BIODISCOVERY BILL 2004

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The objectives of the *Biodiscovery Bill 2004* are to:

1. facilitate sustainable access by biodiscovery entities to the State's native biological resources for biodiscovery;
2. encourage the development in the State of value added biodiscovery;
3. ensure the State obtains a fair and equitable share in the benefits of biodiscovery on behalf of all Queenslanders; and
4. enhance the knowledge of the State's native biological diversity promoting conservation and sustainable use of these resources.

By introducing the proposed legislative framework, the Queensland Government intends to:

- create certainty for all stakeholders by establishing a streamlined and clear legislative framework regulating collection and use of all native biological material from Queensland State land and Queensland waters for biodiscovery purposes;
- ensure that the State of Queensland, on behalf of all Queenslanders, shares in the benefits that flow from making these resources available;
- allow access to small quantities of biological material from protected species and areas, whilst maintaining strict protection of these resources; and
- enhance conservation outcomes through improved scientific knowledge of Queensland's wildlife.

Reasons for and Achievements of the Policy Objectives

Australia has ratified the *United Nations Environment Program Convention on Biological Diversity* (CBD), the objectives of which are: to conserve biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits arising from the use of genetic resources. Article 15 of the CBD recognises the sovereign rights of states over their natural resources and their authority to determine access to genetic resources, including the fair and equitable sharing of benefits gained.

The proposed *Biodiscovery Bill 2004* aims to implement the objectives of Article 15 of the CBD by creating a regulatory and contractual framework for the access and use of Queensland's native biological resources.

The benefits sought under the *Biodiscovery Bill 2004* will align with those (that are relevant to Queensland) spelt out in Appendix II to the *Access to Genetic Resources and Benefit-sharing Bonn Guidelines* of the CBD. These are listed below.

1. Monetary benefits may include, but not be limited to:
    a. access fees/fee per sample collected or otherwise acquired;
    b. up-front payments;
    c. milestone payments;
    d. payment of royalties;
    e. licence fees in case of commercialisation;
    f. special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity;
    g. salaries and preferential terms where mutually agreed;
    h. research funding;
    i. joint ventures; and
    j. joint ownership of relevant intellectual property rights.
2. Non-monetary benefits may include, but not be limited to:

a. sharing of research and development results;

b. collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the provider country;

c. participation in product development;

d. collaboration, cooperation and contribution in education and training;

e. admittance to ex situ facilities of genetic resources and to databases;

f. transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity;

g. strengthening capacities for technology transfer to user developing country Parties (to the CBD) and to Parties that are countries with economies in transition and technology development in the country of origin that provides genetic resources. Also to facilitate abilities of indigenous and local communities to conserve and sustainably use their genetic resources;

h. institutional capacity-building;

i. human and material resources to strengthen the capacities for the administration and enforcement of access regulations;

j. training related to genetic resources with the full participation of providing Parties, and where possible, in such Parties;

k. access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies;

l. contributions to the local economy;

m. research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in provider countries;

n. institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities;

o. food and livelihood security benefits;

p. social recognition; and

q. joint ownership of relevant intellectual property rights.

The proposed legislation will establish the authority for the Queensland Government to comprehensively regulate the collection of native biological material on all State land and in Queensland waters for the purpose of biodiscovery and enter into benefit sharing agreements with parties undertaking biodiscovery research and commercialisation in relation to those resources.

Consistent with its Objective, the *Biodiscovery Bill 2004* proposes a two-pronged approach that will be taken with this regulatory framework by introducing:

i) a single regime authorising collection of native biological resources for biodiscovery on State land and in Queensland waters; and

ii) mandatory commercial benefit sharing agreements with the State Government for use of native biological resources sourced from Queensland.

The draft *Biodiscovery Bill 2004* requires any person, organisation or institute seeking to undertake biodiscovery using native biological material sourced from State land or Queensland waters to agree to share with the State (on behalf of the Queensland community) any benefits that may be derived from biodiscovery. The type of benefits the State will seek include:

- increased investment in Queensland's biotechnology industry;
- increased and improved knowledge of Queensland's biodiversity;
- technology transfer;
- collaborations with Queensland-based entities;
- job creation – scientific, technical, legal, financial and administrative;
- development of new or improved products or processes for agricultural, medical and industrial purposes; and
- monetary returns.

It is intended that the State will assert its authority to regulate the taking of all native biological material on all State land and in Queensland waters. This approach is supported by Article 15.1 of the CBD. It is intended that a private land owner may enter into a benefit sharing agreement in respect of native biological resources sourced from his or her land. It is not intended to alter any access rights of landholders or alter existing intellectual property rights which may be generated in the course of biodiscovery.

Alternatives to the Bill

There are no alternatives considered appropriate for achieving these policy objectives. Further, maintaining the status quo would compound and enhance restrictions preventing the development of a sustainable biodiscovery industry in Queensland. Currently to collect and use biological resources for biodiscovery purposes:

- multiple approvals may be necessary from multiple agencies;
- access to biological resources may not be allowed for some species or for particular localities containing important genetic reservoirs of the State's biodiversity; and
- there is no legislative requirement for the State to require a person or organisation undertaking biodiscovery on native biological resources sourced from State land or Queensland waters to enter into a benefit sharing agreement.

Estimated Cost of Implementation

The economic implications for the State of the proposed system can be examined in terms of the two key outcomes of the proposed regulatory regime.

1 Streamlined Assessment

- As the streamlined assessment process will build upon existing processes, any resulting financial burden borne by industry is likely to be minimal and should be offset by the positive administrative impact that will arise through streamlining.
- In accordance with normal Environmental Protection Agency (EPA) practice charges for assessment and management costs may be levied. Charges will be based on current charges for permits issued under the *Nature Conservation Act 1992*.
- There will be some costs for the State associated with resourcing the assessment process. There may be some management costs to the State as a result of the more comprehensive coverage of permits that will now fall within the *Biodiscovery Bill 2004*. However as this is a small industry this requirement will be met from current resources.

- There may be some cost to the Queensland Museum and Queensland Herbarium in relation to the processing of voucher specimens. However these organisations have the ability to charge fees for services rendered on a cost recovery basis.

2 Benefit Sharing Agreements

- The benefit sharing regime represents a new requirement for the biodiscovery industry and will result in a negative financial impact - firstly in the contracting of legal assistance during the negotiation stage, and secondly in the payment of monetary benefits.
- There also will be costs for the State in relation to negotiation and management of any prosecution process.

Consistency with Fundamental Legislative Principles

The *Biodiscovery Bill 2004* has been drafted with regard to Fundamental Legislative Principles.

Consultation

In May-June 2002 the Department of Innovation and Information Economy undertook an extensive public consultative effort to gauge interest in and reactions to the *Queensland Biodiscovery Policy Discussion Paper*. This included placement of the document on the Department's website, public fora in Townsville, Cairns, Mareeba and Brisbane, as well as 12 round table consultations. The Department received 65 written submissions on the paper.

On 23 June 2003 a six week consultative process commenced on an *Exposure Draft Biodiscovery Bill 2004*, Explanatory Notes, draft *Compliance Code for Collection of Native Biological Material for Biodiscovery Purposes*, and a *Queensland Biodiscovery Bill 2004Fact Pack*. The Department received 38 written submissions on the documents.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 – Short title

This is a formal provision that specifies the short title of the Bill as the *Biodiscovery Bill 2004*.

Clause 2 – Commencement

This provides the *Biodiscovery Bill 2004* will commence on the day on which the Act is proclaimed.

Clause 3 – Purposes of Act

Sub-clause 3(1) provides that the purposes of the *Biodiscovery Bill 2004* are to:

a) facilitate managed access by biodiscovery entities to the State's native biological resources for biodiscovery ensuring the sustainability of those resources;

b) encourage the development in the State of value added biodiscovery;

c) ensure the State, for the benefit of all persons in the State, obtains a fair and equitable share in the benefits of biodiscovery; and

d) enhance conservation outcomes through improved scientific knowledge of Queensland's wildlife.

Sub-clause 3(2) provides that the purposes are to be achieved by a streamlined regulatory framework for biodiscovery, a contractual framework for sharing of benefits of biodiscovery, a Compliance Code and Collection Protocols, and through monitoring and enforcement of compliance with the Act.

The terms "biodiscovery" and "benefit" are defined in Schedule - Dictionary.

"Biodiscovery" is defined as including biodiscovery research or the commercialisation of native biological material or a product of biodiscovery research. "Biodiscovery research" involves the analysis of molecular, biochemical or genetic information about native biological

material for the purpose of commercialising (i.e. using for gain) the material.

"Sustainability" is not defined in the Bill as the United Nations World Commission on Environment and Development definition of "sustainability" from its 1987 report *Our Common Future* has been relied upon – "a development which meets the needs of the present without compromising the ability of future generations to meet their own needs".

"Benefit of biodiscovery" is defined so as to align, as much as is possible subject to Constitutional limitations, with the benefits defined in Appendix II to the *Access to Genetic Resources and Benefit-sharing Bonn Guidelines* of the CBD (see above). The definition of "benefit of biodiscovery" is an inclusive definition, which provides biodiscovery entities with an indication of the types of benefits that may be returned to the State.

Clause 4 – Why this Act was enacted

This clause clarifies that the Biodiscovery Bill 2004 has been developed to fulfil the State of Queensland's responsibilities under Article 15 of the CBD and give legislative effect to those responsibilities.

Clause 5 – Definitions

This clause refers the reader to the Dictionary for definition of terms (i.e. Schedule).

PART 2—OPERATION OF ACT

Clause 6 – Act binds all persons

Sub-clause 6(1) provides that the *Biodiscovery Bill 2004* will bind the Crown in each of its capacities, as far as the Parliament permits.

Sub-clause 6(2) provides that the Crown may not be prosecuted for a criminal offence against the *Biodiscovery Bill 2004* or ensuing regulations.

Clause 7 – Relationship with other Acts

This clause clarifies that the *Biodiscovery Bill 2004* will operate to the exclusion of (i.e. overrides) other legislation in relation to permitting requirements for biodiscovery purposes.

For example, possession of a Biodiscovery Collection Authority (BCA) removes the requirement for a permit under the Nature Conservation Act 1992 to take, use, keep or interfere with wildlife in a national park. The holder of a BCA will be subject to the requirements of other Acts other than the permitting requirements.

Clause 8 – Operation of Act

This is an interpretation clause to clarify that the operation of the *Biodiscovery Bill 2004* has full effect notwithstanding any adverse effect it may have on the existence or exercise of private rights, including proprietary rights. This clause has been included to overcome the presumption of statutory interpretation against legislation having such an effect.

Clause 9 – Extra-territorial application of Act

This clause states that the *Biodiscovery Bill 2004* will have effect outside Queensland borders in respect of offences committed in relation to biodiscovery (e.g. the provisions in the *Biodiscovery Bill 2004* will continue to apply to samples collected for biodiscovery purposes even though such samples may be moved out of Queensland). This is similar in some respects to the extra-territorial application of the *Environmental Protection Act 1994* to actions outside Queensland that might impact on Queensland.

PART 3—COLLECTION AUTHORITIES

Division 1—Preliminary

Clause 10 – What collection authority authorises

This clause states that a BCA will authorise the taking and keeping of minimal quantities of native biological resources from State land and Queensland waters.

The term “State land” is defined in Schedule – Dictionary and it excludes freehold land not owned by the State; freeholding lease to be granted in fee-simple by the State to someone other than the State and land that has been the subject of native title determination granting rights of exclusive possession.

