Flora and Fauna Guarantee Amendment Bill 2019

Introduction Print

EXPLANATORY MEMORANDUM

General

The Bill amends the **Flora and Fauna Guarantee Act 1988** and makes consequential amendments to other Acts and for other purposes.

Clause Notes

Part 1—Preliminary

Clause 1 sets out the main purposes of the Bill, which are—

- to amend the **Flora and Fauna Guarantee Act 1988** (the Act)—
  - to promote Victoria's biodiversity by establishing objectives and principles of the Act; and
  - to strengthen government leadership and accountability by imposing obligations to consider biodiversity and improving reporting obligations; and
  - to improve strategic biodiversity planning by creating a Biodiversity Strategy; and
  - to enhance accountability and transparency in the administration of the Act by promoting public consultation; and
  - 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

- to make various other amendments to promote modern and effective regulation, compliance and enforcement; and
- to make other amendments to strengthen the Act; and

- to make consequential amendments to other Acts.

Clause 2 provides for the commencement of the Bill. The provisions of the Bill come into operation on a day or days to be proclaimed. Any provisions that have not come into operation before 1 June 2020 will come into operation on that day.

Clause 3 provides that 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

Clause 4 sets out definitions of various terms that will be amended or inserted into section 3(1) of the Act. In particular—

- ***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 diversity within species and between species and 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 the categories of threat referred to in new section 13. The categories of threat are—
  - extinct;
  - extinct in the wild;
  - critically endangered;
  - endangered;

- vulnerable;
- in the case of a taxon of fish, conservation dependent;

- ***common assessment method*** means the method agreed to by the Commonwealth, States and Territories for assessing the risk of extinction of a 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 or not it is at risk of extinction in Australia; and

  (b) that a category of threat be applied to a taxon of flora or fauna that is assessed at risk of extinction in Australia; and

  (c) 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 the State 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 un 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;
- ***habitat conservation order*** means a habitat conservation order made under Division 1 of Part 5;
- ***listed*** means, 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, in relation to a potentially threatening process, that the process is specified in the Processes List;
- ***private land*** means any land that it not public land;
- ***public land*** means Crown land or land owned or vested in a public authority;
- ***recategorisation 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;
- ***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;

- the definition of ***protected flora*** is substituted to clarify the various ways in which flora may be protected under the Act;
- the definition of ***public authority*** is substituted to mean a body established for a public purpose by or under any Act and specifically includes an Administrative Office, a Government Department, a municipal council, a public entity, and a State owned enterprise. This definition is intended to clarify the scope of the term.

The clause also inserts a new subsection (4) to set out a list of factors that may be taken into account when determining whether an activity has caused or is likely to cause a significant detrimental impact on protected flora or fish under new sections 47A, 47C or 52A.

Clause 5 substitutes section 4 of the Act, which sets out the objectives of the Act. The new objectives update the language to apply modern terms widely used in conservation legislation and standards, and address contemporary conservation challenges and approaches. The objectives must be taken into consideration by decision makers in accordance with this Act, including—

- the Secretary, when administering the Act under section 7(1), making the Biodiversity Strategy under new section 17(1), and making a management plan under new section 23(1); and
- the Minister, when preparing a habitat conservation order under new section 28 and determining whether to grant a permit under new section 35; and
- public authorities under the duty in new section 4B.

Clause 6 inserts new sections 4A to 4C into the Act, which state the principles of the Act, impose a duty on public authorities and Ministers to consider the objectives of the Act, and provide a power for the Minister to request information relating to public authorities' compliance with the duty.

New Section 4A requires that a decision, policy program or process gives consideration to the principles of the Act.

The Act expressly provides that the principles must be considered in the following decisions—

- the Secretary in the administration of the Act under section 7(1);
- the Secretary in the making of the Biodiversity Strategy (new section 17(1));
- the Secretary in the making of a management plan (new section 23(1));
- the Minister in the preparation of a habitat conservation order (new section 28); and
- the Secretary when granting permits (new section 35) under a habitat conservation order.

New section 4B expands upon section 4(2) of the Principal Act, which requires public authorities to be administered so as to have regard to the flora and fauna conservation and management objectives. New section 4B imposes a duty on public authorities and Ministers to give proper consideration to the objectives of the Act, and any instruments made under the Act, when performing any function, so far as is consistent with the proper exercising of those functions. New section 4B recognises the responsibility of government to duly consider effects that decisions and actions may have on biodiversity. The consideration of biodiversity applies generally to the administration and exercise of functions by public authorities and Ministers. The intention is to elevate biodiversity considerations to form part of the administration of government.

New section 4B(2) specifies that instruments made under this Act that must be considered under this duty include the Biodiversity Strategy, action statements, critical habitat determinations and management plans.

New section 4B(3) provides that, without limiting the duty to give consideration to the objectives and any instruments made under the Act, consideration must be given to potential impacts on biodiversity.

New section 4B(4) provides that the Minister may make guidelines in relation to the proper consideration of the objectives by public authorities.

New section 4C provides that the Minister may request any information from a public authority that the Minister considers is necessary and reasonable to ensure the duty to consider the objectives of the Act is being performed, or 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. Under new section 4C(2) a public authority must comply with a request made under this section. New section 4C(3) provides that the Minister may publish any information obtained under this sections on the Internet.

Clause 7 substitutes "section 36" in section 6A of the Principle Act with "section 32". Section 6A provides that offences for agreed activities (except for failure to comply with an Interim Conservation Order) do not apply to apply to a member of a traditional owner group which has an agreement under the Part 6 of the **Traditional Owner Settlement Act 2010** who is carrying out the agreed activity in accordance with the agreement and on land to which the agreement applies. Interim Conservation Orders cannot be issued following the commencement of this Act. Habitat Conservation Orders may be issued under this Act instead, and the offence of failing to comply with a Habitat Conservation Order is applicable to a member of a traditional owner settlement group.

Clause 8 replaces "flora and fauna conservation and management objectives" with "objectives of this Act" and replaces "survival" with "persistence", for consistency with Clause 4.

New section 7(3) places an obligation on the Secretary to give proper consideration to the principles of the Act in administering the Act.

Clause 9 amends the membership requirements of the Scientific Advisory Committee (***the Committee***) to enable more flexibility in the appointment of members.

New section 8(3) provides that the Committee is to consist of at least 7 but not more than 9 members appointed by the Minister. This replaces the prescriptive requirements of the current section 3 which provides that the Committee consists of—

- 3 senior government scientific officers; and
- 2 scientists on the staff of any of the Victorian education institutions; and
- 2 scientists appointed by the Minister who are not employed by the Government.

New section 3A maintains the current Act's requirement that all members of the Committee must be scientists.

New section 3B requires that the majority of members are not employed in the public service to ensure objectivity. This is a consolidation and clarification of the existing requirements which prescribe a specific number of scientists employed by the government.

Clause 10 removes the advisory functions of the Conservation Advisory Committee, established under the **Conservation, Forests and Lands Act 1987** (CFL Act). This Committee has not been established for many years and has not performed a substantive advisory function under this Act. Section 12 of the CFL Act could be used by the Minister to establish a Council or Committee in future, if advice is considered necessary to inform the administration of this Act.

Clause 11 substitutes Part 3 of the Principal Act with a new Part that continues to provide for the listing of communities of flora and fauna and potentially threatening processes and provides for the listing of threatened taxa of flora or fauna in accordance with the *Intergovernmental Memorandum of Understanding – Agreement on a Common Assessment Method for listing of threatened species and ecological communities* (***common assessment method***). The Memorandum of Understanding (***MOU***) was signed by the Minister for Energy, Environment and Climate Change on behalf of the Victorian Government on 18 April 2018.

