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**PARIS AT THE SUB-NATIONAL SCALE? AN
EXPLORATION OF THE ROLE AND POTENTIAL OF
FRAMEWORK CLIMATE CHANGE LAWS**

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Framework climate laws are being introduced around the world at the national and sub-national scale to set greenhouse gas emissions reduction targets and coordinate climate change mitigation activities to meet those targets. Drawing on a 2020 empirical study, this article analyses the legal design and early implementation of an Australian example: the Climate Change Act 2017 (Vic). The Victorian case study informs a discussion of the role that such laws can play in supporting the realisation of the climate change mitigation goals of the international Paris Agreement. The article explores the promise and the challenges of using framework legislation to align domestic emissions reduction activities to Paris Agreement temperature goals. It demonstrates the potential, but also the pitfalls, of the bottom-up, facilitatory regulatory approach employed in Victoria, which is similar to many other framework laws and the core emissions reduction mechanisms of the Paris Agreement itself. Cross-referencing recent experience in comparative jurisdictions, the article highlights lessons for the legal design and implementation of effective, impactful framework climate change laws.

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I INTRODUCTION

Framework climate change laws are emerging in many jurisdictions around the world as tools to support the implementation of the international *Paris Agreement*¹ under the *United Nations Framework Convention on Climate Change* ('UNFCCC').² The central goals of the *Paris Agreement*, to which Australia is a party, are to hold global average temperature rise to 'well below 2°C above pre-industrial temperatures', and to pursue efforts to limit temperature rise to no more than 1.5°C, so as to significantly reduce the risks and impacts of climate change.³ In order to achieve this 'long-term temperature goal', the *Paris Agreement* provides that parties should aim to

reach global peaking of greenhouse gas emissions as soon as possible ... and to undertake rapid reductions thereafter ... so as to achieve a balance between

¹ *Paris Agreement under the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) ('*Paris Agreement*').

² *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1998, 1771 UNTS 107 (entered into force 21 March 1994). See, eg, Eloise Scotford and Stephen Minas, 'Probing the Hidden Depths of Climate Law: Analysing National Climate Change Legislation' (2019) 28(1) *Review of European, Comparative & International Environmental Law* 67, 75–6; Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the World* (Web Page) <<https://climate-laws.org>>; Ecologic Institute, *Climate Laws in Europe: Good Practices in Net-Zero Management* (Report, February 2020) 8 ('*Climate Laws in Europe*'); Thomas L Muinzer, 'Introduction' in Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020) 1, 1 ('Introduction'); Alina Averchenkova, Sam Fankhauser and Michal Nachmany, 'Introduction' in Alina Averchenkova, Sam Fankhauser and Michal Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017) 1, 3, 7.

³ *Paris Agreement* (n 1) art 2(1)(a). This objective is referred to in the agreement as the 'long-term temperature goal': at art 4(1).

anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century,⁴

an objective commonly interpreted as requiring net zero emissions globally in the second half of the century.⁵

Unlike previous international climate change accords, such as the *Kyoto Protocol*,⁶ the *Paris Agreement* contains no specific legal obligations for states to commit to or to achieve a certain level of emissions reductions.⁷ Instead, there is heavy reliance on procedural obligations and transparency measures to drive parties to nominate emissions reduction objectives that are a sufficiently ambitious and fair contribution towards the global temperature goals, and to hold parties accountable for delivering on these objectives.⁸ Parties must prepare, communicate and maintain nationally determined contributions ('NDCs') which outline domestic measures to reduce emissions every five years,⁹ and report regularly on their implementation.¹⁰ Therefore, the *Paris Agreement* represents a shift in the international climate regime

from a 'regulatory' model of binding, negotiated emissions targets to a 'catalytic and facilitative' model that seeks to create conditions under which actors progressively reduce their emissions through coordinated policy shifts.¹¹

⁴ Ibid art 4(1).

⁵ See, eg, Heleen L van Soest, Michel GJ den Elzen and Detlef P van Vuuren, 'Net-Zero Emissions Targets for Major Emitting Countries Consistent with the Paris Agreement' (2021) 12(1) *Nature Communications* 1, 2.

⁶ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005). See, eg, at art 2(1).

⁷ See Matthias Duwe and Ralph Bodle, "'Paris Compatible" Climate Change Acts? National Framework Legislation in an International World' in Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020) 43, 50–1.

⁸ See Myele Rouxel, 'The Paris Rulebook's Rules on Transparency: A Compliance Pull?' (2020) 14(1) *Carbon & Climate Law Review* 18, 18–19, 26–32.

⁹ *Paris Agreement* (n 1) arts 4(2), (9). Article 4(3) specifically provides that each successive NDC should represent a progression on the previous NDC, and should reflect the 'highest possible ambition'.

¹⁰ Article 13 sets out the transparency framework, which includes reporting obligations for parties and technical expert review: *ibid* arts 13(7), (11)–(12).

¹¹ Thomas Hale, "'All Hands on Deck": The Paris Agreement and Nonstate Climate Action' (2016) 16(3) *Global Environmental Politics* 12, 12. See also Duwe and Bodle (n 7) 50–2; Robert Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92(5) *International Affairs* 1107, 1107–8, 1114–15; Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying

Although framework climate laws around the world are not uniform in their legal design, a general regulatory approach is emerging which is similar to the core emissions reduction mechanisms of the *Paris Agreement*.¹² These laws typically set a long-term greenhouse gas ('GHG') emissions reduction target ('ERT'), and many laws now provide for the alignment of domestic emissions reductions with the *Paris Agreement's* global temperature or net zero goals. Framework laws then establish procedural obligations for governments, intended to facilitate and coordinate action towards these long-term goals. These include obligations to set interim targets and develop associated policy measures. Direct measures to deliver emissions reductions, such as carbon taxes or regulatory standards for emissions-intensive activities, are generally not included in framework legislation itself,¹³ but the processes by which these more direct measures are to be articulated, monitored, evaluated and revised compose the 'framework' laid out by the law.¹⁴ Similarly to the *Paris Agreement*, transparency measures, such as regular progress-monitoring and -reporting, are used to promote accountability and support effective implementation.

While framework climate laws have been introduced predominantly at the national scale (at which international obligations under the *Paris Agreement* sit), there are also examples, such as the *Climate Change Act 2017* (Vic) ('*Victorian Act*'), emerging at a sub-national scale.¹⁵ The role of non-state actors such as sub-national governments in addressing climate change is explicitly recognised in the *Paris Agreement*,¹⁶ and these actors have significant potential

Politics' (2016) 65(2) *International and Comparative Law Quarterly* 493, 501; Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110(2) *American Journal of International Law* 288, 289, 300–2, 316 ('The Paris Climate Change Agreement'); Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) 6 (1–2) *Climate Law* 1, 2–5, 20.

¹² See generally *Climate Laws in Europe* (n 2); Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020) ('*National Climate Change Acts*'); Alina Averchenkova, Sam Fankhauser and Michal Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017).

¹³ Noting that some framework laws do include sectoral measures such as carbon taxes and emissions performance standards: see *Climate Laws in Europe* (n 2) 23–6.

¹⁴ Michael Bennett, 'The Role of National Framework Legislation in Implementing Australia's Emission Reduction Commitments under the Paris Agreement' (2018) 43(1) *University of Western Australia Law Review* 240, 251–2.

¹⁵ The United States, in particular, provides multiple examples of sub-national action. For an overview, see generally Vicki Arroyo, 'From Paris to Pittsburgh: US State and Local Leadership in an Era of Trump' (2019) 31(3) *Georgetown Environmental Law Review* 433.

¹⁶ *Paris Agreement* (n 1) art 11(2).

to contribute to the achievement of NDCs.¹⁷ Climate law and policy at the sub-national scale make particular sense in a federated jurisdiction like Australia, where state governments have considerable power and influence over key sectors such as energy, transport, agriculture and industry that are central to reducing GHG emissions.¹⁸ However, the emergence of framework climate laws like the *Victorian Act*, alongside ambitious climate policy commitments in other state and territory jurisdictions,¹⁹ also represents an attempt to drive a Paris-aligned climate policy agenda at the sub-national scale in a situation where there is currently no national framework legislation to coordinate

¹⁷ Angel Hsu et al, 'Exploring Links between National Climate Strategies and Non-State and Subnational Climate Action in Nationally Determined Contributions (NDCs)' (2020) 20(4) *Climate Policy* 443, 443–5.

¹⁸ See Anne Kallies, 'The Australian Energy Transition as a Federalism Challenge: (Un)cooperative Energy Federalism?' (2021) 10(2) *Transnational Environmental Law* 211, 216–19, 227–33.

¹⁹ For example, New South Wales has committed to the net zero by 2050 target, but has not enacted a framework climate law: see Office of Environment and Heritage (NSW), 'Achieving Net-Zero Emissions by 2050' (Fact Sheet) 1 <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Climate-change/achieving-net-zero-emissions-by-2050-fact-sheet-160604.pdf>>, archived at <<https://perma.cc/5TD8-SGV8>>. Framework climate laws are, however, in place in South Australia, Tasmania and the Australian Capital Territory (as well as Victoria), although not all of these have a long-term target of net zero. These laws also differ in their legal design and comprehensiveness: see *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) ('ACT Act'); *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA) ('SA Act'); *Climate Change (State Action) Act 2008* (Tas) ('Tas Act').

climate change mitigation,²⁰ and existing national climate law and policy have to date not been well aligned with *Paris* temperature goals.²¹

²⁰ Climate law in Australia and elsewhere is a dynamic area of law. Please note that this article describes the law as at October 2021. At that time, there was an independent member's Bill for a comprehensive framework climate law before the Australian Parliament: Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 (Cth) ('Climate Change Bill'). Introduced by independent MP Zali Steggall, the Bill was referred in November 2020 to the House Standing Committee on the Environment and Energy for review and report: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 2020, 9436 (Tony Smith, Speaker). Neither major party supported the Bill and the Committee recommended that it not be passed: see House of Representatives Standing Committee on the Environment and Energy, Parliament of Australia, *Advisory Report on the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 and Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020* (Report, June 2021) 66. The Bill was reintroduced to Parliament on 18 October 2021: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 2021, 9416–17 (Zali Steggall), discussing Climate Change (National Framework for Adaptation and Mitigation) Bill 2021 (Cth). The new Bill lapsed with the dissolution of the 46th Parliament: 'Climate Change (National Framework for Adaptation and Mitigation) Bill 2021', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6780>, archived at <<https://perma.cc/4EXT-4Z4P>>. In May 2022, there was a change of government at the federal level, with the incoming Albanese Labor Government signalling a considerable shift in climate policy: Smriti Mallapaty, 'Australians Vote for Stronger Climate Action', *Nature* (Web Page, 23 May 2022) <<https://www.nature.com/articles/d41586-022-01445-0>>, archived at <<https://perma.cc/GY9Q-KY5Y>>.

²¹ Australia's previous (until June 2022) NDC, with its target of reducing emissions by 26–8 per cent below 2005 levels by 2030 and its lack of comprehensive policies — such as an emissions trading scheme ('ETS'), carbon price or direct regulatory initiatives to drive emissions reduction — has been assessed as low and unambitious compared to other Western jurisdictions: see, eg, 'Australia: Country Summary' *Climate Action Tracker* (Web Page, 15 September 2021) <<https://climateactiontracker.org/countries/australia>>, archived at <<https://perma.cc/6QRZ-KCMP>>; 'Australia', *Climate Change Performance Index* (Web Page, 3 December 2021) <<https://ccpi.org/country/aus>>, archived at <<https://perma.cc/NC32-XR2B>>, which ranks Australia's performance as 'very low', in the bottom six of the 62 countries ranked. More generally, see United Nations Environment Programme, *Emissions Gap Report 2020: Executive Summary* (Report, 2020). A comprehensive law and policy package called the Clean Energy Futures Package, introduced by the Gillard Labor government in 2011, did include an ETS and a range of other climate governance initiatives, but was subsequently repealed by an incoming conservative government: see Australian Panel of Experts on Environmental Law, *Climate Law* (Technical Paper No 5, April 2017) 10. In October 2021, the federal government announced a net zero by 2050 target and released an accompanying emissions reduction strategy with a focus on government investment in low-emissions technology. However, there were no changes made to the 2030 target: Department of Industry, Science, Energy and Resources (Cth), *Australia's Long-Term Emissions Reduction Plan: A Whole-of-Economy Plan to Achieve Net Zero Emissions by 2050* (2021) 10–11, 15, 24, 101 ('Australia's Long-Term Emissions Reduction Plan'). On 16 June 2022, the new federal government submitted an updated NDC to the UNFCCC, committing to 43 per cent below 2005 levels by 2030: Department of Industry, Science, Energy and Resources (Cth), *Australia's Nationally Determined Contribution Communication* (2022) 3.

Drawing on an empirical study conducted in 2020, this article presents an analysis of the legal design and early implementation of the *Victorian Act*. The analysis focuses on two key features of the *Victorian Act*: the approach taken to align target-setting with the *Paris* temperature or net zero goals; and the adoption of a facilitatory, bottom-up regulatory approach with heavy reliance on transparency measures to drive implementation and accountability. Both have important implications for the effectiveness of framework laws in supporting the implementation of the *Paris Agreement*. For national and sub-national governments alike, ‘*Paris*-alignment’ is generally taken to mean setting long-term and nearer-term ERTs based on global emissions budgets for keeping warming within the ‘safe’ parameters articulated by the *Paris* temperature goals.²² Yet transposing the collective global temperature goals to targets or emissions budgets at a disaggregated, national or sub-national level is highly contested and complex.²³ Further, while the facilitatory regulatory approach taken in the *Paris Agreement* reflects the political compromise between nation states that was necessary to move international climate action forward on the basis of some level of consensus,²⁴ there remains considerable risk that state parties will not make adequate and fair commitments to achieving temperature

²² A global emissions budget is an estimate of the total cumulative amount of GHG that could be emitted consistently with a certain likelihood of keeping global temperature rise within a set limit above pre-industrial levels by 2100 (eg, 1.5°C or 2°C): see Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Report, 2018) 24 (‘*IPCC Special Report on Global Warming of 1.5°C*’).