The term “Queensland waters” is defined in the *Acts Interpretation Act 1954*.

“Queensland waters” means all waters that are:

(a) within the limits of the State; or

(b) coastal waters of the State.

The term “coastal waters” is defined in the *Acts Interpretation Act 1954*.

“Coastal waters of the State” mean:

(a) all waters of the territorial sea of Australia that are within the adjacent area in respect of the State, other than any part mentioned in the *Coastal Waters (State Powers) Act 1980 (Cth)*, section 4(2); or

(b) any sea that is on the landward side of any part of the territorial sea of Australia and within the adjacent area in respect of the State, but is not within the limits of the State.

The term “territorial sea of Australia” is defined in the *Acts Interpretation Act 1954* as follows.

“Territorial sea of Australia” means the territorial sea of Australia within the limits mentioned in the *Coastal Waters (State Powers) Act 1980 (Cth)*.

The term “adjacent area in respect of the State” is defined in the *Acts Interpretation Act 1954* as follows.

“Adjacent area in respect of the State” means the area the boundary of which is described in the *Petroleum (Submerged Lands) Act 1967 (Cth)*, schedule 2, as in force immediately before the commencement of the *Coastal Waters (State Powers) Act 1980 (Cth)*.

Schedule 2 of the *Petroleum (Submerged Lands) Act 1967 (Cth)* lists the coordinates (longitude and latitude) of adjacent area in respect of Queensland.

Section 4 of the *Coastal Waters (State Powers) Act 1980 (Cth)* defines “coastal waters” as follows.

4. Extent of territorial sea and coastal waters

(1) For the purposes of this Act, the limits of the territorial sea of Australia shall be the limits existing from time to time, ascertained consistently with the *Seas and Submerged Lands Act 1973* and instruments under that Act and with any agreement (whether made before or after the commencement of this Act) for

the time being in force between Australia and another country with respect to the outer limit of a particular part of that territorial sea.

(2) If at any time the breadth of the territorial sea of Australia is determined or declared to be greater than 3 nautical miles, references in this Act to the coastal waters of the State do not include, in relation to any State, any part of the territorial sea of Australia that would not be within the limits of that territorial sea if the breadth of that territorial sea had continued to be 3 nautical miles.

Division 2—Application for collection authority

Clause 11 – Procedural requirements for application

Sub-clause 11(1) requires that applications for a BCA must be made to the EPA chief executive in an approved form, supported by sufficient information and documentation for the application to be assessed and accompanied by relevant fees.

Sub-clause 11(2) provides that the application must be accompanied by a copy of the proposed or approved biodiscovery plan. (Note: biodiscovery is a commercial undertaking and the biodiscovery plan will assist Government in determining whether proposed activities are commercial in nature or otherwise, in which case a different permit regime may be applicable).

Sub-clause 11(3) provides that sub-clause 11(2) does not apply if the applicant entered into a BSA with the State prior to commencement of this section of the Biodiscovery Bill 2004 and the BSA provides for the matters mentioned in clauses 32(1) and 33.

Sub-clause 11(4) provides that the information may require verification by a statutory declaration.

Clause 12 - Content of approved form

This clause sets out the mandatory information that must be included in a BCA application form. The information includes:

- the applicant's name and, if the applicant is not an individual, the applicant's Australian Corporation Number (ACN) or Australian Business Number (ABN);

- the applicant's place of business;
- a description of the State land or Queensland waters (e.g. the real property description or geographic coordinates);
- the type of material to be collected, including its scientific classification to the extent known by the applicant; and
- the period the BCA is to apply (i.e. a one off collection or a repeated collection activity over a period of seasons or years).

Clause 13 – Chief executive's powers before deciding application

Sub-clause 13(1) provides that the EPA chief executive may request further information from the applicant (in relation to applications).

Sub-clause 13(2) provides that at least 20 business days must be provided to the applicant to provide the requested information.

(Note: when the term "business days" is used in these Exaplanatory Notes the term should be taken to mean a day other than a Saturday, Sunday, bank or public holiday in Brisbane, Queensland.)

Sub-clause 13(3) provides that the EPA chief executive may require the information requested to be verified by a statutory declaration.

Sub-clause 13(4) provides that the applicant is taken to have withdrawn the application if the requested information is not provided within the requested time period.

Sub-clause 13(5) provides that the EPA chief executive must request information mentioned in sub-clause 13(1) within 20 business days of receiving the application.

Clause 14 – Deciding application

Sub-clause 14(1) provides that the EPA chief executive may decide to grant the application or refuse to grant the application.

Sub-clause 14(2) provides that the EPA chief executive may grant the application if satisfied that:

- the collection is for biodiscovery;
- the collection conforms with the Compliance Code and any relevant Collection Protocol; and
- other matters prescribed under regulations have been adhered to.

Sub-clause 14(2A) provides that the EPA chief executive is not limited in any way by sub-clause 14(2) in relation to what he or she may have

regard to in deciding an application. This ensures that the EPA chief executive takes into account all relevant matters in deciding an application.

Sub-clause 14(3) provides that the EPA chief executive may refuse to grant a BCA even if the applicant has entered into a BSA or has an approved Biodiscovery Plan. This head of power ensures that the sustainability of the resource is paramount to other considerations.

Clause 15 – Steps to be taken after application decided

Sub-clause 15(1) provides that if the EPA chief executive decides to grant an application she or he must advise the applicant as soon as practicable.

Sub-clause 15(2) provides that if the EPA chief executive decides:

- to grant a BCA with conditions she or he must, as soon as practicable, advise the applicant of the decision; or
- not to grant an application she or he must, as soon as practicable, advise the applicant about the decision and refund any fee charged for registration of the BCA.

Clause 16 – Term of authority

This clause provides that a BCA may be for any time period, but it may not exceed three years and it expires at the end of its term.

Sub-clause 16(4) provides that a BCA lapses after one year if no BSA has been entered into by that time.

Clause 17 – Conditions of collection authority

Sub-clause 17(1) provides that it is a condition of a BCA that collection of native biological materIal must not take place unless a BSA is in force. This clause applies to biodiscovery entities and collection agents acting on their behalf, to ensure that the entity who will use the native biological material has a BSA in place so as to avoid any breach of the proposed legislation.

This clause further provides that to the extent they are applicable to a BCA, the condition of the Compliance Code or a Collection Protocol are conditions of a BCA. These are in addition to conditions imposed under clause 14. However, where there is an inconsistency between the two, the condition imposed under clause 14 prevails.

Clause 18 – Collection authority

This clause outlines the details that will be included in a BCA. For example it must state: its number; the date of issue and expiry date; the

holder's name (individual or corporation) and ABN or can, where applicable; the type of material to which it relates and its scientific classification to the extent known; the areas from which the material may be collected; as well as any conditions imposed under clause 14.

Clause 19 – Failure to decide application

This clause provides that the EPA chief executive is taken to have refused to grant a BCA if no decision is reached within 40 business days after further information or documentation requested has been provided. If further information or documentation is not requested, the EPA chief executive has 40 business days to decide the application after receiving such further information else it is taken to be refused.

Sub-clause 19(3) provides that as soon as practicable after the EPA chief executive is taken to have refused the application she or he must refund any registration fee paid by an applicant.

Division 3—Amending, suspending, cancelling or surrendering collection authority

Clause 20 - Amending, suspending or cancelling collection authority

Sub-clause 20(1) provides that the EPA chief executive may amend, suspend or cancel a BCA if she or he reasonably believes:

- the BCA was obtained because of incorrect or misleading information; or
- the BCA holder has breached a condition of the BCA; or
- an emergency such as a natural disaster (e.g. bushfire) has impacted upon the sustainability of the activities approved under the BCA; or
- the BCA holder has been convicted of an offence under the *Biodiscovery bill 2004*.

Sub-clause 20(2) provides that the EPA chief executive may amend a BCA if:

- land is dedicated as a new national park under the *Nature Conservation Act 1992* (Qld);
- marine park is declared under the *Marine Parks Act 1982* (Qld);

- particular wildlife is changed to a higher level of classification under the *Nature Conservation Act 1992* (Qld);or
- at a holder's request.

Sub-clause 20(3) provides that no compensation is payable by the State to any party for any action undertaken according to sub-clauses 20(1) and 20(2).

Clause 21 – Procedure for amendment, suspension or cancellation

Sub-clause 21(1) provides that the EPA chief executive must advise the holder in writing of her or his intention to amend, suspend or cancel a BCA, the grounds for such action and further relevant details and invite the holder to show cause as to why such action should not be taken (the holder has a minimum of 20 business days to respond).

Sub-clause 21(2) provides that after examining the response from the holder the EPA chief executive may decide to proceed with an amendment, suspension or cancellation.

Sub-clauses 21(3), 21(4) and 21(5) provide that the EPA chief executive must inform the holder of her or his decision to proceed with an amendment, suspension or cancellation and that the decision takes effect on the date the written notice is given to the holder or on a nominated date.

Sub-clause 21(6) provides that the effect of an amendment does not depend on such amendment being noted on the BCA. This means that administration is reduced so that the decision of the EPA chief executive does not need to be recorded on a BCA for the decision to be effective.

Clause 22 – Returning collection authority on cancellation

This clause provides that the holder of a BCA that has been cancelled must within 10 business days of receiving advice of such cancellation from the EPA chief executive (unless the person has a reasonable excuse) return the BCA to the EPA chief executive.

A reasonable excuse in such circumstances may include the situtation where a person is out of the country during the 10 business days allowed and was therefore unable to return the BCA.

Clause 23 – Surrendering collection authority

This clause provides that the holder of a BCA may surrender that BCA by advising the EPA chief executuve in writing that it is being surrendered and returning it.

Division 4 – Effect of particular statutory changes on collection authority

Clause 24 – Collection authority concerning land dedicated as new national park or declared as marine park

This clause provides that where land is dedicated under the *Nature Conservation Act 1992* as a national park, national park (scientific) or national park (recovery) or where land or water is declared a marine park under the *Marine Parks Act 1982* or the zoning of a marine park is changed and a BCA is inconsistent with the applicable Act, that BCA will continue for the term that is unexpired, subject to the *Biodiscovery Bill 2004*. This clause has been included to provide some certainty for biodiscovery entities. It has also been included to ensure national park and marine park planning processes mesh with BCA assessment procedures. However, the BCA remains subject to amendment, cancellation or suspension under clause 20.

Clause 25 – Collection authority concerning wildlife

This clause provides for changes in classification of wildlife to a higher level under the *Nature Conservation Act 1992*. The BCA will continue for the term that remains unexpired subject to any amendment, cancellation or suspension under clause 20.

Division 5—Miscellaneous

Clause 26 – Replacement collection authority

This clause provides that a BCA holder may apply to the EPA chief executive in the approved form for a replacement of the relevant BCA. The clause also provides that fees may be charged for such.

Clause 27 – Collection authority register

This clause provides that the EPA chief executive must maintain a register of BCAs in a way the EPA chief executive considers appropriate (e.g. on the internet).

Sub-clause 27(3) provides that the publicly available elements of the register must only include:

- the name of the person to whom the BCA was issued;
- the date the BCA was issued; and

- the term of the BCA.

Sub-clause 27(4) provides that the elements of the register of BCAs that is not publicly available must include an appropriate description of the land or water to which the BCA applies and any conditions that may have been imposed on the BCA. This clause provides guidance for Government officials as to what information should be recorded in relation to BCAs. Such information can then be used to learn more about and monitor the ecology of particular areas or species.