The common assessment method aims to streamline the assessment and listing of nationally threatened taxa through the adoption of common categories and criteria and the establishment of enhanced collaboration between Commonwealth, State and Territory agencies. An outcome of the common assessment method will be a single operational list of nationally threatened taxa that is consistent across the Commonwealth and all States and Territories and reduces duplication of effort.

Under the common assessment method, the Commonwealth, States and Territories will lead and contribute to assessments of taxa of flora and fauna. The Victorian Government will lead on some assessments and contribute to assessments initiated by other jurisdictions.

The amendments provide a process for assessing and listing taxa based on a national assessment of risk or a Victorian assessment of risk and for the assignment of categories of threat such as critically endangered, endangered and vulnerable.

Clause 11 does not substantially change the process for the listing of taxa or communities of flora or fauna or potentially threatening processes. However, the provisions clarify the role of the Governor in Council in relation to establishing and maintaining the Threatened List and the Processes List.

New Division 1 provides for establishment of the Threatened List and Processes List.

New section 10(1) requires the Governor in Council to establish and maintain a list of threatened taxa of flora and fauna and threatened communities of flora or fauna.

New section 10(2) provides that the Governor in Council—

- 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 on the list; and
- for each taxon specified under paragraph (a), must set out, in accordance with the Minister's recommendation under Division 3, the category of threat that applies to the taxon and whether the taxon is at risk of extinction in Australia or at risk of extinction in Victoria in that category of threat.

The substantive new elements of new section 10 are requiring the Governor in Council to set out the category of threat and the scale of extinction risk, e.g. national or Victorian.

New section 10(3) and (4) maintain the substantive effect of the Principal Act, which enable the Governor in Council to list communities of flora and fauna and to remove taxa or communities of flora or fauna from the Threatened List if no longer eligible.

New section 10(5) enables the Governor in Council to amend the Threatened List to change the category of threat, e.g. "endangered" to "critically endangered", or to change the scale of the extinction risk, e.g. from "critically endangered" in Victoria to "vulnerable" nationally, if the Minister so recommends under Division 3. This section reflects that changes that may be made to the Threatened List from a recategorisation amendment.

New section 10(6) enables the Governor in Council to make a minor amendment to the Threatened List or Processes List if the Minister, under section 16I so recommends. A minor amendment is not required to follow the nomination and assessment process of Division 3. Minor amendments are not provided for by the Principal Act.

New section 10(7) provides that a decision of the Governor in Council under this section must be made by Order and published in the Government Gazette, which maintains the substantive effect of the Principal Act.

New section 11 provides for the listing of potentially threatening processes. This section maintains the substantive effect of the Principal Act and provides that the Governor in Council must maintain a list of potentially threatening processes, may specify any potentially threatening process in the Processes List or remove a potentially threatening process from the list, upon recommendation from the Minister.

New Division 2 provides for the eligibility of taxa of flora or fauna, communities of flora or fauna and potentially threatening processes to be listed under Division 1.

New section 12(1) maintains the Principal Act's approach whereby eligibility criteria for listing are prescribed in the Regulations. This section replaces section 11(4) of the Principal Act. Section 11(4) assigned responsibility for preparing eligibility criteria to the Committee. New section 12(1) removes the responsibility for preparing the eligibility criteria from the Committee. The eligibility criteria for taxa will be based on the International Union for the Conservation of Nature (IUCN) Red List Categories and Criteria, in accordance with the common assessment method.

New section 12(2) provides that eligibility criteria prescribed for the purposes of this Division must be based only on nature conservation matters. This replicates the Principal Act's existing requirement in section 10(7) that the Committee in preparing the list of criteria for eligibility are to have regard only to nature conservation matters.

New section 13 establishes the categories of threat into which eligible taxa are to be listed. The categories are—

- extinct;
- extinct in the wild;
- critically endangered;
- endangered;
- vulnerable;
- in the case of fish, conservation dependent.

These categories are based on the IUCN categories, in accordance with the common assessment method. If a taxon does not meet the prescribed eligibility criteria for any of these categories, it is not eligible to be listed. The non-IUCN category of conservation dependent is included in accordance with the common assessment method, for the purposes of section 179(6)(b) of the Environment Protection and Biodiversity Conservation Act 1999 of the Commonwealth. A taxon of fish can be listed in any of the categories above but only taxa of fish can be listed in the conservation dependent category.

New section 14 provides for the eligibility criteria for listing communities of flora or fauna. As above, the detailed eligibility criteria are prescribed. The effect of this criterion is identical to the Principal Act.

New section 15 provides for the eligibility of taxa of flora or fauna below the level of subspecies and communities of flora or fauna which are narrowly defined. This section is identical to section 11(2) of the Principal Act.

New section 16 provides for the eligibility for listing of potentially threatening processes. This criterion is identical to section 11(3) of the Principal Act.

New Division 3 provides for the nomination and assessment process for the listing of taxa, communities and processes.

New section 16A replaces section 12 of the Principal Act. The purpose of section 16A is the same as section 12 of the Principal Act, that any person may nominate a taxon of flora or fauna, community of flora or fauna or potentially threatening process to be listed under the Act, or removed from the Threatened List or Processes List.

New section 16A(1)(a) enables a person to nominate a taxon of flora or fauna for inclusion on the Threatened List, which maintains the substantive effect of section 12(1) of the Principal Act and also enables a nominator to specify a category of threat in a nomination and whether the taxon is at risk of extinction in Australia or Victoria only.

New section 16A(1)(b) enables a person to nominate a community of flora or fauna to be specified in the Threatened List. This section maintains the substantive effect of section 12(1) of the Principal Act.

New section 16A(1)(c) enables a person to nominate a potentially threatening process to be specified in the Processes List. This section maintains the substantive effect of section 12(1) of the Principal Act.

New sections 16A(2)(a)–(c) maintain the substantive effect of section 12(1) of the Principal Act which enables a person to nominate that listed taxa, communities or potentially threatening processes are no longer eligible to be listed.

New section 16A(3) provides for a new power for any person to nominate that a taxon be reassessed and recategorised. Recategorisation may move a taxon from one category of threat to another, or from a category of threat based on the risk of extinction in Victoria to a category of threat based on the risk of extinction in Australia, and vice versa. For example, if the populations of a taxon listed in the vulnerable category have declined, a person may nominate that taxon for reassessment and listing in the endangered category.

New section 16A(4) maintains the substantive effect of section 12(2) of the Principal Act and provides for the information that must be included in a nomination to be prescribed in the Regulations.

New section 16B is similar to section 13 of the Principal Act.

New section 16B(1) specifies that this section does not apply to a nomination made by the Committee. Under new section 16C(1)(b), the Committee may assess the eligibility of a taxon of flora or fauna, a community of flora or fauna, or a potentially threatening process of flora or fauna on its own motion. New section 16B provides grounds for rejecting a nomination and requirements for notifying nominators, which do not apply to assessments undertaken by the Committee on its own motion.

New section 16B(2) requires the Committee to consider each nomination as soon as possible after it has been made. This is identical to section 13(1) of the Principal Act.

New section 16B(3) enables the Committee to consider different nominations about the same matter together. This maintains the substantive effect of section 13(2) of the Principal Act.

New section 16B(4) specifies the circumstances in which the Committee may reject a nomination. New sections 16B(4)(a), (c) and (d) maintain the substantive effect of section 13(3) of the Principal Act. New section 16B(4)(b) provides a new ground for rejection in the case of a nomination to recategorise a taxon, if the Committee considers that a reassessment would not result in a recategorisation amendment being made. This limits the burden on the Committee if nominations are made repeatedly or with little evidence. New section 16B(4)(b) will enable the Committee to reject such nominations.