²³ See generally Yann Robiou du Pont et al, ‘Equitable Mitigation to Achieve the Paris Agreement Goals’ (2017) 7(1) *Nature Climate Change* 38; Xunzhang Pan et al, ‘Exploring Fair and Ambitious Mitigation Contributions under the Paris Agreement Goals’ (2017) 74 *Environmental Science and Policy* 49; van Soest, den Elzen and van Vuuren (n 5). For an overview of approaches to determining a fair level of contribution to the global effort, see ‘Comparability of Effort’, *Climate Action Tracker* (Web Page) <<https://climateactiontracker.org/methodology/comparability-of-effort>>, archived at <<https://perma.cc/6VN6-4GFL>>.

²⁴ As Matthias Duwe and Ralph Bodle explain,

[o]verall, the *Paris Agreement* represents a shift to a collective approach that is based on national planning and policies ... and international transparency obligations, and that relies on peer pressure and public pressure to safeguard ambition. This was the trade-off for getting developing states on board to take on binding obligations on a par with developed country parties.

Duwe and Bodle (n 7) 48–9. See also Falkner (n 11) 1117; Rajamani (n 11) 498; Bodansky, ‘The Paris Climate Change Agreement’ (n 11) 289; Doelle (n 11) 14.

goals, and will fall short in their implementation of them.²⁵ Therefore, at the domestic scale, and perhaps even more so at the sub-national scale, it is useful to evaluate whether such a regulatory approach is in fact effective in supporting implementation of the *Paris Agreement*.

With the *Paris Agreement* now more than five years old, it is timely to reflect on the role that framework climate laws are playing in its implementation. It is also now possible to use empirical evidence of the early implementation of framework laws such as the *Victorian Act* to test the assumptions underpinning their legal design and explore options to strengthen and improve them. As the third-largest state contributor to Australia's GHG emissions, with an emissions-intensive (brown-coal-dominated) energy sector,²⁶ Victoria has the potential to make a substantial contribution to Australia's overall emissions reduction efforts. Further, while there are other Australian state and territory jurisdictions with framework climate laws,²⁷ the *Victorian Act* is one of the most established and comprehensive. Victoria, therefore, provides a useful case study from which to draw insights that may be relevant to comparable jurisdictions and to the development of framework laws more generally. Therefore, this article contributes important, practical insights to the climate law literature.²⁸ In light

²⁵ For a critique of the heavy reliance on *ex ante* transparency measures as compliance tools within the *Paris Agreement* (n 1), see Rouxel (n 8) 32–9. See generally Lavanya Rajamani and Jacob Werksman, 'The Legal Character and Operational Relevance of the Paris Agreement's Temperature Goal' (2018) 376(2119) *Philosophical Transactions of the Royal Society A* 1; Alexander Zahar, 'A Bottom-Up Compliance Mechanism for the Paris Agreement' (2017) 1(1) *Chinese Journal of Environmental Law* 69; Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25(2) *Review of European Community & International Environmental Law* 142.

²⁶ Department of Environment, Land, Water and Planning (Vic), *Victorian Greenhouse Gas Emissions Report 2019* (Report, 2019) 8, 14–17 ('*DELWP GHG Report 2019*').

²⁷ *ACT Act* (n 19); *SA Act* (n 19); *Tas Act* (n 19).

²⁸ This includes literature exploring the development of climate law and its emergence as a distinct body of law: see, eg, Scotford and Minas (n 2); Grantham Research Institute on Climate Change and the Environment (n 2); *Climate Laws in Europe* (n 2); Muinzer (ed), *National Climate Change Acts* (n 12); Averchenkova, Fankhauser and Nachmany (eds), *Trends in Climate Change Legislation* (n 12). It also includes literature exploring different scales of climate law and regulation and the role of various sub-national and non-state actors: see, eg, Thijs Etty et al, 'Transnational Climate Law' (2018) 7(2) *Transnational Environmental Law* 191; Sander Chan, Clara Brandi and Steffan Bauer, 'Aligning Transnational Climate Action with International Climate Governance: The Road from Paris' (2016) 25(2) *Review of European Community & International Environmental Law* 238; Hale (n 11). The consideration of enforceability of framework climate laws in this article also contributes to the literature on climate justice and accountability: see, eg, Fergus Green, 'The Normative Foundations of Climate Legislation' in Alina Averchenkova, Sam Fankhauser and Michal Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017) 85; Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot' (Policy Report,

of recent proposals to introduce a framework climate law at the national level in Australia,²⁹ and the climate policy commitments of other state and territory governments,³⁰ such an analysis can also usefully inform future discussions about the development of new framework laws and the reform of existing laws at both the sub-national and national scale in Australia.

Part II introduces the *Victorian Act*, situating this legislation within the broader context of framework climate laws emerging around the world and exploring the approach taken to translating *Paris Agreement* objectives and regulatory approaches into legislation at the sub-national scale. Part III presents the empirical study of the early implementation of the *Victorian Act*. This provides useful insights into the role that framework laws can play in supporting the implementation of the *Paris Agreement*. It highlights the promise, but also the challenges, of using a framework law to align domestic climate action with the *Paris Agreement* goals, particularly at the sub-national scale in the Australian context. It also underscores the potential risks and pitfalls of framework legislation which is closely modelled on the facilitatory, bottom-up regulatory approach of the *Paris Agreement*. Drawing on these findings, and also on emerging discussions about developing, implementing and enforcing climate laws in other jurisdictions, Part IV synthesises lessons for the legal design and implementation of effective framework climate legislation, and Part V concludes.

II THE CLIMATE CHANGE ACT 2017 (VIC)

Victoria first introduced climate change legislation — the *Climate Change Act 2010* (Vic) (*‘2010 Victorian Act’*) — under a Labor government in 2010.³¹ However, typical of the partisan nature of climate policy in Australia in recent years,³² the emissions reduction measures contained in this legislation were

Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy, July 2019); Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015); Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘Shaping the “Next Generation” of Climate Change Litigation in Australia’ (2017) 41(2) *Melbourne University Law Review* 793.

²⁹ See above n 20.

³⁰ Office of Environment and Heritage (NSW) (n 19); *ACT Act* (n 19); *SA Act* (n 19); *Tas Act* (n 19).

³¹ Lynne Williams, Department of Premier and Cabinet (Vic), *Review of the Climate Change Act 2010* (December 2011) 1.

³² See Kallies (n 18) 229–30.

substantially undone by an incoming Coalition government in 2012.³³ In the lead-up to the 2014 State election, the Labor Party committed to ‘reinstat[ing] Victoria as a leader in climate change action.’³⁴ Drawing on the recommendations of a comprehensive independent review of the 2010 Act undertaken in 2015,³⁵ the Andrews Labor government introduced the *Victorian Act*.

The *Victorian Act* was therefore legislated just over a year after the global commitment to address climate change through the *Paris Agreement*. This generated considerable momentum and legitimacy both for its objectives and for its regulatory approach. The *Victorian Act* was framed as a ‘a world-leading legislative framework’ to address climate change, and a commitment by the Victorian government to play its part in global efforts to limit warming to 1.5–2°C in line with the temperature goals of the *Paris Agreement*.³⁶ In the context of renewed global commitment, and a perceived failure of the federal government to take sufficiently ambitious action to reduce emissions, it was designed as a model for action at the sub-national scale that was consistent with international goals.³⁷ Its legal architecture was informed by the emerging body of framework climate laws around the world, including the United Kingdom’s (‘UK’s’) pioneering *Climate Change Act 2008* (UK) (‘UK Act’), as well as the facilitatory regulatory approach taken to the core emissions reduction obligations under the *Paris Agreement* itself.³⁸

The below discussion introduces central features of the *Victorian Act* — the emissions reduction mechanisms and accountability provisions — and

³³ Ibid. An independent review of the *Climate Change Act 2010* (Vic) (‘2010 Victorian Act’) was triggered in 2011 when the Commonwealth government introduced the Clean Energy Futures Package, which included the carbon pricing mechanism. This review recommended the repeal of the State’s ERT to preserve the efficiency of the Commonwealth scheme: *Review of the Climate Change Act 2010* (n 31) ix, 44. The Baillieu Coalition government subsequently repealed the ERT, removed the policy objectives from the *2010 Victorian Act* (n 33) and modified reporting requirements (among other relatively minor amendments) in the *Climate Change and Environment Protection Amendment Act 2012* (Vic) ss 4, 7 (‘2012 Amendments’).

³⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 23 November 2016, 4549 (Lily D’Ambrosio) (‘*Climate Change Bill Second Reading Speech*’). See also Victorian Labor Party, *Platform 2014* (Policy Platform, May 2014) 80.

³⁵ Martijn Wilder, Anna Skarbek and Rosemary Lyster, *Independent Review of the Climate Change Act 2010* (Report, December 2015) (‘*Independent Review Report*’).

³⁶ *Climate Change Bill Second Reading Speech* (n 34) 4549 (Lily D’Ambrosio).

³⁷ Ibid. See also Alannah Calabro, Stephanie Niall and Anna Skarbek, ‘The Victorian Climate Change Act: A Model’ (2018) 92(10) *Australian Law Journal* 814, 816–17.

³⁸ *Independent Review Report* (n 35) 13. See also Calabro, Niall and Skarbek (n 37) 816–17.

discusses the assumptions underpinning its regulatory approach.³⁹ This discussion situates the *Victorian Act* as an example of a developing category of climate framework legislation and explores parallels to the regulatory approach of the *Paris Agreement*.

A Emissions Reduction Mechanisms

Like many other framework climate laws, the apex objective of the *Victorian Act* is reflected in a long-term ERT.⁴⁰ Aligning with art 4(1) of the *Paris Agreement*, the Act sets a target of net zero emissions by 2050.⁴¹ While no explicit reference is made in the active provisions of the legislation to the 1.5°C or 2°C *Paris* temperature goals, in the Preamble and in the second reading speech to Parliament it is made clear that this legislation is intended to align Victoria's climate action with these goals and support Australia's contribution to their realisation.⁴²

Provision for interim targets to define the trajectory to net zero is increasingly recognised as good practice in framework laws, to 'guide this process [of reducing emissions towards the long-term ERT] from one year to the next',⁴³ to encourage early and consistent emissions reductions over time, and to help keep track of progress.⁴⁴ Some framework laws use an emissions 'budget' approach to establish the parameters and short-term objectives for emissions reduction,⁴⁵ which serve a similar purpose to interim targets. Under the *Victorian Act*, interim targets must be determined by the Premier and the Minister responsible for the Act — currently the Minister for Energy, Environment and Climate Change ('the Minister') — for five-year periods commencing in 2021,⁴⁶ using 2005 as the baseline year.⁴⁷ The Minister is

³⁹ The Act also includes provisions on adaptation, mainstreaming climate change considerations in decision-making, and carbon sequestration: *Climate Change Act 2017* (Vic) pts 3, 7–8 ('*Victorian Act*'). However, in accordance with the scope of the original study, this analysis focuses only on the emissions reduction mechanisms of the Act.

⁴⁰ See *Climate Laws in Europe* (n 2) 18–21.

⁴¹ *Victorian Act* (n 39) s 6(1).

⁴² *Ibid* Preamble; *Climate Change Bill Second Reading Speech* (n 34) 4549 (Lily D'Ambrosio).

⁴³ Sarah Louise Nash and Reinhard Steurer, 'Taking Stock of Climate Change Acts in Europe: Living Policy Processes or Symbolic Gestures?' (2019) 19(8) *Climate Policy* 1052, 1061. See also at 1053.

⁴⁴ *Independent Review Report* (n 35) 95–6.

⁴⁵ See, eg, *Climate Change Act 2008* (UK) s 4 ('*UK Act*').

⁴⁶ *Victorian Act* (n 39) s 10.

⁴⁷ *Ibid* s 11. With the exception of the first two periods, interim emissions targets must be set more than seven years in advance of the start of the target period: at ss 10(4)–(6).

required to obtain expert advice to inform the determination of the targets, which must take into account a range of considerations including the long-term ERT, climate science, economic, social and environmental circumstances, progress towards the achievement of targets, and national and global action to reduce emissions.⁴⁸ In setting interim targets, the Premier and the Minister must consider the expert advice,⁴⁹ the long-term ERT, the policy objectives and guiding principles in the Act,⁵⁰ and any relevant annual GHG emissions reports.⁵¹ There is an explicit requirement that ‘each interim emissions reduction target [constitute] a greater reduction in greenhouse gas emissions than any previous interim emissions reduction target.’⁵²

Climate framework laws also typically include a requirement for government to develop policies and programs to deliver the ERTs.⁵³ In Victoria, the primary mechanism to deliver on the interim targets is a sector-based pledging system.⁵⁴ This is designed to spread responsibility and accountability for climate change action across government, strengthen coordination of the mitigation effort required to achieve interim targets, and integrate climate change into decision-making across different policy areas.⁵⁵ It is through these pledges that commitments to introduce, expand on, or reform direct policy measures — such as regulatory standards for emissions-intensive activities or economic incentives for emissions reduction or clean energy uptake — are to be articulated. The *Victorian Act* requires the development of ‘pledges’ that outline government actions ‘that are reasonably expected to contribute to the reduction of greenhouse gas emissions’ and must include ‘a reasonable estimate’ of the expected reductions to be achieved across sectors of the Victorian economy over five-year periods beginning in 2021.⁵⁶ It also provides for a

⁴⁸ *Ibid* ss 12(1), (3).

⁴⁹ *Ibid* s 14(1)(b).

⁵⁰ *Ibid* ss 14(1)(a), (c)–(d). The policy objectives laid out in the Act include: reducing emissions consistently with long-term and interim ERTs; building resilience of infrastructure, built environment and communities; promoting resilience of natural resources, ecosystems and biodiversity; promoting and supporting regions, industries and communities to transition to a net zero economy; and supporting vulnerable communities and promoting social justice and intergenerational equity: at s 22. The guiding principles laid out in the Act include: informed decision-making; integrated decision-making; risk management; equity; community engagement; and compatibility: at ss 23–8.

⁵¹ *Ibid* s 14(1)(e).

⁵² *Ibid* s 14(2).

⁵³ *Climate Laws in Europe* (n 2) 14, 22–7.