Clause 28 – Public access to collection authority register

This clause provides that a member of the public may inspect the puiblicly avaiable elements of the register established under clause 27 free of charge at the EPA head office during normal business hours or obtain a copy of those details on payment of a fee decided by the EPA chief executive.

Subclause 28(2) provides that the fee must not be more than the reasonable cost of producing that copy.

Subclause 28(3) provides that the EPA chief executive may publish the publicly available elements of the part of the register established under clause 28 in a manner considered appropriate by the EPA chief executive.

PART 4—OTHER MATTERS ABOUT COLLECTION AUTHORITIES

Division 1—Identifying native biological material and giving samples of material to State

Clause 29 – Identifying native biological material

This clause provides that the holder of BCA must, as soon as practicable after collecting a sample of native biological material, label that material and keep the native biological material appropriately labeled for the full term the BCA holder holds the sample.

Sub-clause 29(2) provides that the label must state: the BCA (e.g. number) under which the native biological material was collected; the date of collection; and the scientific classification of the native biological

material if the holder is reasonably able to classify it. The label must also identify the geographic location from which the native biological material was collected.

Sub-clause 29(3) provides that the holder of a BCA must ensure that any sample or substance sourced from the original material collected under the BCA is labeled appropriately so as to allow its source to be tracked.

For example, if a novel chemical is identified in a sample, documentation concerning the research on the chemical must always include reference to the source material (species, collection date, collection area). This requirement will remain in place throughout the biodiscovery research, development and commercialisation stages and will assist the State to track a valuable product from source to market.

It has been proposed that BCAs be individually identified via bar code so that disclosure or information inappropriately or inadvertently is avoided.

Clause 30 – Giving samples of material to State

This clause provides that as soon as practicable after collection of a sample authorised under a BCA, the holder of that BCA must lodge a sample of the material with the Queensland Museum (for animal material) or the Queensland Herbarium (for plant material) or another nominated agency/institution for other native biological materials (e.g. micro-organisms, fungi).

The clause further provides that such samples must be appropriately labelled (for taxonomy, geographic location of collection) and be of sufficient size to enable scientific classification of the material. If the material is to be identified prior to lodgement, that identification must contain as much detail as possible regarding the sample's taxonomic status.

Sub-clause 30(4) provides that if the labelling requirements of this clause are not complied with, the Queensland Museum, Queensland Herbarium or another nominated agency/institution may scientifically classify the material and recover costs associated with doing so from the BCA holder.

The requirement for biodiscovery entities to pay for classification carried out by the State (i.e. the Queensland Museum or Queensland Herbarium) has been included at the request of the Queensland Museum and Queensland Herbarium to ensure internal resource allocation is not negatively impacted upon by the proposed legislation. This requirement is

not compulsory and relates only to voucher samples submitted under the *Biodiscovery Bill 2004* that have not been appropriately identified or where voucher samples are submitted prior to identification. From an environmental perspective, this requirement will ensure that biodiscovery entities have a suitable body of taxonomic knowledge, thus ensuring minimal disturbance to the natural environment.

Clause 31 – Restriction on receiving entity's use of samples

This clause provides that a receiving entity (i.e. the Queensland Museum, Queensland Herbarium or another nominated agency/institution) may not use the sample given to it, or part thereof, except for:

- identification purposes as stipulated under clause 29; or
- with the BCA holder's consent.

Division 2—Material disposal report

Clause 32 - Giving material disposal report to DSDI chief executive

This clause provides that within 15 business days of 30 June and 31 December each year a BCA holder must provide the State with details as to what native biological material was collected under the BCA, when, to whom that material has been delivered (including contact details), and the quantity delivered in each case. Whilst this is a considerable reporting burden, it is considered appropriate as it will allow the State to track samples and ensure BSAs are negotiated with those parties that actually conduct biodiscovery. Further, it is less onerous than requiring the BCA holder to enter into a BSA with the State in respect of each sample. Finally, this requirement will assist the State in ensuring it obtains a fair and equitable share in the benefits of biodiscovery on behalf of all Queenslanders.

The term "material disposal report" is defined in Schedule - Dictionary.

PART 5—BENEFIT SHARING AGREEMENTS

Division 1—Entering into agreement

Clause 33 – Power to enter into agreement

Sub-clause 33(1) gives the Minister for State Development and Innovation (the DSDI Minister) the power to enter into a BSA with a biodiscovery entity on behalf of the State.

The term "biodiscovery entity" is defined in the *Biodiscovery Bill 2004* as any entity that engages in biodiscovery. This includes any company, partnership, sole trader, institution or research organisation involved in biodiscovery research or commercialisation of native biological material or biodiscovery research.

The definition links with the definition of "entity" contained in the *Acts Interpretation Act 1954*, which states: "entity" includes a person and an unincorporated body.

The DSDI Minister may delegate this power. The BSA gives the entity the right to use native biological material for biodiscovery and the entity agrees to provide benefits to the State.

Sub-clause 33(2) provides that the DSDI Minister must not enter into a BSA with a biodiscovery entity unless the latter has an approved Biodiscovery Plan.

Sub-clause 33(3) provides that the parties to the BSA may decide to amend the BSA at any time.

Clause 34 – Content of agreement

Sub-clause 34(1) provides that the BSA must include certain elements such as: date of commencement; the benefits to be provided, as well as when those benefits are to be provided; a list of all relevant BCAs; and the biodiscovery entity's place of business.

Sub-clause 34(2) provides that the BSA must also include any conditions attached to the BSA, other than those referred to in clause 35.

Clause 35 – Conditions of agreement

Sub-clause 35(1) provides that all BSAs permit the biodiscovery entity to carry out only the biodiscovery research and commercialisation activities detailed in its approved Biodiscovery Plan.

Sub-clause 35(2) provides that a condition of all BSAs is that the biodiscovery entity must not allow another party to use the native biological material the subject of the BSA unless that other party is: acting for the entity; a person exempted from requiring a BSA under clause 54 of the *Biodiscovery Bill 2004*; or a party to a BSA concerning the material.

Sub-clause 35(3) provides that sub-clauses 35(1) and 35(2) do not limit the conditions that may be included in an agreement.

Division 2—Approval of biodiscovery plans

Clause 36 – Application for approval of plan

This clause provides that a biodiscovery entity may apply to the DSDI chief executive for approval of a Biodiscovery Plan. The Biodiscovery Plan must be in the approved form and provide details listed in clause 37.

Clause 37 – Content of plan

This clause provides that a Biodiscovery Plan must include certain elements including:

- the commercialisation activities the entity proposes and a related timetable;
- the elements of those activities that the entity proposes to carry out outside Queensland;
- the benefits that the biodiscovery entity considers will flow to Queensland as a result of the biodiscovery activities; and
- the elements of research and commercialisation activities that the biodiscovery entity proposes to outsource.

Clause 38 – Chief executive's powers before deciding application

Sub-clause 38(1) provides that the DSDI chief executive may request in writing further information or documents from the biodiscovery entity to aid the assessment of a Biodiscovery Plan. Sub-clause 38(2) provides that such a request must be made within 20 business days of the DSDI chief executive receiving the application.

Sub-clause 38(2) provides that the DSDI chief executive must provide the biodiscovery entity a reasonable period of at least 20 business days in which to deliver the information requested in sub-clause 38(1).

Sub-clause 38(3) provides that the DSDI chief executive may require that the information or documentation be verified via a statutory declaration.

Sub-cluse 38(4) provides that the biodiscovery entity is taken to have withdrawn an application for approval of a Biodiscovery Plan if the information or documentation requested by the DSDI chief executive is not received within the stated period.

Clause 39 – Deciding application

This clause provides that the DSDI chief executive must consider and approve or refuse to approve the Biodiscovery Plan submitted by a biodiscovery entity. The decision of the DSDI chief executive may be with or without conditions. Approval must only take place if the DSDI chief executive is satisfied with the proposed benefits that will accrue to the State of Queensland (based on her or his consideration of the proposed Biodiscovery Plan) under a BSA.

As an application may cover various State land tenures and areas of scientific endeavour, administrative arrangements will be put in place so that on all applications the DSDI chief executive will consult with the chief executives of the Queensland Government Departments that administer the:

- *Nature Conservation Act 1992* – currently EPA;
- *Fisheries Act 1994* – currently DPIF; and
- *Land Act 1994* – currently the DNRME.

Clause 40 – Steps to be taken after application decided

This clause provides that the DSDI chief executive must, as soon as practicable, advise the biodiscovery entity in writing of her or his decision in relation to the Biodiscovery Plan including any conditions.

No right of external review has been included for decisions made under this clause. Prohibition on external appeals for the DSDI chief executive's refusal to approve a Biodiscovery Plan has not been included as the Biodiscovery Plan forms the basis of negotiations between the State and biodiscovery entities in negotiating a BSA. In all commercial negotiations both parties have a right to decide whether to enter negotiations or cease negotiations and this is reflected in the *Biodiscovery Bill 2004*. Including such a right may, in effect, be viewed as attempting to force a commercial agreement. Including a right of external review or appeal could also expose confidential commercial information, a prospect that has been strongly

opposed by industry and research institutions during both rounds of public consultation. However, applicants will retain a right to a merits-based review by the DSDI Minister.

Clause 41 – Amendment of approved plan

Sub-clause 41(1) provides that where a biodiscovery entity wishes to amend its Biodiscovery Plan the biodiscovery entity must apply in the approved form to the DSDI chief executive for approval of any amendment.

Sub-clause 41(2) provides that the process outlined in clauses 37 through 40 apply to the application for amendment. For example, under

sub-clause 40(4) if the DSDI chief executive does not advise the applicant within a period of 20 business days of receiving the application for amendment, the DSDI chief executive is taken to have approved the amended Biodiscovery Plan.

Division 3—Register and other records about benefits sharing agreements

Clause 42 – Benefit sharing agreement register

This clause provides that the DSDI chief executive must maintain a register of biodiscovery BSAs in a way the DSDI chief executive considers appropriate (e.g. on the internet).

Sub-clause 42(3) provides that the register must only include:

- the name of the biodiscovery entity with whom the BSA has been entered;
- the date the agreement was entered into;
- the term of the BSA; and
- other particulars the DSDI Minister and the biodiscovery entity agree in writing to disclose.

Clause 43 – Records to be kept by biodiscovery entity

Sub-clause 43(1) requires a biodiscovery entity that has entered into a BSA with the State to maintain each record or document evidencing the results of biodiscovery research carried out under the BSA for a period of 30 years after the document is created. This requirement also applies to the biodiscovery entity's successors and assigns.

Sub-clause 43(2) requires a biodiscovery entity that has entered into a BSA with the State to maintain all records or accounts necessary for calculating the amounts payable to the State under the BSA for 30 years after the record or account is created. This requirement also applies to the biodiscovery entity's and its successors and assigns.

The 30 year time limit has been included to reflect the often long time lag between collection and initial research and development of a viable product. This time period also reflects the fact that patents for therapeutic goods generally run for 20 years, with an option to extend for a further five years.

The penalty units (50) proposed for not complying with sub-clause 40(1) equates to a maximum financial penalty of $3,750 for an individual and $18,750 for a corporation. This may be applied on a per document basis.