New section 16B(5) replaces section 13(4) of the Principal Act, which requires the Committee, if it rejects a nomination, to notify the Minister and the nominator and to give reasons for that rejection.

New section 16C provides for the process of the Committee's assessment of eligibility.

New section 16C(1) enables the Committee to assess the eligibility of a taxon of flora or fauna, community of flora or fauna, or potentially threatening process to be listed—

- if a nomination has been made under new section 16B and the Committee has not rejected the nomination (new section 16C(1)(a)); or
- on the Committee's own motion (new section 16C(1)(b)).

New section 16C(2) requires the Committee to conduct an assessment in accordance with the prescribed eligibility criteria.

New section 16C(3) requires the Committee to assess the eligibility of a taxon of flora or fauna (not communities of flora or fauna) first on the basis of its risk of extinction in Australia. This section gives effect to a key component of the common assessment method.

New section 16C(4) specifies the circumstances in which the Committee may then assess the eligibility of taxa of flora of fauna on the basis of the risk of extinction in Victoria.

New section 16C(4)(a) enables a Victorian assessment if the taxon has been assessed by the Committee or under the law of another jurisdiction as not being at risk of extinction in Australia.

New section 16C(4)(b) enables a Victorian assessment if the Committee is of the opinion that an assessment carried out under the law of another jurisdiction was not conducted in accordance with the common assessment method. Such a circumstance is not anticipated to occur frequently if at all, however it provides the Committee with the flexibility to continue to facilitate the listing process at the Victorian scale, if the consultation or assessment process is considered to be defective in some way.

New section 16C(4)(c) enables the Committee to undertake an assessment at the Victorian scale, even if a taxon likely to be assessed under the common assessment method at the national scale in future, if the Committee considers that there are factors that warrant the assessment. These factors might include that the assessment is not a priority for the Commonwealth or other jurisdictions to participate in at the time.

New section 16C(5) provides the categories of threat under which the Committee is to assess eligibility for listing a taxon at the Victorian scale under subsection (4). These categories are identical to the national categories except for conservation dependent which is omitted. Conservation dependent is included in the categories under the common assessment method for the purposes of section 179(6)(b) of the Environment Protection and Biodiversity Conservation Act 1999 of the Commonwealth. This category is not required for assessments conducted at the Victorian scale.

New section 16D maintains the substantive effect of section 14 of the Principal Act which requires the Committee to publish a preliminary recommendation and seek public comment.

New section 16D(1) requires the Committee, after assessing a nomination, to make a preliminary recommendation that the nomination should either be supported, with or without variation, or not be supported.

When the Committee has made a preliminary recommendation, new section 16D(2) requires the Committee to—

- notify the nominator (new section 16D(2)(a)); and
- publish the preliminary recommendation and the reasons for it on the Internet together with a statement that submissions may made within 30 days (new section 16D(2)(b)); and
- publish notice of the making of the preliminary recommendation in the Government Gazette together with a statement that submissions may be made within 30 days (new section 16D(2)(c)).

New section 16D(3) requires the Committee to allow 30 days to elapse for public comment to be made on the preliminary recommendation.

In replacing section 14 of the Principal Act, new section 16D omits section 14(2)(b) which required preliminary recommendations and the reasons for it to be published in a newspaper circulating throughout the State and in a newspaper circulating generally in the area likely to be affected by the recommendation. Preliminary recommendations in recent years have attracted a declining number of public submissions and feedback from submitters has indicated that very few became aware of preliminary recommendations via newspaper advertisements. Publishing each preliminary recommendation in newspapers poses a considerable cost to the Department and is no longer considered to be necessary. Publication in the Government Gazette and on the Internet will adequately notify Victorians of preliminary recommendations.

New section 16E provides a new power for the Committee to consider an assessment and make a final recommendation to the Minister following an assessment by another jurisdiction under the common assessment method. This power is necessary, as

under the common assessment method, the Commonwealth or other States and Territories may lead the assessment of a taxon that is indigenous to Victoria. This section applies if under the law of another jurisdiction, a taxon of flora or fauna has been assessed and a determination made—

- that the taxon is at risk of extinction in Australia in a particular category of threat (new section 16E(1)(a)); or
- that the taxon is not at risk of extinction in Australia (new section 16E(1)(b)); or
- that the taxon is at risk of extinction in Australia in a different category of threat to the category that currently applies (new section 16E(1)(c)).

New section 16E(2) requires the Committee to make a final recommendation (under new section 16F) if of the opinion that the assessment was conducted in accordance with the common assessment method. The final recommendation must be the same as any recommendation arising from the assessment. The common assessment method MOU requires the parties to undertake public consultation during the assessment process. Therefore, the Victorian community will have the opportunity to comment on assessments for listing, even if the process is being led by another jurisdiction. Nothing in new section 16E prevents the Committee from seeking public comment should it wish to do so, before making a final recommendation under new section 16F.

For assessments considered under new section 16E, the Committee is not required to follow the process of new section 16D, which relates only to assessments following a nomination. For the purposes of the amended Act, an assessment under new section 16E, in accordance with the common assessment method, is not considered to constitute a nomination. No nomination is required for the Committee to consider an assessment under the common assessment method by another jurisdiction, only that the circumstances of new section 16E are met.

It should also be noted that new section 16E applies only to taxa of flora or fauna and not to communities of flora or fauna, as at this time Victoria has not "opted in" to the common assessment method with respect to communities of flora or fauna.

New section 16F which replaces and maintains the substantive effect of section 15(2) of the Principal Act, requires the Committee to make a final recommendation to the Minister.

New section 16F(1)(a) requires the Committee to make a final recommendation to the Minister that a nomination should either be supported, with or without amendment, or not be supported. A recommendation under this section must be made within 3 years after the making of a nomination as per section 16F(4)(a).

New section 16F(1)(b) relates to taxa of flora or fauna assessed under the common assessment method by another jurisdiction (new section 16E(2)) and requires the Committee to make a final recommendation to the Minister, that the taxon be specified in the Threatened List, that the taxon be removed from the Threatened List, that the category of threat be changed, that the taxon is not specified in the Threatened List, or that no change be made to the category of threat. A recommendation under this section must be made within 2 years after the making of the decision as per section 16F(4)(b).

New section 16F(2) requires the Committee to consider any public comments made within the 30 day period before making a final recommendation to the Minister, if a preliminary recommendation has been made under new section 16D(3). This is currently required by section 15(1) of the Principal Act.

New section 16F(3) requires the Committee to give reasons for its final recommendation to the Minister. This is currently required by section 15(1) of the Principal Act.

New section 16F(4) specifies the time periods within which final recommendations must be made, which are described above.

New section 16F(5) requires the Committee, when it has made its final recommendation, to—

- notify any nominator and the Victorian Catchment Management Council (new section 16F(5)(a)); and
- publish the recommendation and the reasons for it on the Internet (new section 16F(5)(b)); and
- publish notice of the making of the recommendation in the Government Gazette (new section 16F(5)(c)).

New section 16F(5) maintains the substantive effect of section 15 of the Principal Act, however the requirement to advertise the Committee's recommendation in newspapers (section 15(3)(b) of the Principal Act) is omitted.