⁵⁴ *Victorian Act* (n 39) pt 5 div 3.

⁵⁵ *Independent Review Report* (n 35) 99–100; Calabro, Niall and Skarbek (n 37) 818.

⁵⁶ *Victorian Act* (n 39) s 44. See also at ss 41, 43.

whole-of-government pledge to reduce emissions from government operations and activities.⁵⁷ The Minister may nominate other Ministers to be responsible for preparing a sector pledge for a prescribed category of emissions.⁵⁸ The pledges are to be included in a climate change strategy prepared every five years.⁵⁹ Beyond this, little detail is provided on the form that the pledges should take, or on the process for their development.⁶⁰ There is no explicit requirement that pledged emissions reductions add up to the interim targets for a particular time period.

In many ways the procedural obligations of the *Victorian Act*, to set interim targets and develop pledges along a pathway to the long-term ERT, reflect the regulatory approach of the *Paris Agreement*. While quantified targets are not compulsory in NDCs under the *Paris Agreement*,⁶¹ they are discussed in UNFCCC resolutions as useful and appropriate means of providing ‘clarity, transparency and understanding’⁶² and are commonly included.⁶³ NDCs, like interim targets, cover a period of five years,⁶⁴ and many countries, including Australia, have included ERTs for 2025 or 2030 in their NDC submissions in the lead-up to the next meeting of the parties in late 2021.⁶⁵ Both NDCs and interim targets under the *Victorian Act* must become more ambitious over time.⁶⁶ Even more so than interim targets, the sector-pledging process reflects

⁵⁷ *Ibid* ss 41–2.

⁵⁸ *Ibid* s 45(1).

⁵⁹ *Ibid* ss 29, 30(4).

⁶⁰ Section 44(2) of the *Victorian Act* (n 39) provides that in preparing a sector pledge, the nominated Minister must consider the policy objectives, guiding principles and any independent advice obtained under s 12. They may also consider any annual GHG emissions report: at s 44(3).

⁶¹ Article 4(4) of the *Paris Agreement* (n 1) provides that

[d]eveloped country Parties *should* continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties ... are encouraged to move over time towards economy-wide emission reduction or limitation targets ...

(emphasis added).

⁶² *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018*, UN Doc FCCC/PA/CMA/2018/3/Add.1 (19 March 2019) 7 [9], annex I.

⁶³ Gregory Briner and Sara Moarif, ‘Enhancing Transparency of Climate Change Mitigation under the Paris Agreement: Lessons from Experience’ (Organisation for Economic Co-Operation and Development and International Energy Agency Climate Change Expert Group Paper No 2016(4), October 2016) 11–12.

⁶⁴ *Paris Agreement* (n 1) art 4(9).

⁶⁵ *Nationally Determined Contributions under the Paris Agreement*, UN Doc FCCC/PA/CMA/2021/2 (26 February 2021) 13 [70]–[71]. See also *Australia’s Long-Term Emissions Reduction Plan* (n 21) 11.

⁶⁶ *Victorian Act* (n 39) s 14(2). See also *Paris Agreement* (n 1) art 4(3).

the *Paris Agreement's* approach of requiring signatories to put forward NDCs to be achieved through 'domestic mitigation measures' (effectively, bottom-up pledges).⁶⁷

B Accountability Mechanisms

Framework laws typically impose procedural obligations on governments rather than creating any direct legal obligations for industries, corporations or individuals.⁶⁸ Democratic accountability, transparency and public discourse are vital in holding government to account for its obligations under framework laws, as there are generally few, if any, formal sanctions for a failure to meet interim or long-term targets.⁶⁹

The *Victorian Act* includes a number of mechanisms to promote accountability. It assigns responsibility to specific Ministers for key functions: the Premier and the Minister are jointly responsible for achieving the long-term ERT,⁷⁰ determining the amount of GHG emissions attributable to the State,⁷¹ setting interim targets,⁷² and ensuring interim targets increase in ambition over time.⁷³ This situates ultimate responsibility for the implementation of the Act at the head of government. As noted above, the Minister can also assign responsibility for sectoral pledges to other Ministers.⁷⁴

The *Victorian Act* also establishes a transparency framework intended to allow for public and political accountability. The framework includes requirements to publish the interim targets,⁷⁵ including the expert advice received by the government to inform the targets;⁷⁶ the climate change strategy;⁷⁷ and pledges.⁷⁸ There are also provisions for regular progress-monitoring: public reporting on interim targets, including whether the target was achieved and an evaluation of the emissions reduction pledges and progress towards the long-

⁶⁷ *Paris Agreement* (n 1) art 4(2).

⁶⁸ See, eg, *Climate Laws in Europe* (n 2) 14, 18–21.

⁶⁹ Nash and Steurer (n 43) 1061.

⁷⁰ *Victorian Act* (n 39) s 8.

⁷¹ *Ibid* s 7.

⁷² *Ibid* s 10(1).

⁷³ *Ibid* s 14(2).

⁷⁴ *Ibid* s 45(1).

⁷⁵ *Ibid* s 15.

⁷⁶ *Ibid* s 13.

⁷⁷ *Ibid* s 33.

⁷⁸ *Ibid* ss 30(4), 33, 50(3).

term target, is required every five years.⁷⁹ A climate science report must be produced and published every five years, prior to the development of the climate change strategy and pledges,⁸⁰ as well as an annual GHG emissions report.⁸¹

These transparency provisions in the *Victorian Act* have clear analogues in the 'enhanced transparency framework' established under the *Paris Agreement*, also intended to 'build mutual trust and confidence and ... promote effective implementation.'⁸² Parties to the *Paris Agreement* are required to regularly 'account for' their NDCs,⁸³ and there is provision for a 'global stocktake' of commitments made under NDCs to measure their alignment with overarching temperature goals.⁸⁴ The timelines of the *Victorian Act* have also been designed to align with the timing of review cycles under the *Paris Agreement*,⁸⁵ creating the opportunity to easily translate progress in Victoria into a contribution on a global scale. Both the transparency framework of the Act and that of the *Paris Agreement* are designed and timed to support an 'ambition cycle' in which increasingly ambitious emissions reduction commitments are spurred on by the dissemination of information about progress and climate change risks and impacts.⁸⁶

Framework laws typically include provision for engagement with the public and with expert stakeholders to further promote accountability.⁸⁷ As noted above, independent expert advice is integral to the interim target-setting process under the *Victorian Act*, however there is no specification of the types of expertise required, nor the process to be followed in seeking expert advice.⁸⁸ Unlike several leading-practice framework laws in other jurisdictions, the Act does not provide for an independent advisory body on climate change to play

⁷⁹ Ibid ss 54–5.

⁸⁰ Ibid s 51. See, eg, Department of Environment, Land, Water and Planning (Vic), *Victoria's Climate Science* (Report, 2019).

⁸¹ Ibid s 52. See, eg, *DELWP GHG Report 2019* (n 26).

⁸² *Paris Agreement* (n 1) art 13(1).

⁸³ Ibid art 4(13). See generally Christina Hood and Carly Soo, 'Accounting for Mitigation Targets in Nationally Determined Contributions under the Paris Agreement' (Organisation for Economic Co-Operation and Development and International Energy Agency Climate Change Expert Group Paper No 2017(5), October 2017).

⁸⁴ *Paris Agreement* (n 1) art 14.

⁸⁵ *Independent Review Report* (n 35) 85–6.

⁸⁶ Rajamani and Werksman (n 25) 10.

⁸⁷ *Climate Laws in Europe* (n 2) 32–9.

⁸⁸ *Victorian Act* (n 39) s 12(1).

a continuous role in policy development or progress-monitoring.⁸⁹ Further, the only specific obligation for public consultation on mitigation activities, beyond a general '[p]rinciple of community engagement',⁹⁰ is a requirement to receive public submissions on a draft climate change strategy (which incorporates emissions reduction pledges) prior to finalisation.⁹¹

Claims of ambition or 'leadership'⁹² in reducing emissions through framework laws are premised on the assumption that the government will drive an ambitious agenda itself, or respond to public and political pressure to take strong action on climate change and achieve legislated targets. Given the flexibility that is typically embedded in their design and the emphasis on procedural requirements, progress in reducing emissions under framework laws is vulnerable to political lack of interest in, or opposition to, ambitious climate action.⁹³ Although more precise and more exigent procedural requirements can reduce these risks, the political will to act on climate change is seen as essential for framework legislation to be effective.⁹⁴

However, the significance of enacting commitments to targets and a cycle of action to reduce emissions in legislation rather than policy should not be understated.⁹⁵ Eloise Scotford and Stephen Minas argue that

legal frameworks within national systems present a legal and social *status quo*, reflecting deep-seated values ... and reflecting embedded practices and assumptions about social norms ...⁹⁶

Legislation plays an important role in signalling commitments to climate change action, internally to government, in the wider community or jurisdiction in which the legislation is enacted, and to other governments, sub-national or national. Legislation is also widely perceived to be more durable than policy commitments which may be amended or simply lapse with a change of government.⁹⁷ This can create a level of certainty about the trajectory

⁸⁹ For example, pt 2 of the *UK Act* (n 45) establishes the Committee on Climate Change with a wide range of advisory, monitoring and reporting functions.

⁹⁰ *Victorian Act* (n 39) s 27.

⁹¹ *Ibid* ss 32(b)–(d). The Minister may also make directions regarding consultation on emissions reduction pledges, but this is not a requirement under the Act: at ss 49(1), (2)(b).

⁹² *Climate Change Bill Second Reading Speech* (n 34) 4553 (Lily D'Ambrosio).

⁹³ Nash and Steurer (n 43) 1061.

⁹⁴ See Calabro, Niall and Skarbek (n 37) 818.

⁹⁵ The importance of legislation as opposed to policy was emphasised by several interviewees for this project: see Part III(B) below.

⁹⁶ Scotford and Minas (n 2) 68.

⁹⁷ Nash and Steurer (n 43) 1060–1.

of climate policy, which is crucial to developing and sustaining momentum for investment and other action to address climate change.⁹⁸ Of course, legislation is still vulnerable to changes in political currents, exemplified by the amendments to the original *2010 Victorian Act*.⁹⁹ However, the requirement for statutory amendments to pass through Parliament means changes are, at least in principle, subject to heightened levels of scrutiny compared to policy commitments.¹⁰⁰ In effect, 'legislation acts as a significant hurdle for policy roll-backs'¹⁰¹ because of its deeper institutional entrenchment, wider visibility and establishment of default policy settings that keep procedural wheels in motion unless they are actively challenged.

III EMPIRICAL INSIGHTS FROM VICTORIA

Having introduced the *Victorian Act* 'on paper', this Part presents an empirical study of the legal design and early implementation of the Act, focusing particularly on the value and challenges of aligning sub-national climate action with *Paris Agreement* goals and the effectiveness of the regulatory approach adopted.

A Research Method

A case study of the *Victorian Act* was prepared in 2020 as part of an analysis of framework climate laws around the world.¹⁰² This study gathered empirical evidence of the impact and effectiveness of these laws in two key areas —

⁹⁸ Calabro, Niall and Skarbek (n 37) 817. See also Alina Averchenkova, Sam Fankhauser and Jared J Finnegan, 'The Impact of Strategic Climate Legislation: Evidence from Expert Interviews on the UK Climate Change Act' (2021) 21(2) *Climate Policy* 251, 254.

⁹⁹ See generally *2012 Amendments* (n 33). See also *Review of the Climate Change Act 2010* (n 31).

¹⁰⁰ However, as Richard Macrory and Thomas L Muinzer note in relation to the *UK Act* (n 45),
one must not over-estimate its sense of permanence simply because it is expressed in law. Legislation is by its very nature impermanent, and the principle of *parliamentary sovereignty* in the UK means that current and subsequent parliaments are always at liberty to repeal it.

See Richard Macrory and Thomas L Muinzer, 'The UK's Climate Change Act' in Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020) 69, 87 (emphasis added).

¹⁰¹ *Climate Laws in Europe* (n 2) 12.

¹⁰² The Victorian case study was prepared as part of a broader project, led by UK-based public interest environmental lawyers ClientEarth, exploring the effectiveness and impact of substantive climate change laws at both a national and sub-national scale in six different jurisdictions: see ClientEarth, *Navigating Net-Zero: Global Lessons in Climate Law-Making* (Report, August 2021) 8–9, 19–20.

driving GHG emissions reductions and supporting positive political engagement on climate change.¹⁰³

The mixed-method, socio-legal research approach combined desktop analysis of the legislation and its key outputs (eg annual GHG emissions reports and independent expert advice on interim targets),¹⁰⁴ with targeted collection and analysis of qualitative and quantitative data.¹⁰⁵ The approach explicitly acknowledges that there are many legal, policy and political developments and measures at different scales that impact on emissions reductions and political engagement on climate change in Victoria and considers available evidence of the effectiveness and impact of the *Victorian Act* in this context.¹⁰⁶

The discussion here draws particularly on the desktop analysis and a program of qualitative research interviews with stakeholders closely involved in the development and implementation of the *Victorian Act*. Ten interviews involving 11 individuals were conducted via video conference in May, June and July 2020. Interview participants were selected on the basis of their expertise and experience working with the Act and comprised six Victorian government civil servants, one independent expert, three representatives of civil society and

¹⁰³ Ibid 23–4.

¹⁰⁴ The key outputs incorporated into the original study included: Department of Environment, Land, Water and Planning (Vic), *Victorian Greenhouse Gas Emissions Report 2018* (Report, 2018) ('DELWP GHG Report 2018'); *DELWP GHG Report 2019* (n 26); *Victoria's Climate Science* (n 80); *Interim Emissions Reduction Targets for Victoria (2021–2030)* (Final Report, March 2019) ('Independent Expert Panel Report').

¹⁰⁵ In addition to qualitative interviews described further in Parts III(B)–(C) below, quantitative data was also collected from a range of sources to explore and illustrate the impact of the *Victorian Act* (n 39) on emissions reduction and political engagement. For example, GHG emissions data (historical and projected) for Victoria, with comparison to other state jurisdictions, was used to gauge the signalling effect of the legislated long-term ERT. Quantitative data on the extent and nature of engagement with the Act in parliamentary member statements, political media releases and media coverage was used to help assess the Act's influence on political engagement on climate change in Victoria. The quantitative analysis is not reported in detail in this article.

