

Flora and Fauna Guarantee Amendment Act 2019

No. of 2019

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- (ii) to strengthen government leadership and accountability by imposing obligations to consider biodiversity and improving reporting obligations; and
 - (iii) to improve strategic biodiversity planning by creating a Biodiversity Strategy; and
 - (iv) to enhance accountability and transparency in the administration of the Act by promoting public consultation; and
 - (v) to deliver effective protection for taxa and communities of flora and fauna and important habitats by creating critical habitat determinations and habitat conservation orders; and
 - (vi) to make various other amendments to promote modern and effective regulation, compliance and enforcement; and
 - (vii) to make other amendments to strengthen that Act; and
- (b) to make consequential amendments to other Acts.

2 Commencement

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision of this Act does not come into operation before 1 June 2020, it comes into operation on that day.

3 Principal Act

In this Act, the **Flora and Fauna Guarantee Act 1988** is called the Principal Act.

Part 2—Amendment of Flora and Fauna Guarantee Act 1988

4 Definitions

(1) In section 3(1) of the Principal Act **insert** the following definitions—

"Administrative Office has the same meaning as in the **Public Administration Act 2004**;

another jurisdiction means the Commonwealth or another State or a Territory;

biodiversity means the variability among living organisms from all sources (including terrestrial, marine and other aquatic ecosystems) and includes—

(a) diversity within species and between species; and

(b) diversity of ecosystems;

Biodiversity Strategy means a Biodiversity Strategy made under Division 1 of Part 4;

category of threat, in relation to a taxon of flora or fauna, means any of the categories of threat referred to in section 13;

climate change has the same meaning as in the **Climate Change Act 2017**;

Commissioner for Environmental Sustainability has the same meaning as *Commissioner* has in the **Commissioner for Environmental Sustainability Act 2003**;

common assessment method means the method agreed to by the Commonwealth, States and Territories for assessing the risk of extinction of taxa of flora or fauna, which requires—

- (a) the assessment of the risk of extinction of a taxon of flora or fauna to be assessed first on the basis of whether it is at risk of extinction in Australia; and
- (b) that—
 - (i) a category of threat be applied to a taxon of flora or fauna that is assessed at risk of extinction in Australia; and
 - (ii) a category of threat applied to a taxon of flora or fauna be changed if a further assessment as to the risk of extinction in Australia of the taxon is made;

Commonwealth Act means the Environment Protection and Biodiversity Conservation Act 1999 of the Commonwealth;

conservation dependent, in relation to a taxon of fish, means that the taxon needs to be the subject of a plan of management under the law of another jurisdiction that provides for management actions necessary to stop the decline, or support the recovery, of the taxon to maximise its chances of long-term survival in nature;

critical habitat means an area of Victoria in respect of which a critical habitat determination is made;

critical habitat determination means a determination made under Division 2 of Part 4;

critically endangered, in relation to a taxon of flora or fauna, means that the taxon is facing an extremely high risk of extinction in the wild in the immediate future;

endangered, in relation to a taxon of flora or fauna, means that the taxon is not critically endangered but is facing a very high risk of extinction in the wild in the near future;

enforceable undertaking means an undertaking accepted by the Secretary under section 62A;

extinct, in relation to a taxon of flora or fauna, means that there is no reasonable doubt that the last member of the taxon has died;

extinct in the wild, in relation to a taxon of flora or fauna, means that the taxon is known only to survive in cultivation, in captivity, or as a naturalised population well outside its past range;

extinction risk, in relation to a taxon of flora or fauna, means whether the taxon is at risk of extinction in Australia or Victoria;

Government Department has the same meaning as ***Department*** has in the **Public Administration Act 2004**;

habitat conservation order means a habitat conservation order made under Division 1 of Part 5;

listed means—

- (a) in relation to a taxon of flora or fauna or a community of flora or fauna, that the taxon or community is specified in the Threatened List; and
- (b) in relation to a potentially threatening process, that the process is specified in the Processes List;

management plan means a management plan made under Division 3 of Part 4;

minor amendment, in relation to a list under section 10 or 11, has the same meaning as in section 16I(4);

municipal council has the same meaning as **Council** has in the **Local Government Act 1989**;

national conservation advice has the same meaning as *approved conservation advice* has in the Commonwealth Act;

national recovery plan has the same meaning as *recovery plan* has in the Commonwealth Act;

nomination means a nomination made under section 16A;

private land means any land other than public land;

public entity has the same meaning as in the **Public Administration Act 2004**;

public land means Crown land or land owned by, or vested in, a public authority;

reategorisation amendment means an amendment made to the Threatened List under section 10(5) in relation to a taxon of flora or fauna;

restricted use protected flora means a taxon of flora that is declared under section 46 to be protected and is subject to a restriction on use;

State owned enterprise has the same meaning as in the **State Owned Enterprises Act 1992**;

threat abatement plan has the same meaning as in the Commonwealth Act;

vulnerable, in relation to a taxon of flora or fauna, means that the taxon is not critically endangered or endangered but is facing a high risk of extinction in the wild in the medium-term future;".

- (2) In section 3(1) of the Principal Act, in the definition of *Department*, for "Environment and Primary Industries" **substitute** "Environment, Land, Water and Planning".
 - (3) In section 3(1) of the Principal Act, in the definition of *Processes List*, for "list made under section 10(2)" **substitute** "list established and maintained under section 11(1)".
 - (4) In section 3(1) of the Principal Act, for the definition of *protected flora* **substitute**—
"*protected flora* means—
 - (a) any flora that is a member of a taxon of flora that is declared to be protected under section 46; or
 - (b) any flora that is a member of a listed taxon of flora; or
 - (c) any flora that is a part or member of a listed community of flora or fauna to the extent that it occurs within that community;".
 - (5) In section 3(1) of the Principal Act, for the definition of *public authority* **substitute**—
"*public authority* means a body established for a public purpose by or under any Act and includes—
 - (a) an Administrative Office; and
 - (b) a Government Department; and
 - (c) a municipal council; and
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- (d) a public entity; and
 - (e) a State-owned enterprise;".
 - (6) In section 3(1) of the Principal Act, in the definition of *Threatened List*, for "made" **substitute** "established and maintained".
 - (7) In section 3(1) of the Principal Act, the definition of *Conservation Advisory Committee* is **repealed**.
 - (8) In section 3(3) of the Principal Act, for "Environment and Primary Industries" **substitute** "Environment, Land, Water and Planning".
 - (9) After section 3(3) of the Principal Act **insert**—
 - "(4) In determining whether an activity has caused or is likely to cause a significant detrimental impact on protected flora or fish under section 47A, 47C or 52A, the following factors may be taken into account in addition to any other relevant factors—
 - (a) the notable nature of the impact or likely impact on the protected flora or fish;
 - (b) the context of the impact which includes, but is not limited to, the region and locality where the impact occurred;
 - (c) the adverse effect that the impact may have on a scientific, cultural or historical resource;
 - (d) the severity of the impact, which considers, but is not limited to, the unique characteristics of the protected flora or fish, the community of which the protected flora or fish is a part or member (the *relevant community*) or geographic area;
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- (e) the cumulative impact of the activity and any other activities or processes, regardless of the significance of those other activities or processes;
- (f) whether the impact is a direct or indirect consequence of the activity;
- (g) the extent the impact has on—
 - (i) the interaction between the components making up the relevant community;
 - (ii) opportunities for re-establishment and recovery of the protected flora or fish or relevant community;
 - (iii) the capacity for adaptation to environment change of the protected flora or fish or relevant community;
 - (iv) the conservation of the protected flora or fish or relevant community;
 - (v) the alteration of the ecological character of a relevant community;
 - (vi) the genetic diversity of the protected flora or fish or relevant community;
 - (vii) current or future conservation efforts."

5 Substitution of section 4

For section 4 of the Principal Act **substitute—**

"4 Objectives of this Act

The objectives of this Act are—

- (a) to guarantee that all taxa of Victoria's flora and fauna, other than taxa specified in the Excluded List, can persist and improve in the wild and retain their capacity to adapt to environmental change; and
- (b) to prevent taxa and communities of flora and fauna from becoming threatened and to recover threatened taxa and communities so their conservation status improves; and
- (c) to protect, conserve, restore and enhance biodiversity, including—
 - (i) flora and fauna and their habitats; and
 - (ii) genetic diversity; and
 - (iii) ecological communities; and
 - (iv) ecological processes; and
- (d) to identify and mitigate the impacts of potentially threatening processes to address the important underlying causes of biodiversity decline; and
- (e) to ensure the use of biodiversity as a natural resource is ecologically sustainable; and
- (f) to identify and conserve areas of Victoria in respect of which critical habitat determinations are made."

6 New sections 4A to 4C inserted

After section 4 of the Principal Act **insert**—

"4A Principles of this Act

It is a principle of this Act that a decision, policy, program or process gives proper consideration to the following—

- (a) the rights and interests of traditional owners by—
 - (i) acknowledging cultural and spiritual connections to land, biodiversity and resources through a relationship with country; and
 - (ii) supporting participation in decision-making, planning and the development of policies, programs and processes; and
 - (iii) facilitating access to biodiversity and providing opportunities for economic advancement;
 - (b) the potential impacts of climate change;
 - (c) the best practicably available information relevant to biodiversity;
 - (d) the precautionary principle, such that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
 - (e) enabling public participation;
 - (f) supporting collaboration between government, the community and partner agencies.
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4B Ministers and public authorities to give proper consideration of objectives

- (1) In performing any of their functions that may reasonably be expected to impact on biodiversity in Victoria, including a function under this Act or any other Act, a Minister and a public authority must give proper consideration to the objectives of this Act, so far as is consistent with the proper exercising of their functions.
 - (2) In addition to subsection (1), a Minister and a public authority, so far as is consistent with the proper exercising of their functions, must give proper consideration to any instrument made under this Act, including—
 - (a) the Biodiversity Strategy; and
 - (b) action statements; and
 - (c) critical habitat determinations; and
 - (d) management plans.
 - (3) Without limiting subsections (1) and (2), consideration must be given to the potential impacts on biodiversity, including—
 - (a) long and short-term impacts; and
 - (b) beneficial and detrimental impacts; and
 - (c) direct and indirect impacts; and
 - (d) cumulative impacts; and
 - (e) the impacts of potentially threatening processes.
 - (4) The Minister may make guidelines in relation to the proper consideration of the objectives of this Act and the instruments made under it by public authorities.
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4C Minister may request information to ensure objectives are being considered

- (1) The Minister may request a public authority to provide any information that the Minister considers is necessary and reasonable—
 - (a) to ensure that the duty to consider the objectives of this Act and the instruments made under it is being performed; or
 - (b) to ensure that an action taken, or to be taken, by the public authority does not threaten the persistence of a listed taxon or community or critical habitat.
- (2) A public authority must comply with a request under subsection (1).
- (3) The Minister may cause any information obtained under this section to be published on the Internet."

7 Traditional owner agreement for natural resources

In section 6A of the Principal Act, for "section 36" **substitute** "section 32".

8 Functions of the Secretary

- (1) In section 7(1) of the Principal Act, for "flora and fauna conservation and management objectives" **substitute** "objectives of this Act".
- (2) In section 7(2) of the Principal Act, for "survival" **substitute** "persistence".
- (3) For section 7(3) of the Principal Act **substitute**—
 - "(3) In administering this Act, the Secretary is to give proper consideration to the principles of this Act."

9 The Scientific Advisory Committee

For section 8(3) of the Principal Act **substitute**—

- "(3) The Committee consists of at least 7 but not more than 9 members appointed by the Minister.
- (3A) Subject to subsection (3B), each member of the Committee must be a scientist.
- (3B) A majority of the members of the Committee must be scientists who are not employed under Part 3 of the **Public Administration Act 2004**".

10 Advice

- (1) In section 9(1) of the Principal Act **omit** "Conservation Advisory Committee and the".
- (2) In section 9(2) of the Principal Act **omit** "Conservation Advisory Committee, the".

