resources without consent.

The objective of the Bill is to amend the Act to ensure that it is contemporary, effective and equitable, by reflecting international standards which include providing an obligation for the use of traditional knowledge. This will help Queensland's biodiscovery industry to remain globally competitive and ensure that the benefits of biodiscovery are shared equitably throughout Queensland, including with First Nations peoples.

Specifically, the Bill:

1. recognises and protects traditional knowledge used for biodiscovery by providing for consent to be provided, and benefit sharing on mutually agreed terms, to be negotiated with traditional knowledge custodians prior to commencing biodiscovery activities, where traditional knowledge is to be used in the biodiscovery;

2. simplifies approvals under the Act by removing the requirement for a biodiscovery entity to apply for and obtain an approved biodiscovery plan, on the basis that information contained in the biodiscovery plan is provided in the application for a collection authority, or in the negotiation of a benefit sharing agreement with the State; and

3. clarifies the relationship between the Act and relevant international protocols by:

   (a) recognising that the Nagoya Protocol is the relevant international agreement under the CBD to which the Act gives effect, to the extent it concerns native biological material and traditional knowledge in Queensland; and

   (b) clarifying that plants listed under Annex 1 and subject to the *Food and Agriculture Organisation of the United Nations International Treaty on Plant and Genetic Resources for Food and Agriculture* (the FAO Treaty) are exempt from the Act under certain circumstances.

An independent Statutory Review of the Act was undertaken in 2016. A key priority identified through consultation with First Nations peoples, commercialisation entities, research partners, and other biodiscovery stakeholders was the need for improved alignment with the Nagoya Protocol, including providing for the recognition and protection of traditional knowledge used in biodiscovery.

Achievement of policy objectives

Recognise and protect traditional knowledge used for biodiscovery

The Bill establishes:

- an overarching obligation to take all reasonable and practical measures to ensure that traditional knowledge is used for biodiscovery only with the agreement of the custodians of the knowledge (traditional knowledge obligation); and
- that a person has complied with the traditional knowledge obligation if they comply with a traditional knowledge code of practice that states how a person can fulfil their traditional knowledge obligation, including the minimum steps of obtaining free and prior informed consent from the custodian of the knowledge and negotiating benefits on mutually agreed terms with the traditional knowledge custodian.

During consultation on the inclusion of traditional knowledge within the Act, stakeholders highlighted that traditional knowledge may be, but is not always, connected to a given parcel of land or specific biological resource. To ensure adequate protection for the use of any traditional knowledge used in biodiscovery, irrespective of whether the traditional knowledge is tied to the location where the native biological resource (to which it applies) is sourced or collected, the obligation will apply to any person using native biological material for biodiscovery, whether or not the material has been taken from State land or Queensland waters.

Having a traditional knowledge code of practice (the Code) ensures both industry and First Nations communities have adequate information to be able to fulfil their obligation when using traditional knowledge. In effect, it provides the minimum steps required. Should an entity wish to go beyond the minimum requirements as outlined by the Code, they are free to do so.

The Code will outline that free and prior informed consent must be obtained from First Nations peoples before their knowledge is used in biodiscovery. This means that consent is given willingly without coercion, and based on having a clear understanding of the project details such as its design, duration, likely benefits and/or impacts. It also establishes that a benefit sharing agreement must be negotiated on mutually agreed terms, between the custodian of traditional knowledge and the biodiscovery entity proposing to use the traditional knowledge. The State is not a party to these agreements.

It is anticipated that the Code will clearly outline:

- how to identify the appropriate/authorised custodian of the traditional knowledge;
- definitions for free and prior informed consent, benefit sharing and mutually agreed terms;
- the circumstances in which the traditional knowledge obligation applies; and
- minimum requirements to fulfil the traditional knowledge obligation under different circumstances, such as when biodiscovery activity is undertaken on non-State land and/or when ex-situ collections of native biological material are accessed and when traditional knowledge is publicly available.

Guidelines to facilitate compliance with the traditional knowledge obligation and Code will also be produced to further support industry engagement with First Nations peoples, such as identifying culturally appropriate ways to negotiate free and prior informed consent and mutually agreed benefits arising from a biodiscovery project.