¹⁰⁶ For the original study, the *Victorian Act* (n 39) was considered in the context of a timeline of significant events and drivers for emissions reduction and political engagement on climate change, and available evidence of its effectiveness and impact was interpreted in this context. In addition to key points in the development and implementation of the Act, this timeline included climate law and policy developments beyond the scope of the Act, at the international scale (eg *Paris Agreement* (n 1)), national scale (eg introduction and subsequent repeal of the Carbon Pricing Mechanism under the *Clean Energy Act 2011* (Cth)), and sub-national scale (eg *Renewable Energy (Jobs and Investment) Act 2017* (Vic)). It also included state and federal elections.

one expert observer.¹⁰⁷ While this was a small sample, participant selection was purposive and achieved good coverage of relevant stakeholders.¹⁰⁸

Using semi-structured, in-depth interviews to collect qualitative data is a method well suited to exploring and gaining insights about the development, implementation and effect of law and legal processes in practice, including from the perspectives of experts and stakeholders.¹⁰⁹ Participants were asked a range of questions about the implementation of the *Victorian Act*: whether the Act had helped to (or was likely to help) drive emissions reductions and/or support positive political engagement on climate change; and what aspects of the legal design and implementation were most effective in this respect. Interview transcripts were coded manually to identify themes and relevant observations.¹¹⁰ The interviews provided useful data both on the processes followed and actions taken under the legal framework to date, and on views and opinions from key stakeholders on its effectiveness and likely impact. This qualitative data was an important supplement to the desktop analysis, allowing for a richer observation of the practice of implementing a framework climate law. Where interview data is used in this analysis, relevant interviews are noted with a de-identified reference.

¹⁰⁷ Given timing and political sensitivities, it was not possible to recruit politicians and political advisers, nor was it possible to interview civil servants in departments and agencies beyond the lead implementation agency — the Department of Environment, Land, Water and Planning — and two other relevant departments. These additional perspectives would be valuable to any future consideration of the Act's implementation and effectiveness.

¹⁰⁸ See generally Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (SAGE Publications, 4th ed, 2015) 264–72; Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 933–5.

¹⁰⁹ See generally Webley (n 108) 933–5; Svend Brinkmann, 'Unstructured and Semi-Structured Interviewing' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press, 2014) 277.

¹¹⁰ The approach involved a qualitative content analysis of interview transcripts to identify themes and observations about practice. Interviews were reviewed and coded by three individual researchers using a high-level template to assist in identifying data relevant to the overarching research questions: see generally Webley (n 108) 940–5.

Table 1: Interview Reference Numbers

Role	Reference
Civil Servant (Current and Past) — Department of Environment, Land, Water and Planning	1, 7, 10
Civil Servant (Current) — Department of Health and Human Services; Department of Jobs, Precincts and Regions	4, 6
Independent Expert	5
Civil Society Representative	2, 3, 8
Expert Observer	9

Since the interviews were conducted in mid 2020, the first round of interim target-setting and pledge-making has been completed, albeit with some delay and deviation from the statutory timetable as a result of the global pandemic.¹¹¹ Analysis of the first climate change strategy and pledges developed under the *Victorian Act* has also been included below.

B *Aligning Sub-National Climate Action with Paris Goals*

The objective of ‘Paris-alignment’ is now widely invoked by national and sub-national governments in their climate policy commitments, including those made in framework laws like the *Victorian Act*.¹¹² The Victorian case study provides an example of how one jurisdiction has sought to transpose the global temperature goals of the *Paris Agreement* to the sub-national scale, and highlights a number of associated challenges.

Among interviewees, the legislated long-term ERT, linked to interim target-setting and planning processes, was seen as one of the key strengths of the *Victorian Act*:

The 2050 target is legislated in the Act ... and that’s been ... quite a critical part of setting the interim targets because there’s no choice. They have to get to [net] zero by that year and so they’ve got to work out how they’re going get there,

¹¹¹ Richard Willingham, ‘Business Leaders Call on Victorian Government to Set Interim Emissions Reduction Targets for 2025’ *ABC News* (online, 28 January 2021) <<https://www.abc.net.au/news/2021-01-28/victorian-government-interim-emissions-reduction-targets-climate/13099354>>, archived at <<https://perma.cc/XTC3-PFXC>>.

¹¹² See, eg, *Climate Change Bill Second Reading Speech* (n 34) 4549 (Lily D’Ambrosio).

rather than leaving the ultimate target up in the air and to be determined under regulations.¹¹³

The low ambition of federal-level emissions reduction targets and policy responses was noted by all participants, who argued that this context made state-level legislation like the *Victorian Act*, with its reference to *Paris* goals, especially important. Interviewees also emphasised the importance of the first phase of interim target-setting in settling and securing the Act and its policy agenda, and shaping the emissions trajectory at a critical timepoint:

It's really what we do in the next 10 or 15 years that matters. The [first] five-yearly targets are clearly the things that are going to have the most effect at shaping the trajectory.¹¹⁴

An independent expert panel ('Panel') was appointed under the Act to provide advice to the Victorian government on the 2021–25 and 2026–30 interim targets.¹¹⁵ Using an emissions budget approach to map an emissions reduction trajectory consistent with the long-term ERT, taking into account the *Paris* temperature goals, the Panel recommended interim targets in the range of 32–9 per cent below 2005 levels by 2025, and 45–60 per cent below 2005 levels by 2030.¹¹⁶ In estimating an emissions budget for Victoria, the Panel first relied on the previous work of the Commonwealth Climate Change Authority¹¹⁷ in determining Australia's 'fair share' of global emissions budgets aligned with *Paris* temperature goals,¹¹⁸ and then further extrapolated a share for Victoria, referring to a range of approaches to spread emissions reductions equitably between Australian states and territories.¹¹⁹ Interviewees noted the particular

¹¹³ Interview with Interviewee 3 (Anita Foerster, 15 June 2020) ('Interview 3').

¹¹⁴ Interview with Interviewee 2 (Anita Foerster and Alice Bleby, 12 June 2020) ('Interview 2'). See also Interview with Interviewee 1 (Anita Foerster and Alice Bleby, 12 June 2020) ('Interview 1').

¹¹⁵ Three people were appointed to the Panel with expertise in climate science, the energy sector, and politics: Dr Penny Whetton, Dr Lorraine Stephenson and the Hon Greg Combet AM. They were supported by a small secretariat within the Department of Environment, Land, Water and Planning. The Panel commissioned additional expert advice from a variety of sources. For an overview, see 'Independent Expert Advice on Interim Targets', *Department of Environment, Land, Water and Planning* (Web Page, 30 August 2019), archived at <<https://perma.cc/3SYT-NADN>>.

¹¹⁶ *Independent Expert Panel Report* (n 104) 7.

¹¹⁷ The Commonwealth Climate Change Authority is an independent statutory body established under the *Climate Change Authority Act 2011* (Cth) to provide expert advice to the Australian government.

¹¹⁸ Climate Change Authority (Cth), *Reducing Australia's Greenhouse Gas Emissions: Targets and Progress Review* (Final Report, February 2014).

¹¹⁹ *Independent Expert Panel Report* (n 104) 48–9.

challenges faced by a sub-national jurisdiction in setting *Paris*-aligned targets in the absence of a similarly aligned national approach, including in relation to determining a fair share of an available emissions budget:

[The] sub-national jurisdiction does struggle with what targets should be at a state level ... what is their proportion of the carbon budget? It's obviously hard enough ... at the international level for ... one country to work that out. It's harder again at the state level.¹²⁰

The Panel's recommended targets were significantly more ambitious than the 2030 target put forward by the Australian government in its NDC at the time (26–8 per cent below 2005 levels by 2030).¹²¹ The Panel described their recommended targets as 'entirely consistent' with a 2°C temperature goal, and 'consistent' with the well-below 2°C temperature goal of the *Paris Agreement*, and indicated that they imply relatively steady emissions reductions from 2030 to 2050 to achieve net zero, at least for the upper range targets.¹²² However, the Panel noted that in order for the recommended interim targets to be consistent with a 1.5°C temperature goal, even for the upper range targets, rapid emissions reductions would be required beyond 2030.¹²³ Therefore, the recommended targets were not nearly as well aligned with the more aspirational 1.5°C goal, and the lower range targets were particularly poorly aligned. The Panel justified this approach on the basis that the 1.5°C goal 'represents an ambition that has not fully crystallised [and] has not yet been translated into commensurate commitments and action.'¹²⁴ They also noted the significant uncertainties about how emissions could be rapidly reduced in order to align with the 1.5°C goal, and about the pace of change that could be sustained.¹²⁵

Interviewees noted the pragmatic nature of the recommended targets. Some argued that the Panel had overemphasised socio-economic considerations for particular sectors and communities and taken too much account of slow progress on climate action nationally and internationally, and, as a result, failed

¹²⁰ Interview 3 (n 113).

¹²¹ In 2014, the Climate Change Authority recommended targets of 40–60 per cent below 2000 levels by 2030, consistent with Australia's fair share of global carbon budgets associated with a 50–75 per cent chance of avoiding 2°C global warming: see Climate Change Authority (Cth) (n 118) 125–6. Despite the previous federal government committing to net zero by 2050, it did not update this interim target: *Australia's Long-Term Emissions Reduction Plan* (n 21) 101. An updated target of 43 per cent below 2005 levels by 2030 was recently submitted by the new federal government: see also above n 21.

¹²² *Independent Expert Panel Report* (n 104) 58.

¹²³ *Ibid* 57–8.

¹²⁴ *Ibid* 12.

¹²⁵ *Ibid*.

to recommend ambitious targets that aligned with best available science.¹²⁶ However, some interviewees saw this pragmatic approach as necessary to the ultimate success of the legislative process:

[W]hat's politically acceptable and, acceptable in the sense you can win a community over, you can get buy-in from people that have to accept change, and also what's technologically feasible ... trying to find a balance between plausible and feasible and acceptable versus technically possible ... So, it's not a dismissing of the science at all, or even trying to water down the response to it, it's really practical, social, financial considerations in just how fast you can do that.¹²⁷

Indeed, the Panel was very clear in its report that the recommendations sought to balance a range of factors including achievability on the basis of available technologies, behaviours, costs, markets, and economic and social impacts.¹²⁸ Although perceived as taking a (perhaps unnecessarily) pragmatic approach, the Panel's report complied with all relevant requirements in the legislation. Notably, the *Victorian Act* provides a long list of potentially competing factors for the Panel to consider in preparing advice on the targets, including the long-term ERT, climate science and technology, but also economic, social and environmental circumstances, national and global action and commitments on climate change and progress in reducing emissions.¹²⁹ There is no explicit requirement to prioritise best available science or the more ambitious international temperature goal of 1.5°C.

The interim targets adopted by the government in the first climate change strategy released in May 2021 include a target to reduce emissions by 28–33 per cent on 2005 levels by 2025 and by 45–50 per cent by 2030.¹³⁰ While not inconsistent with the expert advice, the government targets are still less ambitious than what was recommended by the Panel, particularly the nearer-term targets.¹³¹ Yet, similar to the Panel's initial recommendations, the government's interim targets appear to be consistent with the broadly framed statutory constraints. Indeed, in setting the targets, the expert advice is only

¹²⁶ Interview 2 (n 114); Interview 3 (n 113); Interview with Interviewee 8 (Anita Foerster and Anne Kallies, 18 June 2020) ('Interview 8').

¹²⁷ Interview with Interviewee 5 (Anita Foerster, 16 June 2020) ('Interview 5'). See also Interview 2 (n 114); Interview 8 (n 126).

¹²⁸ *Independent Expert Panel Report* (n 104) 8.

¹²⁹ *Victorian Act* (n 39) s 12(3).

¹³⁰ Department of Environment, Land, Water and Planning (Vic), *Victoria's Climate Change Strategy* (May 2021) 6.

¹³¹ *Independent Expert Panel Report* (n 104) 7.

one of a number of considerations that must be taken into account by the Premier and the Minister.¹³²

This outcome reflects concerns expressed by some interviewees that requiring the Panel, and the Minister and Premier when setting the interim targets, to weigh competing factors permits the watering down of ambition for the interim targets in a way that compromises Victoria's ability to achieve the long-term ERT:

[T]he provisions of the Act that tell the decision-makers what the targets should be, are clearly not strong enough to actually get the targets that we need ... It's quite clear now how much we need to reduce emissions by in order to keep warming to 1.5 degrees and certainly no more than 2 degrees. And the targets that have been recommended are not going to do that ... It's quite clear what the science is saying now — matching the legislation to the science, that's the part that's not being done. [Decision-makers] have to consider the science, but they also have to consider a whole bunch of other things. So, it's just that final step in linking the target with the science and making that the ... overriding question ... that's just not happening.¹³³

The outcome also reflects concerns with the extent of flexibility built into the *Victorian Act*, which provides the government of the day with broad discretion about the ambition and rigour with which they deliver on required policy commitments.¹³⁴ One participant noted that

under a government that was very committed to climate action, there is quite a lot you could do with this Act, but for a government that doesn't really want to act, there's a lot you can get out of.¹³⁵

These concerns about Victoria's first round of interim targets and the associated weaknesses in the statutory framework take on particular importance when considered in the context of evolving scientific understanding of what is needed to achieve the *Paris* temperature goals. In 2018, the Intergovernmental Panel on Climate Change ('IPCC') clarified that global emissions would need to decline by about 45 per cent from 2010 levels by 2030 and reach net zero by 2050 in order to be consistent with modelled pathways for limiting global

¹³² *Victorian Act* (n 39) s 14(1).

¹³³ Interview 3 (n 113). See also Interview 2 (n 114).

¹³⁴ See *Victorian Act* (n 39) pt 2 div 2.