11 Substitution of Part 3

For Part 3 of the Principal Act **substitute**—

"Part 3—Listing of threatened taxa and communities and potentially threatening processes

Division 1—The Threatened List and the Processes List

10 The Threatened List

- (1) The Governor in Council, in accordance with this section, must establish and maintain a list—

- (a) of threatened taxa of flora and fauna that sets out—
 - (i) the extinction risk of each listed taxon; and
 - (ii) the category of threat that applies to each listed taxon; and
 - (b) of threatened communities of flora or fauna.
- (2) The Governor in Council—
- (a) may specify in the list under subsection (1)(a) any taxon of flora or fauna that the Minister, under Division 3, recommends should be specified in the list; and
 - (b) for each taxon specified in the list under subsection (1)(a), must set out, in accordance with the Minister's recommendation under Division 3—
 - (i) the extinction risk of the taxon; and
 - (ii) the category of threat that applies to the taxon.
- (3) The Governor in Council may specify in the list under subsection (1)(b) any community of flora or fauna that the Minister, under Division 3, recommends should be specified in the list.
- (4) The Governor in Council—
- (a) may remove any taxon of flora or fauna from the list under subsection (1)(a) that the Minister, under Division 3, recommends to be removed from the list; and
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- (b) may remove any community of flora or fauna from the list under subsection (1)(b) that the Minister, under Division 3, recommends should be removed from the list.
- (5) The Governor in Council may amend the list under subsection (1)(a) to change the extinction risk of, or category of threat that applies to, a taxon of flora or fauna specified in the list, if the Minister, under Division 3, so recommends.
- (6) The Governor in Council may make a minor amendment to the list under subsection (1)(a) or (b) if the Minister, under section 16I, so recommends.
- (7) A decision of the Governor in Council under this section must be made by Order and published in the Government Gazette.

Note

Under section 16G(2), the Minister must consider the Committee's final recommendation before making a recommendation to the Governor in Council that an Order be made under this section.

11 Listing of potentially threatening processes

- (1) The Governor in Council, in accordance with this section, must establish and maintain a list of potentially threatening processes.
 - (2) The Governor in Council may specify in the list under subsection (1) any potentially threatening process that the Minister, under Division 3, recommends should be specified in the list.
 - (3) The Governor in Council may remove any potentially threatening process from the list under subsection (1) that the Minister, under
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Division 3, recommends should be removed from the list.

- (4) The Governor in Council may make a minor amendment to the list under subsection (1) if the Minister, under section 16I, so recommends.
- (5) A decision of the Governor in Council under this section must be made by Order and published in the Government Gazette.

Note

Under section 16G(2) the Minister must consider the Committee's final recommendation before making a recommendation to the Governor in Council that an Order be made under this section.

**Division 2—Eligibility of taxa,
communities and processes to be
listed under Division 1**

12 Determination of eligibility for listing

- (1) The eligibility of a taxon of flora or fauna (including the extinction risk and the category of threat that applies to the taxon) or the eligibility of a community of flora or fauna to be specified in the Threatened List or the eligibility of a potentially threatening process to be specified in the Processes List must be determined in accordance with the eligibility criteria prescribed for the purposes of this Division that apply to that taxon, community or potentially threatening process.
- (2) Any eligibility criteria prescribed for the purposes of this Division must be based only on nature conservation matters.

13 Eligibility for listing of taxon of flora or fauna

A taxon of flora or fauna is eligible to be listed in the Threatened List—

- (a) if at the time of listing it is at risk of extinction in Australia, in one of the following categories of threat—
 - (i) extinct;
 - (ii) extinct in the wild;
 - (iii) critically endangered;
 - (iv) endangered;
 - (v) vulnerable;
 - (vi) in the case of a taxon of fish, conservation dependent; or
- (b) if at the time of listing it is at risk of extinction in Victoria, in a category of threat referred to in paragraph (a)(i) to (v).

14 Eligibility for listing of communities of flora or fauna

A community of flora or fauna is eligible to be listed in the Threatened List if it is—

- (a) in a demonstrable state of decline that is likely to result in extinction in Victoria; or
- (b) significantly prone to future threats which are likely to result in extinction in Victoria.

15 Eligibility of sub-species of flora or fauna or narrowly defined community of flora or fauna

A taxon of flora or fauna that is below the level of sub-species and a community of flora or fauna that is narrowly defined because of its taxonomic composition, environmental conditions or geography is only eligible for listing on the Threatened List if, in addition to the requirements of section 13 or 14, there is a special need to conserve it.

16 Eligibility for listing of potentially threatening processes

A potentially threatening process is eligible to be listed in the Processes List if, in the absence of appropriate management, it poses or has the potential to pose a significant threat to the survival or evolutionary development of a range of flora or fauna.

Division 3—The nomination and assessment process for the listing of taxa, communities and processes

16A Nominations for listing

- (1) A person may make a nomination to the Committee to be considered under this Division—
 - (a) that a taxon of flora or fauna is eligible to be specified in the Threatened List and may, in the nomination, specify an extinction risk and category of threat for the taxon; or
 - (b) that a community of flora or fauna is eligible to be specified in the Threatened List; or
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- (c) that a potentially threatening process is eligible to be specified in the Processes List.
- (2) A person may make a nomination to the Committee to be considered under this Division—
 - (a) that a taxon of flora or fauna that is specified in the Threatened List is no longer eligible to be specified in the Threatened List; or
 - (b) that a community of flora or fauna that is specified in the Threatened List is no longer eligible to be specified in the Threatened List; or
 - (c) that a potentially threatening process that is specified in the Processes List is no longer eligible to be specified in the Processes List.
- (3) A person may make a nomination to the Committee that a recategorisation amendment be made to the Threatened List in relation to a taxon of flora or fauna specified in that list.
- (4) A nomination must—
 - (a) include any prescribed information; and
 - (b) be in writing addressed to the Secretary to the Committee unless the nomination is made by the Committee on its own motion.

16B Consideration of the nomination by the Committee

- (1) This section does not apply in relation to a nomination made by the Committee.
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- (2) The Committee must consider each nomination as soon as possible after it has been made.
- (3) The Committee may consider different nominations about the same taxon of flora or fauna or community of flora or fauna or potentially threatening process together.
- (4) The Committee may reject a nomination if—
 - (a) for a nomination made under section 16A(1), the subject of the nomination is already listed; or
 - (b) for a nomination made under section 16A(3), the Committee considers that a reassessment under this Division would not result in a recategorisation amendment being made in relation to the listed taxon of flora or fauna; or
 - (c) the nomination is vexatious; or
 - (d) the nomination is not accompanied by the prescribed information (if any).
- (5) If the Committee rejects a nomination it must notify the Minister and the nominator of that rejection and must give reasons for rejecting the nomination.

16C Assessment of eligibility of taxon, community or process to be listed

- (1) The Committee may assess the eligibility for listing of a taxon of flora or fauna, a community of flora or fauna or a potentially threatening process if a nomination has been made in relation to the taxon, community or process—
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- (a) which the Committee has considered and not rejected under section 16B; or
 - (b) by the Committee.
 - (2) An assessment must be conducted by the Committee under this section in accordance with the eligibility criteria prescribed for the purposes of Division 2.
 - (3) Subject to subsection (4), the Committee must assess the eligibility of a taxon of flora or fauna to be specified in the Threatened List first on the basis of its risk of extinction in Australia.
 - (4) The Committee may assess the eligibility of a taxon of flora or fauna to be specified in the Threatened list on the basis of its risk of extinction in Victoria only in any of the following circumstances—
 - (a) the taxon has been assessed by the Committee or under the law of another jurisdiction as not being at risk of extinction in Australia;
 - (b) the taxon has been assessed under the law of another jurisdiction as being at risk of extinction in Australia but the Committee is of the opinion that the assessment was not conducted in accordance with the common assessment method;
 - (c) the taxon is likely to be assessed in accordance with the common assessment method under the law of another jurisdiction but the Committee is of the opinion that there are factors that warrant the assessment of the taxon on the basis of its risk of extinction in Victoria.
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- (5) The Committee may only, under subsection (4), assess the eligibility of a taxon of flora or fauna to be listed on the basis of its risk of extinction in Victoria for any of the following categories of threat—
- (a) extinct;
 - (b) extinct in the wild;
 - (c) critically endangered;
 - (d) endangered;
 - (e) vulnerable.

16D The Committee's preliminary recommendation

- (1) The Committee, after assessing a nomination, must make a preliminary recommendation that the nomination should either be supported, with or without variation, or not be supported.
- (2) When the Committee has made a preliminary recommendation it must as soon as possible—
- (a) notify the nominator (other than the Committee) of the nomination; and
 - (b) publish the Committee's preliminary recommendation and the reasons for it on the Internet together with a statement that submissions may be made on the preliminary recommendation to the Committee within 30 days after publication of the preliminary recommendation; and

- (c) publish a notice of the making of the preliminary recommendation in the Government Gazette that includes a statement that submissions may be made on the preliminary recommendation to the Committee within 30 days after publication of the preliminary recommendation.
- (3) After publishing a preliminary recommendation the Committee must allow 30 days to elapse for public comment to be made on the preliminary recommendation.

16E Taxon assessed by another jurisdiction as to its risk of extinction in Australia

- (1) This section applies if, under the law of another jurisdiction, a taxon of flora or fauna has been assessed in relation to its eligibility to be listed under that law as threatened with extinction and a determination is made—
 - (a) that the taxon is at risk of extinction in Australia in a particular category of threat; or
 - (b) that the taxon is not at risk of extinction in Australia in a particular category of threat; or
 - (c) that the taxon is at risk of extinction in Australia in a different category of threat to the category of threat that currently applies to the taxon.
 - (2) If the Committee is of the opinion that the assessment of the taxon of flora or fauna was conducted in accordance with the common assessment method, the Committee must decide to make a final recommendation under section 16F in relation to the taxon
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that is the same as any recommendation arising from the assessment.

Note

If the Committee does not make a final recommendation under section 16F in relation to a taxon referred to in subsection (1) because the Committee is of the opinion that the assessment of the taxon in another jurisdiction was not conducted in accordance with the common assessment method, a nomination under section 16A could be made by a person or the Committee in relation to the taxon and in that case the assessment process in this Division would apply.

16F The Committee's final recommendation

- (1) The Committee must make a final recommendation to the Minister—
 - (a) that a nomination should either be supported, with or without variation, or not be supported; or
 - (b) in relation to a taxon of flora or fauna referred to in section 16E(2)—
 - (i) that the taxon be specified in the Threatened List; or
 - (ii) that the taxon be removed from the Threatened List; or
 - (iii) that a change be made to the category of threat that applies to the taxon in the Threatened List; or
 - (iv) that the taxon not be specified in the Threatened List; or
 - (v) that no change be made to the category of threat that applies to the taxon in the Threatened List.
 - (2) If a preliminary recommendation on a nomination has been made under section 16D, the Committee must consider
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any public comments made within the 30-day period allowed for public comment under section 16D(3) before making a final recommendation to the Minister under subsection (1)(a).

- (3) The Committee must give reasons for its final recommendation to the Minister.
- (4) The Committee must make a final recommendation—
 - (a) under subsection (1)(a) within 3 years after the making of the nomination; and
 - (b) under subsection (1)(b) within 2 years after the making of the decision under section 16E(2).
- (5) When the Committee has made its final recommendation—
 - (a) it must notify any nominator (other than the Committee) and the Victorian Catchment Management Council of the recommendation; and
 - (b) publish the recommendation and the reasons for it on the Internet; and
 - (c) publish a notice of the making of the recommendation in the Government Gazette.

16G Minister's recommendation

- (1) After receiving a final recommendation from the Committee, the Minister may recommend to the Governor in Council that the Governor in Council—
 - (a) specify any eligible taxon of flora or fauna in the Threatened List and set out the extinction risk of, and the category of threat that applies, to the taxon; or
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- (b) specify an eligible community of flora or fauna in the Threatened List; or
 - (c) remove any taxon of flora or fauna from the Threatened List that is no longer an eligible taxon of flora or fauna; or
 - (d) remove any eligible community of flora or fauna from the Threatened List that is no longer an eligible community of flora or fauna; or
 - (e) amend the Threatened List to change the extinction risk of, or the category of threat that applies to, a taxon of flora or fauna specified in that list; or
 - (f) specify an eligible potentially threatening process in the Processes List; or
 - (g) remove a potentially threatening process from the Processes List that is no longer an eligible potentially threatening process.
- (2) Before making a recommendation under subsection (1), the Minister must consider the final recommendation of the Committee.
- (3) For each final recommendation of the Committee, the Minister must—
- (a) within 60 days after receiving the final recommendation make a decision as to whether or not to support the final recommendation; and
 - (b) if the Minister supports the final recommendation, make a recommendation under subsection (1) in relation to the final recommendation (other than a final recommendation
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referred to in section 16F(1)(b)(iv) or (v)).