The Bill establishes a requirement that in preparing the traditional knowledge code of practice, the Minister must consult with First Nations people and biodiscovery entities, therefore the guidelines and the Code will be developed in consultation with all key stakeholders..

Where a biodiscovery project uses native biological material sourced from State lands, the State will require confirmation that the obligation about using traditional knowledge has been or will be satisfied where traditional knowledge has or will be used, before the State can enter into a benefit sharing agreement with the entity. This confirmation will be provided through an amendment to the benefit sharing agreement that equates signing of the agreement with this confirmation that all obligations have been met.

For biodiscovery activities utilising traditional knowledge on non-State land (for example, freehold land), there is no requirement to provide confirmation to the State. However, the Bill will provide a penalty for failure to take reasonable and practical steps to discharge the obligation. The contents of benefit sharing agreements relating to the use of traditional knowledge are a matter for the parties to the agreement.

A collection authority can be issued without demonstrated compliance with the traditional knowledge obligation, as a finalised benefit sharing agreement is still required prior to actual collection of the native biological material for biodiscovery purposes.

Simplifying approvals under the Act

The Bill provides for a simplified approvals process, which was a key recommendation of the 2016 Statutory Review. Biodiscovery industry stakeholders reported that a preliminary requirement to develop and obtain approval for a biodiscovery plan was onerous and it increases the costs of project initiation.

The information provided in biodiscovery plans is duplicated through the process of applying for a collection authority or in the negotiations of a benefit sharing agreement with the State. By omitting the need to apply and obtain approval for a biodiscovery plan, duplication of information is greatly reduced, making the approvals process more efficient and encouraging for new applicants.

The information that the State requires to evaluate a potential benefit sharing agreement with a biodiscovery entity will continue to be available either as part of the collection authority (to collect native biological material from State land or Queensland waters) or through the negotiation of a benefit sharing agreement. The State's capacity to effectively regulate biodiscovery activities is not compromised.

Clarifying the relationship between the Act and relevant international protocols

Finally, the Bill clarifies the relationship between the Act and international protocols, namely the CBD, the Nagoya Protocol and the FAO Treaty. The FAO Treaty was ratified by Australia in 2005, and establishes a multilateral benefit sharing system for the sustainable use and equitable sharing of key farming crops, which collectively comprise 80% of the world's plant based foods.

The different permit requirements to transfer and use material under the FAO Treaty compared to those under the Act, cause confusion for biodiscovery entities in terms of which regulatory system applies to material subject to both regimes. Resolving this confusion is critical, both to support development of the biodiscovery industry and to support the sharing of crucial food and agricultural crops.

To provide greater regulatory clarity for biodiscovery entities, the Bill will provide an exemption for the 64 plants that are listed under Annex 1, and subject to the FAO Treaty's multilateral access and benefit sharing (ABS) framework. This exemption will only apply on the basis that these plants are being used for food or agricultural purposes.

This exemption does not run counter to the objectives of the Nagoya Protocol, which clarifies that, where a specialised ABS instrument applies (such as the FAO Treaty), and does not run

counter to the objectives of the CBD (which the FAO Treaty does not), the Nagoya Protocol need not apply. The FAO Treaty's multilateral ABS framework similarly has regard for the use of traditional knowledge.

Where the 64 Annex 1 species are used for a non-food or agriculturally related purpose, they will still be subject to the requirements of the Act. It should be noted that many of the Annex 1 species are not native to Australia and thus would not be subject to the Act in the absence of an exemption.

Alternative ways of achieving policy objectives

Extensive consultation on the reforms to date canvassed a variety of options for achieving the key policy objectives of the Bill.

Recognise and protect traditional knowledge used for biodiscovery

A number of options were considered to recognise and protect traditional knowledge used for biodiscovery. One option was that the State maintain a register of traditional knowledge and administer an ABS fund on behalf of biodiscovery entities to distribute benefits to traditional knowledge custodians. First Nations peoples did not support this option because it is inconsistent with contemporary approaches to self-determination.