New section 16G(1) provides for the Minister to make recommendations to the Governor in Council, after considering the Committee's final recommendation. The Minister may make recommendations that—

- a taxon of flora or fauna be specified in the Threatened List, the relevant category of threat and whether the taxon is listed on the basis of a national assessment under the common assessment method or a Victorian assessment (new section 16G(1)(a)); or
- a community of flora or fauna be specified in the Threatened List (new section 16G(1)(b)); or
- that a taxon of flora or fauna be removed from the Threatened List (new section 16G(1)(c)); or
- that a community of flora or fauna be removed from the Threatened List (new section 16G(1)(d)); or
- that the extinction risk or category of threat be changed, in relation to a taxon of flora or fauna (new section 16G(1)(e)); or
- that a potentially threatening process be specified in the Processes List (new section 16G(1)(f)); or
- that a potentially threatening process be removed from the Processes List (new section 16G(1)(g)).

New section 16G(2) requires the Minister to consider the final recommendation of the Committee before making a recommendation to the Governor in Council.

New section 16G(3) requires the Minister to make a decision whether or not to support the final recommendation and make a recommendation under 16G(1) in relation to the final recommendation. The Minister must decide whether to support a final recommendation within 60 days of receiving the final recommendation. However, if the final recommendation is of the nature referred to in sections 16F(1)(b)(iv) or 16F(1)(b)(v), the Minister is not required to make a recommendation under 16F(1)

as there will be no change required to be made in the Threatened List.

New section 16G(4) provides that a decision by the Minister made under this section is not made invalid by a failure to make a decision within the 60 day period.

New section 16G(5) requires the Minister to publish the decision and the reasons for it to be published on the Internet and a notice of the making of the decision to be published in the Government Gazette.

New section 16H requires the Committee and the Minister in making decisions and recommendations under Division 3 of Part 3 to have regard only to nature conservation matters, which maintains the substantive effect of the Principal Act.

New Division 4 provides for general matters associated with the listing process.

New section 16I enables the Minister to recommend that minor amendments be made to Lists.

New section 16I(1) enables the Committee to recommend to the Minister that a minor amendment be made to the Threatened List or Processes List.

New section 16I(2) enables the Minister, on the recommendation of the Committee, to recommend to the Governor in Council that a minor amendment be made to the Threatened List or Processes List.

New section 16I includes a definition of ***minor amendment***, which means an amendment that does not change the status of the listing or the category of threat (if applicable) and includes—

- a change in the name of a listed taxon of flora or fauna;
- a reclassification of a listed taxon of flora or fauna into a further taxon as a result of taxonomic revision;
- 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;
- a correction of any error or omission.

New section 16J requires the Minister to ensure that up-to-date consolidated versions of the Threatened List and Processes List are published on the Internet.

New section 16K requires the Minister to ensure that the Threatened List and the Processes List are reviewed for the purposes of identifying whether any changes are necessary and must ensure that reviews are carried out at least every 5 years. The reviews are intended to identify whether listed taxa of flora or fauna have declined further or improved and may therefore be eligible to be listed in a different category of threat. The reviews are also intended to identify whether any unlisted taxa of flora or fauna are eligible to be listed. If the Minister determines that changes to the lists are necessary the Minister may make a nomination under new section 16A.

Clause 12 substitutes Division 1 of Part 4 of the Principal Act with a new Division 1, comprised of sections 17–18E.

New Division 1 prescribes the procedure for making the Biodiversity Strategy by the Secretary. Since the commencement of the Principal Act in 1988, environmental conservation vernacular has changed significantly to reflect the international and national approaches to the biodiversity conservation, namely, recognising the holistic importance of all organisms and ecosystems as opposed to specifically flora and fauna. The Biodiversity Strategy aligns with the current scientific language and the holistic perspective.

New section 17 requires the Secretary to make a Biodiversity Strategy and outlines what must be included in the Strategy.

New section 18 sets out the matters that the Secretary must consider in preparing the Biodiversity Strategy. Other matters which the Secretary is required to consider may be prescribed in Regulations.

New section 18A requires that public consultation and publication must occur before the making of the Biodiversity Strategy.

New section 18B sets out the process for the making publication of the finalised Biodiversity Strategy.

New section 18C sets out a process for the Secretary to amend the Biodiversity Strategy at any time, and confirms the applicability of the process contained in new sections 17–18B in

making an amendment, unless the amendment is considered by the Secretary to be fundamentally declaratory machinery or administrative in nature.

New section 18D requires the Commissioner for Environmental Sustainability to report on the progress of the Biodiversity Strategy in achieving its proposals and targets no later than 5 years after the making of the first Strategy and then every 5 years thereafter.

New section 18E requires the Secretary to cause a review of the Biodiversity Strategy to occur on or before 1 July 2037, with further reviews to occur on or before 1 July in every twentieth year after July 2037. New section 18E(3) allows the Secretary to amend the Strategy in accordance with Division 1 following a review.

Clause 13 amends the heading to Division 2 of Part 4 of the Principal Act by substituting "habitats" with "habitat determinations".

Clause 14 amends section 19 by—

- omitting the reference to the Conservation Advisory Committee, which no longer exists; and
- omitting the reference to the Victorian Catchment Management Council, which will not have any future role in the making of action statements.

Clause 15 substitutes section 20 of the Principal Act with new section 20 and new sections 20A to 20F, to provide for the making of critical habitat determinations.

These provisions aim to clarify the basis of, and process for, the Secretary's decision in making a critical habitat determination.

New section 20 enables the Secretary to determine any area of the State to be a critical habitat. It guides the identification of areas eligible for determination by setting out the criteria defining critical habitat and specifying circumstances in which the Secretary may make a critical habitat determination.

New section 20A concerns the Scientific Advisory Committee's involvement in process of critical habitat determinations. It enables the Committee to make a recommendation to the Secretary and specifies that the Secretary must consider the recommendation and decide whether to make the determination.

The Secretary must give reasons for the decision and publish said reasons on the Internet site of the Department.

New section 20B mandates that the public consultation and outlines the following requirements—

- the Secretary must provide written notification and an invitation to make submissions to relevant landholders and relevant authorities in accordance with subsection (1);
- the Secretary must publish information regarding the proposed determination on the Internet in accordance with subsection (3); and
- the Secretary must consider any submission received on or before the specified date in accordance with subsection (6).

New section 20B(4) provides an exception to sections 20B(1) and 20B(3) to account for circumstances where there is an imminent need to protect the habitat, namely, where a delay is likely to result damage caused to the habitat. New section 20B(5) provides an exception to the requirement to publish following a request from a landholder if the Minister approves the withholding of the information. New section 20B(7) requires the Secretary to consult with the Committee on the making of a critical habitat determination. This provision strengthens the Secretary's decision making by explicitly incorporating the examination of scientific evidence as part of the process.

Section 20C provides for the making of critical habitat determinations by the Secretary, with or without amendment, following the compulsory consideration of any submissions. A notice of the making of the determination must be published in the Government Gazette.

Section 20D allows the amendment of critical habitat determinations and states that the process determined in sections 20 to 20C is to be applied unless the amendment is fundamentally declaratory, machinery or administrative in nature.

Section 20E provides for the making of guidelines by the Secretary in relation to areas eligible for critical habitat determinations. The guidelines may be used to facilitate consistency in determinations.

Section 20F states that the Secretary must take all reasonable steps to enter into public authority management agreement or an agreement under section 69 of the **Conservation, Forests and Lands Act 1987**, in respect of an area which is subject to a critical habitat determination unless the Secretary considers that there is an alternative agreement in place which provides for the long-term conservation and protection of the critical habitat.

Clause 16 amends section 21 of the Principal Act, being the procedure for making management plans.

"The" in subsection 21(1) is substituted with "Subject to subsection (2)". Subsection (1) allows the Secretary to make a management plan, subject to any guidelines made by the Minister.

Subsections (2)–(4) are substituted with new subsections (2)–(4).