¹³⁵ Interview 3 (n 113). See also Interview with Interviewee 6 (Anita Foerster, 16 June 2020) ('Interview 6'); Interview 8 (n 126).

warming to 1.5°C.¹³⁶ To have a 66 per cent chance of limiting global warming to below 2°C, emissions would still need to decline by approximately 25 per cent by 2030 and reach net zero by 2070.¹³⁷ A recent report by Australia's Climate Council cites '[m]ultiple lines of evidence [that] strongly suggest that we can no longer limit warming to 1.5°C without significant overshoot and subsequent drawdown',¹³⁸ and argues for the rapid reduction of emissions to net zero this decade: 'The world achieving net zero by 2050 is at least a decade too late and carries a strong risk of irreversible global climate disruption at levels inconsistent with maintaining well-functioning human societies.'¹³⁹

As the Panel acknowledged, there are difficult questions around how interim targets and emissions trajectories should spread the required emissions reductions, and associated costs and benefits, over time.¹⁴⁰ However, it is increasingly clear that pushing forward the required emissions reductions with more ambitious near-term targets will deliver more certainty around climate outcomes and involve less dramatic reductions towards 2050, particularly if the aim is to align with a 1.5°C emissions budget. An emissions reduction pathway that emphasises earlier rather than later progress will mean cumulatively less emissions overall and therefore a reduced impact on global warming.¹⁴¹ Deferring emissions reductions with less ambitious near-term targets will necessitate much more dramatic reductions towards 2050, increasing the burden on future generations and making it difficult to achieve an emissions budget consistent with the 1.5°C goal.¹⁴² Unfortunately, the *Victorian Act* does not contain clear requirements to prioritise consistency with, or revise targets to correspond to, the best available science; nor does the first set of interim targets announced suggest that the government — even a government committed to leadership on climate action — will pursue this higher, and arguably necessary, level of ambition of its own accord.

¹³⁶ *IPCC Special Report on Global Warming of 1.5°C* (n 22) 12. The IPCC is a United Nations body created to provide policymakers with regular scientific assessments on climate change: 'About the IPCC', *Intergovernmental Panel on Climate Change* (Web Page) <<https://www.ipcc.ch/about>>, archived at <<https://perma.cc/G7Z9-TDZW>>.

¹³⁷ *IPCC Special Report on Global Warming of 1.5°C* (n 22) 12.

¹³⁸ Will Steffen et al, *Aim High, Go Fast: Why Emissions Need to Plummet This Decade* (Report, 2021) ii. See also at 9.

¹³⁹ *Ibid* ii.

¹⁴⁰ *Independent Expert Panel Report* (n 104) 46.

¹⁴¹ See Committee on Climate Change (UK), *Net Zero — Technical Annex: Climate Science* (Report, 2019) 2.

¹⁴² *Independent Expert Panel Report* (n 104) 46, 51–2. See also *IPCC Special Report on Global Warming of 1.5°C* (n 22) 12–13.

C Effectiveness of Regulatory Approach

As outlined in Part II, the *Victorian Act* establishes procedural duties of conduct, underpinned by transparency measures to hold governments to account, with the aim of catalysing progress towards the long-term ERT. The flexibility and associated durability of this legal architecture were recognised by interviewees:

[T]he five yearly cycle of targets, pledges, review, reset that all follows the structure laid out in Paris ... recognises the inherent uncertainty around any policy development process that proceeds over such a long-term horizon, particularly one that's so dependent on technology to do a lot of the heavier lifting.¹⁴³

Yet, as the discussion below indicates, this high degree of flexibility has some potential shortcomings. These relate to the reliance on a bottom-up pledging mechanism, enforceability of relevant duties, the limits of the transparency measures in driving government action and enhancing accountability, and the potential for framework laws to delay the introduction of more direct sectoral measures to drive emissions reductions. All raise the question of whether the regulatory approach — closely reflecting that adopted at the international level — is well suited to the domestic, and particularly the sub-national, context.

1 Bottom-Up Pledging

Compared to the target-setting provisions, there is little detail in the *Victorian Act* on the process that should be followed or the form that emissions reduction pledges should take. While the *Victorian Act* provides for the making of ministerial directions to govern the pledging process,¹⁴⁴ no formal, publicly available directions have been issued under this power.¹⁴⁵ In the view of some participants, while a bottom-up approach is understandable in the international context where it has developed out of necessity, the open-ended version of this mechanism used in the *Victorian Act* is unnecessarily risky:

[A]sking everyone to volunteer reductions and adding those up and hoping that they get us [to the long-term ERT] is not really going to work. And I think you can understand why that approach is taken at the international level, but that

¹⁴³ Interview 1 (n 114). See also Interview 5 (n 127).

¹⁴⁴ *Victorian Act* (n 39) s 49.

¹⁴⁵ One participant did note, however, that informal guidance had been provided: Interview 6 (n 135).

approach doesn't need to be taken at the state level. Agencies are not completely separate organisations that the government has no control over.¹⁴⁶

As noted in Part II, the Minister can assign responsibility for developing emissions reduction pledges for different sectors of the economy to other government Ministers,¹⁴⁷ an approach intended to spread the emissions reduction effort across government, to coordinate activities in the most effective, efficient and timely way, and to build climate capacity in different policy areas.¹⁴⁸ However, the interviews suggested that engagement by various Ministers with the pledging process and the capacity to prepare pledges across different government departments were highly variable. Some interviewees argued that spreading pledging responsibilities was slowly resulting in capacity-building across departments, albeit from a fairly low base.¹⁴⁹ However, there was also some concern that the varied approaches being taken would result in poorly developed, low-ambition pledges for some sectors.¹⁵⁰

It is now very much left to the different agencies, and of course different agencies have a very different culture around these things, and for resources agencies, which really are ... the agencies that are responsible for ... the bulk of the emissions in our economy, this is not their main priority.¹⁵¹

The way the *Victorian Act* requires key processes, including the devolution of responsibility across government, to be led by the Minister, rather than creating direct duties for other relevant Ministers to develop sectoral pledges, was also identified as a weakness in the legal design:

I think leaving this to an environment department was a mistake because ... it's actually a fundamental big change in economic systems, which an environment department is ill equipped to drive ... And to drive that from the environment department that a lot of other departments are expert at marginalising, I don't think was ever going to work.¹⁵²

To a certain extent, these concerns about the statutory constraints governing pledging have been substantiated in the first round of sectoral emissions

¹⁴⁶ Interview 3 (n 113).

¹⁴⁷ *Victorian Act* (n 39) s 45(1).

¹⁴⁸ *Independent Review Report* (n 35) 99–100; Calabro, Niall and Skarbek (n 37) 818.

¹⁴⁹ Interview with Interviewees 4A and 4B (Anita Foerster, 16 June 2020); Interview 5 (n 127); Interview 6 (n 135).

¹⁵⁰ Interview 2 (n 114); Interview 3 (n 113).

¹⁵¹ Interview 3 (n 113).

¹⁵² Interview with Interviewee 7 (Anita Foerster, 18 June 2020) ('Interview 7'). See also Interview 3 (n 113).

reduction pledges released in May 2021.¹⁵³ The pledges clearly represent a significant commitment of State government funding to emissions reduction initiatives in Victoria, particularly considering the global pandemic context in which this commitment was made.¹⁵⁴ Yet some of the sector pledges (eg Transport and Agriculture) contain far less developed, less concrete measures than other sectors and do not contain any quantified estimate of the expected emissions reductions,¹⁵⁵ as required by the *Victorian Act*.¹⁵⁶ Indeed, the initiatives proposed in the *Agriculture Pledge* (eg research into low emissions technologies, developing a long-term vision, non-specific commitments to research partnerships and collaboration, pilot programs for grants to farmers and information tools)¹⁵⁷ are indirect and vague, making it difficult to judge whether or not they could ‘reasonably [be] expected to contribute to the reduction of greenhouse gas emissions’ as required by the Act.¹⁵⁸ Some of the sector pledges (eg the *Transport Pledge*) propose actions that will occur after 2025 (ie in the second pledging period), which will not produce emissions reductions within the scope of the first 5-year period specified under the Act.¹⁵⁹ Further, there appears to be a mismatch between the emissions reductions promised via the pledges (3.2 Mt CO₂-e reduction by 2025)¹⁶⁰ and the emissions reductions required to meet the interim 2025 targets (3.9–9.95 Mt CO₂-e reduction),¹⁶¹ leaving a shortfall which is not directly accounted for, other than

¹⁵³ Emissions reduction pledges were made for the following sectors and categories of emission: agriculture; energy; industrial processes and product use; land use, land use change and forestry; transport; and waste. A whole-of-government pledge was also made addressing emissions from the direct activities of the government: see ‘Victorian Government Action on Climate Change’, *Department of Environment, Land, Water and Planning* (Web Page, 21 December 2021) <<https://www.climatechange.vic.gov.au/victorian-government-action-on-climate-change>>, archived at <<https://perma.cc/DX86-V23H>>.

¹⁵⁴ For example, the government committed to investing an additional \$20 million, on top of \$30 million already committed to emissions reduction activities in agriculture: Department of Environment, Land, Water and Planning (Vic), *Cutting Victoria’s Emissions 2021–2025: Agricultural Sector Emissions Reduction Pledge* (May 2021) 1 (*‘Agriculture Pledge’*).

¹⁵⁵ *Agriculture Pledge* (n 154). See also Department of Environment, Land, Water and Planning (Vic), *Cutting Victoria’s Emissions 2021–2025: Transport Sector Emissions Reduction Pledge* (May 2021) (*‘Transport Pledge’*).

¹⁵⁶ *Victorian Act* (n 39) s 44(1)(b).

¹⁵⁷ See especially *Agriculture Pledge* (n 177) 4–6.

¹⁵⁸ *Victorian Act* (n 39) s 44(1)(a).

¹⁵⁹ See, eg, *Transport Pledge* (n 155) 3.

¹⁶⁰ *Victoria’s Climate Change Strategy* (n 130) 12.

¹⁶¹ Victoria’s GHG emissions were 121.4 Mt CO₂-e in 2005, and had reduced by 24.8 per cent by 2019: *DELWP GHG Report 2019* (n 26) 9. To achieve emissions reductions of 28 per cent (the lower end of the target range) by 2025, a further reduction of 3.2 per cent is required, or 3.9 Mt

by the suggestion that these reductions will be achieved by 'actions taken independently by Victorian households and businesses'.¹⁶²

Slower progress in harder-to-abate sectors can be expected, particularly in the first round of pledges.¹⁶³ In some sectors, such as transport, the less developed nature of the pledged commitments also reflects policy gaps at a federal level, underscoring the particular challenges of developing sub-national climate policy in a federal context. As one interviewee commented, while there are several policy levers available to a state government to decarbonise transport systems (eg car registration and public transport systems), the federal government has other, potentially more impactful controls (eg fuel standards and vehicle emissions standards), but has shown little interest in using them to help drive the uptake of electric vehicles.¹⁶⁴ In any case, the gaps, lack of detail and inability to quantify expected emissions reductions will make it more difficult to hold government accountable for delivering on the pledges, illustrating the risks of a flexible, relatively open-ended statutory framework.

2 Legal Enforceability

The *Victorian Act* allocates clear legal responsibility for core emissions reduction functions to the Premier and the Minister.¹⁶⁵ However, there are limited options for legal enforcement of these responsibilities, for example, in the case that an interim target is not achieved, or if an interim target is deemed to be inconsistent with the 2050 net zero target.

The *Victorian Act* makes no provision for merits review of key decisions, despite the independent review of the 2010 *Victorian Act* recommending the inclusion of a pathway for merits review with regard to certain decisions to which climate change is relevant.¹⁶⁶ While judicial review of a decision made under the Act is theoretically possible, pathways for establishing an error of law

CO₂-e. To achieve 33 per cent (the higher end of the target range) by 2025, a further reduction of 8.2 per cent is required, or 9.95 Mt CO₂-e.

¹⁶² *Victoria's Climate Change Strategy* (n 130) 12.

¹⁶³ Industry (eg cement, steel, aluminium), as well as some transport modalities like shipping and trucking, are often framed as 'harder-to-abate' sectors due to the fossil-fuel dependence of existing production systems: see, eg, ClimateWorks Australia, *Decarbonisation Futures: Solutions, Actions and Benchmarks for a Net Zero Emissions Australia* (Report, March 2020) 13, 21; Energy Transitions Commission, *Mission Possible: Reaching Net-Zero Carbon Emissions from Harder-to-Abate Sectors by Mid-Century* (Report, November 2018) 11; Max Åhman, 'Unlocking the "Hard To Abate" Sectors' (Research Paper, World Resources Institute, March 2020).

¹⁶⁴ Interview 5 (n 127).

¹⁶⁵ See *Victorian Act* (n 39) ss 8 (achieving the long-term ERT), 10 (setting interim targets), 14(2) (ensuring targets increase in ambition over time).

¹⁶⁶ *Independent Review Report* (n 35) 80.

related to setting interim targets (eg on the grounds of a failure to take into account independent advice, taking into account irrelevant matters, or unreasonableness) appear to provide poor prospects of success unless there has been a substantial departure from the independent advice or from widely held understandings of an acceptable pathway towards 2050. This is largely because the statutory constraints on decision-making are broadly drafted.¹⁶⁷ For example, as noted above, while there are binding obligations relating to how these interim targets are set, including a requirement to take into account the independent advice,¹⁶⁸ there is no guidance on how to prioritise mandatory considerations. Further, the *Victorian Act* requires that independent experts consider a range of potentially competing factors in developing their advice, with no clear prioritisation of particular considerations that may be expected to take precedence, such as best available science.¹⁶⁹

While s 8 establishes a duty for the Premier and Minister to achieve the long-term ERT, there is no similar duty to achieve interim targets. Enforcing the duty to achieve the long-term ERT at the early stages of the Act's implementation would be difficult. In the words of one participant:

The duty on the Premier and the Minister is a good start, but ... it's only in relation to the long-term target ... [I]t's going to be very difficult to make that enforceable ... [I]n the earlier days it's harder to say definitively they're not going to make the 2050 target just because an interim target is not good enough.¹⁷⁰

3 Transparency Measures

Given the above, accountability for the core emissions reduction responsibilities relies heavily on public and political scrutiny. The *Victorian Act* sets up a comprehensive transparency regime, with timetabled, cyclical

¹⁶⁷ Further, under the separation of powers doctrine, Australian courts take a restrictive view of their role with regard to 'political questions', suggesting that courts will be reluctant to review target-setting decisions, finding them to be beyond the scope of judicial review: see, eg, Gleeson CJ's discussion of justiciability (in the context of a negligence claim against a governmental authority) in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553–5 [6]–[9]. See especially at 554 [6], 555 [9], where Gleeson CJ observed:

Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature. ... In the case of a governmental authority, it may be a very large step from foreseeability of harm to the imposition of a legal duty, breach of which sounds in damages, to take steps to prevent the occurrence of harm. And there may also be a large step from the existence of power to take action to the recognition of a duty to exercise the power.