Another option was that the State only require evidence of ABS if a biodiscovery entity sought a certificate from the State for international compliance. First Nations peoples did not support this option because bio-piracy could still occur within Australia; and, biodiscovery entities did not support this option because it does not support the industry to comply early, when costs of compliance are small relative to the cost of retro-approval.

Adopting the approach of other jurisdictions was also considered. For example, the approach of the Commonwealth under *Environment Protection and Biodiversity Conservation Act 1999* regulations, requires that a copy of the benefit sharing agreement regarding the use of traditional knowledge be provided to the regulator. This approach was not supported because stakeholders outlined that benefit sharing agreements are private negotiations, and the State should not be a party to such negotiations. Further, there was some concern that commercial-in-confidence information could be distributed if copies of the agreement were shared with the State and/or included in a public biodiscovery register.

Simplifying approvals under the Act

Initially, a comprehensive change to the biodiscovery permitting regime was considered, in the form of using other existing permits (such as Scientific Purposes Permits) under the *Nature Conservation Act 1992* (the NCA) to replace Collection Authorities under the Act.

It was determined that permits under the NCA were not well suited to provide for the collection of material for biodiscovery because of the commercial aspect. Utilising NCA permits in this way would require changes to the NCA thus failing to simplify the assessment process.

Consultation with stakeholders affirmed that removal of the biodiscovery plan was the best way to increase the efficiency of the approval process, without diminishing the amount of information available to regulate biodiscovery.

Clarifying the relationship between the Act and relevant international protocols

To resolve conflicts between the FAO Treaty and the Act, a range of possible options were considered.

These included developing guidance on the access and benefit sharing obligations under both the Act and the FAO Treaty. This option was not preferable to stakeholders however, as they would still be required to self-manage compliance under both regimes and resolve possible conflicts. The benefits of self-regulation in this case did not outweigh the costs of continued regulatory uncertainty.

Another option was to develop a Ministerial power to declare certain activities that fall within the ABS framework of the FAO Treaty exempt from regulation under the Act on a case-by-case basis. This option was discounted as it could increase regulatory burden by lengthening the assessment and approvals timeframes for projects that utilise FAO species. It also meant that the Department could require additional resources to administer this process.

In consultation with stakeholders, it was determined that an exemption for Annex 1 species used for food and agricultural proposes was the best option as:

- it places the lowest regulatory burden on biodiscovery entities given they only need to comply with one ABS framework;
- biodiscovery activities that fall within scope of the FAO Treaty are still covered by an ABS framework, meaning biodiscovery entities are still required to seek consent including for the use of traditional knowledge; and
- the Nagoya Protocol explicitly provides an exemption for species covered by the FAO Treaty and subject to its multilateral system. As such, exempting them from the Act does not compromise the ability of local organisations to collaborate internationally nor diminish compliance with international standards.

Estimated cost for government implementation

The cost of implementing the Bill can be met from within existing resources.

Expanding the scope of the Act to require an obligation about using traditional knowledge for biodiscovery may marginally increase assessment costs for the State. However, this will be off-set by economic benefits to the State through an advancing biodiscovery industry and new employment opportunities for First Nations peoples and regional communities.

It is expected that removal of the Biodiscovery Plan will reduce the overall assessment and approval costs for the State, and reduce project timeframes for industry (subject to satisfaction of requirements relating to collection authorities and the traditional knowledge obligation). These benefits will be further supported by the reduced regulatory burden on biodiscovery entities working with species subject to the FAO Treaty.

Consistency with fundamental legislative principles

The Bill has been examined for consistency with the fundamental legislative principles outlined in Section 4 of the *Legislative Standards Act 1992*.
The Bill is generally consistent with fundamental legislative principles. The details below specify inconsistencies (perceived or actual) and why they are justifiable:

- **Proportionality of Penalties:**
  Penalty levels must have sufficient regard to the rights and liberties of the persons potentially subject to the penalties. Further, penalties must be consistent, proportionate to the offence and the legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence.

  The Bill introduces a maximum penalty of 5000 penalty units for failing to comply with the obligation about using traditional knowledge for biodiscovery (Clause 10). This penalty is required to provide an adequate disincentive for conducting 'bio-piracy' (i.e. theft and use of traditional knowledge) and reflects the potential harm to First Nations communities if traditional knowledge is utilised without their consent or the fair and equitable sharing of benefits. The cost of complying with the Bill is less prohibitive than the cost of non-compliance, and voids any potential 'competitive advantage' that may arise from non-compliance.