New subsection (2) enables the Minister to make guidelines in relation to circumstances that obligate the making of a management plan. The Ministerial guidelines can effectively provide the "triggers" that instigate and prioritise the making of a management plan by the Secretary, and the Secretary must decide how the management plan is to be constructed subject to any legislative requirements. This will also allow the Minister to balance the community's strong desire for certainty in the making of management plans, and the need to appropriately apportion resources to on-ground actions, allowing greater flexibility in decision making.

New subsection (3) requires that the Secretary make a management plan in accordance with any guidelines made by the Minister.

New subsection (4) stipulates the mandatory publishing requirements which must occur before the making of the management plan.

The requirement for the Secretary to acknowledge receipt of each submission in subsection (5) has been removed. New subsection (7) allows management plans to address one or more taxa, communities, or potentially threatening processes. This allows flexibility for management plans to be more strategic, addressing impacts on broader scale, as opposed to being species specific.

Clause 17 substitutes section 23 of the Principal Act with new section 23, which sets out contents of management plans. The new section operates in a similar manner to the old provision subject to the following changes—

- The requirement for the management place to include "the nature conservation and the social and economic consequences of the plan" has been removed. It is now optional to include this matter in the content place.
- New section 23(3) includes additional matters that may be included in a management plan.
- New section 23(3) outlines additional mattes that the Secretary must consider in the making or amendment of a management plan.

Clause 18 inserts new section 23A after section 23 of the Principal Act. New section 23A provides for the publication of a management plan by the Secretary on the Internet.

Clause 19 amends section 25, concerning public authority management agreements, of the Principal Act by substituting "The Secretary" with "Subject to subsection (1A), the Secretary" in subsection (1), and inserting a new subsection (1A) after.

Subsection (1A) prohibits the making of a public authority management agreement if, in the opinion of the Secretary, the agreement would threaten the conservation of a listed taxon or community of flora or fauna. This applies a limitation on Secretary's discretion, in line with the objectives of the amending Act.

Clause 20 substitutes Division 1 of Part 5 of the Principal Act with new Division 1, comprised of sections 26 to 42, which governs the making and operation of habitat conservation orders.

New sections 26–28 provides requirements for the making of a habitat conservation order.

New section 26 enables the Minister to make habitat conservation orders to conserve, protect or manage any critical habitat, or any area of State where a determination has not been made but there is proposal for determination by the Secretary. It creates a duty for the Minister to decide whether a habitat conservation order should be made within 2 years of a critical habitat determination being made, and outlines the circumstances in which the making

of the habitat conservation order may be necessary. In relation to an area of State where a determination has not been made but there is proposal for determination by the Secretary, a habitat conservation order will cease to have effect if a determination is not made within 12 months.

New section 27 stipulates what may be provided for by a habitat conservation order, namely—

- the conservation, protection or management of flora, fauna, land or water;
- the prohibition of any activity, land use or development within the critical habitat or proposed critical habitat;
- a requirement to obtain a permit prior to any activity, land use, or development within the critical habitat;
- a power to enable the Secretary to undertake any actions or works to conserve, protect, or manage the critical habitat or the proposed critical habitat;
- a requirement for the reparation of any damage to the critical habitat or proposed critical habitat that has occurred since notice of the critical habitat determination.

The habitat conservation order may specify how long it remains in force, and that must not exceed 10 years after it takes effect.

New section 28 provides for the preparatory process of habitat conservation orders. It compels the Minister to consider the objectives and principles of the Act, nature conservation matters and the social and economic consequences of the making of an order. It requires the Minister to consult with any other Minister whose area of responsibility is likely to be affected by a habitat conservation order.

For proposed determinations where the critical habitat is within an area of land that is subject to an agreement under Part 6 of the **Traditional Owner Settlement Act 2010**, new section 28 provides that, if the proposed determination has an effect on the agreed activity under the agreement, the Minister must not make an order unless the Secretary takes all reasonable steps to reach agreement with the traditional owner group entity and—

- an agreement is reached; or
- reasonable time is allowed for the agreement to be reached.

New section 29 outlines the mandatory notification procedure relating to the habitat conservation orders.

New section 30 relates to the mandatory publication of notice of habitat conservation orders, and specifies that a habitat conservation order comes into operation on the date the notice is published or any later date specified in the notice.

New section 31 governs the amendment of habitat conservation orders. Subsection (1) allows the Minister to amend the habitat conservation order at any time, and subsection (2) confirms that new sections 26–30 applies, unless the amendment is fundamentally declaratory, machinery or administrative in nature as per subsection (3).

New section 32 creates a criminal offence for contravening a habitat conservation order.

An analogous offence is currently in the Act for breach of a notice to comply with an interim conservation order. The use of the notice to comply was limited, allowing the Secretary only to direct a person to act in accordance with the interim conservation order. The new offence is direct, and does not require the intermediate step of issuing a notice prior to the offence being triggered.

New section 33 addresses the implications of defects in procedure. In circumstances where there is any failure to comply with the procedure regarding a habitat conservation order—

- subsection (1) states that a person cannot bring an action unless there is substantial or material disadvantage;
- subsection (2) provides for the validity of a habitat conservation order despite defects in procedure; and
- subsection (3) states that a person may apply to the Victorian Civil and Administrative Tribunal for review of a decision to make a habitat conservation if there substantial or material disadvantage.

New section 34 establishes the power for the Minister to suspend licences, permits and authorities to the extent that they permit actions that contravene the habitat conservation order. The exercise of this power is subject to consultation between the Secretary and the issuer of the licence, permit or authority, and the Minister being advised of the result of the consultation. The Secretary must give notice of the suspension, with the suspension occurring at the time the notice is provided or on a later date in the notice.

New section 35 provides that if a permit is required under a habitat conservation order for a particular use or activity, an application must be made to the Minister. Subsection (2) lists the matters that the Minister must consider in deciding whether a permit should be granted. Under subsection (3) the Minister must not grant the permit if granting of the permit would threaten the conservation of any indigenous species or communities within the area. Subsection (4) clarifies that Secretary need not obtain a permit or any other authority to undertake works to manage habitat or repair any damage.

New section 36 provides a right for a person to review a requirement, prohibition or decision of the Minister under the habitat conservation order at the Victorian Civil and Administrative Tribunal. It also provides the right for a person to review a decision to suspend a licence, permit or authority at the Victorian Civil and Administrative Tribunal. Subsection (3) sets out the time limits for making an application for review.

New section 37 states that a declaration concerning the validity of a requirement, prohibition or decision referenced in new section 36 may be sought from the presidential member of the Victorian Civil and Administrative Tribunal.

New section 38 states the matters that the Victorian Civil and Administrative Tribunal must take into account when determining an application for review or declaration.

New section 39 establishes a right to compensation for a person who has suffered financial loss as a natural, direct and reasonable consequence of the applicable habitat conservation order where the order affects an existing use right under the **Planning and Environment Act 1987**, or an authority under another Act. It requires the Secretary to make a determination regarding the amount of compensation, subject to consultation and

consideration of specific matters. It also establishes the arrangement for payment of compensation by the Secretary.

New section 40 states that the Minister and Secretary must take all reasonable steps to ensure the long term conservation of the taxon, community or critical habitat of which the habitat conservation order was made before the expiry of the habitat conservation order or a condition imposed in the habitat conservation order.

New section 41 clarifies that in the event there is conflict between a habitat conservation order and a planning scheme, the habitat conservation order is to prevail.

New section 42 requires the Secretary to establish and maintain the register of critical habitat determinations and habitat conservation orders and prescribes the mandatory information that it must contain. It states that an up-to-date copy of the register is to be made publicly available on the Internet, but access to certain information may be restricted if it would be necessary to do so in the public interest.