¹⁶⁸ *Victorian Act* (n 39) s 14(1)(b).

¹⁶⁹ *Ibid* s 12(3).

¹⁷⁰ Interview 3 (n 113).

requirements to publish targets, pledges, and progress-evaluation, as well as broader information on GHG emissions and climate science. Interviewees recognised this as a clear strength of the Act. For example, in relation to the requirement to publish the advice of the Panel prior to the government's determination of targets,¹⁷¹ one participant commented:

The fact that [the advice is] in the public domain is extremely useful because it provides an accountability measure against the government ... [W]herever [the targets] land, it gives a really clear opportunity to go, well, look, there's something in this report that says you should have gone higher.¹⁷²

Others noted that the timetabled transparency provisions of the *Victorian Act* provide a platform for civil society engagement and advocacy:

When there's a piece of legislation it creates a framework for government discussion, government policy development, that gives [advocacy groups] an opportunity to get involved.¹⁷³

Yet, according to the interviews, the first round of target-setting and policy-development under the *Victorian Act* was largely an internal, behind-closed-doors exercise, with almost no public or stakeholder consultation.¹⁷⁴ Indeed, despite a clear statutory requirement,¹⁷⁵ there was no public consultation on a draft climate change strategy prior to its release in May 2021. Some participants saw this lack of engagement in the lead-up to the first major policy commitments under the Act as a missed opportunity to build internal momentum within government and external momentum with stakeholders:

The government really hasn't done the work to build consensus around this, to build a really good understanding of which sectors could make big cuts and to socialise it in the Victorian community.¹⁷⁶

Interviewees also raised concerns about the narrow scope of the role of the expert Panel and resulting implications for transparency.¹⁷⁷ As noted in Part II,

¹⁷¹ *Victorian Act* (n 39) ss 13, 14(1)(b).

¹⁷² Interview 2 (n 114).

¹⁷³ *Ibid.* See also Interview with Interviewee 9 (Anita Foerster and Anne Kallies, 19 June 2020) ('Interview 9').

¹⁷⁴ Interview 2 (n 114); Interview 3 (n 113); Interview 9 (n 173). It should be noted that, although this was not specifically required by the *Victorian Act* (n 39), the Panel did consult publicly on the recommendations for interim targets in 2017: *Independent Expert Panel: Interim Emissions Reduction Targets for Victoria (2021–2030)* (Issues Paper, 2017) 35.

¹⁷⁵ *Victorian Act* (n 39) s 32.

¹⁷⁶ Interview 3 (n 113). See also Interview 8 (n 126).

¹⁷⁷ Interview 2 (n 114); Interview 3 (n 113).

the *Victorian Act* requires the Panel to advise on interim targets and indicative trajectories to achieve the targets, and on ‘potential opportunities across the Victorian economy ... for reducing greenhouse gas emissions in the most efficient and cost-effective manner’,¹⁷⁸ but then envisages no further role for expert input. This was seen as perhaps the most awkward aspect of the Panel’s role, with a number of participants supportive of a greater role for independent expertise:

One of the flaws in the terms of reference ... [was that the Panel was] asked to think about trajectories, opportunities, abatement, but [not] to comment on policies ... It was simply in isolation to say this is what the targets should be and, by the way ... you could find 20 megatons of abatement, and be completely silent on the policies that would deliver it.¹⁷⁹

The interviews also suggested that the political context in which the *Victorian Act* was being implemented had the potential to undermine the effectiveness of the transparency measures in supporting ambitious implementation. For example, participants noted the ongoing political sensitivities associated with climate policy in Victoria — particularly in relation to regulatory interventions in the electricity sector — with one participant remarking:

This government is terrified of doing anything that costs jobs, in particular blue collar jobs ... [T]he prospect of any kind of government decision leading directly to the closure of a power station is one that terrifies the Labor government.¹⁸⁰

Participants also emphasised that a lack of bipartisanship on climate change at both a federal and a state level remains a real and powerful influence on the political landscape:

In other countries you would have bipartisan support for the legislation ... that’s the real gap in Australia ... [I]n other countries where we’ve seen major swings politically maybe to the right, we haven’t actually seen a lot of change in the legislation when it comes to climate change. In Australia ... we don’t have that level of certainty.¹⁸¹

There was even concern that a change of government could lead to another dismantling of the Act: ‘I wouldn’t be confident that the Act would survive or key parts of the Act would survive a change of government.’¹⁸² It was also

¹⁷⁸ *Victorian Act* (n 39) ss 12(2)(a)–(c).

¹⁷⁹ Interview 5 (n 127).

¹⁸⁰ Interview 2 (n 114). See also Interview 7 (n 152).

¹⁸¹ Interview 5 (n 127).

¹⁸² Interview 3 (n 113). See also Interview 7 (n 152).

observed that climate change is widely perceived as a federal government issue, with federal climate politics dominating public debate in Australia. This contributes to a lack of political engagement with initiatives at a state level and helps explain the significant influence of partisan federal climate politics on state agendas.¹⁸³ Taken together, all of these contextual factors point to a distinct lack of positive and constructive political pressure on the Victorian government to drive ambitious implementation.

There is, however, some suggestion that this context is changing. When the first interim targets were released in May 2021, there were no strong objections recorded by the Victorian opposition to the targets.¹⁸⁴ Indeed, a number of Australian states and territories with conservative governments, including New South Wales, have set net zero targets and are developing ambitious climate and energy policy initiatives to deliver on these targets.¹⁸⁵ In October 2021, the conservative federal government also announced a net zero 2050 target, but made no change to its interim targets.¹⁸⁶

4 *Delaying Direct Action?*

While framework laws like the *Victorian Act* provide a context for the introduction, coordination and implementation of more direct sectoral measures, there are also potential trade-offs in practice between timely sectoral action, such as policies to reduce emissions at the source or incentivise low-

¹⁸³ Interview 2 (n 114); Interview 9 (n 173).

¹⁸⁴ Neither the then-Opposition Leader, Michael O'Brien MP, nor the then-Shadow Minister for Environment, Bridget Vallence MP, made press releases on the Victorian Climate Change Strategy, emissions reduction targets and pledges. Indeed, the Victorian Liberal Party called on federal colleagues to set long-term emissions reduction targets: Sumeyya Ilanbey, 'Victorian Liberals Call on Morrison to Adopt "Sensible" Emissions Reduction Targets', *The Age* (online, 22 January 2020) <<https://www.theage.com.au/politics/victoria/victorian-liberals-call-on-morrison-to-adopt-sensible-emissions-reductions-targets-20200122-p53ts9.html>>, archived at <<https://perma.cc/9TXA-E7X6>>. The Victorian National Party also publicly criticised its national counterpart for its failure to embrace a net zero emissions target: Sarah Martin, 'Victorian Nationals to Push for Bolder Climate Position amid Anger at Return of Barnaby Joyce', *The Guardian* (online, 5 July 2021) <<https://www.theguardian.com/australia-news/2021/jul/06/victorian-nationals-to-push-for-bolder-climate-position-amid-anger-at-return-of-barnaby-joyce>>, archived at <<https://perma.cc/J9MA-LRJN>>.

¹⁸⁵ Office of Environment and Heritage (NSW) (n 19) 1; *South Australian Government Climate Change Action Plan 2021–2025* (2020) 1; *SA Act* (n 19); Peter Gutwein, 'Securing Tasmania's Status as a Climate Leader' (Media Release, 13 October 2021) <https://www.premier.tas.gov.au/site_resources_2015/additional_releases/securing_tasmania_s_status_as_a_climate_leader>, archived at <<https://perma.cc/7VQD-ZGPF>>; *Tas Act* (n 19).

¹⁸⁶ *Australia's Long-Term Emissions Reduction Plan* (n 21). See especially at 3. See also Australia's updated interim targets: *Australia's Nationally Determined Contribution Communication* (n 21).

emissions technologies, and the benefits of using laws to establish overarching policy frameworks.

Interviewees noted that the Victorian government, like other state jurisdictions in Australia, has multiple direct levers to drive emissions reductions at its command,¹⁸⁷ with some suggesting that the government could have adopted a more direct approach.¹⁸⁸ For example, under the *Environment Protection Act 2017* (Vic), there is considerable scope to directly regulate GHG emissions for licensed facilities such as power stations, however this power has not yet been deployed.¹⁸⁹ One interviewee suggested that this is partly due to delays in setting targets and pledges under the *Victorian Act*.¹⁹⁰ One participant contrasted progress in other states with that in Victoria:

The government has ... said a number of times that it wants to be the leader on climate change [but] you couldn't at the moment say it was the leader. South Australia is doing far more and sort of just getting on with it ... at a very practical level, whereas now, we're really lagging behind. We have the worst polluting power stations in Australia with no timeline for closure ... and not a fast enough ramping up of renewables and storage.¹⁹¹

Indeed, Victoria's progress on reducing emissions to date compares poorly to neighbouring State South Australia.¹⁹² In South Australia, progress has been linked specifically to direct sectoral policy measures (especially the high uptake of federal renewable energy incentives), which were less effective in Victoria over relevant time periods due to other state-level legal barriers on renewable

¹⁸⁷ Interview 1 (n 114); Interview 2 (n 114); Interview 3 (n 113); Interview 7 (n 152); Interview with Interviewee 10 (Anne Kallies and Alice Bleby, 30 June 2020) ('Interview 10').

¹⁸⁸ Interview 3 (n 113); Interview 7 (n 152); Interview 10 (n 187).

¹⁸⁹ For example, a recent review of licences issued under the *Environment Protection Act 1970* (Vic) to coal-fired power station operators in the Latrobe Valley did not result in any regulation of GHG emissions, despite the fact that this is now possible and anticipated by the governing legislation: see Jarrod Whittaker, 'Greenhouse Gas Restrictions Denied, but New Pollution Limits Imposed on Latrobe Valley Power Stations', *ABC News* (online, 5 March 2021) <<https://www.abc.net.au/news/2021-03-05/victoria-power-stations-pollution-epa-licence-review-released/13219060>>, archived at <<https://perma.cc/22Y2-KEJE>>.

¹⁹⁰ Interview 3 (n 113).

¹⁹¹ *Ibid.*

¹⁹² Between 2005 and 2018, South Australia reduced GHG emissions by 31.6 per cent, compared to Victoria's reduction of 17.5 per cent: Department of Industry, Science, Energy and Resources (Cth), *State and Territory Greenhouse Gas Inventories 2018: Australia's National Greenhouse Accounts* (Report, May 2020) 3.

energy development such as planning controls, as well as the lack of fossil fuel resources in the State.¹⁹³

IV LESSONS FOR THE LEGAL DESIGN AND IMPLEMENTATION OF FRAMEWORK CLIMATE CHANGE LAWS

When considering the role that framework laws can play in supporting the implementation of the *Paris Agreement*, it is important to recognise the differences between the international and domestic contexts, as well as the opportunity to use framework laws to build on and strengthen commitments under the international regime.¹⁹⁴ As Thomas L Muinzer argues, framework laws can play a key role in addressing the weaknesses of the *Paris Agreement*, particularly in translating the ‘less stringent, aspirational terms of international law’ regarding targets and associated decarbonisation trajectories into ‘robust legislative terms at the national level’, and in ‘integrat[ing] significant compliance mechanisms’ which can ‘mitigate the impacts of the compliance vacuum’ at the international scale.¹⁹⁵ Yet, as the Victorian case study suggests, aligning domestic targets and policy with *Paris* temperature goals via framework laws is complex and contested, and particular challenges arise at the sub-national scale. Further, if framework laws adopt the facilitatory, bottom-up regulatory approach of the *Paris Agreement*, they may well replicate many of the flaws associated with the international model.

In the interests of realising the full potential of framework climate laws like the *Victorian Act*, this discussion draws on recent experience in developing,

¹⁹³ Interviewee 8 noted that

the main driver of the South Australian progress is a combination of the national renewable energy target and restrictions on wind farms in Victoria that were in effect for about four years, and ... that ... circumstance saw a lot of investment flow to that State ...

Interview 8 (n 126). See Lisa Caripis and Anne Kallies, “Planning Away” Victoria’s Renewable Energy Future? Resolving the Tension between the Local and Global in Windfarm Developments’ (2012) 29(5) *Environmental and Planning Law Journal* 415, 424–6.

¹⁹⁴ Duwe and Bodle have recently argued that framework laws can address the shortcomings of the *Paris* regime, playing a bridging function between the collective goals of the *Paris Agreement* (n 1) and the myriad of actions that must be taken domestically to realise these goals: Duwe and Bodle, “Paris Compatible” Climate Change Acts? (n 7) 52.

¹⁹⁵ Thomas L Muinzer, ‘What Do We Mean When We Talk about National “Climate Change Acts” and How Important Are They in the Context of International Climate Law?’ in Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020) 11, 41.

implementing and enforcing climate laws in other similar jurisdictions.¹⁹⁶ This is not intended as an in-depth comparison of laws which operate in different legal and political contexts, but rather seeks to identify examples of legal framing or governance arrangements that temper some of the risks and address some of the weaknesses of the regulatory approach taken in Victoria.