Note

A final recommendation of the Committee in relation to a taxon of flora or fauna referred to in section 16F(1)(b)(iv) or (v) will not require a recommendation under subsection (1) as there will be no change required to be made to the Threatened List in relation to that taxon.

- (4) A decision by the Minister under subsection (3) is not made invalid by a failure to make that decision within the 60 day period referred to in that subsection.
- (5) The Minister must cause—
 - (a) a decision made by the Minister under this section and the reasons for it to be published on the Internet; and
 - (b) a notice of the making of the decision to be published in the Government Gazette.

16H Decisions and recommendations must be made on the basis of nature conservation matters

In making a decision or recommendation under this Division, the Minister and the Committee must have regard only to nature conservation matters.

Division 4—General

16I Recommendations that minor amendments be made to lists

- (1) The Committee may recommend to the Minister that a minor amendment be made to the Threatened List or the Processes List.
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- (2) The Minister, within 60 days after receiving the recommendation of the Committee, may recommend to the Governor in Council that the Governor in Council make a minor amendment to the Threatened List or the Processes List.
- (3) A recommendation by the Minister under subsection (2) is not made invalid by a failure to make that recommendation within the 60-day period referred to in that subsection.
- (4) Nothing in Division 3 applies—
 - (a) to the Committee in respect of the Committee's decision to make a recommendation under subsection (1);
or
 - (b) to the Minister in making a recommendation under subsection (2);
or
 - (c) to the making of a minor amendment referred to under subsection (2).
- (5) In this section—

minor amendment means an amendment made to the Threatened List or the Processes List that does not change the status of the listing or category of threat (if applicable) of a listed taxon of flora or fauna, a listed community of flora or fauna or a listed potentially threatening process and includes any of the following—

- (a) a change in the name of a listed taxon of flora or fauna;

- (b) a reclassification of a listed taxon of flora or fauna into a further taxon as a result of taxonomic revision;
- (c) a clarification of a description of a listed community of flora or fauna including to reflect new surveys or research conducted in relation to the community;
- (d) a correction of any minor error or omission.

16J Consolidated lists to be published on the Internet

- (1) The Minister must, as soon as practicable after there has been a change made to the Threatened List or the Processes List, ensure that an up-to-date consolidated version of the Threatened List or the Processes List is published on the Internet.
- (2) In this section—

change made to the Threatened List or the Processes List means—

- (a) any additional taxon of flora or fauna, community of flora or fauna or potentially threatening process that is specified in the Threatened List or the Processes List; or
- (b) any taxon of flora or fauna, community of flora or fauna or potentially threatening process that is removed from the Threatened List or the Processes List; or

- (c) any recategorisation amendment that is made to the Threatened List in relation to a taxon of flora or fauna; or
- (d) any minor amendment that is made to the Threatened List or the Processes List.

16K Minister to review Lists

- (1) The Minister must, in accordance with the regulations, ensure that the Threatened List and the Processes List are reviewed for the purposes of identifying any necessary changes referred to in section 16J(2) to be made to those lists.
- (2) The Minister must ensure that reviews required under subsection (1) are carried out at intervals of no more than 5 years.
- (3) The first review required under subsection (1) must be carried out within 6 years after the commencement of this Part.
- (4) The Minister must provide a copy of any review carried out under this section to the Committee."

12 Substitution of Division 1 of Part 4

For Division 1 of Part 4 of the Principal Act
substitute—

"Division 1—Biodiversity Strategy

17 Biodiversity Strategy

- (1) The Secretary must make a Biodiversity Strategy in relation to the objectives of this Act.

- (2) A Biodiversity Strategy must include—
- (a) proposals for achieving the objectives; and
 - (b) targets to measure the achievement of the objectives; and
 - (c) a framework for the purposes of monitoring and evaluating the implementation of the strategy.

18 Preparation of a Biodiversity Strategy

In preparing a Biodiversity Strategy, the Secretary must consider—

- (a) the objectives and principles of this Act; and
- (b) the need to achieve the objectives and principles of this Act efficiently, effectively and with minimum adverse social and economic impacts; and
- (c) any approved national biodiversity strategy or equivalent; and
- (d) any other prescribed matter.

18A Public consultation on a Biodiversity Strategy

- (1) Before making a Biodiversity Strategy, the Secretary must publish—
- (a) on the Internet—
 - (i) a copy of the draft strategy; and
 - (ii) a statement that submissions on the draft strategy may be made to the Secretary on or before a specified date, being at least 30 days after publication; and

- (b) in a newspaper circulating generally throughout Victoria a notice that—
 - (i) summarises the contents of the draft strategy; and
 - (ii) specifies where a copy of the draft strategy can be obtained; and
 - (iii) states that submissions on the draft strategy may be made to the Secretary on or before a specified date, being at least 30 days after publication of the notice in the newspaper.
- (2) The Secretary must consider any submissions received on or before the specified date.

18B Making and publication of a Biodiversity Strategy

- (1) After considering any submissions on a Biodiversity Strategy, the Secretary may make the strategy.
- (2) The Secretary must publish notice of the making of a Biodiversity Strategy in—
 - (a) the Government Gazette; and
 - (b) a newspaper circulating generally throughout Victoria.
- (3) In addition to the notice under subsection (2), the Secretary must publish a copy of the Biodiversity Strategy on the Internet.

18C Amendment of a Biodiversity Strategy

- (1) The Secretary may amend a Biodiversity Strategy at any time.

- (2) Sections 17 to 18B apply to the amendment of a Biodiversity Strategy as if the amendment were a draft strategy.
- (3) Subsection (2) does not apply if the Secretary considers the amendment to be fundamentally declaratory, machinery or administrative in nature.

18D Report on the implementation of a Biodiversity Strategy

- (1) The Commissioner for Environmental Sustainability must report on the progress of a Biodiversity Strategy in achieving its proposals and targets no later than 5 years after the making of the first strategy under this Division.
- (2) The Commissioner for Environmental Sustainability must report on the progress of a Biodiversity Strategy in achieving its proposals and targets every 5 years after the first report made under subsection (1).
- (3) The Secretary must ensure that a report made under this section is laid before both Houses of the Parliament as soon as practicable after the report is made.

18E Future review of a Biodiversity Strategy

- (1) The Secretary must cause a review to be made of a Biodiversity Strategy on or before 1 July 2037.
 - (2) The Secretary must cause further reviews to be made of the Biodiversity Strategy on or before 1 July in every twentieth year after 1 July 2037.
 - (3) After reviewing a Biodiversity Strategy, the Secretary may amend the strategy in accordance with this Division."
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13 Action statements and critical habitat determinations

In the heading to Division 2 of Part 4 of the Principal Act, for "**habitats**" substitute "**habitat determinations**".

14 Action statements

In section 19(3)(a) of the Principal Act **omit** ", the Conservation Advisory Committee and the Victorian Catchment Management Council".

15 Section 20 substituted and new sections 20A to 20F inserted

For section 20 of the Principal Act **substitute—**
"20 Critical habitats

- (1) The Secretary may determine any area of Victoria to be a critical habitat.
- (2) A determination under subsection (1) must not be made unless the Secretary considers that—
 - (a) the area significantly contributes to the conservation in Victoria of a listed taxon or community of flora or fauna; or
 - (b) the area significantly contributes to the conservation in Victoria of a taxon or community of flora or fauna that is not listed, but in respect of which—
 - (i) a recommendation has been made by the Committee under section 16D; and
 - (ii) the Minister has not made a decision under section 16G or has made a decision under that section to make a recommendation; or

- (c) the area supports ecological processes or ecological integrity that significantly contributes to the conservation of a taxon or community that is listed.
- (3) Without limiting subsection (2), a determination of a critical habitat may be made if—
- (a) the area is critical to the persistence of a taxon or community of flora or fauna; or
 - (b) flora or fauna aggregate in the area for reproduction or other important life stages; or
 - (c) the area is used by flora or fauna to move between populations, migrate or disperse, or as refugia during environmental stress; or
 - (d) the taxon or community of flora or fauna is occasionally present in the area; or
 - (e) the taxon or community of flora or fauna is not present in the area but was previously present in the area and there is potential to reintroduce it; or
 - (f) the area is likely to be needed by a taxon or community of flora or fauna in the future.

20A Role of Committee

- (1) The Committee may make a recommendation to the Secretary to make a critical habitat determination.
 - (2) The Secretary must consider a recommendation of the Committee under subsection (1) and decide whether or not
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to propose to make a critical habitat determination.

- (3) The Secretary must give reasons to the Committee for a decision to propose or not propose to make a critical habitat determination.
- (4) The Secretary must publish the decision and the reasons for it on the Internet.

20B Public consultation on critical habitats

- (1) Before making a critical habitat determination, the Secretary must give written notice to the following—
 - (a) the landholder of any land that is within the area of the proposed determination;
 - (b) any public authority that performs a function or exercises a power in the area of the proposed determination;
 - (c) any person whose interests, in the opinion of the Secretary, are likely to be adversely affected by the proposed determination.
 - (2) A written notice under subsection (1) must include a statement that submissions on the proposed determination may be made to the Secretary on or before a specified date, being at least 30 days after the giving of the notice.
 - (3) The Secretary must publish on the Internet—
 - (a) a copy of the proposed determination; and
 - (b) a general description of the effect of the proposed determination; and
 - (c) a statement that submissions on the proposed determination may be made to the Secretary on or before a specified
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date, being at least 30 days after publication.

- (4) Subsections (1) and (3) do not apply if the Secretary considers that the written notice or publication of a proposed determination is likely to result in damage being done to the habitat within the area that is subject to the determination.
- (5) Subsection (3) does not apply if the landholder of any land requests that the information be withheld and the Minister approves the withholding of the information.
- (6) The Secretary must consider any submissions made under this section and received on or before the specified date.
- (7) The Secretary must consult with the Committee in preparing a critical habitat determination after the specified date.

20C Making and publication of critical habitat determinations

- (1) After considering any submissions on a proposed critical habitat determination, the Secretary may make the determination with or without amendment.
- (2) The Secretary must decide whether or not to make a critical habitat determination within 12 months of the publication of the proposed determination under section 20B(3).
- (3) The Secretary must publish notice of the making of a critical habitat determination in the Government Gazette.

20D Amendment of critical habitat determinations

- (1) The Secretary may amend a critical habitat determination at any time.
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- (2) Sections 20 to 20C apply to the amendment of a critical habitat determination as if the amendment were a proposed determination.
- (3) Subsection (2) does not apply if the Secretary considers the amendment to be fundamentally declaratory, machinery or administrative in nature.

20E Guidelines

- (1) The Secretary may make guidelines in relation to areas that may be eligible for critical habitat determinations.
- (2) The Secretary must consult with the Committee before making any guidelines under this section.
- (3) The Secretary must publish a copy of any guidelines made under this section on the Internet.

20F Critical habitat agreements

- (1) The Secretary must take all reasonable steps to enter into an agreement in respect of an area that is subject to a critical habitat determination.
 - (2) For the purposes of subsection (1), the agreement must be—
 - (a) a public authority management agreement; or
 - (b) an agreement under section 69 of the **Conservation, Forests and Lands Act 1987**.
 - (3) An agreement referred to in this section must specify measures to provide for the long-term conservation and protection of the critical habitat.
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- (4) Subsection (1) does not apply if the Secretary considers that an alternative agreement is in place to provide for the long-term conservation and protection of the critical habitat."

16 Procedure for making management plans

- (1) In section 21(1) of the Principal Act, for "The" **substitute** "Subject to subsection (2), the".
- (2) For section 21(2), (3) and (4) of the Principal Act **substitute**—

"(2) The Minister may make guidelines in relation to the circumstances in which the Secretary must make a management plan under this section.

- (3) The Secretary must make a management plan for a taxon or community of flora or fauna or potentially threatening process in accordance with any guidelines made by the Minister.

- (4) Before making a management plan, the Secretary must publish—

(a) on the Internet—

(i) a copy of the draft management plan; and

(ii) a statement that submissions on the draft management plan may be made to the Secretary on or before a specified date, being at least 30 days after publication; and

(b) in a newspaper circulating generally throughout Victoria—notice of the preparation of the draft management plan."

- (3) In section 21(5) of the Principal Act **omit** "and the Secretary must acknowledge receipt of each submission".
- (4) For section 21(7) of the Principal Act **substitute**—
- "(7) A management plan may deal with one or more taxa or communities or potentially threatening processes."