Clause 21 substitutes section 46 with new section 46, 46A, 46B and 46C of the Principal Act.

New section 46 enables the Governor in Council, by Order published in the Government Gazette, and on the recommendation of the Minister, to declare a taxon of flora to be protected flora, or to be protected and subject to restriction on use. It provides guidance and clarifies the circumstances in which the Minister may recommend that a taxon of flora be declared protected or declared to be protected and subject to a restriction on use. The introduction of the new "restriction on use category" identifies flora that is not currently threatened (and therefore, not listed as threatened), but will be at risk if commercial or personal use is not managed. The declaration will activate the "take flora" offences at sections 47, 47A, 47B and 47C.

New section 46A provides for the revocation of declaration of flora to be protected by the Governor in Council by Order published in the Government Gazette, on the recommendation of the Minister.

New section 46B states that the Minister must prepare guidelines, which must only relate to nature conservation matters, for determining whether a taxon of flora is eligible to be declared protected or protected subject to restriction on use. In making or amending the guidelines, the Minister is obliged to consult the Committee and make available a current version of the guidelines on the Internet.

Section 46C states that the Minister must ensure that an up-to-date consolidated list of taxa of flora declared to be protected is published on the Internet.

Clause 22 substitutes section 47 with new sections 47, 47A, 47B and 47C of the Principal Act.

New section 47 establishes the strict liability offence of taking restricted use protected flora for the purposes of sale or personal use. The penalty is 120 penalty units for a natural person and 600 penalty units for a body corporate.

New section 47A establishes the aggravated offence of taking restricted use protected flora causing significant detrimental impact on restricted use protected flora. The penalty is 240 penalty units or 2 years imprisonment or both for a natural person or 1200 penalty units for a body corporate.

A note indicates to the reader that the new section is to be read in conjunction with new section 3(4) above.

New section 47B establishes the strict liability offence of taking other protected flora. The penalty is 120 penalty units for a natural person and 600 penalty units for a body corporate.

New section 47C establishes the aggravated offence of taking other protected flora causing significant detrimental impact on the taxon of flora or community of flora or fauna of which the protected flora is a member or part. The penalty is 240 penalty units or 2 years imprisonment or both for a natural person or 1200 penalty units for a body corporate.

A note indicates to the reader that the new section is to be read in conjunction with new section 3(4) above.

New sections 47 and 47A reflect the new category of restricted use protected flora.

The splitting of the offences into strict liability and aggravated aims to address offending according to severity. Minor offending that falls under sections 47 or 47B can be addressed effectively and efficiently by way of infringement notices. Serious offending that causes significant detrimental impact is captured by sections 47A and 47C which carry higher penalties accordingly.

Clause 23 substitutes section 48 with new sections 48, 48A and 48B of the Principal Act.

New section 48 provides the Secretary's power to issue a licence or permit for the taking, trading in, keeping, moving or processing protected flora. The Secretary must take into account any prescribed criteria and must not exercise this power if to do so would threaten the conservation of the taxon of flora or community of flora or fauna of which the protected flora is a member or part. The Secretary can only grant a permit for the taking of the members of a listed taxon for the purpose of control (but not a licence), but the Secretary must not exercise this power unless the listed taxon of flora is a serious cause of injury to property, crops stock or another listed taxon of flora or fauna or community of flora or fauna.

New section 48A enables the Governor in Council, on the recommendation of the Minister, to grant an authorisation, by Order published in the Government Gazette, for the taking, trading in, keeping, moving, processing of protected flora subject to the terms and condition. In exercising this power, the Minister must take into account the prescribed criteria and carry out the necessary consultation and publication requirements. The Minister must not make a recommendation if, in the opinion of the Minister, an authorisation would threaten the conservation of the taxon of flora or community of flora or fauna of which the protected flora is a member or part.

New section 48B establishes the criminal offence of contravening terms of authorisation under new section 48A. The penalty for non-compliance is 240 penalty units or imprisonment for 2 years or both in the case of a natural person, and 1200 penalty units in the case of a body corporate.

Clause 24 amends section 49 of the Principal Act, offences to flora generally, by increasing the penalty of section 49(1) and 49(2) to 240 penalty units or imprisonment for 2 years of both for a

natural person, and a body corporate penalty which is 5 times that of the natural person. The wording of section 49(2) has been updated to a modern drafting style.

Clause 25 substitutes section 52 with new sections 52 and 52A of the Principal Act.

New section 52 establishes the strict liability offence of taking, trading in or keeping fish that is a member of a listed taxon or community.

New section 52A establishes the aggravated offence of taking, trading in or keeping fish that is a member of a listed taxon or community causing significant detrimental impact on the listed taxon of fauna or listed community of flora or fauna of which the fish is a member or part.

A note indicates to the reader that the new section is to be read in conjunction with new section 3(4) above.

The splitting of the offences into general and aggravated aims to address offending according to severity, and allows for minor offending to be addressed through infringements. The aggravated offence targets serious offending, and as such, carries a higher penalty.

Clause 26 substitutes section 53 and inserts new sections 53A and 53B of the Principal Act.

New section 53 provides the Secretary's power to issue a licence or permit to take, trade in or keep fish. It states that, in making a decision, the Secretary must take into account any prescribed criteria, and prohibits the issuing of a licence or permit, 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.

New section 53A enables the Governor in Council, upon recommendation of the Minister, to issue an authorisation with respect to listed fish. In deciding whether or not to make a recommendation, the Minister must take into account any prescribed criteria, and must satisfy consultation and publication requirements. The Minister must not make a recommendation if, in the opinion of the Minister, an authorisation would threaten the conservation of the listed taxon of fauna or community of flora or fauna or which the fish is a member or part.

New section 53B establishes the offence and penalty for contravening terms of authorisation under new section 53A. The penalty for non compliance is 240 penalty units or imprisonment for 2 years or both in the case of a natural person, and 1200 penalty units in the case of a body corporate.

Clause 27 amends section 56 of the Principal Act which contains the offence of failing to comply with the terms and limitations of a licence or permit. The penalty is, in the case of a natural person, 240 penalty units or 2 years imprisonment or both, and, in the case of a body corporate, 1200 penalty units. The wording of section 49(2) has been updated to a modern drafting style.

Clause 28 inserts new section 56A, which defines the term ***thing*** as including the whole or part of an animal or plant in Division 2 of Part 6 of the Principal Act.

Clause 29 amends section 57 of the Principal Act by—

- inserting the heading "Entry without consent or warrant";
- substituting reference to "an interim conservation order" with "a habitat conservation order";
- repealing section 27(2)(c) of the Principal Act, which concerns searches with a warrant;
- substituting subsection (2)(g) with a provision permitting seizure of any thing, as defined in new section 56A, in certain circumstances;
- amending subsection (2)(h) to allow an authorised officer to take or require from a person any thing in respect of a contravention of the Principal Act;
- inserting new subsection (2)(ia) after subsection (2)(i) which allows authorised officers to examine, take copies of and take extracts from, documents seized or produced;
- substituting subsection (2)(k) to allow an authorised officer to mark any thing;
- substituting subsection (3) of the Principal Act with the requirement that the authorised officer must inform the person who has been asked to produce a thing under

section 57(2)(j), of the period and place in which the person must produce a thing; and

- repealing subsections (4) and (5).

The amendments provide a broader power for authorised officers, enabling the seizure of any equipment, material or other thing if the authorised office hold the belief, on reasonable grounds, that it is necessary in accordance with section 57.

Clause 30 inserts new sections 57A to 57J after section 57 of the Principal Act.

New section 57A provides that an authorised officer may apply to a magistrate for the issue of a search warrant of a residential building.