  Furthermore, a penalty of this size is consistent with other serious offences already established under the Act, such as using native biological material sourced from State lands or Queensland waters for biodiscovery purposes without a benefit sharing agreement.

- **Derivative Liability**
  The traditional knowledge obligation will be added to the list of executive liability provisions relevant to the Act. This is consistent with other serious offences of equivalent and/or lower penalty, already established under the Act.

- **Proceedings (other)**
  No amendment will be made to section 112 (summary proceedings for offences). The offence tied to the new traditional knowledge obligation will be dealt with summarily with the period for commencing proceedings being within 2 years after commission of the offence. This is consistent with arrangements for existing offences against the Act (other than against section 54 (using native biological material without agreement) which has a longer period to reflect the potential time taken between commencing research and product development). Consistency with existing offences accounts for the fact that while benefit sharing agreements for the use of native biological material collected on State land or Queensland waters will be with the State, benefit sharing agreements for the use of traditional knowledge, which are similar to subsequent use agreements, will not involve the State.

- **Clear meaning:**
  Legislation must be drafted in such a way that that it is unambiguous, sufficiently clear and precise. The Bill introduces an overarching obligation on persons engaging in, or intending to engage in biodiscovery, who obtains traditional knowledge, to take

all 'reasonable and practical measures' to ensure that traditional knowledge for biodiscovery is used only with the agreement of the traditional knowledge custodian/s (Clause 10). Without further guidance, this obligation may be considered vague and ambiguous.

To support persons in fulfilling their obligation, the Bill provides for the development of a code of practice for traditional knowledge to detail sufficient instruction on what this obligation entails. Furthermore, a person is not liable to be prosecuted for contravention of the traditional knowledge obligation provision until the first traditional knowledge code of practice is approved by regulation.

Consultation

The amendments within this Bill are a subset of the possible reforms canvassed with stakeholders. They represent the highest priority amendments.

A Traditional Knowledge Stakeholder Roundtable was convened by the Minister for Environment and the Great Barrier Reef, Minister for Science, and Minister for the Arts, to consult on proposed amendments to the Act with respect to traditional knowledge. The Traditional Knowledge Stakeholder Roundtable comprises First Nations representatives and experts in traditional knowledge benefit sharing.

Development of the Bill followed extensive targeted community consultation, including:

- Release of an Options Paper in November 2018 for public consultation. Nine written submissions were received from Dugalunji Aboriginal Corporation, Rijik Zwaan, researchers from the University of Queensland (UQ), Marrawah Law, AgForce, the Australian Government's Department of the Environment and Energy, Cape York Land Council, Chuulangun Aboriginal Corporation and Griffith University.

- Five consultation workshops hosted by the Department. Two of these were with Biodiscovery entities including Griffith University, UQ (including Queensland Alliance for Agriculture and Food Innovation (QAAFI) and UniQuest, UQ's commercialisation office), the University of the Sunshine Coast, the Dugalunji Aboriginal Corporation, EcoBiotics Limited and QIMR Berghofer; and two workshops with the Traditional Knowledge Stakeholder Roundtable. In June 2019, a joint workshop was held to bring together biodiscovery entities and the Traditional Knowledge Stakeholder Roundtable and discuss key principles and priority issues for reform.

- Following the joint workshop, Griffith University and the Chuulangun Aboriginal Corporation wrote additional submissions about the reform and QAAFI arranged a meeting to discuss interactions with the Act and the FAO Treaty.

- One-on-one meetings were held with stakeholders that did not attend the workshops. This included meetings with the Wet Tropics Management Authority (WTMA) and the WTMA Traditional Owners Leadership Group, Carpentaria Land Council, and officers of the Indigenous Land and Sea Corporation.

Stakeholders and the Government agree that the Act should be amended to recognise and protect traditional knowledge used for biodiscovery. Members of the Traditional Knowledge Stakeholder Roundtable agree that the inclusion of traditional knowledge in legislation for biodiscovery is essential to First Nations peoples, to enable them to decide how their traditional knowledge is to be used, to maintain a connection to country, and to be able to negotiate a fair and equitable share of the benefits arising from the use of their traditional knowledge.