17 Substitution of section 23

For section 23 of the Principal Act **substitute**—

"23 Contents of management plans

- (1) A management plan must state—
- (a) the taxon or community of flora or fauna or potentially threatening process to which the plan applies; and
 - (b) the way in which the objectives of this Act are to be implemented or promoted for the benefit of that taxon or community or the management of that process; and
 - (c) the method by which progress towards achieving the objectives of this Act can be assessed; and
 - (d) the date by which the management plan is recommended for review by the Secretary; and
 - (e) any other prescribed matter.
- (2) A management plan may provide for any of the following—
- (a) the conservation or restoration of any taxon or community;

- (b) the mitigation of impacts to a listed taxon or community, including the manner in which impacts are to be avoided;
 - (c) the management of a listed potentially threatening process;
 - (d) the management of a particular area or resource;
 - (e) the conservation, management or restoration of a critical habitat.
- (3) In making or amending a management plan the Secretary must consider—
- (a) the objectives and principles of this Act; and
 - (b) any public submissions; and
 - (c) any comments from the Committee; and
 - (d) any relevant action statement; and
 - (e) any relevant national recovery plan, threat abatement plan or national conservation advice; and
 - (f) any other relevant nature conservation, social or economic matters; and
 - (g) any other prescribed matter."

18 New section 23A inserted

After section 23 of the Principal Act **insert—**

"23A Publication of a management plan

The Secretary must publish a copy of a management plan on the Internet."

19 Public authority management agreements

- (1) In section 25(1) of the Principal Act, for "The Secretary" **substitute** "Subject to subsection (1A), the Secretary".
- (2) After section 25(1) of the Principal Act **insert**—
"(1A) The Secretary must not enter into an agreement if, in the opinion of the Secretary, the agreement would threaten the conservation of any listed taxon or community of flora or fauna."

20 Substitution of Division 1 of Part 5

For Division 1 of Part 5 of the Principal Act **substitute**—

"Division 1—Habitat conservation orders

26 Habitat conservation orders

- (1) Subject to this section, the Minister may make a habitat conservation order for the purposes of conserving, protecting or managing—
 - (a) any critical habitat; or
 - (b) any area of Victoria that the Secretary proposes to determine as critical habitat but in respect of which a critical habitat determination has not been made.
- (2) If a critical habitat determination has been made in relation to a taxon of flora or fauna that is critically endangered or a community of flora or fauna, the Minister must consider whether to make a habitat conservation order for that critical habitat within 2 years of the determination.

- (3) A habitat conservation order must not be made unless the Minister considers that the order is necessary—
- (a) to halt, prevent or repair damage that has occurred, is occurring, or is likely to occur to the critical habitat or proposed critical habitat; or
 - (b) to manage the critical habitat or proposed critical habitat to ensure its conservation or protection.
- (4) A habitat conservation order made in respect of an area of Victoria that the Secretary proposes to determine as critical habitat, but in respect of which a critical habitat determination has not been made, ceases to have effect 12 months after the order is made if a critical habitat determination is not made in respect of that area within that 12-month period.

27 Content of habitat conservation orders

- (1) A habitat conservation order may provide for any of the following—
- (a) the conservation, protection or management of flora, fauna, land or water within the critical habitat or proposed critical habitat that is the subject of the order;
 - (b) the prohibition of any activity, land use or development within the critical habitat or proposed critical habitat;
 - (c) a requirement for any person proposing to undertake any activity, land use or development within the critical habitat or proposed critical habitat to obtain a permit from the Minister;
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- (d) a power to enable the Secretary to undertake any actions or works to conserve, protect or manage the critical habitat or proposed critical habitat;
 - (e) a requirement for the person to repair any damage to the critical habitat or proposed critical habitat that has occurred since the person was given notice of the critical habitat determination or proposed critical habitat determination.
- (2) In addition to subsection (1), a habitat conservation order may provide for any of the following in respect of an area that is outside the critical habitat or proposed critical habitat but is likely to adversely affect it—
- (a) the prohibition of any activity, land use or development within the area outside the critical habitat or proposed critical habitat;
 - (b) a requirement for any person proposing to undertake any activity, land use or development within the area outside the critical habitat or proposed critical habitat to obtain a permit from the Minister.
- (3) A habitat conservation order may specify a period of time for which a requirement imposed under subsection (1) or (2) has effect.
- (4) A habitat conservation order remains in force for the period specified in the order which must not exceed 10 years after the order takes effect.
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28 Preparation of habitat conservation orders

- (1) In preparing a habitat conservation order, the Minister must consider—
 - (a) the objectives and principles of this Act; and
 - (b) nature conservation matters; and
 - (c) the social and economic consequences of making the order.
 - (2) Before making a habitat conservation order, the Minister must consult with any other Minister whose area of responsibility is likely to be affected by a habitat conservation order.
 - (3) Subsection (4) applies if the Minister is proposing to make an order in relation to a critical habitat and—
 - (a) some or all of the critical habitat is within an area of land that is the subject of an agreement under Part 6 of the **Traditional Owner Settlement Act 2010**; and
 - (b) the order will affect the carrying out of an agreed activity under the agreement.
 - (4) The Minister must not make the order—
 - (a) unless before making the order the Secretary takes all reasonable steps to reach agreement with the relevant traditional owner group entity on alternative measures for the conservation, protection or management of the critical habitat; and
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- (b) either of the following applies—
 - (i) agreement is reached by the Secretary and the traditional owner group entity on alternative measures;
 - (ii) a reasonable time is allowed for agreement to be reached by the Secretary and the traditional owner group entity on alternative measures.

29 Making, amendment and revocation of habitat conservation orders

- (1) The Minister must give notice of the making of a habitat conservation order to—
 - (a) any landholder in relation to land within the critical habitat; and
 - (b) any public authority that performs a function or exercises a power in the critical habitat; and
 - (c) any person whose interests, in the opinion of the Secretary, are likely to be adversely affected by the habitat conservation order.
 - (2) A notice under subsection (1) must state that submissions on the habitat conservation order may be made to the Minister on or before a specified date, being at least 30 days after receipt of the notice.
 - (3) After considering any submissions received on or before the specified date, the Minister may confirm, amend or revoke the habitat conservation order.
 - (4) A notice under subsection (1) must be in the prescribed form.
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30 Publication of habitat conservation orders

- (1) The Minister must publish notice of the making of a habitat conservation order in the Government Gazette.
- (2) A habitat conservation order comes into operation—
 - (a) on the date on which the notice under subsection (1) is published in the Government Gazette; or
 - (b) on any later date specified in the notice.

31 Further amendment of habitat conservation orders

- (1) The Minister may amend a habitat conservation order at any time.
- (2) Sections 26 to 30 apply to the amendment of a habitat conservation order as if the amendment were a proposed order.
- (3) Subsection (2) does not apply if the Minister considers the amendment to be fundamentally declaratory, machinery or administrative in nature.

32 Offence to contravene a habitat conservation order

A person must not contravene a habitat conservation order.

Penalty: In the case of a natural person,
240 penalty units or imprisonment
for 2 years or both;

In the case of a body corporate,
1200 penalty units.

33 Defects in procedure

- (1) A person cannot bring an action in respect of a failure to comply with the procedure for making a habitat conservation order unless the person is substantially or materially disadvantaged by the failure.
- (2) A habitat conservation order or an amendment to a habitat conservation order is not made invalid by any failure to comply with the procedure for making or amending a habitat conservation order.
- (3) A person may apply to the Tribunal for review of a decision to make a habitat conservation order if that person is substantially or materially disadvantaged by a failure to comply with the procedure for making the order.

34 Suspension of other licences, permits and authorities

- (1) The Minister may suspend a licence, permit or other authority issued under any other Act that permits the holder of the licence, permit or authority to act in contravention of a habitat conservation order.
- (2) A licence, permit or other authority referred to in subsection (1) may be suspended to the extent that it permits the contravention of the habitat conservation order.
- (3) Before suspending the licence, permit or other authority, the Secretary must consult with the issuer of the licence, permit or authority and advise the Minister of the result of the consultation.

- (4) The Secretary must give notice of the suspension of the licence, permit or other authority to the holder of the licence, permit or authority.
- (5) The suspension of the licence, permit or other authority commences—
 - (a) at the time at which the notice is given; or
 - (b) on any later date specified in the notice.

35 Permits

- (1) A person who wishes to undertake a particular use or activity for which a permit is required under a habitat conservation order must apply to the Minister.
 - (2) In determining whether to grant a permit, the Minister must consider—
 - (a) the objectives and principles of this Act; and
 - (b) the significance of the likely impacts of the proposal on the habitat or the persistence of taxa or communities of flora or fauna within the area; and
 - (c) whether all reasonable steps have been taken to avoid the impacts of the proposal on the habitat or the persistence of taxa or communities of flora or fauna within the area; and
 - (d) the likely effectiveness of any proposed measures to mitigate the impacts of the proposal on the habitat or the persistence of taxa or communities of flora or fauna within the area; and
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- (e) any possible social and economic effects that the granting of the permit might have.
- (3) The Minister must not grant a permit unless the Minister considers that the granting of a permit would not threaten the conservation of any taxon or community of flora or fauna within the area.
- (4) If the Secretary undertakes any actions or works to manage a habitat or a person is required to repair any damage to the habitat under a habitat conservation order, the Secretary or person is not required to obtain a permit or other authority under the **Planning and Environment Act 1987** to carry out those actions or works.

36 Reviews

- (1) A person may apply to the Tribunal for review of—
 - (a) a requirement or prohibition imposed by a habitat conservation order that affects that person's interests; or
 - (b) a decision of the Minister under a habitat conservation order that affects that person's interests; or
 - (c) a decision of the Minister to suspend a licence, permit or authority of that person under section 34.
- (2) If the Minister has not determined an application for a permit within 45 days after it is lodged, the Minister is taken to have made a decision refusing the application at the end of that 45-day period.

- (3) An application for review must be made—
- (a) within 30 days after the day on which the applicant was advised of the requirement, prohibition or decision; or
 - (b) in the circumstances referred to in subsection (2), within 30 days after the end of the 45-day period referred to in that subsection.

37 Application for declaration

- (1) A person may apply to the Tribunal for a declaration concerning the validity of a requirement, prohibition or decision referred to in section 36(1).
- (2) On an application under subsection (1), the Tribunal may make any declaration it considers appropriate in the circumstances.
- (3) The Tribunal's power to make a declaration under this section is exercisable only by a presidential member of the Tribunal.

38 Matters Tribunal must take into account

In determining an application for review under section 36 or a declaration under section 37 the Tribunal must—

- (a) take into account any relevant planning scheme; and
- (b) where appropriate, have regard to any planning scheme or amendment adopted by a planning authority under the **Planning and Environment Act 1987** but not, as at the date the application is determined, approved by the Minister or the planning authority; and

- (c) take account of, and give effect to, any relevant State environment protection policy declared in any Order made by the Governor in Council under section 16 of the **Environment Protection Act 1970**; and
- (d) where appropriate, have regard to any agreement made under section 173 of the **Planning and Environment Act 1987** affecting land the subject of the application.

39 Compensation

- (1) A person is entitled to compensation for financial loss suffered as a natural, direct and reasonable consequence of the making of a habitat conservation order where the order affects—
 - (a) an existing use right under the **Planning and Environment Act 1987**; or
 - (b) an authority granted under another Act.
 - (2) In addition to subsection (1), the holder of a licence, permit or other authority suspended under section 34 is entitled to compensation for financial loss suffered as a natural, direct and reasonable consequence of the suspension of that licence, permit or other authority.
 - (3) The Secretary must determine the amount of compensation to be paid to a person entitled to compensation.
 - (4) In making a determination under subsection (3), the Secretary must consult with, and consider the submissions of, any other
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relevant person or body and must have regard to the following matters—

- (a) the amount by which, in the Secretary's opinion, the value of the land will be increased or decreased because of the order;
 - (b) the amount of financial loss to the person which, in the Secretary's opinion, would result from compliance with the order;
 - (c) any increase in the value of the land which, in the Secretary's opinion, would result from the carrying out of works by the Secretary;
 - (d) what, in the Secretary's opinion, will be the cost of any works required to be carried out on the land;
 - (e) any change in the value of chattels or improvements which would, in the Secretary's opinion, occur because the land use or activity to which they relate is to be restricted or prohibited by the order;
 - (f) any other matter which the Secretary considers relevant.
- (5) If compensation is payable under this section, the person to whom it is payable is also entitled to be paid for any reasonable costs associated with the claim for compensation and interest associated with the claim for compensation calculated from the time when the loss was first incurred.
- (6) If a person has applied for compensation, the Secretary may decide to make a payment of an amount determined by the Secretary to

that person in advance of any decision being made on that person's application.