New section 57B enables the seizure of things not mentioned in a warrant if there are reasonable grounds, namely, if the thing is connected with an offence referred to in new section 57A or another offence against the Principal Act or its regulations, if the authorised officer believes, on reasonable grounds, 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.

New section 57C requires announcement before entry under a search warrant, unless there is a belief, on reasonable grounds, that immediate entry to the building is necessary to ensure a person's safety or effective execution of the search warrant is not frustrated.

New section 57D requires that a copy of warrant is given to the occupier or another person who represents the occupier.

New section 57E stipulates that, where an authorised officer has taken samples or seize a thing, the authorised officer must issue written receipt for the thing, and take reasonable steps to return the thing to the owner if the reasons for seizure no longer exist.

New section 57F requires that if a sample is proposed to be taken, owner must be advised beforehand that the sample is taken for analysis, if possible.

New section 57G provides that a retention notice may be issued in respect of any thing if the authorised officer believe, on reasonable grounds, that the thing relates to a contravention of the Principal Act or its regulations. The retention notice can

require the keeping of the thing and prohibit its sale or disposal. The effect of a retention notice is up to 90 days after its issue, may be cancelled at anytime by the authorised officer, but can only be extended by the Secretary. This section creates the criminal offence of failing to comply with the notice. The penalty for non compliance is 120 penalty units or imprisonment for 2 years or both in the case of a natural person, and 600 penalty units in the case of a body corporate.

New section 57H stipulates that evidence that a thing specified in a retention notice, under new section 57G, as being in a person's possession is no longer in the possession of the person is evidence and, in the absence of evidence to the contrary, is proof of non-compliance of the retention notice. This section states that a thing specified in a retention notice as being in the possession of a person, is evidence and, in the absence of evidence to the contrary, is proof that the thing was in that person's possession.

New section 57I allows for the return of seized flora or fauna to its natural habitat if the authorised officer considers it appropriate to do so. This section provides that before proceedings for an offence relating to the seized thing are determined, an authorised officer may make an application to the Magistrates' Court for an order for the destruction or disposal of the thing. The Magistrates' Court may make such an order if there are reasonable grounds that the possession of the flora or fauna is not authorised by a licence, permit or authorisation under the Principal Act, or the owner of the thing cannot be found. This section also states that if there is a finding of guilt of an offence against the Principal Act or the regulations by a court, the court may order the destruction or disposal of anything seized, in addition to the imposition of any other penalty.

New section 57J clarifies that new sections 57 to 57I do not limit the other powers that an authorised officer has under the Principal Act or the **Conservation, Forests and Lands Act 1987**.

Clause 31 inserts a new Division heading before section 58 of the Principal Act, being "Division 2A—Offences".

Clause 32 amends section 58 of the Principal Act, being the offence of obstructing an authorised officer by—

- increasing the penalty for non compliance with section 58(1) to 120 penalty units or imprisonment for 12 months or both; and,
- increasing the penalty for non compliance with section 58(2) to 60 penalty units in the case of a natural person and 300 penalty units in the case of a body corporate.

Section 58(2)(b)(ii) is also expanded to require production of plants, animals or any other this within the compliance period specified.

Clause 33 repeals the heading in Division 3 of Part 6 of the Principal Act.

Clause 34 amends section 59, being the offence of interfering with a notice mark or equipment, by inserting "or any other thing" after "fauna" and increasing the penalty to 60 penalty units in the case of a natural person, and 300 penalty units in the case of a body corporate.

Clause 35 inserts a new heading before section 60 of the Principal Act, namely, "Division 3A—Matters relating to offences".

Clause 36 inserts new section 59A after section 59 of the Principal Act.

New section 59A establishes the new time frame for bringing criminal proceedings, being no later than 2 years after the date on which the offence is alleged to have been committed. This timeframe accounts for the time that is required for the detection and complex investigation of offences, and aligns with the time limit to commence proceedings for equivalent offences in comparable Victorian legislation. New section 59A applies specifically to new sections 32, 47, 47A, 47B, 47C, 48B, 49, 52, 52A, 53B and 56.

Clause 37 inserts a new Division 3A, relating to enforceable undertakings, in Part 6 of the Principal Act.

New section 62A provides that the Secretary may enter into a written undertaking with a person who has contravened, or allegedly contravened, a provision of the Principal Act or the regulations.

New section 62B allows the variation or withdrawal of an enforceable undertaking with the consent of the Secretary.

New section 62C stipulates when proceedings for the contravention of an enforceable undertaking can be brought. It states that proceedings cannot be brought for any offence constituted by the contravention or alleged contravention in respect of which the enforceable undertaking is given when the enforceable undertaking is in force.

Proceedings can be brought if a person withdraws an enforceable undertaking before the undertaking has been fulfilled.

Section 62D provides for the enforcement of enforceable undertaking in circumstances of failure to comply with an enforceable undertaking. It allows the Secretary to apply to the Magistrates' Court and for the Magistrates' Court to make an order—

- that directs the person to comply with a term of the enforceable undertaking;
- that the person takes a specified action;
- that the person compensates another person; or
- any other order that the court considers appropriate.

Section 62E enables the Secretary to take specified actions in the event of non-compliance with the enforceable undertaking.

Section 62F provides that contempt of court proceedings is not prevented by new section 62E, and if a person is found in contempt of court for failing to comply with an order under new section 62D, the Secretary may take actions necessary to carry out any action outstanding under the order than can be practicably done and may publicise the failure of the person to comply with the order.

Section 62G states that the Secretary may recover costs incurred in taking action under new sections 62E or 62F.

Section 62H establishes the register of enforceable undertakings, which must be maintained by the Secretary.

Clause 38 amends section 66 of the Principal Act, being the offence of disclosing information declared confidential, by increasing the penalty to 60 penalty units.

Clause 39 amends section 67 of the Principal Act, which specifies the information that the Secretary must make available for inspection at the Department's principal offices, the Secretary's principal office and the regional departmental offices. It does this by—

- substituting "listing criteria" with "eligibility criteria prescribed for the purposes of Division 2 of Part 3" in subsection (a);
- substituting "on nominations for listing" with "relating to the making of recommendations under section 16G" in subsection (b);
- substituting subsection (d) with a reference to the Biodiversity Strategy;
- substituting subsections (f) to (h) with references to critical habitat determination, flora and fauna management plan, and habitat conservation order, respectively; and
- substituting subsection (m) by making reference to the listing of a taxon of flora or fauna, community of flora or fauna and potentially threatening process under section 16F, and reflecting not having to take into account comments by the Conservation Advisory Committee or the Victorian Catchment Management Council.

The changes reflect the new terminology and management processes detailed in the amending Act.

Clause 40 amends section 68(a) of the Principal Act by substituting "flora and fauna conservation and management objectives" with "objectives of this Act".

Clause 41 amends section 69 of the Principal Act, concerning the making of regulations, by—

- substituting subsection (1)(b) with—

  "(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;";

- amending subsection (1)(d) to refer to making of a habitat conservation order instead of an interim conservation order as interim conservation orders are to be replaced by habitat conservation orders;
- inserting new subsection (1)(ga) after subsection (1)(g), being—

  "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";
- increasing the maximum penalty for contravention of the regulations to 20 penalty units.

Clause 42 provides for the repeal of section 71 of the Principal Act which is redundant.

Clause 43 inserts new Part 8 into the Principal Act, comprised of new sections 73 to 82, to provide for effective savings and transitional arrangements for decisions and processes.

New section 73 provides the definitions for new Part 8.