PART 6—COMPLIANCE CODE AND COLLECTION PROTOCOLS

Clause 44 – Establishing compliance code

This clause provides that the EPA chief executive may establish a Compliance Code to provide guidance on the collecting of native biological material under a BCA. The Compliance Code may provide for:

- standards for collecting native biological material designed so as to ensure the sustainability of such actions;
- measures for minimising the impact of collection activities; and
- setting standards for the use of motor vehicles, or other machinery or things, on or in areas where collection for biodiscovery may be proposed.

Sub-clause 44(3) provides that the Compliance Code will be a statutory instrument (as defined under the *Statutory Instruments Act 1992*), but that it will not be subordinate legislation. Despite this, sub-clause 45(4) provides that sections 49 through 51 of the *Statutory Instruments Act 1992*, which deal with tabling of subordinate legislation in the Legsilative Assembly, apply to the Compliance Code as if it were subordinate legislation.

Making this regulatory tool (i.e. the Compliance Code) a statutory instrument rather than sub-ordinate legislation should not demonstrate

insufficient regard to the institution of Parliament. The Compliance Code will be technical and procedural in nature, and elevating such to subordinate legislation status may not add to the rigor of the proposed regulatory regime. To ensure the Compliance Code is subject to Parliamentary scrutiny, the *Biodiscovery Bill 2004* requires that it be subject to the tabling and disallowance provisions of the *Statutory Instruments Act 1992*. Finally, transparency will assured through the requirement of the *Biodiscovery Bill 20043* that the Compliance Code be made publicly available by the EPA chief executive (e.g. on the internet).

Clause 45 – Establishing collection protocols

This clause provides that the EPA chief executive may establish Biodiscovery Collection Protocols (Collection Protocols) as written documents to govern the collection of native biological material to ensure sustainability. Collection Protocols may be developed for:

- the collection of particular native biological material under a BCA;
- collecting native biological material in a particular area; or
- using a particular collection technique for collection of native biological material.

Sub-clause 45(3) provides that a Collection Protocol will be a statutory instrument (as defined under the *Statutory Instruments Act 1992*), but that it will not be subordinate legislation. Despite this, sub-clause 45(4) provides that sections 49 through 51 of the *Statutory Instruments Act 1992*, which deal with tabling of subordinate legislation in the Legsilative Assembly, apply to the Compliance Code as if it were subordinate legislation.

Making this regulatory tool (i.e. Collection Protocols) a statutory instrument rather than sub-ordinate legislation should not demonstrate insufficient regard to the institution of Parliament. Collection Protocols will be technical and procedural in nature, and elevating such to subordinate legislation status may not add to the rigor of the proposed regulatory regime. It may also prove difficult to draft workable subordinate legislation to deal with such matters. Further, as the *Biodiscovery Bill 2004* requires Collection Protocols (at this time none have been established) be subject to the tabling and disallowance provisions of the *Statutory Instruments Act 1992*. Finally, transparency will be assured through the requirement of the *Biodiscovery Bill 2004* that all Collection Protocols developed by the EPA be made publicly available by the EPA chief executive (e.g. on the internet).

Clause 46 – Consultation for compliance code and protocols

The clause provides that if the Compliance Code or a Collection Protocol relates to the Wet Tropics World Heritage Area or land or waters contiguous with the Great Barrier Reef Region the EPA chief executive must consult with and have regard to the views of the Wet Tropics Management Authority and the Great Barrier Reef Marine Park Authority respectively.

Sub-clause 46(2) provides that the EPA chief executive may consult with other bodies (e.g. Queensland Museum) when establishing or amending the Compliance Code or a Collection Protocol.

As the *Biodiscovery Bill 2004* applies to lands and waters not managed by EPA, and matters not proposed to be managed by EPA (i.e. BSA negotiations), administrative arrangements will be put in place so that prior to establishing or amending the Compliance Code or a Collection Protocol, the EPA chief executive will consult with the chief executive of the Queensland Government Departments that administer the:

- *Gene Technology Act 2001* – currently DSDI;
- *Fisheries Act 1994* – currently DPIF; and
- *Land Act 1994* – currently the DNRME.

Clause 47 – Public notice of establishment of compliance code and collection protocols

Sub-clause 47(1) requires the EPA chief executive publish in the gazette a notice stating that a Compliance Code and or Collection Protocol has been established or amended by the EPA and is available for inspection on the EPA website and at the EPA head office and each regional office.

Clause 48 – When compliance code and collection protocols have effect

A Compliance Code or Collection Protocol is effective from the date its establishment or amendment is published in the gazette or a later date stated in the notice.

Clause 49 – Access to compliance code and collection protocols

The EPA chief executive must keep a copy of the Compliance Code and each Collection Protocol together with all documents applied by the Compliance Code or Collection Protocol, documents adopted by the Compliance Code or Collection Protocol and documents incorporated into the Compliance Code or Collection Protocol.

Sub-clause 49(2) provides that persons may purchase a copy of a Compliance Code or Collection Protocol from the EPA chief executive.

Sub-clause 49(3) provides that the fees charged must not represent an amount greater than the reasonable cost of producing such documents.

PART 7—OFFENCES

Division 1—Offences about collection authorities and biodiscovery plans

Clause 50 – Offence to take without a collection authority

This clause creates offences (punishable by up to 3000 penalty units) for: taking native biological material for biodiscovery from State land or Queensland waters without a BCA.

The penalty units (3000 and 2000 respectively) proposed for this offence equate to a maximum financial penalty of $225,000 for an individual and $1,125,000 for a corporation. These very strict penalties are proposed to ensure alignment with similar offences in the *Nature Conservation Act 1992* and to erect a real and decisive disincentive for biopiracy – the act of collecting and using native bioligical material without approval of Government or land holders. If penalties were less restrictive, it is conceivable that some unethical players may decide to pay a penalty rather than comply with the requirements proposed in the *Biodiscovery Bill 2004*.

Clause 51 – Contravening a condition of a collection authority

This clause creates an offence for contravention of conditions imposed under a BCA. This offence also applies to conditions imposed under the Compliance Code or a Collection Protocol.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation. This strict penalty is proposed to ensure a real and decisive disincentive for collection activities that may endanger the sustainability of the State's native biological assets. This penalty is consistent with similar penalties imposed under the *Nature Conservation Act 1992*.

Clause 52 - False or misleading information given by applicant

This clause creates offences for the deliberate provision of false or misleading information to the EPA chief executive in an application for a BCA and the DSDI chief executive in an application for approval of a Biodiscovery Plan.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation. These penalties are proposed to ensure a real and decisive disincentive for biopiracy and defrauding the State and the Queensland community of a share in the benefits derived from biodiscovery. If penalties were less restrictive, it is conceivable that some unethical players may decide to pay a penalty rather than comply with the requirements proposed in the *Biodiscovery Bill 2004*.

Clause 53 – False or misleading documents given by applicant

This clause creates offences for the deliberate provision of false or misleading documents to the EPA chief executive in an application for a BCA and the DSDI chief executive in an application for approval of a Biodiscovery Plan.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation. These penalties are proposed to ensure a real and decisive disincentive for biopiracy and defrauding the State and the Queensland community of a share in the benefits derived from biodiscovery. If penalties were less restrictive, it is conceivable that some unethical players may decide to pay a penalty rather than comply with the requirements proposed in the *Biodiscovery Bill 2004*.

Sub-clause 53(3) provides that the offence does not apply to a person who, when delivering such documents, informs the EPA or DSDI chief executive (in respect of an application for a BCA or an application for approval of a Biodiscovery Plan respectively) how it is false or misleading and gives the correct information to the EPA or DSDI chief executive (in respect of an application for a BCA or an application for approval of a Biodiscovery Plan respectively) if the person has or can reasonably obtain the correct information.

This exemption allows for biodiscovery entities to use best endeavours to ensure information provided is as up to date and accurate as possible in their interactions with Government.

Division 2—Offences about benefit sharing agreements

Clause 54 – Using native biological material for biodiscovery without a benefit sharing agreement

This clause creates an offence for using native biological material for biodiscovery without a BSA with the State. This offence is limited to native biological material that was collected from State land or Queensland waters and State collections, if the material is sourced from State land or Queensland waters.

Sub-clause 54(2) provides that the offence created under sub-clause 54(1) does not apply to a person using the material for scientific classification, verification of results or conducting biodiscovery on behalf of a biodiscovery entity that is already party to a BSA in respect of activities permitted by the agreement.

Sub-clause 54(3) provides that the offence created under sub-clause 54(1) does not apply to an educational institution or a researcher at that institution undertaking research (on native biological material or something sourced from that material) that does not involve commercialisation of the native bioliogical material. "Educational institution" is defined as a school, college, university, university college, TAFE institute or registered training organisation under the *Vocational Education, Training and Employment Act 2000*. This exemption has been included so that research that is not commercial in nature or intent will not be impeded by the enactment of the *Biodiscovery Bill 2004*.

The penalties proposed for this offence are very strict (5000 penalty units. The full commercial value of any commercialisation of the material). These penalties are proposed to ensure a real and decisive disincentive for biopiracy and reflect the magnitude of gains to be made by unethical players. Erecting such a strict disincentive should result in a situation where the cost of complying with the *Biodiscovery Bill 2004* are less prohibitive than the cost of non-compliance.

Clause 55 – Contravening a condition of a benefit sharing agreement

This clause creates an offence for biodisiveroy entities breaching a condition of a BSA that has been executed with the State. This will occur when an apporved Biodisciovery Plan is contravened.

The penalties units (100) proposed for this offence will provide an incentive for biodiscovery entities to ensure the Government is advised of all biodiscovery activities (i.e. the that Biodiscovery Plans are up to date).

Clause 56 – False or misleading information given by person seeking benefit sharing agreement

This clause creates an offence for the deliberate provision of false or misleading information to the DSDI Minister in negotiation of a BSA.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation. These penalties are proposed to ensure a real and decisive disincentive for efforts to defraud the State and the Queensland community of a share in the benefits derived from biodiscovery. If penalties were less restrictive, it is conceivable that some unethical players may decide to pay a penalty rather than comply with the requirements proposed in the *Biodiscovery Bill 2004*. The magnitude of the maximum penalty is reflective of the potential financial benefit unethical players may enjoy.

In its dealings to date in respect of benefit sharing, the Government has not experienced such unethical behaviour. Therefore, the strict penalties have been included as a precautionary measure.

Clause 57 – False or misleading documents given by person seeking benefit sharing agreement

This clause creates an offence for the deliberate provision of false or misleading documents to the DSDI Minister in negotiation of a BSA.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation. These penalties are proposed to ensure a real and decisive disincentive for efforts to defraud the State and the Queensland community of a share in the benefits derived from biodiscovery. If penalties were less restrictive, it is conceivable that some unethical players may decide to pay a penalty rather than comply with the requirements proposed in the *Biodiscovery Bill 2004*.

In its dealings to date in respect of benefit sharing, the Government has not experienced such unethical behaviour. Therefore, the strict penalties have been included as a precautionary measure.

Sub-clause 57(2) provides that the offence does not apply to a person who, when delivering such documents, informs the IIE Minister how it is false or misleading and gives the correct information to the IIE Minister if the person has or can reasonably obtain the correct information.

This exemption allows for biodiscovery entities to use best endeavours to ensure documentation provided is up to date and as accurate as possible in their interactions with Government.