- (7) The Secretary may pay compensation to a person entitled to receive it by part payments at periodic intervals if the Secretary and that person so agree.
- (8) Parts 10 and 11 and section 37 of the **Land Acquisition and Compensation Act 1986**, with any necessary changes, apply to the determination of compensation under this section as if the claim were a claim under section 37 of that Act.
- (9) In this section—
existing use right means a use or other thing referred to in section 6(3) of the **Planning and Environment Act 1987** (subject to section 6(4) of that Act).

40 Minister and Secretary to ensure conservation of taxon, community or habitat

Before a habitat conservation order expires or before a requirement imposed under section 27 expires, the Minister and the Secretary must take all reasonable steps for the purpose of ensuring the long-term conservation of the taxon, community or critical habitat in respect of which the order was made.

41 Habitat conservation orders to prevail over planning schemes

Where there is any conflict between a habitat conservation order and a planning scheme, the order prevails over the planning scheme.

42 Register of critical habitat determinations and habitat conservation orders

- (1) The Secretary must ensure that a register of critical habitat determinations and habitat conservation orders is kept and maintained.
- (2) The register must include information relating to the following—
 - (a) critical habitat determinations;
 - (b) the amendment or revocation of any critical habitat determinations;
 - (c) agreements with landowners and public authorities relating to areas of critical habitat;
 - (d) habitat conservation orders;
 - (e) the amendment or revocation of any habitat conservation orders.
- (3) Subject to subsection (4), the Secretary must ensure that an up-to-date copy of the register is made publicly available on the Internet.
- (4) The Secretary may restrict access to certain information in the register if the Secretary considers that it is necessary to do so in the public interest."

21 Section 46 substituted and new sections 46A, 46B and 46C inserted

For section 46 of the Principal Act **substitute—**

"46 Declaration of flora to be protected flora

- (1) The Governor in Council, on the recommendation of the Minister, may by Order published in the Government Gazette declare a taxon of flora to be protected.

- (2) A declaration of a taxon of flora under subsection (1) may provide that the flora is declared to be protected and subject to a restriction on use.
- (3) The Minister may recommend that a taxon of flora be declared under subsection (1) if the Minister is satisfied that the taxon must be declared to be protected for any one or more of the following reasons—
 - (a) to ensure the taxon survives and retains its capacity to adapt to environmental change;
 - (b) to ensure the use of the taxon is sustainable;
 - (c) to manage risks to the taxon;
 - (d) to ensure genetic diversity of the taxon is maintained.
- (4) The Minister may recommend, as part of a recommendation made under subsection (3), that a taxon of flora be declared to be protected and that the taxon is subject to a restriction on use if the Minister is of the opinion that unrestricted commercial or personal use of the members of the taxon has the potential to be ecologically unsustainable.

46A Revocation of declaration of flora to be protected

- (1) The Governor in Council, on the recommendation of the Minister, may by Order published in the Government Gazette revoke a declaration made under section 46 in relation to any taxon of flora declared to be protected.

- (2) The Minister may recommend that an Order be made be under subsection (1) in relation to a taxon of flora that is declared protected if the Minister is satisfied that there is no longer any reason specified in section 46(3) for declaring the taxon to be protected.

46B Guidelines for declaring flora to be protected flora

- (1) The Minister must prepare guidelines for determining whether a taxon of flora is eligible to be declared to be protected including being subject to a restriction on use.
- (2) The guidelines must only relate to nature conservation matters.
- (3) The Minister may amend the guidelines at any time.
- (4) The Minister must consult with the Committee before preparing or amending the guidelines.
- (5) The Minister must ensure that an up-to-date version of the guidelines as amended from time to time is published on the Internet.

46C Minister must publish list of taxa of flora declared to be protected

The Minister must ensure that an up-to-date consolidated list of the taxa of flora that have been declared to be protected under section 46 is published on the Internet."

22 Section 47 substituted and new sections 47A, 47B and 47C inserted

For section 47 of the Principal Act **substitute—**

"47 Offence to take restricted use protected flora

- (1) A person must not take, trade in, keep, move or process a restricted use protected flora for the purposes of sale or personal use, unless an exception in subsection (2) applies.

Penalty: In the case of a natural person,
 120 penalty units;
 In the case of a body corporate,
 600 penalty units.

- (2) For the purposes of subsection (1), the exceptions are as follows—
- (a) the person is acting in accordance with a licence or permit under section 48 or an authorisation under section 48A;
 - (b) if the member of the restricted use protected flora was taken from private land, the person—
 - (i) is the landowner or a person given permission by the landowner to take the member; and
 - (ii) did not take the member for the purposes of sale or has not sold or offered the member for sale;
 - (c) the member of the restricted use protected flora was propagated from another member of the restricted use protected flora which had been lawfully obtained and kept.
-

47A Offence to take restricted use protected flora which causes significant detrimental impact on restricted use protected flora

- (1) A person must not take, trade in, keep, move or process a member of a restricted use protected flora for the purposes of sale or personal use if that activity causes or is likely to cause a significant detrimental impact on the restricted use protected flora, unless an exception in subsection (2) applies.

Penalty: In the case of a natural person,
240 penalty units or imprisonment
for 2 years or both;

In the case of a body corporate,
1200 penalty units.

Note

Section 3(4) sets out factors that are to be taken into account in deciding whether an activity has caused or is likely to cause a significant detrimental impact on a member of restricted use protected flora.

- (2) For the purposes of subsection (1) the exceptions are as follows—
- (a) the person is acting in accordance with a licence or permit under section 48 or an authorisation under section 48A;
 - (b) if the member of the restricted use protected flora was taken from private land, the person—
 - (i) is the landowner or a person given permission by the landowner to take the member; and
 - (ii) did not take the member for the purposes of sale or has not sold or offered the member for sale;
-

- (c) the member of the restricted use protected flora was propagated from another member of the restricted use protected flora which had been lawfully obtained and kept;
- (d) the person has accidentally taken the member of the restricted use protected flora despite exercising reasonable care not to take the member.

47B Offence to take other protected flora

- (1) A person must not take, trade in, keep, move or process protected flora (other than a member of restricted use protected flora) unless an exception in subsection (2) applies.

Penalty: In the case of a natural person,
120 penalty units;
In the case of a body corporate,
600 penalty units.

- (2) For the purposes of subsection (1), the exceptions are as follows—
 - (a) the person is acting in accordance with a licence or permit under section 48 or an authorisation under section 48A;
 - (b) if the protected flora were taken from private land, the person—
 - (i) is the landowner or a person given permission by the landowner to take the protected flora; and
 - (ii) did not take the protected flora for the purposes of sale or has not sold or offered the protected flora for sale;

- (c) the protected flora were propagated from protected flora which had been lawfully obtained and kept;
- (d) the person is a public authority that is carrying out an activity referred to in subsection (1) in accordance with a public authority management agreement that provides for the carrying out of that activity.

47C Offence to take other protected flora which causes significant detrimental impact to the relevant taxon or community

- (1) A person must not take, trade in, keep, move or process protected flora (other than a member of restricted use protected flora) if that activity has caused or is likely to cause a significant detrimental impact on the taxon of flora or community of flora or fauna of which the protected flora is a member or part, unless an exception in subsection (2) applies.

Penalty: In the case of a natural person,
240 penalty units or 2 years
imprisonment or both;

In the case of a body corporate,
1200 penalty units.

Note

Section 3(4) sets out factors that are to be taken into account in deciding whether an activity has caused or is likely to cause a significant detrimental impact on protected flora.

- (2) For the purposes of subsection (1), the exceptions are as follows—
- (a) the person is acting in accordance with a licence or permit under section 48 or an authorisation under section 48A;
 - (b) if the protected flora were taken from private land, the person—
 - (i) is the landowner or a person given permission by the landowner to take the protected flora; and
 - (ii) did not take the protected flora for the purposes of sale or has not sold or offered the protected flora for sale;
 - (c) the protected flora were propagated from protected flora which had been lawfully obtained and kept;
 - (d) the person has accidentally taken the protected flora despite exercising reasonable care not to take the protected flora;
 - (e) the person is a public authority that is carrying out an activity referred to in subsection (1) in accordance with a public authority management agreement that provides for the carrying out of that activity."

**23 Section 48 substituted and new sections 48A
and 48B inserted**

For section 48 of the Principal Act **substitute—**

**"48 Licence or permit to take, trade in, keep,
move or process protected flora**

- (1) The Secretary may issue a licence to take (other than for the purpose of controlling), trade in, keep, move or process protected flora.
- (2) The Secretary may issue a permit to take, trade in, keep, move or process protected flora.
- (3) In deciding whether or not to issue a licence or permit under this section, the Secretary must take into account the prescribed criteria for making that decision.
- (4) The Secretary must not issue a licence or permit for the taking, trading, keeping, moving or processing of protected flora if, in the opinion of the Secretary, to do so would threaten the conservation of the taxon of flora or any community of flora or fauna of which the protected flora is a member or part.
- (5) The Secretary must not issue a permit for the taking of members of a listed taxon of flora for the purpose of control, unless the Secretary is of the opinion that the listed taxon of flora is a serious cause of injury to property, crops, stock or to another listed taxon of flora or fauna or a listed community of flora or fauna.

Note

There are general provisions relating to licences and permits in Part 6.

**48A Authorisation to take, trade in, keep,
move or process protected flora**

- (1) The Governor in Council, on the recommendation of the Minister, may by Order published in the Government Gazette authorise the taking (other than for the purpose of controlling), trading in, keeping, moving or processing of protected flora subject to the terms and conditions fixed by the Governor in Council in the Order.
- (2) In deciding whether or not to recommend that an Order be made under this section the Minister must take into account the prescribed criteria for making that decision.
- (3) The Minister must not recommend that an Order be made under this section in relation to protected flora if in the opinion of the Minister to do so would threaten the conservation of the taxon of flora or any community of flora or fauna of which the protected flora is a member or part.
- (4) Before an Order is made under this section, the Minister must ensure that a draft of the proposed Order is published on the Internet together with a statement that submissions may be made on the proposed Order to the Minister within 30 days after publication of the draft.
- (5) Any person may make a submission on the proposed Order within 30 days of the publication of the draft of the proposed Order under subsection (4).

- (6) The Minister must consider any submissions made on the proposed Order received within the 30-day period before the Order is made with or without changes.
- (7) An Order under this section remains in force for the period specified in the Order which must not exceed 10 years after the Order takes effect.

48B Offence to contravene terms of authorisation

If the taking, trading in, keeping, moving or processing of protected flora is authorised by an Order under section 48A, a person must not take, trade in, keep, move or process that protected flora in contravention of the terms and conditions fixed in that Order.

Penalty: In the case of a natural person,
240 penalty units or imprisonment
for 2 years or both;

In the case of a body corporate,
1200 penalty units."

24 Offences relating to flora generally

- (1) For the penalty at the foot of section 49(1) of the Principal Act **substitute**—

"Penalty: In the case of a natural person,
240 penalty units or imprisonment
for 2 years or both;

In the case of a body corporate,
1200 penalty units."

(2) For section 49(2) of the Principal Act
substitute—

"(2) A person must mark any flora that is required by the regulations to be marked in the prescribed circumstances and in the prescribed manner.

Penalty: In the case of a natural person,
240 penalty units or imprisonment
for 2 years or both;

In the case of a body corporate,
1200 penalty units."

25 Section 52 substituted and new section 52A inserted

For section 52 of the Principal Act **substitute—**

"52 Offence to take, trade in or keep fish

(1) A person must not take, trade in or keep any fish that is a member or part of a listed taxon of fauna or a listed community of flora or fauna, unless the person is acting in accordance with a licence or permit under section 53 or an authorisation under section 53A.

Penalty: In the case of a natural person,
120 penalty units;

In the case of a body corporate,
600 penalty units.

(2) A licence issued under the **Fisheries Act 1995** does not authorise the holder to take, trade in or keep fish in circumstances in which the taking, trading in or keeping of fish is prohibited under subsection (1).

52A Offence to take, trade in or keep fish which causes a significant detrimental impact on the relevant taxon or community

- (1) A person must not take, trade in or keep any fish that is a member or part of a listed taxon of fauna or a listed community of flora or fauna, if that activity causes or is likely to cause a significant detrimental impact on that listed taxon of fauna or listed community of flora or fauna, unless—
- (a) the person is acting in accordance with a licence or permit under section 53 or an authorisation under section 53A; or
 - (b) the person—
 - (i) has unintentionally taken the fish; and
 - (ii) has not killed the fish or put it into a container; and
 - (iii) has immediately taken all reasonable steps to return the fish to its natural habitat with the least possible injury or damage.