New section 74 stipulates that the Scientific Advisory Committee established immediately before the commencement day is taken to be the Scientific Advisory Committee established under the Principal Act, and a person appointed as a member of the Scientific Advisory Committee whose appointment is in effect immediately before the commencement date is taken to be a member of the Scientific Advisory Committee.

This section provides for the transition from the current overlapping lists of threatened taxa to a single list in accordance with the Common Assessment Method, with national and Victorian extinction risk and categories of threat.

New section 75 provides that a taxon of flora or fauna that is specified in the old Threatened List, immediately before the commencement day, is taken to be specified in the new Threatened List from commencement day until a Governor in Council Order is made in relation that taxon. It also enables

the Minister to recommend to the Governor in Council the removal of a taxon from the Threatened List.

New section 75 provides that if the Minister is satisfied that a taxon of flora or fauna that is specified in the old Threatened List, Federal List, or an Advisory List immediately before the commencement day, is eligible to be specified in the new Threatened List on the basis of its risk of extinction in Australia or Victoria, in a particular category of threat, the Minister may recommend the Governor in Council specify the eligible taxon in the Threatened List. The Minister must take into account the relevant eligibility criteria when deciding whether to recommend the specification of a taxon of flora or fauna in, or the removal of a taxon of flora or fauna from, the Threatened List.

The Minister must make any recommendations under new section 75 to the Governor in Council within 12 months after the commencement day. On the Minister's recommendation, the Governor in Council can amend the extinction risk that applies to a taxon of flora or fauna, specify a taxon of flora or fauna in the Threatened List, or remove a taxon of flora or fauna from the Threatened List. The Minister may request advice from the Committee on making a recommendation, and the Committee must provide advice to the Minister within 60 days after that request. If the Committee provides advice to the Minister in accordance with that request, the Minister must take into account the advice before making the relevant recommendation.

New section 76 allows for a community of flora or fauna specified in the old Threatened List immediately before commencement day to be specified in the Threatened List under new section 10(1).

New section 77 allows for a potentially threatening process that is specified in the Processes List to be taken as specified in the Processes List in new section 11(1).

New section 78 specifies that a nomination which has been made to the Committee prior to commencement day, in accordance with existing Part 3 of the Principal Act, will be taken to be a nomination under new Part 3 of the Principal Act. The point at which new Part 3 applies to a nomination made under existing Part 3 will correspond to the stage that the nomination is at under existing Part 3. For example, if a nomination has been accepted and is being assessed by the Committee, the equivalent

new Part 3 process will apply from that point. Where a recommendation has been made by the Committee to the Minister under the old Part 3, the Committee will be required to remake that recommendation in accordance with new Part 3. This will apply to both preliminary and final recommendations.

New section 79 states that a Flora and Fauna Guarantee Strategy in effect immediately before the commencement day is taken to be a Biodiversity Strategy made under this Act.

New section 80 provides that a taxon of flora declared to be protected immediately before the commencement day is taken to be a taxon of flora declared to be protected under new section 46.

New section 81 provides that an application for a licence or permit under section 48, or licence under section 53, of which the Secretary has not made a decision and is in force immediately before commencement day, is taken to be an application for a licence or permits under section 48, or licence under section 53, respectively.

New section 82 provides for the continuation of licences, permits and authorisations upon commencement. More specifically, it states that—

- a permit issued under section 40, that was in force immediately before commencement day, is taken to continue in force on the same terms and conditions as if it had been issued under new section 35;
- a licence or permit issued under section 48, that is in force immediately before commencement day, is taken to continue in force on the same terms and conditions as if it had been issued under new section 48;
- an authorisation made under section 48, that was in force immediately before commencement day, is taken to continue in force on the same terms and conditions as if it had been issued made new section 48A and remains in force for 10 years thereafter;
- a licence issued under section 53, that was in force immediately before commencement day, is taken to continue in force on the same terms and conditions as if it had been issued under new section 53;

- an authorisation made by Order under section 53, that was in force immediately before commencement day, is taken to continue in force on the same terms and conditions as if it had been made under new section 53A and remains in force for 10 years thereafter.

Clause 44 provides for the repeal of Schedules 1, 2 and 3 to the Principal Act as they are redundant.

Part 3—Consequential amendments to other Acts

Clause 45 amends the **Catchment and Land Protection Act 1994** by—

- substituting "taxon or community of flora listed in an Order" with "taxon of flora or community of flora specified in the Threatened List" in section 59(1) of the **Catchment and Land Protection Act 1994**; and
- substituting "taxon or community of fauna listed in an Order" with "taxon of fauna or community of fauna specified in the Threatened List" in section 59(3)(a) of the **Catchment and Land Protection Act 1994**.

The changes reflect the new terminology and listing methodology adopted in the amending Act.

Clause 46 amends Schedule 1 to the **Climate Change Act 2017**. Section 17 of the **Climate Change Act 2017** states that a person making a decision under a provision in Schedule 1 is required to have regard to the potential impacts of climate change, with Schedule 1 including items under the Principal Act. Schedule 1 has been amended to—

- replace references to Flora and Fauna Guarantee Strategy's with Biodiversity Strategy; and
- replace references to interim conservation order with habitat conservation order.

Clause 47 amends the **Commissioner for Environmental Sustainability Act 2003** by inserting a new provision 8(db) before section 8(e) of the **Commissioner for Environmental Sustainability Act 2003**, which enables the independent review of a Biodiversity Strategy by the Commissioner for Environmental Sustainability.

Clause 48 amends Schedule 1 to the **Confiscation Act 1997** to make reference to the new category of "restricted use protected flora" and include new offences being section 47A, 47B, 47C and 52A.

Clause 49 amends the **Fisheries Act 1995** to align with language used in the amending Act by—

- referring to a licence as well as a permit under the Principal Act in section 71(2) of the **Fisheries Act 1995**;
- substituting "of flora and fauna" with "of flora or fauna" in section 71(2) of the **Fisheries Act 1995**;
- inserting "of flora or fauna" after "community" in section 73(2)(a) of the **Fisheries Act 1995**;
- inserting "of flora or fauna" after "community" in section 75(2)(c) of the **Fisheries Act 1995**.

Clause 50 amends section 3 of the **Game Management Authority Act 2014** by substituting "any list made" with "the Threatened List" in the definition of ***threatened wildlife***.

Clause 51 amends the **Major Transport Projects Facilitation Act 2009** by—

- substituting "section 40" with "section 35" in section 87(1) and (2) of the **Major Transport Projects Facilitation Act 2009**;
- substituting "Permit under section 40" with "Permit under section 35"; and
- substituting section "Licence under section 53(1) to take and keep fish" with "Licence or permit under section 53(1) to take, trade in or keep listed fish".

Clause 52 amends the definition of ***low impact exploration*** in clause 1 of Schedule 4A to the **Mineral Resources (Sustainable Development) Act 1990**, ensuring that relevant references made to flora and fauna are consistent with the language used by, and correspond correctly to relevant sections of, the amending Act.

Clause 53 amends the **Victorian Civil and Administrative Tribunal Act 1998** by substituting references to "section 41" with "section 36" in section 52(4) and Schedule 1.

Clause 54 amends section 3(1) of the **Wildlife Act 1975** by substituting "any list made" with "the Threatened List" in the definition of ***threatened wildlife***.

Clause 55 amends section 37 of the **Environment Protection Amendment Act 2018** to ensure that certain anticipated amendments to the **Flora and Fauna Guarantee Act 1988** are correctly made to that Act following the making of this Act.

Part 4—Repeal of this Act

Clause 56 provides for the repeal of this Act on 1 June 2021. The repeal of this Act does not affect the continuing operation of the amendments made by this Act (see section 15(1) of the **Interpretation of Legislation Act 1984**).