Clause 58 – False or misleading information about reportable matters

This clause creates an offence for the deliberate provision of false or misleading information or documents in relation to a reportable matter to the DSDI Minister. A "reportable matter" is a commitment made under a BSA involving providing reports to the DSDI Minister on:

- results of biodiscovery research;
- commercialisation activities; or
- the total value or consideration of commercialisation activities.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation. These penalties are proposed to ensure a real and decisive disincentive for efforts to defraud the State and the Queensland community of a share in the benefits derived from biodiscovery. If penalties were less restrictive, it is conceivable that some unethical players may decide to pay a penalty rather than comply with the requirements proposed in the *Biodiscovery Bill 2004*.

In its dealings to date in respect of benefit sharing, the Government has not experienced such unethical behaviour. Therefore, the strict penalties have been included as a precautionary measure.

Division 3—Other offence provisions

Clause 59 – Claims by persons about holding a collection authority

This clause creates an offence for a person fraudulently claiming she or he is the holder of a BCA. This offence has been designed to deter unethical players from claiming activities have been approved.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation.

Clause 60 – Collection authority to be available for immediate inspection

This clause requires the holder of a BCA to have that BCA or a copy thereof available for inspection whilst undertaking collection activities. This will improve the monitoring of collection activities and help ensure the *Biodiscovery Bill 2004* creates a transparent and accountable regulatory system.

The penalty units (20) proposed for this offence equate to a maximum financial penalty of $1,500 for an individual and $7,500 for a corporation.

PART 8—MONITORING AND ENFORCEMENT

Division 1—Inspectors

Clause 61 – Appointment and qualifications

This clause provides that the EPA chief executive or the DSDI chief executive may appoint inspectors. Inspectors must have specific qualifications if they are to be appointed.

The clause provides that an inspector may be:

- a public service employee - this allows rangers and ecological experts currently employed by the EPA, DPIF, DNRME, Queensland Museum or the Wet Tropics Management Authority to be appointed (e.g. to police collection activities in national parks or the Wet Tropics World Heritage Area);
- a local government employee;
- a person accredited by the National Association of Testing Authorities (NATA) – this allows professional auditors to be appointed (e.g. to audit company accounts to ensure all benefits committed to the State under a BSA are delivered); and
- a person prescribed under a regulation – at present there are no regulations under the *Biodiscovery Bill 2004*, however providing for such will allow the EPA or DSDI chief executive to appoint persons with particular expertise (e.g. a mycology expert or particular species of plant, an intellectual property expert or patent attorney or forensic accountant) that may not be found within Government or through NATA accredited auditors.

Subject to the approval of the relevant agency, Commonwealth Government employees may provide advice in inspection and monitoring activities. The relevant agencies may include the Great Barrier Reef Marine Park Authority or CSIRO.

Clause 62 – Appointment conditions and limit on powers

This clause provides that in appointing an inspector the EPA or DSDI chief executive, whichever has made the relevant appointment, must ensure that an inspector is advised in writing of any conditions relating to his or her appointment.

Clause 63 – Issue of identity card

This clause provides that in appointing an inspector the EPA or DSDI chief executive, whichever has made the relevant appointment, must issue the inspector with an identity card that contains:

- a recent photograph of the inspector;
- a copy of the inspector's signature;
- clarification that the inspector has been appointed as an inspector under the *Biodiscovery Bill 2004*; and
- an expiry date.

Sub-clause 63(3) provides that an inspector may be issued with a single identity card even though they fulfil different functions under different legislation. This is standard practice in Queensland.

Clause 64 – Production or display of identity card

This clause provides that in exercising any powers under the *Biodiscovery Bill 2004* an inspector must produce her or his identity card for display to a person or have the identity card displayed so that it is clearly visible to the person. If this is not possible the inspector must produce the identity card for the person at the first reasonable opportunity.

Clause 65 – When inspector ceases to hold office

This clause provides that an inspector appointed will cease to hold that office when:

- the term of appointment expires;
- the appointment ceases under a condition of appointment; or
- the inspector resigns (see clause 66).

Sub-clause 65(2) provides that the above examples do not limit the ways or circumstances in which an inspector ceases to hold office. This allows, for example, disciplinary procedures to be implemented.

Clause 66 – Resignation

This clause provides that an inspector may resign that position by providing written advice of such an intention to the EPA or DSDI chief executive, whichever was responsible for the inspector's appointment.

Clause 67 – Return of identity card

This clause provides that a person who ceases to be an inspector must return the idenitity card issued under clause 58 to the EPA or DSDI chief executive, whichever was responsible for the inspector's appointment, within 21 days of ceasing to be an inspector. The penalty units (20) proposed for failure to return identity card equate to a maximum financial penalty of $1,500. However, the penalty may be avoided if the person has a reasonable excuse for failing to return the identity card within the 21 days.

Division 2—Powers of inspectors

The powers created in the following provisions reflect standard Queensland criminal investigatorial powers. The penalties listed below reflect the special circumstances of the biodiscovery industry and have been designed to deter, as much as is possible, unethical or illegal activity.

Subdivision 1—Entry of places

Clause 68 – Power to enter places

Sub-clause 68(1) provides that an inspector appointed under clause 61 may enter a place if:

- the occupier consents; or
- it is a public place that is open to the public at the time of entry; or
- entry is authorised under a warrant; or
- it is a biodiscovery entity's place of business stated in the biodiscovery entity's BCA or the BSA and is: open for business; open for entry; or required to be open for inspection under the BCA or the BSA.

Sub-clause 68(2) provides that an inspector may, within reason:

- enter land surrounding the premises she or he wishes to enter; or
- enter part of the place she or he wishes to enter that the public is ordinarily allowed to enter when they wish to contact the occupier (e.g. the foyer of a building premises).

Sub-clause 68(3) provides that the power to enter a biodiscovery entity's place of business does not extend to that part or those parts of a premises where a person resides (e.g. a dwelling above a shop).

Subdivision 2—Procedure for entry

Clause 69 – Entry with consent

Sub-clause 69(1) provides clarification that this clause applies where an inspector appointed under clause 50 intends to seek the approval from an occupier of a place for entry by that inspector or another inspector.

Sub-clause 69(2) provides that before seeking consent for entry, an inspector must inform the occupier of the reason entry is sought and that approval may be withheld.

Sub-clause 69(3) provides that if approval is given for the inspector to enter a premises, the inspector may ask the occupier to confirm such approval was given in writing.

Sub-clause 69(4) provides that in giving approval in writing, such approval must state that:

- the occupier has been advised of the purpose of entry and that approval may be withheld;
- the purpose of entry;
- the occupier gives the inspector consent to enter the place and exercise powers granted to the inspector; and
- the time and date the approval was given.

Sub-clause 69(5) provides that if the occupier signs the approval, the inspector must immediately give the occupier a copy of the approval.

Sub-clause 69(6) provides that if an issue arises in a proceeding under the *Biodiscovery Bill 2004* about whether approval for entry was in fact granted and an approval complying with sub-clause 69(4) is not produced, the onus of proof for proving that the occupier gave approval for entry rests with the person relying on the lawfulness of entry.

Clause 70 – Application for warrant

This clause provides that an inspector appointed under clause 61 may apply to a magistrate for a warrant for a place, that the warrant must be sworn and state the grounds on which the warrant is sought and that the magistrate may refuse to consider the application until the inspector provides all the information the magistrate requires in the way the magistrate requires.

Clause 71 – Issue of warrant

This clause provides that a magistrate may issue a warrant only if satisfied there are reasonable grounds for suspecting an identified place contains evidence of an offence against the *Biodiscovery Bill 2004* and that such evidence is at the identified place or will be at the identified place within the next seven days. The warrant must state that:

- an inspector may enter the identified place or any other necessary place and exercise her or his powers;
- the suspected offence justifying the warrant;
- the evidence sought;
- the evidence may be seized;
- the hours of the day or night when the place may be entered; and
- the date the warrant ends (limited to 14 days after issue).

Clause 72 – Special warrants

This clause provides that an inspector appointed under clause 61 may apply for a special warrant by telephone, fax, radio or other form of communication in special circumstances (e.g. urgency of the matter or remoteness of the inspector's location). Before doing so, the inspector must prepare an application stating grounds for seeking the warrant, however, the application may be made before the application is sworn.

Upon issuing a special warrant the relevant magistrate must fax the inspector a copy of the special warrant if it is reasonably practicable to do so. If it is not reasonably practicable to do so:

- the magistrate must advise the inspector of the terms of the special warrant and the date and time the special warrant was issued; and
- the inspector must complete a form of warrant (i.e. "warrant form") and include the magistrate's name and the date and time the magistrate issued the special warrant.

Clause 73 – Warrants - procedure before entry

This clause applies if an inspector appointed under clause 61 and named in a warrant intends to enter the place named in the warrant.

Sub-clause 73(2) provides that the inspector must make a reasonable attempt to:

- identify herself or himself to an occupier of the place named in the warrant by producing her or his identity card issued to the inspector under clause 63 or by some other means that identifies her or him as an inspector appointed under the *Biodiscovery Bill 2004*;
- give the occupier a copy of the warrant, special warrant or warrant form, whichever is relevant;
- verbally advise the occupier that she or he is permitted by the warrant to enter the place; and
- give the occupier the opportunity to allow immediate entry prior to using force.

Sub-clause 73(3) provides an exemption for the inspector from sub-clause 73(2) if the inspector reasonably believes that immediate entry to the place is required to ensure the effective execution of the warrant. Such a power may be seen as not having sufficient regard to a person's rights and liberties. However, this power is justified on the basis that it will only be exercised if an inspector reasonably suspects a place has been used or is being used to commit an offence or the place is, or contains, evidence of an offence and such action is required to avoid loss of the evidence.

Subdivision 3—Other powers

Clause 74 – Power to stop and search vehicles etc.

Sub-clause 74(1) provides that this section applies if an inspector appointed under clause 61 reasonably believes a vehicle, boat or aircraft is being or has been used in the commission of an offence against the *Biodiscovery Bill 2004*, or that a vehicle, boat or aircraft or the contents of any may contain evidence of the commission of an offence against the *Biodiscovery Bill 2004*.

Sub-clause 74(2) provides that the inspector may enter or board the vehicle, boat or aircraft and exercise powers spelt out in clause 74(3) of the

Biodiscovery Bill 2004. In doing so the inspector may use necessary and reasonable force without a warrant. Such a power may be seen as not having sufficient regard to a person's rights and liberties. However, this power is justified on the basis that it will only be exercised if an inspector reasonably suspects a vehicle has been used or is being used to commit an offence or the vehicle etc is, or contains, evidence of an offence and such action is required to avoid loss of the evidence.

Sub-clause 74(3) provides that if the vehicle, boat or aircraft is in motion or about to move the inspector may signal the person in control of such vehicle, boat or aricraft to stop or not move the vehicle, boat or aircraft. This clause only applies to aircraft when that aircraft is on the ground.

Sub-clause 74(4) creates an offence for willfully and without a reasonable excuse ignoring the signal given under sub-clause 74(3).

The penalty units (165) proposed for this offence equate to a maximum financial penalty of $12,375 for an individual and $61,875 for a corporation. These very strict penalties have been set to reflect the seriousness of the State's sovereign responsibility to protect and manage on behalf of all Queenslanders the State's native biological material. Providing a serious disincentive should encourage players to operate legally within the framework set by the *Biodiscovery Bill 2004* rather than risk financial penalty.

Sub-clause 74(5) provides that sub-clause 74(4) does not apply to a person if to obey the signal given by an inspector under sub-clause 74(3) would endanger the person or other persons and if the person obeys the signal given by an inspector under sub-clause 74(3) as soon as practicable.