Penalty: In the case of a natural person,
240 penalty units or 2 years
imprisonment or both;

In the case of a body corporate,
1200 penalty units.

Note

Section 3(4) sets out factors that are to be taken into account in deciding whether an activity has caused or is likely to cause a significant detrimental impact on a fish that is a member or part of a listed taxon of fauna or a listed community of flora or fauna.

- (2) A licence issued under the **Fisheries Act 1995** does not authorise the holder to take, trade in or keep fish in circumstances in which the taking, trading in or keeping of fish is prohibited under subsection (1)."

26 Section 53 substituted and new sections 53A and 53B inserted

For section 53 of the Principal Act **substitute—**

"53 Licence or permit to take, trade in or keep fish

- (1) The Secretary may issue a licence or a permit to take, trade in or keep any fish that is a member or part of a listed taxon of fauna or a listed community of flora or fauna.
- (2) In deciding whether or not to issue a licence or permit under this section, the Secretary must take into account the prescribed criteria for making that decision.
- (3) The Secretary must not issue a licence or permit for the taking, trading or keeping of any fish referred to in subsection (1), if in the opinion of the Secretary to do so would threaten the conservation of the listed taxon of fauna or the listed community of flora or fauna of which the fish is a member or part.
- (4) A licence or permit issued under subsection (1) does not authorise a person to take, trade in or keep fish in any circumstances in which that action is prohibited under the **Fisheries Act 1995**.

53A Authorisation to take, trade in or keep fish

- (1) The Governor in Council, on the recommendation of the Minister, may by Order published in the Government Gazette authorise the taking, trading in or keeping of any fish that is a member or part of a listed taxon of fauna or a listed community of flora or fauna, subject to the terms and conditions fixed by the Governor in Council in the Order.
- (2) In deciding whether to recommend that an Order be made under this section the Minister must take into account the prescribed criteria for making that decision.
- (3) The Minister must not recommend the making of an Order under this section in relation to any fish referred to in subsection (1), if in the opinion of the Minister to do so would threaten the conservation of the listed taxon of fauna or the listed community of flora or fauna of which the fish is a member or part.
- (4) Before an Order is made under this section, the Minister must ensure that a draft of the proposed Order is published on the Internet together with a statement that submissions may be made on the proposed Order to the Minister within 30 days after publication of the draft.
- (5) Any person may make a submission on the proposed Order within 30 days of the publication of the draft of the proposed Order under subsection (4).

- (6) The Minister must consider any submissions made on the proposed Order received within the 30-day period before making the Order with or without changes.
- (7) An Order under this section remains in force for the period specified in the Order which must not exceed 10 years after the Order takes effect.
- (8) An authorisation under this section does not authorise a person to take, trade in or keep fish in any circumstances in which that action is prohibited under the **Fisheries Act 1995**.

53B Offence to contravene terms of authorisation

If the taking, trading in or keeping of any fish that is a member of a listed taxon of fauna or a part or member of a listed community of flora or fauna is authorised by an Order under section 53A, a person must not take, trade in or keep that fish in contravention of the terms and conditions fixed in that Order.

Penalty: 240 penalty units or imprisonment for 2 years or both;

In the case of a body corporate, 1200 penalty units."

27 Section 56 substituted

For section 56 of the Principal Act **substitute—**

"56 Offence of not complying with terms and limitations of licence or permit

A person who holds a licence or permit issued under this Act must comply with the terms and limitations of that licence or permit.

Penalty: 240 penalty units or imprisonment
for 2 years or both;

In the case of a body corporate,
1200 penalty units."

28 New section 56A inserted

Before section 57 of the Principal Act **insert**—

"56A Definition

In this Division—

thing includes the whole or part of an animal
or plant."

29 Entry without consent or warrant

(1) **Insert** the following heading to section 57 of the
Principal Act—

"Entry without consent or warrant".

(2) In section 57(1)(d) of the Principal Act, for
"an interim conservation order" **substitute**
"a habitat conservation order".

(3) Section 57(2)(c) of the Principal Act is **repealed**.

(4) For section 57(2)(g) of the Principal Act
substitute—

"(g) seize any thing (including a document)
found at the land, building or vehicle if the
authorised officer believes on reasonable
grounds that it is necessary to seize the thing
in order to prevent—

(i) its concealment, loss or destruction; or

(ii) its use in the contravention of this
Act or an instrument referred to in
subsection (1); or".

(5) For section 57(2)(h) of the Principal Act
substitute—

"(h) without payment, take or require a person, who is the landholder of the land or is apparently in charge of the building or vehicle (as the case requires), to give to the authorised officer samples of any thing in respect of which the authorised officer suspects that there has been a contravention of this Act or an instrument referred to in subsection (1) that is found at the land, building or vehicle; or".

(6) After section 57(2)(i) of the Principal Act
insert—

"(ia) examine, take copies of, or take extracts from, documents that are seized by or produced to the authorised officer; or".

(7) For section 57(2)(k) of the Principal Act
substitute—

"(k) having first given notice to the landholder of the land or the person in charge of the building or vehicle (as the case requires), construct, erect and maintain markers or mark any thing, on or in the land, building or vehicle; or".

(8) For section 57(3) of the Principal Act
substitute—

"(3) An authorised officer who has asked a person to produce a document, sample, plant, animal or other thing under this section (other than under subsection (2)(j)) must inform the person—

- (a) of the period, which must not be less than 14 days after the request for production, within which the person must produce the thing; and

(b) of the place where the thing must be produced.".

(9) Section 57(4) and (5) of the Principal Act are **repealed**.

30 New sections 57A to 57J inserted

After section 57 of the Principal Act **insert**—

"57A Entry with warrant to search for evidence of offence

- (1) An authorised officer may apply to a magistrate for the issue of a search warrant in relation to a particular building that is occupied as a residence if the authorised officer believes on reasonable grounds that there is, or may be within the next 72 hours, on or in the building a particular thing that may be evidence of the commission of an offence against this Act or the regulations.
 - (2) If a magistrate is satisfied by the evidence on oath or by affirmation or by affidavit that there are reasonable grounds for suspecting that there is, or may be within the next 72 hours, in or on the building a particular thing that may be evidence of the commission of an offence against this Act or the regulations, the magistrate may issue a search warrant authorising an authorised officer named in the warrant—
 - (a) to enter the building named or described in the warrant; and
 - (b) to search for and seize a thing named or described in the warrant; and
 - (c) to use any assistance or force that may be reasonably necessary to enter the building named or described in the warrant or to search for and seize a
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thing named or described in the
warrant.

- (3) In addition to any other requirement, a search warrant under this section must state—
- (a) the offence suspected of being committed; and
 - (b) the building to be searched; and
 - (c) a description of the thing to be searched for; and
 - (d) any condition to which the warrant is subject; and
 - (e) whether entry is authorised to be made at any time or during stated hours; and
 - (f) a day, not later than 7 days after the issue of the warrant, on which the warrant ceases to have effect.
- (4) A search warrant under this section must be issued in accordance with the **Magistrates' Court Act 1989** and in the form prescribed under that Act.
- (5) The rules to be observed with respect to search warrants set out in the **Magistrates' Court Act 1989** extend and apply to search warrants under this section.

57B Seizure of things not mentioned in warrant

If, in the course of executing a search warrant under section 57A, the authorised officer—

- (a) finds a thing that the authorised officer believes on reasonable grounds to be—
 - (i) connected with the offence referred to in section 57A(1), although not the thing named or described in the warrant; or
 - (ii) connected with another offence against this Act or the regulations; and
- (b) believes, on reasonable grounds, that it is necessary to seize that thing in order to prevent its concealment, loss or destruction, or its use in committing, continuing or repeating the offence—

the warrant is deemed to authorise the authorised officer to seize the thing.

57C Announcement before entry

- (1) Before executing a search warrant, the authorised officer named in the warrant and any person assisting the authorised officer must announce that the authorised officer or person is authorised by the warrant to enter the building and give any person at the building an opportunity to allow immediate entry to the building.
- (2) The authorised officer and any person assisting the authorised officer need not comply with subsection (1) if the authorised officer or person believes on reasonable grounds that immediate entry to the building is required to ensure—
 - (a) the safety of any person; or
 - (b) that the effective execution of the search warrant is not frustrated.

57D Copy of warrant to be given to occupier

If the occupier, or another person who apparently represents the occupier, is present at the building when a search warrant is being executed, the authorised officer executing the warrant must—

- (a) produce evidence of the authorised officer's identity and the identity of any person assisting the authorised officer for inspection by the occupier or the occupier's agent; and
- (b) give to the occupier or the occupier's agent a copy of the warrant.

57E Requirements as to taking samples or seizing things

- (1) An authorised officer may not, under this Division, take samples of a thing or seize a thing apparently in the possession of a person unless the authorised officer makes out or tenders to the person a written receipt for the sample taken or thing seized.
- (2) If the authorised officer is unable to ascertain the identity of the owner or custodian of the thing seized or sampled, the authorised officer must leave a receipt with, or post it to, the person apparently in charge of the thing seized.
- (3) If an authorised officer seizes a thing under this Division, the officer must take reasonable steps to return the thing to the person from whom it was seized if the reason for its seizure no longer exists.

57F Samples

If an authorised officer proposes to take a sample under this Division, the authorised officer must advise the owner, if possible, before taking the sample that it is taken for the purpose of analysis.

57G Retention notices

- (1) If an authorised officer believes on reasonable grounds that any thing has been taken or is being held in contravention of this Act or the regulations, the authorised officer may issue the person holding the thing with a notice requiring that person to keep the thing in the person's possession and not to sell or dispose of the thing.
 - (2) A notice under subsection (1)—
 - (a) must be in writing; and
 - (b) has effect for the period specified in the notice (which must not be more than 90 days after the issue of the notice); and
 - (c) may be cancelled by the authorised officer; and
 - (d) is subject to any terms and conditions specified in the notice; and
 - (e) must state the penalty for a failure to comply with the notice; and
 - (f) must state that the Secretary may extend the notice for an additional period.
 - (3) If the Secretary is of the opinion that it is reasonably necessary to do so, the Secretary may extend the period for which a notice has effect under subsection (2).
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- (4) The Secretary may extend the period of a notice under this section more than once.
- (5) If the Secretary extends the period for which a notice has effect, the Secretary must, before the expiry of the notice period—
 - (a) notify the person to whom the notice is issued of the extension; and
 - (b) specify in the notice the period for which the extension is to have effect.
- (6) The Secretary may cancel an extension of a notice under this section at any time.
- (7) A person to whom a notice under this section has been issued must comply with the notice.

Penalty: In the case of a natural person,
 120 penalty units or 12 months
 imprisonment or both;
 In the case of a body corporate,
 600 penalty units.

57H Evidentiary provisions relating to retention notices

- (1) In any proceedings under this Act, evidence that a thing specified in a notice under section 57G as being in the possession of a particular person is no longer in the possession of that person, is evidence that the person has not complied with the notice.
- (2) In any proceedings under this Act, the fact that a thing is specified in a notice under section 57G as being in the possession of a particular person is evidence that the thing was in the possession of that person.

57I Disposal or destruction of seized flora or fauna

- (1) If any live flora or fauna are seized under this Division, an authorised officer may at any time return the flora or fauna to its natural habitat if the authorised officer considers it appropriate and practical to do so.
- (2) At any time before proceedings for an offence relating to a thing seized under this Division are finally determined, the Magistrates' Court may, on the application of an authorised officer, order that the thing be destroyed or otherwise disposed of, if the Court is satisfied that—
 - (a) in the case of flora or fauna, the authorised officer believes on reasonable grounds that the person apparently in possession of the flora or fauna is not authorised by a licence, permit or authorisation under this Act to possess the flora or fauna; and
 - (b) in any other case, the owner of the thing cannot be found.
- (3) If a person is found guilty by a court of an offence against this Act or the regulations, the court may, in addition to imposing any other penalty, order any thing seized under this Act which relates to that offence to be destroyed or otherwise disposed of in the manner specified in the order.

57J Sections 57 to 57I do not limit powers of authorised officers

Sections 57 to 57I are in addition to, and do not limit, the other powers that an authorised officer has under this Act

or the **Conservation, Forests and Lands Act 1987**".

31 New Division heading inserted

Before section 58 of the Principal Act **insert** the following heading—

"Division 2A—Offences".