Stakeholders agree that closer alignment with the Nagoya Protocol will benefit Queensland long-term, and reflects a general trend toward improved research practices by biodiscovery entities. Biodiscovery entities agree that closer alignment with the Nagoya Protocol is essential to enable international collaboration and commercialisation.

Biodiscovery entities support amendments that simplify approval processes such as the removal of a requirement for a biodiscovery entity to apply for and obtain an approved biodiscovery plan. Biodiscovery entities consistently cite a desire to avoid over-regulation in order to encourage industry development and maintain academic freedoms.

Biodiscovery entities – most notably QAAFI – strongly support the provision for an exemption from the Act for plant species listed under Annex 1 and subject to the FAO Treaty. QAAFI consulted extensively with the Department to develop a solution.

In accordance with *The Queensland Government Guide to Better Regulation* (the Guidelines), the Department of Environment and Science consulted with the Office of Best Practice Regulation (OBPR), Queensland Productivity Commission and a Preliminary Impact Assessment of the proposed amendments was reviewed. On 4 September 2019, OBPR concluded that the proposed amendments are unlikely to result in significant adverse impacts, and therefore would not benefit from further regulatory impact analysis under the Guidelines.

Consistency with legislation of other jurisdictions

Queensland was the first State or Territory in Australia to implement an ABS framework for biodiscovery, providing Queensland's emerging biotechnology industry with greater certainty and giving effect (in part) to Article 15 (about access to genetic resources) of the Convention on Biological Diversity (CBD).

However, since 2004, other jurisdictions both nationally and internationally have adopted access and benefit sharing legislation and policies, such that the Act in its current form is now inconsistent because it does not include provisions for the use of traditional knowledge.

Commonwealth legislation, specifically the *Environment Protection and Biodiversity Conservation Act 1999* regulations, establish a process for ABS on Commonwealth land where traditional knowledge is used. Commonwealth regulations require that a benefit sharing agreement contains:

- a statement regarding any use of Indigenous people's knowledge, including details of the source of the knowledge, such as, for example, whether the knowledge was obtained from scientific or other public documents, from the access provider or from another group of Indigenous persons;

- a statement regarding benefits to be provided or any agreed commitments given in return for the use of the Indigenous people's knowledge; and
- if any Indigenous people's knowledge of the access provider, or other group of Indigenous persons, is to be used, a copy of the agreement regarding use of the knowledge (if there is a written document), or the terms of any oral agreement, regarding the use of the knowledge.

The Northern Territory's *Biological Resources Act 2006* requires similar information, however, in the form of details of the benefits the access provider will receive in return for the taking of resources. This may be more limited than the Commonwealth's approach as it focusses on access providers only.

The Australian Capital Territory's *Nature Conservation Act 2014* also includes provisions for benefit sharing when accessing biological resources, similar to the Northern Territory approach. When entering into a benefit sharing agreement with an access provider, the agreement must provide for reasonable benefit sharing arrangements, including protection for, recognition of and valuing of any Aboriginal or Torres Strait Islander people's knowledge to be used. As with the Northern Territory Act, the legislation is focused on benefit sharing with access providers (for traditional knowledge, this may mean those with an exclusive possession Native Title claim granted) and is thus narrower in scope than the Commonwealth regulations.

The Bill, by establishing a requirement for benefit sharing and free and prior informed consent for the use of traditional knowledge, will be consistent with biodiscovery legislation in other Australian states and with the Commonwealth. However, the Bill will in fact, advance the protection of traditional knowledge in biodiscovery beyond the frameworks in other States as requirements for prior informed consent and benefit sharing apply State-wide and irrespective of whether a traditional custodian has an access right over given land. In this way, the traditional knowledge protections provided by this Bill are significantly more robust and broader in scope than other laws in Australia and are reflective of an evolving understanding and appreciation of traditional knowledge, and the rights of First Nations peoples to self-determination.