Sub-clause 74(6) provides that an inspector may require the driver or person in command of a vehicle, boat or aircraft to assist the inspector in entering or boarding and bringing the vehicle, boat or aircraft to a place specified by the inspector and to remain in control of the vehicle, boat or aircraft whilst the inspector exercises her or his powers.

Sub-clause 74(7) creates an offence for a person who willfully and without a reasonable excuse contravenes a requirement given under sub-clause 74(6).

The penalty unit (165) proposed for this offence equates to a maximum financial penalty of $12,375 for an individual and $61,875 for a corporation. These very strict penalties have been set to reflect the seriousness of the State's sovereign responsibility to protect and manage on behalf of all Queenslanders the State's native biological material. Providing a serious disincentive should encourage players to operate

legally within the framework set by the *Biodiscovery Bill 2004* rather than risk financial penalty.

Sub-clause 74(8) provides that if while searching a vehicle, boat or aircraft an inspector finds something that she or he reasonably believes could evidence commission of an offence against the *Biodiscovery Bill 2004* clauses 78 through 86 apply to that thing.

Clause 75 – General powers after entering places

This clause provides guidance for an inspector that has entered a place under clause 68 or if entry is gained with the occupier's approval. For monitoring and enforcing the *Biodiscovery Bill 2004* an inspector may:

- search any part of the place;
- inspect, measure, photograph or film any part of the place or anything at the place;
- take an extract from or copy a document at the place;
- take into or onto the place any equipment the inspector reasonably believes necessary to fulfil their responsibilities under this Division 2;
- require the occupier or another person at the place to provide reasonable help to enable the inspector to exercise the above powers (in doing so the inspector must inform the occupier or other person that it is an offence to fail to comply without a reasonable excuse);
- require the occupier or another person at the place to provide the inspector with information to allow the inspector to ascertain whether compliance with the *Biodiscovery Bill 2004* is being achieved (in doing so the inspector must inform the occupier or other person that it is an offence to fail to comply without a reasonable excuse).

Clause 76 – Failure to help inspector

This clause creates an offence for failing to provide reasonable help under clause 75(3)(e) without a reasonable excuse. The clause provides that a reasonable excuse for a person in relation to this offence includes failing to comply if compliance might incriminate the person.

The penalty units (50) proposed for this offence equate to a maximum financial penalty of $3,750 for an individual and $18,750 for a corporation.

Clause 77 – Failure to give information

This clause creates an offence for failing to provide information to an inspector under clause 75(3)(f) without a reasonable excuse. The clause provides that a reasonable excuse includes failing to comply if compliance might incriminate the person.

The penalty units (50) proposed for this offence equate to a maximum financial penalty of $3,750 for an individual and $18,750 for a corporation.

Subdivision 4—Power to seize evidence

Clause 78 – Seizing evidence at place that may only be entered with consent or warrant

This clause applies if an inspector appointed under clause 61 is authorised to enter a place with the occupier's approval or under a warrant and does so. The clause allows an inspector to seize a thing if the inspector reasonably believes the thing is evidence of commission of an offence against the *Biodiscovery Bill 2004* and such seizure is consistent with the purposes of entry as communicated to the occupier (where approval has been obtained) or with the warrant.

Sub-clause 78(4) provides that the inspector may also seize anything else at the place if the inspector reasonably believes the thing is evidence of commission of an offence against the *Biodiscovery Bill 2004* and such seizure is necessary to prevent the thing being hidden, lost or destroyed.

Clause 79 – Seizing evidence at other places

Sub-clause 79(1) provides that an inspector appointed under clause 61 may enter a public place, enters or boards a vehicle, boat or aircraft without consent or a warrant.

Sub-clause 79(2) provides that an inspector appointed under clause 61 is authorised to seize a thing from a public place, vehicle, boat or aircraft if the inspector reasonably believes the thing is evidence of commission of an offence against the *Biodiscovery Bill 2004*.

Clause 80 – Securing seized things

This clause provides that having seized a thing an inspector appointed under clause 60 reasonably believes is evidence of commission of an offence against the *Biodiscovery Bill 2004*, the inspector may move the thing or leave a thing where it is but restrict access to it.

Clause 81 – Tampering with seized things

This clause creates an offence for tampering or attempting to tamper with a thing to which an inspector appointed under clause 61 has restricted access or tampering with something that is restricting access, without the inspector's approval.

The penalty units (50) proposed for this offence equate to a maximum financial penalty of $3,750 for an individual and $18,750 for a corporation.

Clause 82 – Receipt for seized things

This clause provides that an inspector appointed under clause 61 must, as soon as is practicable, provide a receipt for any seized thing to the person from whom it was taken. The receipt must describe each thing seized. If this is not possible, the inspector must leave a receipt in a conspicuous place and in a secure manner at the place of seizure (e.g. under the windscreen wiper on the windscreen of a vehicle).

Sub-clause 82(4) provides an exemption to the requirement to leave a receipt for seized things if it is impractical or would be unreasonable to give the receipt. This exemption is limited to the nature, condition and value of the seized thing.

Clause 83 – Disposal of native biological material

This clause provides that the EPA chief executive may direct that material that has been seized as evidence of an offence against the *Biodiscovery Bill 2004* be disposed of and may direct the method of disposal if satisfied it is necessary to do so in the interests of the welfare of the material or for the protection of the material. Disposal may take place whether or not a proceeding has been taken or a person has been convicted of an offence.

This clause effects the acquisition of a right, which may constitute an interference with a biodiscovery entity's property rights in native biological material or something sourced from that material, without compensation. The State can legislate to acquire property or to affect commercial interests in property, with or without compensation, both prospectively and with retrospective effect. The one requirement is to legislate with precision on the point. The power effected by this provision is prospective, not retrospective, and very precise as it is limited to instances where it is necessary to do so in the interests of the welfare of the material or for the protection of the material.

Clause 84 – Forfeiture of things not owned by the State

This clause provides that a seized thing that is not owned by the State becomes the property of the State where the seizing inspector cannot find the owner or cannot return it to its owner. In each instance the inspector must make reasonable inquiries or efforts. The term "owner" in respect of property has been defined, for this clause, to mean the person in possession or control.

Clause 85 – Dealing with forfeited things

This clause provides that a thing forfeited to the State (see clause 84) becomes the property of the State and the State may dispose of or destroy the thing as the EPA chief executive considers appropriate.

Clause 86 – Return of seized things

This clause provides that if a seized thing is not disposed of (see clause 83) or forfeited (see clause 84) the inspector must return it to the person from whom it was taken after six months or where proceedings have commenced within 6 months,at the end of any proceedings and appeal from proceedings in which the thing plays a part. However, the inspector must return the thing immediately if she or he is satisfied that it is no longer evidence of commission of an offence against the *Biodiscovery Bill 2004*.

Clause 87 – Access to seized things

This clause provides that until a seized thing is disposed of, forfeited or returned, the inspector must allow access to it by the person from whom it was taken for inspection purposes and if it is a document for copying purposes.

Sub-clause 87(2) provides an exemption to the requirement to allow access to the seized thing if it is impractical or would be unreasonable to allow inspection or copying (e.g. if the thing is being stored in Brisbane and the person sought Access To It In Cairns).

Division 3—General investigation matters

Clause 88 – Inspector's obligation not to cause unnecessary damage

This clause provides that an inspector must take all reasonable steps to ensure he or she does not cause any unnecessary damage.

Clause 89 – Notice of damage

This clause provides that where an inspector appointed under clause 61 or a person acting under the direction of that inspector causes damage to property, the inspector must advise the owner of the property in writing (i.e. give notice) of particulars of the damage. If this is not possible, the inspector must leave written advice of the damage in a conspicuous place and in a secure manner where the damage happened. The term "owner" in respect of property has been defined, for this clause, to mean the person in possession or control. The inspector may also advise that in her or his opinion the damage was caused by a latent defect in the property or was caused by circumstances beyond the control of the inspector or the person acting under her or his direction.

Sub-clause 89(5) provides that the above does not apply if the inspector reasonably believes the damage is trivial.

Clause 90 – Compensation

This clause provides that a person may claim compensation from the State if loss or expense is incurred as a result of entry, search or seizure actions outlined in subdivisions 1, 3 and 4 of Division 2. This includes loss or expense incurred in complying with a requirement made of a person under subdivisions 1, 3 and 4 of Division 2 of Part 8 of the *Biodiscovery Bill 2004*.

Sub-clause 90(3) provides that the court in which such claim is made will depend on the level of compensation claimed.

Sub-clause 90(4) provides that a court may make a compensation order only where the court is satisfied such an order is fair in the particular case.

Clause 91 – False or misleading information given to inspector

This clause creates an offence for deliberately stating false or misleading information to an inspector appointed under clause 61.

The penalty units (50) proposed for this offence equate to a maximum financial penalty of $3,750 for an individual and $18,750 for a corporation.

Clause 92 – False or misleading documents given to inspector

This clause creates an offence for deliberately providing a false or misleading document to an inspector appointed under clause 61.

The penalty units (50) proposed for this offence equate to a maximum financial penalty of $3,750 for an individual and $18,750 for a corporation.

Sub-clause 92(2) provides that the offence does not apply to a person who, when providing such documents, informs the inspector how it is false or misleading and gives the correct information to the inspector if the person has or can reasonably obtain the correct information. This exemption allows for biodiscovery entities to use best endeavours to ensure information provided is as up to date and accurate as possible in their interactions with the Queensland Government.

Clause 93 – Obstructing an inspector

Sub-clause 93(1) creates an offence for obstructing an inspector without a reasonable excuse from exercising her or his powers under the *Biodiscovery Bill 2004*.

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation. These strict penalties have been set to reflect the seriousness of the State's sovereign responsibility to protect and manage on behalf of all Queenslanders the State's native biological material. Providing a serious disincentive should encourage players to operate legally within the framework set by the *Biodiscovery Bill 2004* rather than risk significant financial penalty.

Sub-clause 93(2) provides that if a person obstructs an inspector and the inspector wishes to proceed to enforce her or his powers under the *Biodiscovery Bill 2004*, the inspector must warn the person that it is an offence to obstruct without a reasonable excuse and that the inspector considers the person's actions an obstruction.

Sub-clause 93(3) defines "obstruct" to mean hinder or attempt to obstruct or hinder.

Clause 94 – Impersonating an inspector

This clause creates an offence for pretending to be an inspector appointed under clause 61.

The penalty units (50) proposed for this offence equate to a maximum financial penalty of $3,750 for an individual and $18,750 for a corporation.

PART 9—REVIEW OF DECISIONS

Division 1—Decisions of EPA chief executive

Clause 95 – Application for internal review

This clause provides that where an applicant for a BCA has been advised in writing by the EPA chief executive of his or her refusal of an application or the grant of an application on conditions, the applicant may apply for an internal review of that decision.

Sub-clause 95(2) extends internal review to those applications where the BCA is deemed to be refused under clause 19.

Clause 96 – How to apply for internal review

This clause provides that an application for internal review must be made to the EPA Minister in the approved form and be supported by enough information to allow the Minister to decide the application. The application must be made within 20 business days after the day a person receiveswritten advice from the chief executive about the decision or within 20 business days the day the person learns of the decision.

Clause 97 – Review decision

This clause provides that the EPA Minister must, within 30 business days after receiving the application for internal review, review the decision and advise the applicant in writing of the results of the review and the reasons for reviewed decision, which may include:

- confirmation of the original decision; or
- amendment of the orginal decision; or
- substitution of the original decision with an alternate decision.