32 Offence to obstruct an authorised officer

- (1) For the penalty at the foot of section 58(1) of the Principal Act **substitute**—

"Penalty: 120 penalty units or imprisonment for 12 months or both."

- (2) In section 58(2)(b)(ii) of the Principal Act, for "plant or animal" **substitute** "plant, animal or any other thing within any compliance period stipulated by the authorised officer under section 57(3)".

- (3) For the penalty at the foot of section 58(2) of the Principal Act **substitute**—

"Penalty: In the case of a natural person,
60 penalty units;
In the case of a body corporate,
300 penalty units."

33 Repeal of heading to Division 3 of Part 6

The heading to Division 3 of Part 6 of the Principal Act is **repealed**.

34 Offence to interfere with notices marks or equipment

- (1) In section 59(b) of the Principal Act, after "fauna" **insert** "or any other thing".

(2) For the penalty at the foot of section 59 of the Principal Act **substitute**—

"Penalty: In the case of a natural person,
60 penalty units;

In the case of a body corporate,
300 penalty units."

35 New heading to Division 3 of Part 6 inserted

Before section 60 of the Principal Act **insert** the following heading—

"Division 3—Matters relating to offences".

36 New section 59A inserted

Before section 60 of the Principal Act **insert**—

"59A Time for bringing proceedings

Despite section 7 of the **Criminal Procedure Act 2009**, a proceeding for an offence under section 32, 47, 47A, 47B, 47C, 48B, 49, 52, 52A, 53B or 56 must be commenced not later than 2 years after the date on which the offence is alleged to have been committed."

37 New Division 3A inserted in Part 6

Before Division 4 of Part 6 of the Principal Act **insert**—

"Division 3A—Remedies

62A Enforceable undertakings

(1) The Secretary may accept a written undertaking given by a person who has contravened, or allegedly contravened, a provision of this Act or the regulations if the Secretary considers that, having regard to the matters in subsection (2),

- the undertaking is necessary to deal with the contravention or alleged contravention.
- (2) For the purposes of subsection (1), the Secretary must have regard to the following matters—
- (a) the nature and seriousness of the contravention or alleged contravention;
 - (b) any previous contraventions of this Act or the regulations committed by the person offering the undertaking;
 - (c) the likelihood of the person's compliance with the undertaking;
 - (d) any other matter that the Secretary considers is relevant.
- (3) An enforceable undertaking must—
- (a) be in writing; and
 - (b) include the following—
 - (i) the name of the person giving the undertaking and, in the case of a body corporate, its Australian Business Number;
 - (ii) the details of the contravention or the alleged contravention, including its nature and extent;
 - (iii) timelines for any requirements in the undertaking to take certain actions or to cease certain behaviour or activities, which relate to the contravention or alleged contravention;
 - (iv) a requirement for the person to report to the Secretary on the progress of complying with the undertaking;
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- (v) a statement to the effect that details of the undertaking will be entered in the register of enforceable undertakings and published on the Internet.
- (4) In addition to the matters under subsection (3), an enforceable undertaking may include, but is not limited to including, any one or more of the following requirements—
- (a) that the person cease behaviours or activities that have given rise to the contravention or alleged contravention;
 - (b) that the person take action to remediate any harm caused by the contravention or alleged contravention;
 - (c) that the person carry out specified activities or projects for the protection and conservation of any taxon of flora or fauna, including the taxon's habitat, that is or may be detrimentally affected as a result of the contravention or alleged contravention;
 - (d) that the person take certain actions to reduce any future behaviour that may result in a further contravention that is similar to the contravention or alleged contravention;
 - (e) that the person monitor and audit any requirement of the undertaking to take an action or to cease a behaviour or activity.

62B Person may vary or withdraw enforceable undertaking

A person may withdraw or vary an enforceable undertaking with the consent of the Secretary.

62C Proceedings for contravention

- (1) While an enforceable undertaking is in force, a proceeding may not be brought for any offence constituted by the contravention or alleged contravention of this Act or the regulations in respect of which the enforceable undertaking is given.
- (2) If a person withdraws an enforceable undertaking before the undertaking has been fulfilled, proceedings may be brought for any offence constituted by the contravention or alleged contravention in respect of which the enforceable undertaking was given.
- (3) If a person complies with the requirements of an enforceable undertaking, no further proceedings may be brought for an offence constituted by the contravention or alleged contravention in respect of which the enforceable undertaking was given.

62D Enforcement of enforceable undertaking

- (1) If the Secretary considers that a person who gave an enforceable undertaking has failed to comply with a term of the enforceable undertaking, the Secretary may apply to the Magistrates' Court for an order under subsection (2).
- (2) If the Magistrates' Court is satisfied that the person has failed to comply with a term of the enforceable undertaking, the Magistrates' Court may make any one or more of the following orders—
 - (a) an order directing the person to comply with the term of the enforceable undertaking;

- (b) an order that the person take any specified action for the purpose of complying with the term of the enforceable undertaking;
- (c) an order that directs the person to compensate another person for any reasonable costs incurred in taking any action to prevent, minimise or remedy the harm caused by the failure to comply with the term of the enforceable undertaking;
- (d) an order that directs the person to take any specified action to prevent, minimise or remedy any damage to the environment that has been, or is likely to be caused by, the failure to comply with the term of the enforceable undertaking;
- (e) any other order that the Magistrates' Court considers appropriate in the circumstances.

62E Secretary may take specified actions

- (1) If a person fails to comply with an order made under section 62D (other than under section 62D(2)(c)), the Secretary may give the person a written notice advising the person that the Secretary intends to carry out specified actions that remain to be done under the order unless the person satisfies the Secretary that the person will carry out those actions within a period of time acceptable to the Secretary.
- (2) A person who is given a written notice under subsection (1) must respond to it within 14 days after being given the notice.

- (3) If a person who has been given a notice under subsection (1) fails to give the Secretary a satisfactory response within 14 days, or fails to comply with any undertaking given to the Secretary in response to the notice, the Secretary—
- (a) may do anything that is necessary or expedient to carry out any action that remains to be done under the order and that is still practicable to do; and
 - (b) may publicise the failure of the person to comply with the order.

62F Contempt of court proceedings

- (1) Section 62E does not prevent contempt of court proceedings from being commenced or continued against a person who has failed to comply with an order made under section 62D.
- (2) If a person is found in contempt of court for failing to comply with an order made under section 62D (other than under section 62D(2)(c)), the Secretary—
- (a) may do anything that is necessary or expedient to carry out any action that remains to be done under the order and that is still practicable to do; and
 - (b) may publicise the failure of the person to comply with the order.

62G Secretary may recover costs

The Secretary may recover any reasonable cost the Secretary incurs in taking action under section 62E(3) or 62F(2) as a debt due and payable by the person against whom the order was made under section 62D.

62H Person may recover compensation as debt

If an order is made under section 62D(2)(c) directing a person to compensate another person for costs incurred, the amount of the costs is a debt due to the person who has incurred the costs and may be recovered in a court of competent jurisdiction.

62I Register of enforceable undertakings

- (1) The Secretary must maintain a register of enforceable undertakings.
 - (2) The Secretary must enter details of each enforceable undertaking in the register of enforceable undertakings.
 - (3) The register of enforceable undertakings must include—
 - (a) the date the enforceable undertaking was given; and
 - (b) a copy of the enforceable undertaking; and
 - (c) a copy of any order made by the Magistrates' Court under section 62D as a result of non-compliance with a term of the enforceable undertaking; and
 - (d) whether the person who gave the enforceable undertaking has been convicted or found guilty of contempt of court for failing to comply with an order made by the Magistrates' Court under section 62D.
 - (4) The Secretary must cause the register of enforceable undertakings to be published on the Internet in any form that the Secretary considers to be appropriate.
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- (5) A person may inspect the register of enforceable undertakings at any reasonable time without charge."

38 Secrecy

For the penalty at the foot of section 66 of the Principal Act **substitute**—

"Penalty: 60 penalty units."

39 Availability for inspection

- (1) In section 67(a) of the Principal Act, for "listing criteria" **substitute** "eligibility criteria prescribed for the purposes of Division 2 of Part 3".
- (2) In section 67(b) of the Principal Act, for "on nominations for listing" **substitute** "relating to the making of recommendations under section 16G".
- (3) For section 67(d) of the Principal Act **substitute**—
"(d) the Biodiversity Strategy; and".
- (4) For section 67(f) to (h) of the Principal Act **substitute**—
"(f) any critical habitat determination; and
(g) any management plan; and
(h) any habitat conservation order; and".
- (5) For section 67(m) of the Principal Act **substitute**—
"(m) the Committee's final recommendation under section 16F relating to the listing of a taxon of flora or fauna, a community of flora or fauna or a potentially threatening process."
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40 Matters to be in annual report

In section 68(a) of the Principal Act, for "flora and fauna conservation and management objectives" **substitute** "objectives of this Act".

41 Regulations

(1) For section 69(1)(b) of the Principal Act **substitute**—

"(b) eligibility criteria for the listing of taxa of flora or fauna, communities of flora or fauna or potentially threatening processes which, in the case of a taxon of flora or fauna, may vary according to—

- (i) the extinction risk of the taxon; and
- (ii) the category of threat that is to be applied to the taxon;"

(2) In section 69(1)(d) of the Principal Act, for "an interim conservation order" **substitute** "a habitat conservation order".

(3) After section 69(1)(g) of the Principal Act **insert**—

"(ga) the decision-making criteria in respect of the issuing of a licence or permit under section 48 or 53 or the giving of an authorisation under section 48A or 53A;"

(4) In section 69(2)(d) of the Principal Act, for "5 penalty units" **substitute** "20 penalty units".

42 Repeal of section 71

Section 71 of the Principal Act is **repealed**.

43 New Part 8 inserted

After Part 7 of the Principal Act insert—

"Part 8—Savings and transitional provisions—Flora and Fauna Guarantee Amendment Act 2019

73 Definitions

In this Part—

commencement day means—

- (a) in relation to section 74, the day on which section 9 of the 2019 Act comes into operation; and
- (b) in relation to sections 75, 76, 77 and 78, the day on which section 11 of the 2019 Act comes into operation; and
- (c) in relation to section 79, the day on which section 12 of the 2019 Act comes into operation; and
- (d) in relation to section 80, the day on which section 21 of the 2019 Act comes into operation; and
- (e) in relation to section 82(1), the day on which section 20 of the 2019 Act comes into operation; and
- (f) in relation to sections 81(1) and (2) and 82(2) and (3), the day on which section 23 of the 2019 Act comes into operation; and

(g) in relation to sections 81(3) and 82(4) and (5), the day on which section 26 of the 2019 Act comes into operation;

old Threatened List means the Threatened List kept under this Act immediately before the commencement day;

2019 Act means the **Flora and Fauna Guarantee Amendment Act 2019**.

74 Scientific Advisory Committee

Despite the amendment of section 8 of this Act by section 9 of the 2019 Act—

- (a) the Scientific Advisory Committee established immediately before the commencement day is taken to be the Scientific Advisory Committee established under this Act; and
- (b) a person appointed as a member of the Scientific Advisory Committee whose appointment is in effect immediately before the commencement day is taken to be appointed as a member of the Scientific Advisory Committee under this Act.