Notes on provisions

Part 1 Preliminary

Clause 1 states that, when enacted the Bill will be cited as the *Biodiscovery and Other Legislation Amendment Act 2019* to accommodate the Act's provision to amend both the *Biodiscovery Act 2004* and the *Right to Information Act 2009* for particular purposes as outlined in these notes.

Clause 2 states that the Act will commence on a day as published, stating when the Act comes into operation.

Part 2 Amendment of Biodiscovery Act 2004

Clause 3 provides for Part 2 and Schedule 1 of the Bill to amend the *Biodiscovery Act 2004*.

Clause 4 amends the long title for the *Biodiscovery Act 2004* (the Act), to remove an reference to 'State native biological resources' in favour of 'native biological material', which includes native biological resources, substances sourced from a native biological resource and soil containing a native biological resource.

Clause 5 amends the purposes of the Act (section 3) to include a new purpose, which is to encourage biodiscovery entities to only use traditional knowledge for biodiscovery with the agreement of the custodians of that traditional knowledge, where the custodians are the Aboriginal or Torres Strait Islanders to whom the traditional knowledge relates.

This is a new purpose and achieved by imposing requirements on persons accessing or using traditional knowledge for biodiscovery including a new obligation on a person who chooses to use traditional knowledge for biodiscovery, to do so only with the agreement of the custodians of that knowledge (section 3). The objective of amending the Act in this way is to ensure Queensland's regulatory framework is contemporary, effective and equitable, and suitably reflects international standards, namely the Nagoya Protocol. The Act cannot align with the Nagoya Protocol without recognising and protecting traditional knowledge.

References to 'native biological resource' rather than 'native biological material' are also amended.

Clause 6 amends the current reasons for enacting the Act to reference the Nagoya Protocol as the relevant international agreement under the CBD to which the Act gives effect, having entered into force in 2014 after the Act commenced. This protocol specifically addresses access (consent) and benefit sharing arising from the use of traditional knowledge about genetic resources, and sets the international standard.

Clause 7 is for clarification purposes and addresses the (Relationship with other Acts) provision under Part 2 section 7 of the Act. This provision has been misinterpreted in the past as acquitting a person from requiring any other authority or permit under other legislation when obtaining entry or undertaking activities in the course of their biodiscovery that may require separate authorisation under other legislation. This is not the intent, therefore this

provision reiterates that the collection authority under this Act is all that is required for taking minimal quantities of native biological material for biodiscovery as defined by this Act.

Clause 8 is a new provision designed to clarify obligations under the Act and the FAO Treaty. The objective of the FAO Treaty is the conservation and sustainable use of plant genetic resources for sustainable agriculture and food security. This objective is realised through an alternative and multilateral access and benefit sharing framework. To provide greater regulatory certainty for biodiscovery entities, an exemption is provided for the 64 plants that are listed under Annexure 1 of the FAO Treaty, and subject to the treaty's multilateral access and benefit sharing (ABS) framework. This exemption will only apply to the extent that these plants are being used for food or agricultural purposes under the FAO Treaty, where their use involves biodiscovery including the use of traditional knowledge for biodiscovery. Where they are not being used for food or agricultural purposes under the FAO Treaty, they continue to be subject to the Act.

In consultation with stakeholders, an exemption was considered appropriate because it reduces the regulatory burden on biodiscovery entities by clarifying that those activities need only to comply with one ABS framework (i.e. the FAO Treaty). Activities that fall within scope of the FAO Treaty are still required to address access and benefit sharing requirements, including for the use of traditional knowledge. An exemption under the Act does not diminish compliance with international agreements of a similar standard.

Clause 9 clarifies that the whole of the Act applies both within and outside of Queensland.

Part 2A Using traditional knowledge for biodiscovery

Clause 10 provides for a new Part (Part 2A) and additional legislative provisions to recognise and protect traditional knowledge used for biodiscovery. It also aligns the Act more closely to international standards for ABS by establishing an obligation on persons using traditional knowledge for biodiscovery.

Failing to comply with the obligation will trigger a new penalty provision of up to 5,000 penalty units and be considered an executive liability provision similar to existing offences under the Act. A penalty of this size is consistent with other serious offences in the Act, such as using native biological material sourced from State lands or Queensland waters for biodiscovery without a benefit sharing agreement. The penalty provides a considerable disincentive for conducting theft and use of traditional knowledge without consent and reflects the potential harm to First Nations Peoples if traditional knowledge is utilised without their consent.