Sub-clause 97(3) provides that if the EPA Minister does not give reasons for the review decision where the review decision is not the decision sought by the applicant, the Minister is taken to have confirmed the original decision of the EPA chief executive.

Clause 98 – Restriction on external review

This clause provides that reviews of decisions to refuse an application or grant a BCA on conditions are restricted to internal reviews to the EPA Minister. External reviews have not been included for the decision to allocate the native biological resources on State land or in Queensland

waters as the *Biodiscovery Bill 2004* overides all other statutory provisions relating to the allocation of these resources. At present, the *Nature Conservation Act 1992* specifically precludes commercial use of natural resources in national parks and access to rare and threatened wildlife (unless there is a conservation plan in force). Final determination of access to the State's native biological resources for the purposes of biodiscovery on State land and in Queensland waters will rest with the Minister for the Environment. The *Biodiscovery Bill 2004* does not limit who the Minister for the Environment may consult with in deciding an application for access to these resources.

Sub-clause 98(3) provides that this clause has no impact on the *Judicial Review Act 1991*.

Division 2—Decisions of DSDI chief executive

Clause 99 – Application for review

This clause provides that where a biodiscovery entity seeking approval of a Biodiscovery Plan has been advised in writing by the DSDI chief executive of a decision on such a matter, the applicant may apply for an internal review of that decision.

Clause 100 – How to apply for internal review

This clause provides that an application for internal review must be made to the DSDI Minister in respect of a decision regarding a Biodiscovery Plan in the approved form and be supported by enough information to allow the Minister to decide the application. The application must be made within 20 business days after the day on which the person receives written advice from the DSDI chief executive about the decision or within 20 business days after the day on which the person learns of the decision.

Clause 101 – Review of decision

This clause provides that the DSDI Minister must, within 30 business days after receiving the application for internal review, review the decision and advise the applicant in writing of the results of the review and the reasons for reviewed decision, which may include:

- confirmation of the original decision; or
- amendment of the orginal decision; or

- substitution of the original decision with an alternate decision.

Sub-clause 101(3) provides that if the DSDI Minister does not give reasons for the review decision where the review decision is not the decision sought by the applicant, the Minister is taken to have confirmed the original decision of the DSDI chief executive, in respect of the application for approval of a Biodiscovery Plan.

Clause 102 – Restriction on external review

This clause restricts reviews of the DSDI chief executive's decision in relation to an application for approval of Biodiscovery Plans to internal review to the DSDI Minister. The requirement for internal review protects political accountability but external reviews in relation to Biodiscovery Plans are not considered appropriate. The reason for this is that Biodiscovery Plans will form the basis of negotiations between the State and biodiscovery entities for Benefit Sharing Agreements. In all commercial negotiations both parties have a right to either enter into or cease negotiations and this is reflected in the *Biodiscovery Bill 2004*. Expanding the right of external review could also expose confidential commercial information, a prospect that has been strongly opposed by industry and research institutions during both rounds of public consultation.

PART 10—APPEALS

Clause 103 – Who may appeal

Applicants who have been granted a BCA which is subsequently amended, suspended or cancelled have the right of appeal to a Magistrates Court against such a decision.

Clause 104 – Starting an appeal

Filing a notice of appeal with the clerk of the Magistrates Court, giving a copy of the notice to the EPA chief executive and complying with the rules of court applicable to the appeal will commence an appeal.

Sub-clause 104(2) provides that the appeal must commence within 20 business days after receiving the notice of the decision.

Sub-clause 104(3) retains the right of the court to extend the time for filing the notice of appeal.

Clause 105 – Stay of operation of decisions

This clause allows for the court to order the stay of the decision pending the outcome of the appeal.

Clause 106– Hearing procedures

This clause provides that the court, in deciding the appeal, is not bound by the rules of evidence and is required to comply with natural justice.

Clause 107 – Powers of court on appeal

The Magistrates Court has the discretion to confirm, vary, set aside the decision and substitute another decision or set aside the decision and refer the matter to the EPA chief executive with directions the court considers appropriate.

Sub-clause 107(2) restricts the decision a court may make to decisions that could have been made by the EPA chief executive.

Sub-clause 107(4) allows orders for costs to be made.

PART 11—LEGAL PROCEEDINGS

Division 1—Evidence

Clause 108 – Application of div 1

This clause clarifies that a legal proceeding under the *Biodiscovery Bill 2004* will be dealt with under Division 1 of Part 10 of the *Biodiscovery Bill 2004*.

Clause 109 – Appointments and authority

This clause provides that in presenting evidence under the *Biodiscovery Bill 2004* it is not necessary to prove the appointment of the EPA Minister, the DSDI Minister, the EPA chief executive, the DSDI chief executive or an inspector.

Clause 110 - Signatures

This clause provides that in presenting evidence under the *Biodiscovery Bill 2004* it is not necessary to prove that the signature of the EPA Minister,

the DSDI Minister, the EPA chief executive, the DSDI chief executive or an inspector is actually the signature of that person.

Clause 111 – Evidentiary matters

This clause provides that the EPA or DSDI chief executive may provide a signed certificate in relation to certain matters and that such certificates act as evidence of such matters.

For example, the EPA chief executive may sign a certificate stating that a particular direction (e.g. a condition under a BCA) or document (e.g. a Collection Protocol) was issued under the Biodiscovery Bill 2004.

Division 2—Proceedings

Clause 112 – Summary proceedings for offences

This clause provides that proceedings for an offence against the *Biodiscovery Bill 2004* must comply with the *Justices Act 1886*.

Sub-clause 112(2) provides that a proceeding in relation to an offence against clause 54 of the *Biodiscovery Bill 2004* must commence within five years of the offence or within one year of the complainant gaining knowledge of the offence and within seven years of the commission of the offence. In effect, this creates a limitation period for offences under the *Biodiscovery Bill 2004*.

Whilst prosecutions for criminal offences (essentially those under the *Criminal Code*) are not subject to any time limitation, it is unusual for prosecutions for breach of statutory duty not to be subject to some ultimate time limitation. The length of time within which a prosecution under the *Biodiscovery Bill 2004* may be commenced in relation to using native biological material without a BSA is substantial. However, these time periods only apply to the use of the native biological material and reflect the reality that biodiscovery entities: will not publicly disclose their findings if they are intending to obtain patent protection; will not disclose them at all if they are relying on trade secret protection; and the long term nature of biodiscovery commercialisation (up to 15 years). For these reasons the extended limitation period is considered necessary and should ensure the State obtains a fair and equitable share in the benefits of biodiscovery on behalf of all Queenslanders.

Sub-clause 112(3) provides that a proceeding in relation to an offence under the *Biodiscovery Bill 2004* (other than an offence against clause 54)

must commence within one year of the offence or within one year of the complainant gaining knowledge of the offence and within two years of the commission of the offence. In effect, this creates a statue of limitations for offences under the *Biodiscovery Bill 2004*.

Clause 113 – Allegations of false or misleading information or documents

This clause provides that alleging information or documents provided (e.g. as part of an application for a BCA or in negotiation of a BSA) were false or misleading to a person's knowledge is grounds enough for investigation of an offence under this clause. Surety that the information was in fact false or misleading is not required to commence investigation.

Clause 114 – Responsibility for acts or omissions of representatives

This clause provides that, where it is relevant to a proceeding to demonstrate a person's state of mind in respect of a particular act or omission, it must be shown that the act or omission was done by a representative of the person within the representative's actual authority (i.e. the representative was not acting of her or his own volition) and that the representative had the requisite state of mind.

Sub-clause 114(3) provides that where an act or omission is done by a person's representative, such activity is taken to be done by the person unless she or he can prove that they could not, within reason, have prevented the act or omission.

Sub-clause 114(4) defines "representative" to mean: an executive officer, employee or agent, for a corporation; or an employee or agent, for an individual. The sub-clause defines "state of mind" to mean the person's knowledge, intention, opinion, belief or purpose and the person's reasons for such.

This clause effectively reverses the onus of proof, since under the law a person generally cannot be found guilty of an offence unless the prosecution can establish guilt. The relevant clauses are in a form routinely employed in many Queensland Bills and provide that where an offence was carried out by a person's representative, such activity is taken to be done by the person unless they can prove they could not, within reason, have prevented the offence. Further it must be shown that the offending representative was not acting of her or his own volition. This is a reversal of the onus of proof, but has been included to ensure corporate responsibility in the Queensland biodiscovery industry and to ensure that the industry develops in an ethical and accountable manner.

Clause 115 – Executive officers must ensure corporation complies with Act

This clause creates an offence for executive officers failing to ensure a corporation complies with the *Biodiscovery Bill 2004*. The clause provides that if a corporation commits an offence against the *Biodiscovery Bill 2004*, each of the executive officers of that corporation is taken to have committed an offence (i.e. failing to ensure the corporation complied with the legsilation).

The penalty units proposed for this offence will depend on the relevant offence (e.g. clause 57 - False or misleading documents by person seeking benefit sharing agreement) and the maximum financial penalty for each executive officer will be the maximum amount payable for such offence by an individual (i.e. 100 penalty units or $7,500).

Sub-clause 115(3) provides that evidence that a corporpation has committed an offence against the *Biodiscovery Bill 2004* is evidence that each executive officer of that corporation has committed an offence under this clause.

Sub-clause 115(4) provides that the offence does not apply where an executive officer can demonstrate that she or he exercised reasonable diligence to ensure the corporation's compliance with the *Biodiscovery Bill 2004* or where an executive officer can demonstrate that she or he was not in a postion to influence the conduct of the corporation in relation to the offence. This is a reversal of the onus of proof, but has been included to ensure corporate responsibility in the Queensland biodiscovery industry and to ensure that the industry develops in an ethical and accountable manner. Defences are provided, but must be proved by the defendant rather than the prosecution proving guilt.

The relevant clauses are in a form routinely employed in many Queensland Bills and provide that where an offence was carried out by a person's representative, such activity is taken to be done by the person unless they can prove they could not, within reason, have prevented the offence. Further it must be shown that the offending representative was not acting of her or his own volition. This is a reversal of the onus of proof, but has been included to ensure corporate responsibility in the Queensland biodiscovery industry and to ensure that the industry develops in an ethical and accountable manner. These clauses ensure that officers of corporations cannot hide behind the corporate veil.

PART 12—MISCELLANEOUS

Division 1—Protection of confidentiality

Clause 116 – Freedom of Information Act 1992 does not apply to benefit sharing agreement

This clause provides that section 16 of the *Freedom of Information Act 1992* does not apply to:

- a BSA;
- records kept about a BSA (e.g. legal advice sought);
- records kept about a BCA (e.g. ecological advice sought);
- a Biodiscovery Plan;
- records kept about a Biodiscovery Plan;
- documents identifying the holder of a BCA

The records referred to must be kept by a relevant department, which is defined to mean the EPA or DSDI or a consulting chief executive's department (i.e. DPIF, DNRME).

This protection has been included to protect the commercial in confidence nature of much of the material and information that will be dealt with during: finalisation of a Biodiscovery Plan; negotiation of a BSA; assessment of a BCA application and monitoring of an ensuing BCA; as well as reports and other records developed and delivered under a BSA or according to a Biodiscovery Plan. Such protection was requested by industry and research institutions during both rounds of public consultation. As this information is commercial in nature and would not have entered the public domain except for the passage of relevant provisions of the *Biodiscovery Bill 2004*, it is questionable whether lack of a provision removing such information from the public domain is in the public interest.