A *Strengthening Paris-Alignment through Framework Laws*

Long-term, quantitative ERTs which reference *Paris* temperature or net zero goals are a common central organising feature of framework climate laws. Like the *Victorian Act*, many laws employ a ‘net zero by 2050’ target.¹⁹⁷ This target is, on the face of it, clear and simple, and now widely used as a touchstone for *Paris*-aligned climate action, including beyond the context of framework laws.¹⁹⁸ It accords reasonably well with 2018 IPCC recommendations for limiting global warming to 1.5°C;¹⁹⁹ however, recent scientific developments are increasingly suggesting that the net zero goal should be brought forward, to maximise chances of achieving a 1.5°C limit to global warming.²⁰⁰ Given the long timescales over which framework laws are intended to operate, and an underlying assumption that targets reflect and respond to best available climate science,²⁰¹ adding some additional nuance, ambition and an option to amend long-term targets in light of scientific advances would strengthen and improve legislation like the *Victorian Act*. A number of other framework laws now explicitly reference the 1.5°C goal or adopt a more ambitious interpretation of

¹⁹⁶ Given the availability of academic analysis, most points of comparison in this discussion are with European jurisdictions, although reference is also made to the New Zealand *Climate Change Response Act 2002* (NZ) (‘*NZ Act*’), as amended by the *Climate Change Response (Zero Carbon) Amendment Act 2019* (NZ) (‘*Zero Carbon Amendment (NZ)*’). Further, for a number of reasons, including European Union (‘EU’) leadership on climate policy in the international domain, and EU climate law and policy driving action in EU member states, European laws are also seen to represent current best practice.

¹⁹⁷ *Climate Laws in Europe* (n 2) 19.

¹⁹⁸ For discussion of *Paris*-aligned climate action in the private sector, see generally Jayme Walenta, ‘Climate Risk Assessments and Science-Based Targets: A Review of Emerging Private Sector Climate Action Tools’ (2020) 11(2) *WIREs Climate Change* e628:1–12.

¹⁹⁹ *IPCC Special Report on Global Warming of 1.5°C* (n 22) v–vi.

²⁰⁰ See, eg, Steffen et al (n 130) ii, 1, 31.

²⁰¹ The *Paris Agreement* (n 1) provides that ‘an effective and progressive response to the urgent threat of climate change’ should be based on ‘the best available scientific knowledge’: at Preamble para 4. It also provides that in order to achieve the long-term temperature goal, parties should aim to reduce emissions ‘in accordance with best available science’: at art 4(1). See also *Climate Change Bill Second Reading Speech* (n 34) 4549, 4551 (Lily D’Ambrosio).

the net zero goal.²⁰² For example, the *Climate Act* (Denmark) aims to achieve 'a climate-neutral society by 2050 at the latest, taking into account the *Paris Agreement* target of limiting the global temperature rise to 1.5 degrees Celsius.'²⁰³ Others, such as the *UK Act*, provide carefully constrained scope to amend long-term targets in response to developments in scientific knowledge about climate change, or European or international law or policy.²⁰⁴ Where a review of long-term targets is provided for, specific provision for non-regression is important.²⁰⁵

While a legislated long-term ERT plays a critical role in setting the direction of travel for emissions reduction, statutory constraints on interim target-setting (or periodic emissions budgeting approaches that are mandated by some framework laws)²⁰⁶ are equally important in aligning domestic climate action with *Paris* goals, and particularly in ensuring timely emissions reductions to maximise chances of achieving these goals in an efficient and equitable fashion. The *Victorian Act* includes a number of best-practice features: interim target-

²⁰² For example, s 4 of the *Zero Carbon Amendment (NZ)* (n 196) introduced new statutory objectives that aim to 'contribute to the global effort under the *Paris Agreement* to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels': *NZ Act* (n 196) s 3(1)(aa)(i). See also at s 5W(a); Prue Taylor, 'The New Zealand Legislation: Pursing the 1.5°C Target Using a Net Zero Approach' in Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020) 199, 200.

²⁰³ *Climate Act* (Denmark) No 2020:965, ch 1 s 1 para 1 [tr Danish Ministry of Climate, Energy and Utilities, 'Climate Act (Act No 965 of 26 June 2020)', *Danish Ministry of Climate, Energy and Utilities* (Web Document, 26 June 2020) <https://en.kefm.dk/Media/1/B/Climate%20Act_Denmark%20-%20WEBTILG%C3%86NGELIG-A.pdf>, archived at <<https://perma.cc/7Z22-AJ5D>>]; Grantham Research Institute on Climate Change and the Environment, 'The Climate Act (Denmark)', *Climate Change Laws of the World* (Web Page) <<https://climate-laws.org/geographies/denmark/laws/the-climate-act>>, archived at <<https://perma.cc/M9A8-RLB7>>.

²⁰⁴ *UK Act* (n 45) s 2. This process was used in 2019 to adjust the 2050 target to 100 per cent (up from 80 per cent) below 1990 levels: see *Climate Laws in Europe* (n 2) 20. There are other examples of similar provisions in France (where there is provision for a general review of long-term targets linked to interim progress reports) and Spain (where revision of targets is permitted for specific reasons such as compliance with the *Paris Agreement* (n 1), EU regulation or on the basis of new information such as technological advances): see *Climate Laws in Europe* (n 2) 20.

²⁰⁵ This is explicit in the Spanish and German laws: see *Climate Laws in Europe* (n 2) 20–1.

²⁰⁶ Some jurisdictions explicitly provide for a carbon budgeting approach (eg, the UK, France and New Zealand): see *ibid*; *NZ Act* (n 196) s 5W. Others, like Victoria, use point targets: *Victorian Act* (n 39) s 11. For current purposes, the relative advantages of these approaches are not distinguished. Some commentators have argued, however, that carbon budgeting simultaneously provides certainty (by setting quantitative upper limits) and additional flexibility from year to year, while also providing greater control over emissions over time and an ability to measure cumulative emissions: *Climate Laws in Europe* (n 2) 20.

setting is explicitly constrained by the requirement to increase ambition over time and avoid ‘backsliding’ on targets;²⁰⁷ and targets must be set well in advance of the relevant time period to facilitate stability in the trajectory to net zero.²⁰⁸ However, beyond these safeguards, the *Victorian Act* provides little substantive direction, constraining interim target-setting largely by prescribing a long list of potentially competing considerations for decision-makers.²⁰⁹ This limitation is also evident in other jurisdictions: for example, the *UK Act* requires consideration of climate science in addition to economic, fiscal and social circumstances in the determination of successive emissions budgets.²¹⁰ However, there are also examples of framework laws in European nations which provide more concrete direction on interim target-setting by enshrining Paris-aligned interim 2030 targets in law.²¹¹ The *Climate Change (Scotland) Act 2009* (Scot) specifically includes a requirement to consider what a fair contribution to stabilising the global climate system would be.²¹² In the Victorian context of ongoing political polarisation and sensitivity, incorporating tighter constraints on interim target-setting, as well as indicating the respective priority of considerations in target-setting — for example, ensuring that up-to-date climate science and achieving the long-term target in an efficient, effective and equitable fashion are accorded more weight than other considerations — could help address the risk of deferring emissions reductions to later planning periods.

B Robust and Enforceable Obligations on Government?

Procedural obligations for government actors are central to framework laws. This includes provision for what is required, when and how this should be done, and which government institutions are involved, including whether they

²⁰⁷ See Bennett (n 14) 253. See also *Climate Laws in Europe* (n 2), which describes similar provisions in German and Spanish laws: at 20–1, 42.

²⁰⁸ See *Climate Laws in Europe* (n 2) 20.

²⁰⁹ *Victorian Act* (n 39) ss 12, 14.

²¹⁰ See, eg, s 10 of the *UK Act* (n 45), which provides the matters to be taken into account in determining carbon budgets. This includes scientific knowledge about climate change, but also economic circumstances, fiscal circumstances, social circumstances, and technology relevant to climate change: see at ss 10(2)(a)–(e).

²¹¹ See discussion in *Climate Laws in Europe* (n 2) 19–21. For example, France and Spain enshrine 2030 targets in law. This practice is facilitated by the fact that all EU member states already have binding national reduction targets for 2030 coming from EU legislation for both emissions covered by the EU ETS and those sectors not covered by the ETS. Others, such as Germany, explicitly allocate a proportion of interim emissions budgets to each sector.

²¹² *Climate Change (Scotland) Act 2009* (Scot) ss 2B(1)(a), (2). See also Bennett (n 14) 253–4.

perform a leadership role or are required to perform particular tasks as part of a coordinated system.²¹³ In addition, many framework laws also include some overarching obligations of outcome, framed as legal duties for key government actors. For example, as discussed above, the *Victorian Act* includes a duty on the Premier and the Minister to achieve the long-term ERT.²¹⁴ Framework laws in other jurisdictions apply similar duties to meeting interim targets and emissions budgets.²¹⁵ The way in which these procedural and substantive duties are drafted and allocated to government actors within framework laws will understandably vary depending on legal and political context. Nevertheless, robust obligations, which promote political accountability, and which are also legally enforceable, are important determinants of timely progress towards targets.

Enforceability is a key point on which to distinguish international and domestic climate governance. While effective enforcement of international law is a perennial challenge, enforceability should arguably be the hallmark of domestic framework laws, given the well-established pathways for (and the importance of) holding the executive government to account for ultra vires statutory decision-making within constitutional democracies governed under the rule of law and separation of powers.²¹⁶ That said, while outcome-based duties on government actors can be useful to clearly allocate responsibility and inform the undertaking of procedural duties, they present particular challenges for legal enforcement. Clearly enforceable substantive duties appear to be absent from most framework laws around the world, mirroring the ‘non-adversarial and non-punitive’ approach of the *Paris Agreement*.²¹⁷ Some jurisdictions, such as New Zealand, have even explicitly curtailed enforcement options, excluding any legal remedy or relief for a failure to achieve targets or budgets beyond a declaratory judgment and award of costs.²¹⁸

The issue of legal enforceability has been considered in some detail with regard to the *UK Act*, even though, in relation to key mitigation provisions

²¹³ See *Climate Laws in Europe* (n 2) 14.

²¹⁴ *Victorian Act* (n 39) s 8.

²¹⁵ See, eg, *UK Act* (n 45) s 4(1)(b); *NZ Act* (n 196) s 5X(4).

²¹⁶ See generally Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014).

²¹⁷ *Paris Agreement* (n 1) art 15(2).

²¹⁸ *NZ Act* (n 196) s 5ZM. See discussion in Taylor (n 202) 209, 218–19. The Act does include a requirement that the responsible Minister explain any failure to meet targets and budgets to the Parliament: see *NZ Act* (n 196) s 5ZL(3)(a).

(targets and carbon budgets), it has not yet been tested in the courts.²¹⁹ It is generally accepted that the duties provided in the *UK Act* are justiciable and subject to judicial review.²²⁰ As Richard Macrory and Thomas L Muinzer argue, in situations where procedural duties have not been met, judicial review is

likely to achieve more concrete outcomes; for example, if a reporting duty has been ignored, in determining a breach a court is unlikely to feel inhibited in ordering that the reporting obligation is carried out.²²¹

In contrast, the substantive duty to achieve a long-term 2050 target is likely to be difficult to enforce in a conventional way. This is a result of a combination of factors, including the long-term nature of the outcome that is the subject of the duty; the reluctance of courts to intervene in policy-making processes as per the separation of powers doctrine; the lack of an appropriate remedy beyond declaratory relief; and the way in which courts will take practical realities into account (eg financial constraints and any limitations on the power of the nominated duty holders) in reviewing conduct under statutory duties held by government actors.²²² As noted in Part III, similar concerns have been raised about the enforceability of the duty to achieve the long-term ERT in the *Victorian Act*.

A recent legal claim under the *UK Act*, commenced in March 2022, provides an opportunity to test the limitations of the Act's accountability provisions. This claim, brought by three civil society groups, challenges the legality of the UK government's *Net Zero Strategy*,²²³ arguing that the government has breached its statutory obligations to demonstrate that its climate policies will sufficiently reduce emissions to meet legally binding carbon budgets.²²⁴ The claimants note

²¹⁹ See, eg, Peter McMaster, 'Climate Change: Statutory Duty or Pious Hope?' (2008) 20(1) *Journal of Environmental Law* 115; Aileen McHarg, 'Climate Change Constitutionalism? Lessons from the United Kingdom' (2011) 2(4) *Climate Law* 469; Colin T Reid, 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts' [2012] (October) *Public Law* 749; Jonathan Church, 'Enforcing the Climate Change Act' (2015) 4(1) *University College London Journal of Law and Jurisprudence* 109; Thomas L Muinzer, 'Is the Climate Change Act 2008 a Constitutional Statute?' (2018) 24(4) *European Public Law* 733.

²²⁰ See, eg, Church (n 219) 109; Macrory and Muinzer (n 100) 90.

²²¹ Macrory and Muinzer (n 100) 90.

²²² See *ibid* 89–90; McHarg (n 219) 477–8.

²²³ HM Government (UK), *Net Zero Strategy: Build Back Greener* (October 2021), which was presented to the UK Parliament pursuant to s 14 of the *UK Act* (n 45).

²²⁴ ClientEarth, 'UK Government Must Defend Net Zero Strategy in Court following Case Permission' (Press Release, 3 March 2022) <<https://www.clientearth.org/latest/press-office/press/uk-government-must-defend-net-zero-strategy-in-court-following-case-permission>>, archived at <<https://perma.cc/5XX8-TXVV>>. The case focuses on the

that emissions projections in the strategy significantly exceed the levels required to meet future carbon budgets, and that the strategy does not include sufficient and credible ‘real-world policies that ensure it succeeds’, and instead relies on ‘speculative and unproven technologies that risk the UK having to introduce more drastic measures in future’.²²⁵

This new legal claim under the *UK Act* builds on a 2019 case brought by Friends of the Irish Environment (‘FIE’), an environmental non-government organisation, against the Republic of Ireland.²²⁶ This case alleged that the adoption of the first national mitigation plan prepared under the *Climate Action and Low Carbon Development Act 2015* (Ireland) (‘*Irish Act*’) in 2017 (which allowed for emissions to increase from 2017 to 2020) was ultra vires.²²⁷ FIE argued that the plan was missing mandatory elements such as a specification of the manner in which it was proposed to achieve the national transition objective (to ‘transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050’);²²⁸ and that the State could not be said to have had regard to prescribed matters such as international and

government’s duties under ss 13 and 14 of the *UK Act* (n 45). These provisions establish duties for the government to prepare proposals and policies for meeting carbon budgets and to report on their implementation.