A person is not limited in how they comply with the traditional knowledge obligation, however to ensure people can satisfy this obligation and are fully aware of how to do so, a traditional knowledge code of practice (the Code) will be developed in consultation with stakeholders. The Code will define when the traditional knowledge obligation applies; processes for identifying the custodians of traditional knowledge; and, the reasonable and practical steps that a person must follow. Compliance with the Code will fulfil the obligation.

Providing a pathway for compliance through the Code in **Division 3** ensures that industry and First Nations Peoples are clear about what is required to satisfy the obligation. The Code would detail the minimum steps required, including that free and prior informed consent of

the custodians of the traditional knowledge must be obtained before traditional knowledge is used for biodiscovery. This means that consent is given willingly without coercion, and based on having a clear understanding of the project details such as its design, duration, likely benefits and impacts. The Code will also detail that benefit sharing must be negotiated on mutually agreed terms, between the custodian of traditional knowledge and the person who accesses the traditional knowledge. The State would not a party to these agreements.

The Code will also detail:

- under what circumstances the traditional knowledge obligation applies;
- how to identify the appropriate/authorised custodian of the traditional knowledge;
- definitions for free and prior informed consent, benefit sharing and mutually agreed terms; and
- minimum requirements to fulfil the traditional knowledge obligation under different circumstances, such as when biodiscovery activity is undertaken on non-State land and/or when ex-situ collections of native biological material are accessed.

The Code can only be prepared in consultation with First Nations Peoples and the biodiscovery industry. The Code and supporting guidelines will enable biodiscovery entities and First Nations Peoples to collaborate more easily by, for example, identifying culturally appropriate ways to negotiate free and prior informed consent and benefit sharing.

During consultation, stakeholders shared that because of past government policies that resulted in, for example, the Stolen Generation, some traditional knowledge may not always be connected to a given parcel of land, or the land from which the native biological resource was collected. In order to properly recognise and protect all traditional knowledge about native biological material used for biodiscovery, the obligation would apply state-wide.

Clause 11 relates to **Part 3 Collection Authorities** in the Act and amends procedural requirements for application for a collection authority. References to the EPA (a legacy of machinery of government changes) and biodiscovery plans have been removed. Approvals under the Act have been simplified by removing the requirement for biodiscovery entities to apply for and obtain an approved biodiscovery plan, on the basis that information contained in the biodiscovery plan is provided in the application for a collection authority, or in the negotiation of a benefit sharing agreement with the State.

Clause 12 amends current legislative provisions for the contents of a collection authority (section 12) to include a description of the proposed commercial use of material proposed to be taken under the collection authority.

Clause 13 provides consistency with other provisions by omitting references to the EPA and biodiscovery plans as per **Clause 11**.

Clause 14 amends current legislative provisions for public access to the collection authority register in section 28 of the Act, to omit references reflecting government changes.

Clause 15 provides for a minor amendment to section 29 of the Act, which incorrectly makes a direct reference to a penalty.

Clause 16 amends current legislative requirements for the Minister to enter into a benefit sharing agreement. This amendment establishes that the Minister must not enter into a benefit

sharing agreement with a biodiscovery entity unless satisfied that a biodiscovery entity does not have a traditional knowledge obligation (because it has not or will not use traditional knowledge) or that the entity has met and will continue to meet their traditional knowledge obligation. This can be outlined in the benefit sharing agreement (see **Clause 17**).

Clause 17 outlines that for consistency, the new provision for a traditional knowledge obligation means that future benefit sharing agreements will be negotiated and agreed on the basis that a biodiscovery entity has discharged and will continue to discharge its obligation regarding the use of traditional knowledge, where the obligation applies (i.e. they have or may use traditional knowledge).

Clause 18 outlines that for consistency, the removal of biodiscovery plans from the approvals process means that benefit sharing agreements will no longer be conditioned to include only the activities detailed in an approved biodiscovery plan, and therefore only one statutory condition applies to benefit sharing agreements relative to the biodiscovery entity's relationship with other entities.