Clause 117 – Disclosure of information about collection authority, benefit sharing agreement or biodiscovery plan

This clause creates an offence for the disclosure of information regarding a BSA; a BCA or a Biodiscovery Plan, unless such disclosure is permitted. A person who acquires such information whilst performing

their functions under the *Biodiscovery Bill 2004* may disclose this information only:

- to the extent necessary for the person to perform their functions under the *Biodiscovery Bill 2004*;
- if disclosure is allowed under the *Biodiscovery Bill 2004* or the *Freedom of Information Act 1992*;
- if disclosure is required by law;
- if the party to the relevant BSA consents in writing to disclosure; or
- if the information is already in the public domain (e.g. it has been recorded on the register of BCAs or register of BSAs).

The penalty units (100) proposed for this offence equate to a maximum financial penalty of $7,500 for an individual and $37,500 for a corporation.

No similar protection is provided for a "corresponding authority", as the protection proposed under this clause is new and designed to protect commercial in confidednce information. It is not designed to be retrospective in effect, nor it is designed to prtect information and material that was not considered or assessed under the *Biodiscovery Bil 2003*.

Division 2—Protection from liability

Clause 118 – Liability of State

This clause provides the granting of a BCA or the executing of a BSA by the State does not subject the State to legal liability for any act.

Clause 119 – Protecting officials from liability

This clause provides that Government officials (i.e. a Minister responsible for administering the *Biodiscovery Bill 2004*, a person authorised to enter a BSA for the State, the EPA or DSDI chief executive, or an employee of EPA or DSDI or another Government Department) are not liable for civil proceedings for an act or omission made honestly and without negligence under this legislation. However, if dishonesty or negligence can be proved, liability will attach to the State.

Clause 120 – Whistleblowers' protection

This clause provides that a person who discloses to an official (i.e. a Minister responsible for administering the *Biodiscovery Bill 2004*, a person

authorised to enter a BSA for the State, the EPA or DSDI chief executive) information about a breach of the *Biodiscovery Bill 2004* is not liable for civil, criminal or administrative proceedings (e.g. disciplinary actions). This protection applies to defamation proceedings and where the person might be required under other legislation, oath, rule of law or practice to maintain confidentiality. However, this protection does not apply to a person who discloses to an official information about their own conduct that breaches the *Biodiscovery Bill 2004*.

Division 3—Other miscellaneous provisions

Clause 121 – Review of Act

This clause provides that the EPA and DSDI Ministers must review the *Biodiscovery Bill 2004* within five years of commencement of this clause. The review will focus on the appropriateness of the provisions. The Ministers must, as soon as practicable after completing the review, table a joint report on the outcome(s) of the review in the Legislative Assembly of the Queensland Parliament.

Clause 122 – Approval of forms

Sub-clause 122(1) provides that the EPA chief executive may approve forms in relation to BCAs and clause 96(1).

Sub-clause 122(2) provides that the DSDI chief executive may approve forms in relation to BSAs.

Clause 123 – Regulation-making power

This clause provides that the Governor-in-Council may make regulations under this Act.

PART 13—TRANSITIONAL PROVISION

Clause 124 – Existing benefit sharing agreements with State

This clause provides that BSAs entered into prior to the commencement of the *Biodiscovery Bill 2004* will be recognised as a BSA under the *Biodiscovery Bill 2004*. However, recognising the Queensland

Parliament's Fundamental Legislative Principle regarding retrospective legislation, such recognition will not impose criminal liability retrospectively.

Sub-clause 124(3) provides that biodiscovery entities with an existing BSA with the State will be allowed one year from date of commencment of the *Biodiscovery Bill 2004* to finalise a Biodiscovery Plan and to come within the regime established under the *Biodiscovery Bill 2004*.

Clause 125 – Existing permits, licences or other authorities

This clause provides that BCAs obtained prior to the commencement of the *Biodiscovery Bill 2004* will be recognised as a BCA under the *Biodiscovery Bill 2004*. This means the *Biodiscovery Bill 2004* will not impact on collections that were obtained legally prior to the commencement of the legislation.

PART 14—AMENDMENT OF OTHER ACTS

Division 1—Amendment of Fisheries Act 1994

Clause 126 – Act amended in div 1

This clause clarifies that the the *Fisheries Act 1994* will be amended by the passage of the *Biodiscovery Bill 2004*.

Clause 127 –Amendment of s 11 (General application of Act)

This clause includes an amendment to the *Fisheries Act 1994* to include the *Biodiscovery Bill 2004* in section 11(2) of the that Act. Currently section 11(2) states:

11 General Application of Act

(2) However, this Act does not apply to—

(a) activities to which a Commonwealth law cooperative fishery applies; or

(b) the taking of fish, within the meaning of the *Torres Strait Fisheries Act 1984 (Cwlth)*, for the purposes of a Commonwealth law Torres Strait cooperative fishery; or

(c) the landing in Queensland of fish taken under a Commonwealth fishing concession as mentioned in section 10(2)(c) of the Commonwealth Fisheries Act; or

(d) exclusive Commonwealth matters for a State law cooperative fishery.

Under the proposed amendment the section will read:

11 General Application of Act

(2) However, this Act does not apply to—

(a) activities to which a Commonwealth law cooperative fishery applies; or

(b) the taking of fish, within the meaning of the *Torres Strait Fisheries Act 1984 (Cwlth)*, for the purposes of a Commonwealth law Torres Strait cooperative fishery; or

(c) the landing in Queensland of fish taken under a Commonwealth fishing concession as mentioned in section 10(2)(c) of the Commonwealth Fisheries Act; or

(d) exclusive Commonwealth matters for a State law cooperative fishery.

(e) the taking and keeping of fish under a collection authority issued under the Biodiscovery Act 2004.

This amendment will ensure biodiscovery is not an activity regulated by the *Fisheries Act 1994* and that biodiscovery activities are not prohibited in Fisheries areas by that Act.

Division 2—Amendment of Forestry Act 1959

Clause 128 – Act amended in div 2

This clause clarifies that the the *Forestry Act 1959* will be amended by the passage of the *Biodiscovery Bill 2004*.

Clause 129 – Amendment of s 102 (Saving of certain Acts)

This clause includes as an amendment to the *Forestry Act 1959* to include the *Biodiscovery Bill 2004* in section 102(1) of the that Act. Currently section 102(1) of that Act states:

102 Saving of certain Acts

(1) Unless otherwise expressly provided, the provisions of this Act are in addition to, and do not limit the operation of, the following Acts—

(a) Criminal Code;

(b) *Nature Conservation Act 1992*;

(c) *Fire and Rescue Authority Act 1990*;

(f) *Petroleum (Submerged Lands) Act 1982*;

(h) *Sawmills Licensing Act 1936*;

(i) *Timber Utilisation and Marketing Act 1987*.

Under the amendment proposed, section 102 will read:

(1) Unless otherwise expressly provided, the provisions of this Act are in addition to, and do not limit the operation of, the following Acts—

(a) *Biodiscovery Act 2004*;

(b) *Criminal Code*;

(c) *Fire and Rescue Authority Act 1990*;

(d) *Nature Conservation Act 1992*;

(e) *Petroleum (Submerged Lands) Act 1982*;

(f) *Sawmills Licensing Act 1936*;

(g) *Timber Utilisation and Marketing Act 1987*.

This amendment will ensure the two pieces of legislation work together in a seamless manner by updating the *Forestry Act 1959* to recognise the emerging biodiscovery industry and the necessary interaction between the regulation of forestry in Queensland and biodiscovery.

Division 3—Amendment of Freedom of Information Act 1992

Clause 130 – Act amended in div 3

This clause clarifies that the the *Freedom of Information Act 1992* will be amended by the passage of the *Biodiscovery Bill 2004*.

Clause 131 – Amendment of sch 1 (Secrecy provisions giving exemption)

This clause includes as an amendment to the *Freedom of Information Act 1992* inclusion of clause 106 of the *Biodiscovery Bill 2004* in Schedule 1 of that Act.

This protection has been included to protect the commercial in confidence nature of much of the material and information that will be dealt with during: finalisation of a Biodiscovery Plan; negotiation of a BSA; assessment of a BCA applciation and monitoring of an ensuing BCA; as well as reports and other records developed and delivered under a BSA or according to a Biodiscovery Plan. Such protection was requested by industry and research institutions during both rounds of public consultation. As this information is commercial in nature and would not have entered the public domain except for the passage of relevant provisions of the *Biodiscovery Bill 2004*, it is questionable whether lack of a a provision removing such information from the public domain is in the public interest.

Division 4—Amendment of Gene Technology Act 2001

Clause 132 – Act amended in div 4

This clause clarifies that the the *Gene Technology Act 2001* will be amended by the passage of the *Biodiscovery Bill 2004*.

Clause 133 – Amendment of s 187 (Confidential commercial information must not be disclosed)

This clause includes as an amendment effecting a clarification of protection of commercial-in-confidence, as decalred by the Gene Technology Regulator under the *Gene Technology Act 2001*.

Division 5—Amendment of Nature Conservation Act 1992

Clause 134 – Act amended in div 5

This clause clarifies that the the *Nature Conservation Act 1992* will be amended by the passage of the *Biodiscovery Bill 2004*.

Clause 135 – Amendment of s 17 (Management principles of national parks)

This clause includes as an amendment to the *Nature Conservation Act 1992* to include a phrase in section 17(1) of that Act. Currently section 17(1) of that Act states:

17 Management principles of national parks

(1) A national park is to be managed to—

(a) provide, to the greatest possible extent, for the permanent preservation of the area's natural condition and the protection of the area's cultural resources and values; and

(b) present the area's cultural and natural resources and their values; and

(c) ensure that the only use of the area is nature-based and ecologically sustainable.

Under the amendment proposed, section 102 will read:

17 Management principles of national parks

(1) A national park is to be managed to—

(a) provide, to the greatest possible extent, for the permanent preservation of the area's natural condition and the protection of the area's cultural resources and values; and

(b) present the area's cultural and natural resources and their values; and

(c) ensure that the only use of the area is nature-based, or for biodiscovery under the *Biodiscovery Act 2004*, and ecologically sustainable.

This amendment will ensure the two pieces of legislation work together in a seamless manner by updating the *Nature Conservation Act 1992* to:

- take account of the emerging biodiscovery industry; and
- recognise that if such an industry is to grow in Queensland it must be sustainable (ecologically, economically and socially).

PART 5—REPEAL OF YEAR 2000 INFORMATION DISCLOSURE ACT 1999

Clause 136 – Repeal

This clause clarifies that the the *Year 2000 Information Disclosure Act 1999* will be amended by the passage of the *Biodiscovery Bill 2004* by repealing the Act.

The object of the *Year 2000 Information Disclosure Act 1999* is to encourage the voluntary disclosure and exchange of information about year 2000 computer problems and remediation efforts, and for other purposes. The other purposes effectively support the primary purpose of the Act by defining year 2000 disclosure statements, providing protection from civil liability, containing a presumption against amendment of contracts and exemption from section 45 of the Competition Code.

This Act is now effectively redundant as it has served its primary purpose. As it does not have a sunset clause regulating its expiry it remains on the statute books. Repeal of the legislation will satisfy the requirement that the statute books should be maintained in their highest form by removing redundant legislation. Rather than prepare a separate Authority to Prepare and Authority to Introduce submission, it is proposed to effect the repeal of the *Year 2000 Information Disclosure Act* via this Authority to Introduce submission. Office of the Queensland Parliamentary Counsel support the repeal of this piece of legislation.

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