75 Listing of taxa of flora and fauna

- (1) On and after the commencement day, a taxon of flora or fauna that is specified in the old Threatened List immediately before that day is taken to be specified in the Threatened List under section 10(1) of this Act until an Order under subsection (12) is made in relation to the taxon.
 - (2) If the Minister is satisfied that a taxon of flora or fauna, which is listed in the old Threatened List immediately before
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the commencement day, is eligible to be specified in the Threatened List in a particular category of threat, the Minister may recommend that the Governor in Council specify the taxon in the Threatened List—

- (a) if the taxon is at risk of extinction in Australia, as being at risk of extinction in Australia in that category of threat; or
 - (b) if the taxon is not at risk of extinction in Australia, as being at risk of extinction in Victoria in that category of threat.
- (3) If the Minister is satisfied that a taxon of flora or fauna, which is listed in the Federal List but not in the old Threatened List immediately before the commencement day, is eligible to be specified in the Threatened List on the basis of its risk of extinction in Australia in a particular category of threat, the Minister may recommend that the Governor in Council specify the taxon in the Threatened List as being at risk of extinction in Australia in that category of threat.
- (4) If the Minister is satisfied that a taxon of flora or fauna, which is listed on an advisory list but not in the old Threatened List or the Federal List immediately before the commencement day, is eligible to be specified in the Threatened List in a particular category of threat, the Minister may recommend that the Governor in Council specify the taxon in the Threatened List—
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- (a) if the taxon is at risk of extinction in Australia, as being at risk of extinction in Australia in that category of threat; or
 - (b) if the taxon is not at risk of extinction in Australia, as being at risk of extinction in Victoria in that category of threat.
- (5) If the Minister is satisfied that a taxon of flora or fauna, which is listed in the old Threatened List immediately before the commencement day, is no longer eligible to be specified in the Threatened List, the Minister may recommend that the Governor in Council remove the taxon from the Threatened List.
- (6) The Minister must, in deciding whether a taxon of flora or fauna is eligible to be specified in the Threatened List under subsection (2), (3) or (4) or in deciding whether to remove a taxon of flora or fauna from the Threatened List under subsection (5), take into account the relevant eligibility criteria prescribed for the purposes of Division 2 of Part 3.
- (7) The Minister must make a recommendation under subsection (2), (3), (4) or (5) within 12 months after the commencement day.
- (8) The Minister may request advice from the Committee on making a recommendation under subsection (7).
- (9) The Committee must provide advice to the Minister within 60 days after a request under subsection (8).
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- (10) If the Committee provides advice to the Minister in accordance with subsection (9), the Minister must take into account the advice before making the relevant recommendation under subsection (7).
 - (11) Division 3 of Part 3 does not apply in respect of a recommendation to the Governor in Council made by the Minister under this section.
 - (12) The Governor in Council may by Order published in the Government Gazette in accordance with a recommendation of the Minister under this section—
 - (a) change the extinction risk that applies to a taxon of flora or fauna that is specified in the Threatened List and apply the relevant category of threat to the taxon; or
 - (b) specify a taxon of flora or fauna in the Threatened List setting out the relevant extinction risk of the taxon and the relevant category of threat that applies to the taxon; or
 - (c) remove a taxon of flora or fauna from the Threatened List.
 - (13) An Order made by the Governor in Council under subsection (12)—
 - (a) on the recommendation of the Minister under subsection (2), is taken to be an Order made under section 10(5) of this Act; and
 - (b) on the recommendation of the Minister under subsection (3) or (4), is taken to be an Order made under section 10(2) of this Act; and
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- (c) on the recommendation of the Minister under subsection (5), is taken to be an Order made under section 10(4) of this Act.
- (14) In this section—
- advisory list*** means any of the following advisory lists kept by the Department—
- (a) Advisory list of rare or threatened plants in Victoria—2014;
 - (b) Advisory list of threatened vertebrate fauna in Victoria—2013;
 - (c) Advisory list of threatened invertebrate fauna in Victoria—2009;

Note

These advisory lists are located on the Internet site of the Department.

Federal List means the list of threatened species referred to in section 178 of the Commonwealth Act.

76 Listing of communities of flora and fauna

On and after the commencement day, a community of flora or fauna that is specified in the old Threatened List immediately before that day is taken to be specified in the Threatened List under section 10(1) of this Act.

77 Listing of potentially threatening processes

On and after the commencement day, a potentially threatening process that is specified in the Processes List immediately before that day is taken to be specified in

the Processes List under section 11(1) of this Act.

78 Nominations for listing made before commencement of new Part 3

- (1) A nomination that was made to the Committee under Part 3 as in force immediately before the commencement day that was under consideration by the Committee under section 13 of that Part immediately before the commencement day is taken—
 - (a) to have been made under Division 3 of Part 3 of this Act as amended by the 2019 Act; and
 - (b) to be under consideration of the Committee under section 16B.
- (2) A nomination that was made to the Committee under Part 3 as in force immediately before the commencement day in respect of which the Committee had accepted the nomination and for which no Order was made under section 10 of that Part immediately before the commencement day is taken—
 - (a) to have been made under Division 3 of Part 3 of this Act as amended by the 2019 Act; and
 - (b) to be under assessment by the Committee under section 16C.

79 Flora and Fauna Guarantee Strategy

On and after the commencement day, a Flora and Fauna Guarantee Strategy prepared under Division 1 of Part 4 as in force immediately before that day is taken to be a Biodiversity Strategy made under this Act.

80 Protected flora

On and after the commencement day, a taxon of flora declared to be protected immediately before that day is taken to have been declared to be protected under section 46 of this Act.

81 Applications for licences and permits

- (1) On and after the commencement day, an application for a licence under section 48(1) that is in force immediately before that day and in respect of which the Secretary has not made a decision is taken to be an application under section 48(1) of this Act.
- (2) On and after the commencement day, an application for a permit under section 48(2) that is in force immediately before that day and in respect of which the Secretary has not made a decision is taken to be an application under section 48(2) of this Act.
- (3) On and after the commencement day, an application for a licence under section 53(1) that is in force immediately before that day and in respect of which the Secretary has not made a decision is taken to be an application under section 53(1) of this Act.

82 Licences, permits and authorisations

- (1) On and after the commencement day, a permit issued under section 40 that was in force immediately before that day is taken to continue in force on the same terms and conditions as if it had been issued under section 35 of this Act.
 - (2) On and after the commencement day, a licence or permit issued under section 48 that was in force immediately before that day is taken to continue in force on the same
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terms and conditions as if it had been issued under section 48 of this Act.

- (3) On and after the commencement day, an Order for an authorisation made under section 48 that was in force immediately before that day—
 - (a) is taken to continue in force on the same terms and conditions as if it had been made under section 48A of this Act; and
 - (b) remains in force for 10 years after the commencement day.
- (4) On and after the commencement day, a licence issued under section 53 that was in force immediately before that day is taken to continue in force on the same terms and conditions as if it had been issued under section 53 of this Act.
- (5) On and after the commencement day, an Order for an authorisation made under section 53 that was in force immediately before that day—
 - (a) is taken to continue in force on the same terms and conditions as if it had been made under section 53A of this Act; and
 - (b) remains in force for 10 years after the commencement day."

44 Repeal of Schedules 1, 2 and 3

Schedules 1, 2 and 3 to the Principal Act are **repealed**.

Part 3—Consequential amendments to other Acts

45 Catchment and Land Protection Act 1994

- (1) In section 59(1) of the **Catchment and Land Protection Act 1994**, for "taxon or community of flora listed in an Order" **substitute** "taxon of flora or community of flora specified in the Threatened List".
- (2) In section 59(3)(a) of the **Catchment and Land Protection Act 1994**, for "taxon or community of fauna listed in an Order" **substitute** "taxon of fauna or community of fauna specified in the Threatened List".

46 Climate Change Act 2017

In Schedule 1 to the **Climate Change Act 2017**, in column 2 corresponding to the **Flora and Fauna Guarantee Act 1988**—

- (a) for "Flora and Fauna Guarantee Strategy by the Secretary under section 17 and 18" **substitute** "Biodiversity Strategy by the Secretary under sections 17, 18, 18B and 18C";
 - (b) for "making of an interim conservation order by the Minister under section 26" **substitute** "preparation and making of a habitat conservation order by the Minister under sections 26 and 28";
 - (c) for "confirmation or revocation of an interim conservation order by the Minister under section 31" **substitute** "confirmation, amendment or revocation of a habitat conservation order under section 29";
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- (d) for "confirmed interim conservation order by the Minister under section 33" **substitute** "habitat conservation order by the Minister under section 31";
- (e) **omit** "The amendment of an interim conservation order by the Minister under section 35."

47 Commissioner for Environmental Sustainability Act 2003

Before section 8(e) of the **Commissioner for Environmental Sustainability Act 2003** insert—

- "(db) make a report on the progress of a Biodiversity Strategy under section 18D of the **Flora and Fauna Guarantee Act 1988**;"

48 Confiscation Act 1997

- (1) In Schedule 1 to the **Confiscation Act 1997**, in item 8(a), for "offences relating to protected flora" **substitute** "taking, trading etc. of member of restricted use protected flora".
 - (2) In Schedule 1 to the **Confiscation Act 1997**, after item 8(a), **insert**—
 - "(ab) section 47A(1) (taking, trading etc. of member of restricted use protected flora impacting on that flora);
 - (ac) section 47B(1) (taking, trading etc. of other protected flora);
 - (ad) section 47C(1) (taking, trading etc. of other protected flora impacting on relevant taxon of flora or community of flora or fauna);".
 - (3) In Schedule 1 to the **Confiscation Act 1997**, in item 8(b), for "listed fish)." **substitute** "fish);".
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- (4) In Schedule 1 to the **Confiscation Act 1997**, after item 8(b) **insert**—

"(ba) section 52A(1) (taking, trading in or keeping fish impacting on relevant listed taxon of fauna or community of flora or fauna).".

49 Fisheries Act 1995

- (1) In section 71(2) of the **Fisheries Act 1995**—

(a) for "a permit" **substitute** "a licence or permit"; and

(b) for "of flora and fauna" **substitute** "of flora or fauna".

- (2) In section 73(2)(a) of the **Fisheries Act 1995**, after "community" **insert** "of flora or fauna".

- (3) In section 75(2)(c) of the **Fisheries Act 1995**, after "community" **insert** "of flora or fauna".

50 Game Management Authority Act 2014

In section 3 of the **Game Management Authority Act 2014**, in the definition of *threatened wildlife*, for "any list made" **substitute** "the Threatened List".

51 Major Transport Projects Facilitation Act 2009

- (1) In section 87(1) of the **Major Transport Projects Facilitation Act 2009**, for "section 40" **substitute** "section 35".

- (2) In section 87(2) of the **Major Transport Projects Facilitation Act 2009**, for "section 40" **substitute** "section 35".

- (3) In Schedule 1 to the **Major Transport Projects Facilitation Act 2009**, in Column 2 corresponding to the **Flora and Fauna Guarantee Act 1988**—

(a) for "Permit under section 40" **substitute** "Permit under section 35";

- (b) for "Licence under section 53 to take and keep fish" **substitute** "Licence or permit under section 53(1) to take, trade in or keep listed fish".

52 Mineral Resources (Sustainable Development) Act 1990

In clause 1 of Schedule 4A to the **Mineral Resources (Sustainable Development) Act 1990**, in the definition of *low impact exploration*—

- (a) in paragraph (b), for "flora listed under section 10 or Schedule 2" **substitute** "flora that is a member of a taxon of flora that is specified in the Threatened List under section 10(1)";
- (b) in paragraph (c), for "flora from a community listed under section 10 or Schedule 2" **substitute** "flora that is a part or a member of a community of flora that is specified in the Threatened List under section 10(1)";
- (c) in paragraph (d), for "fauna listed under section 10 or Schedule 2" **substitute** "fauna that is a member of a taxon of fauna, or that is a part or member of a community of fauna, that is specified in the Threatened List under section 10(1)".

53 Victorian Civil and Administrative Tribunal Act 1998

- (1) In section 52(4) of the **Victorian Civil and Administrative Tribunal Act 1998**, in the definition of *planning enactment*, in paragraph (d), for "section 41" **substitute** "section 36".

- (2) In Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998**, in clause 2, in the definition of *planning enactment*, in paragraph (d), for "section 41" **substitute** "section 36".

54 Wildlife Act 1975

In section 3(1) of the **Wildlife Act 1975**, in the definition of *threatened wildlife*, for "any list made" **substitute** "the Threatened List".

55 Environment Protection Amendment Act 2018

For section 37 of the **Environment Protection Amendment Act 2018** **substitute**—

'37 Flora and Fauna Guarantee Act 1988

For section 38(c) of the **Flora and Fauna Guarantee Act 1988** **substitute**—

- "(c) take account of any relevant environment reference standard within the meaning of the **Environment Protection Act 2017**; and
- (ca) take account of any Order made by the Governor in Council under section 156 of the **Environment Protection Act 2017**; and".

Part 4—Repeal of this Act

56 Repeal of this Act

This Act is **repealed** on 1 June 2021.

Note

The repeal of this Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).

Endnotes

1 General information

See www.legislation.vic.gov.au for Victorian Bills, Acts and current authorised versions of legislation and up-to-date legislative information.

[†] *Minister's second reading speech—*

Legislative Assembly:

Legislative Council:

The long title for the Bill for this Act was "A Bill for an Act to amend the **Flora and Fauna Guarantee Act 1988** to promote Victoria's biodiversity by establishing objectives and principles of the Act, imposing additional obligations to consider biodiversity in decision-making, improving transparency and accountability and making various other amendments to strengthen the Act and to make consequential amendments to other Acts and for other purposes."