Clause 19 outlines that for consistency, the provisions for the approval of biodiscovery plans as per part 5 Division 2 of the Act will be repealed.

Clause 20 provides consistency with other provisions to remove unnecessary reference to 'State native biological resources'.

Clause 21-26 removes historical references to Queensland Government departments and/or references to departments that no longer have responsibility for administering the Act or references to past processes that are now redundant.

Clause 26 adds a new reference to the traditional knowledge code of practice, as a stated document, to be made under the Act. It also removes any reference to a biodiscovery plan for consistency purposes.

Clause 27 provides consistency by including the traditional knowledge obligation in the list of executive liability provisions similarly to other serious offences of equivalent and/or lower penalty under the Act.

Clause 28 provides consistency by removing reference to a biodiscovery plan.

Clause 29 notes that in reference to the *Public Service Act 2008* and provision for the protection of civil liability in relation to State employees in section 26C, similar provision may be provided for the Minister in other Queensland legislation as required.

Clause 30 provides a minor amendment to section 120 of the Act to omit reference to 'an official' in favour of 'the Minister or chief executive'.

Clause 31 omits the provision for review of the Act as it is no longer required on the basis the Act has been in operation for longer than 5 years and reviewed twice during its operation.

Clause 32 provides consistency with other provisions by omitting references that are a legacy of machinery of government changes.

Part 13 Repeal and transitional provisions

Clause 33-34 provide for consequential changes to the heading of Part 13 of the Act (Transitional provisions) in order to repeal Part 15 of the Act.

Clause 35 inserts a new division (Division 3) in Part 13 to allow for transitional provisions that arise from the introduction of this Bill and account for changes to requirements and processes that may affect existing biodiscovery.

These provisions acknowledge that a person cannot be prosecuted for not complying with the traditional knowledge obligation until the first traditional knowledge code of practice (the Code) is approved by regulation, given that the Code outlines how a person is able to discharge the traditional knowledge obligation. However, a person is not prevented from complying with the traditional knowledge obligation before the Code is made.

These provisions also acknowledge that approval processes may continue under current provisions of the Act and prosecution is not warranted for a person who has engaged in or are continuing to engage in biodiscovery activities approved prior to the Act commencing, provided that what is contemplated or undertaken is in line with what has been approved. However, this does not prevent a person from complying with the new traditional knowledge obligation in these circumstances.

The Minister is required to consult with First Nations Peoples and biodiscovery entities in the making of the Code and the consultation undertaken in the making of the first Code satisfies this obligation.

Clause 36 amends the current schedule (Dictionary) to omit definitions no longer required; accommodate new definitions relevant to the new traditional knowledge obligation; and, provide consistency in the use of terms such as custodians and traditional knowledge which closely relate to other terms used in other Queensland legislation (refer to the *Acts Interpretation Act 1954*, Schedule 1) such as *Aboriginal tradition* and *Island custom*.

Part 3 Amendment of Right to Information Act 2009

Clause 37 provides for a new Part to amend the *Right to Information Act 2009*.

Clause 38 provides for a new Part to protect existing and changed biodiscovery plans and ongoing departmental records for biodiscovery plans, as a result of the Act removing a requirement for biodiscovery plans in future biodiscovery approvals.

Part 7 Transitional provision for Biodiscovery and Other Legislation Amendment Act 2019

Clause 39 provides for an amendment to the Right to Information Act 2009 to remove reference to 'biodiscovery plans' and simplifies part (f) to any document identifying a person responsible for supplying a sample of native biological material under section 30 of the Act. This amendment is consistent with section 27 of the Biodiscovery Act 2004 allowing for details of the holder of a collection authority to be publicly available on the collection authority register. This amendment also reflects that the depositor of a sample of native

biological material may not always be the same person identified in the collection authority and thus protects the privacy and confidentiality of parties not listed in a public register.

Schedule 1 Minor amendments of Biodiscovery Act 2004

Schedule 1 outlines for necessary and minor changes to provisions of the Act to provide consistency with other clauses of the *Biodiscovery and Other Legislation Amendment Act 2019*.