²²⁵ ClientEarth, ‘ClientEarth Sues UK Government over ‘Pie-in-the-Sky’ Climate Strategy’ (Press Release 12 January 2022) <<https://www.clientearth.org/latest/press-office/press/clientearth-sues-uk-government-over-pie-in-the-sky-climate-strategy>>, archived at <<https://perma.cc/C9FQ-CQ2X>>.

²²⁶ There has also been a recent decision on a case seeking to strengthen German framework climate legislation, in which a group of youth plaintiffs were successful in claiming that the provisions for updating the reduction pathway under the legislation were unconstitutional. At a minimum, the legislature needs ‘to specify the intervals at which further plans must be transparently drawn up’ and must define post-2030 reduction measures in greater detail: Bundesverfassungsgericht, ‘Constitutional Complaints against the Federal Climate Change Act Partially Successful’ (Press Release No 31/2021, 29 April 2021) <<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>>, archived at <<https://perma.cc/44WC-66H4>>.

²²⁷ Andrew Jackson, ‘Ireland’s Climate Action and Low Carbon Development Act 2015: Symbolic Legislation, Trojan Horse, Stepping Stone?’ in Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020) 129, 147. There were a number of further grounds to this legal challenge, including that the plan breached the *Constitution of Ireland* (specifically, the right to life, right to bodily integrity, and right to an environment) and the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953): *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747, [12], [133] (MacGrath J) (‘*Friends of the Irish Environment (High Court)*’).

²²⁸ *Climate Action and Low Carbon Development Act 2015* (Ireland) s 3(1) (‘*Irish Act*’). Section 4(2)(a) requires the adoption of a national mitigation plan that would ‘specify the manner in which it is proposed to achieve the national transition objective’.

European Union climate law and climate justice.²²⁹ The *Irish Act* (at the time of the challenge) did not include particularly strong substantive or procedural duties, nor did it provide quantified long-term or interim ERTs.²³⁰ At first instance, the High Court of Ireland held against FIE, finding that even if the plan is justiciable, the State must be given a broad margin of discretion in its adoption, with reference to the separation of powers doctrine and the nature, extent and wording of the relevant statutory obligations.²³¹ In particular, the Court noted the weak 'have regard to' obligations and the broad discretion granted to the State in making the mitigation plan, as well as the lack of any interim targets to direct early mitigation efforts.²³² However, this decision was subsequently overturned on appeal by the Supreme Court.²³³ The Court acknowledged the justiciability of the obligation on the government to set out serious and credible measures to achieve the national transition objective, noting that 'the overriding requirement of a compliant plan is that it specifies how that objective is to be achieved by 2050'.²³⁴ Therefore, the Court held that the 2017 plan 'falls a long way short of the sort of specificity which the statute requires' and should therefore be quashed.²³⁵

While the Irish case provides an example of a court willing to enforce procedural obligations in framework laws with reference to long-term objectives, and apply a declaratory remedy, it also underscores that enforceability can be greatly enhanced with careful statutory design. Legislating a long-term net zero goal and a duty to achieve this is significant. Increasing accountability around interim targets is also important. Some jurisdictions have now included quantified 2030 and other midpoint targets within

²²⁹ *Friends of the Irish Environment (High Court)* (n 227) [12] (MacGrath J); *Irish Act* (n 228) ss 3(2), 4(7).

²³⁰ For an overview of recent reforms, see Jackson (n 227) 150–2.

²³¹ *Friends of the Irish Environment (High Court)* (n 227) [92]–[94] (MacGrath J).

²³² *Ibid* [96]–[98] (MacGrath J). See also Jackson (n 227) 149.

²³³ *Friends of the Irish Environment CLG v Ireland* [2020] IESC 49, [6.49], [9.3] (Clarke CJ for the Court) ('*Friends of the Irish Environment (Supreme Court)*'). See discussion in Orla Kelleher, 'The Supreme Court of Ireland's Decision in *Friends of the Irish Environment v Government of Ireland* ("Climate Case Ireland")', *EJIL:Talk!* (Blog Post, 9 September 2020) <<https://www.ejiltalk.org/the-supreme-court-of-irelands-decision-in-friends-of-the-irish-environment-v-government-of-ireland-climate-case-ireland/>>, archived at <<https://perma.cc/RH4C-6ZKT>>; Owen Macintyre, 'The Irish Supreme Court Judgment in Climate Case Ireland: "One Step Forward and Two Steps Back"', *IUCN News* (online, 28 August 2020) <https://www.iucn.org/news/world-commission-environmental-law/202008/irish-supreme-court-judgment-climate-case-ireland-one-step-forward-and-two-steps-back>, archived at <<https://perma.cc/BVK6-UWAW>>.

²³⁴ *Friends of the Irish Environment (Supreme Court)* (n 233) [6.18] (Clarke CJ for the Court).

²³⁵ *Ibid* [6.46]–[6.48].

framework laws.²³⁶ Where interim targets are not legislated, the Victorian experience suggests that providing a clear outline of relevant considerations and the priority they must be afforded in the interim target-setting process, as well as duties to achieve interim targets, would offer additional scaffolding for enforcing the legislation. Specifically providing for third-party review of decisions made under the *Victorian Act* would further strengthen accountability. In Victoria, the Independent Review Committee for the *2010 Victorian Act* recommended the inclusion of clear pathways for judicial review with open-standing provisions for a selection of prescribed decisions under the *Victorian Act*.²³⁷ Although this recommendation was not enacted by the Victorian government, there are open-standing provisions in other environmental laws at state and federal levels in Australia that have proven useful in addressing barriers to third-party enforcement and that could provide a model for framework climate laws.²³⁸

Legal enforceability aside, for political accountability purposes, it is also important to consider carefully the way in which laws allocate responsibility and direct and constrain critical activities such as interim target-setting, strategy development, implementation, progress-monitoring and course-correction. In the Victorian context, the *Victorian Act* could benefit from tighter constraints on core procedural obligations. In particular, the pledging mechanism and the associated cycle of implementation and review used in the

²³⁶ See discussion in *Climate Laws in Europe* (n 2) 19–21. For example, France and Spain enshrine 2030 targets in law. This practice is facilitated by the fact that all EU member states already have binding national reduction targets for 2030 coming from EU legislation for both emissions covered by the ETS and those sectors not covered by the ETS. Others, such as Germany, explicitly allocate a proportion of interim emissions budgets to each sector.

²³⁷ *Independent Review Report* (n 35) 80. This recommendation was made in relation to statutory decisions prescribed under sch 1 of the *2010 Victorian Act* (n 33), in relation to which s 14 of the Act required decision-makers to take climate change into account. In September 2021, the environmental organisation, Environment Victoria Inc, launched a legal challenge which tests the equivalent provisions of the *Victorian Act* (n 39): Environment Victoria Inc, Originating Motion in *Environment Victoria Inc v AGL Loy Yang Pty Ltd*, S ECI 2021 03415, 20 September 2021 ('Originating Motion in *Environment Victoria Inc*'). This case alleges that the Victorian Environment Protection Authority has failed to take climate change into account as required by s 17 of the *Victorian Act* (n 39) in its decision to renew the operating licenses for coal-fired power stations operating in Victoria following a lengthy review: Originating Motion in *Environment Victoria Inc* (n 237) [16], [18]. See also Lisa Cox, 'Victoria's Environment Regulator Sued by Advocates over Alleged Failure to Limit Emissions', *The Guardian* (online, 23 September 2021) <<https://www.theguardian.com/australia-news/2021/sep/23/victorias-environment-regulator-sued-by-advocates-for-alleged-failure-to-limit-emissions>>, archived at <<https://perma.cc/9JUJ-CPKK>>.

²³⁸ For example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides specifically in s 487 for extended standing for judicial review of decisions, and similarly for third-party proceedings for an injunction to enforce the Act: at s 475.

Victorian Act are relatively lightly constrained in law, with few clear duties and no substantive guidance covering pledges or the pledging process.²³⁹ As a result, the *Victorian Act* does little to support effective institutional coordination within and across sectors in the pledging process. This creates risks of inefficiencies, including inadequate burden-sharing, competing priorities and free-riding, as well as missed opportunities for strategic targeting of emissions reductions across the economy, mutually advantageous emissions reduction efforts, and peer-learning and capacity-building across sectors and within government (which can arguably already be observed in the first round of pledges released in 2021). Further, there is no mechanism (beyond a general permission to vary a pledge)²⁴⁰ in the *Victorian Act* to address a potential shortfall between the pledges and the interim targets.

Although different laws approach these issues in different ways,²⁴¹ there are examples which ‘establish more pointed guidance and coordination between various sectoral competencies.’²⁴² In Germany, the framework climate law sets sectoral emissions budgets and clearly assigns responsibility for achieving these to the respective ministries, requiring relevant ministries to report annually on progress and holding them responsible for addressing any deviation from the carbon budget.²⁴³ Finnish legislation spreads responsibility across multiple ministries, with clear expectations for each Minister to prepare sectoral input for each long-term and medium-term plan and to provide necessary information for their sector for annual reporting.²⁴⁴ Further, in Europe, ‘[t]he majority of laws provide for the possible development of additional, stronger measures if progress monitoring shows that these are needed.’²⁴⁵ Augmenting the procedural obligations laid out in the *Victorian Act* with more specific requirements, particularly with regard to the development and implementation of pledges, could render this bottom-up mechanism more effective in delivering emissions reductions aligned with interim and long-term targets.

²³⁹ See above Part III(C)(3).

²⁴⁰ *Victorian Act* (n 39) s 50.

²⁴¹ See Scotford and Minas (n 2) 71.

²⁴² *Climate Laws in Europe* (n 2) 29.

²⁴³ *Ibid* 20, 30.

²⁴⁴ *Ibid* 30.

²⁴⁵ *Ibid* 25.

C Transparency through Independent, Expert Participation and Public Engagement?

Like the international model established by the *Paris Agreement*, framework laws rely heavily on transparency mechanisms to achieve accountability. The *Victorian Act* provides a good example of a progress-reporting cycle (linked to pledges and interim targets, with an annual report on GHG emissions) which is reasonably robust.²⁴⁶ Examples in other jurisdictions demonstrate that framework laws can require more regular or more targeted progress-reporting in addition to reporting emissions.²⁴⁷ However, as discussed in Part III, the effectiveness of such measures in driving ambitious implementation and holding governments accountable depends heavily on public and political scrutiny. In the international context, where countries are competing on the world stage to look good, it may be expected that such transparency measures work — at least to a certain degree — to drive ambitious implementation by nation states. Yet, as the Victorian example suggests, such scrutiny is different in nature and far from guaranteed in a domestic context, and can be particularly weak at the sub-national level.²⁴⁸ For this reason, it is important to design framework laws to maximise transparency.

Two particular features of framework laws used in other jurisdictions stand out as important potential transparency amplifiers: prominent and permanent roles for independent experts, and explicit provision for public participation and engagement.

Inspired by the *UK Act*, independent expert bodies play an important role in climate governance under most European framework laws. This includes providing expert advice to inform interim target-setting and the development and implementation of mitigation strategies, monitoring progress towards targets, and facilitating public dialogue.²⁴⁹ The recently reformed New Zealand legislation establishes a Climate Commission with a similarly broad role.²⁵⁰ In the UK, the Committee on Climate Change has also been given explicit roles (via amendments to other laws such as the *Infrastructure Act 2015* (UK)) in advising and supporting different ministries and sectors.²⁵¹ Some laws specifically require the government to respond to the reports or

²⁴⁶ *Victorian Act* (n 39) ss 29–30, 52.

²⁴⁷ *Climate Laws in Europe* (n 2) 27–8.

²⁴⁸ See above Part III(C)(3).

²⁴⁹ *Climate Laws in Europe* (n 2) 32.

²⁵⁰ *NZ Act* (n 196) pt 1A, as inserted by *Zero Carbon Amendment (NZ)* (n 196). See discussion in Taylor (n 202) 207–11.

²⁵¹ *UK Act* (n 45) pt 2. See discussion in Macrory and Muinzer (n 100) 79–81.

recommendations of the independent body, and may require justification of any decision to depart from this advice,²⁵² thereby strengthening the status and influence of independent experts. In contrast, the *Victorian Act* provides for a very limited, advisory role for independent experts in interim target-setting only, with no provision for institutional continuity.²⁵³

Public participation requirements in framework laws vary across jurisdictions, from an extensive list of circumstances in which consultation is required, to a general commitment to public engagement, to more precise but limited requirements to consult on specific policies or plans.²⁵⁴ The *Victorian Act* reflects the latter approach, containing specific requirements to consult on the climate change strategy (including emissions reduction pledges),²⁵⁵ a requirement which was not adhered to in practice. As discussed in Part III, the *Victorian Act* does not provide explicitly for consultation in the development of targets or pledges, and in practice, the first round of pledging has involved very limited stakeholder engagement. In some jurisdictions, a culture of public consultation and engagement or the existence of relevant bodies independent of the legislation possibly reduces the need for specific provisions in framework laws.²⁵⁶ However, neither of these alternatives is clearly in evidence in Victoria.

If the logic of transparency-driven action that underpins the *Paris Agreement* and many other framework climate laws is to be effective in a jurisdiction like Victoria, these mechanisms should be supplemented with robust public participation requirements and clear, wide-ranging, continuous roles for independent experts that can amplify transparency and intensify public scrutiny of government action on climate change.

V CONCLUSION

Framework climate laws can undoubtedly play an important role in supporting the implementation of the *Paris Agreement*. These laws are particularly well suited to the national scale, to guide the delivery of NDCs and to coordinate direct, sectoral policy measures to reduce emissions. However, in federal systems of government, where sub-national governments have relevant powers and competencies, these laws are also important at a sub-national scale, especially where national-level commitment to climate action is lacking. Yet, as

²⁵² *Climate Laws in Europe* (n 2) 33, noting examples in the UK, France and Denmark.

²⁵³ It is, however, notable that a mechanism was proposed in the Climate Change Bill (n 20) pt 6 introduced by Zali Steggall MP.

²⁵⁴ *Climate Laws in Europe* (n 2) 35–6.

²⁵⁵ *Victorian Act* (n 39) s 32.

²⁵⁶ *Climate Laws in Europe* (n 2) 35–7.

the Victorian case study has illustrated, without careful drafting and safeguards to bolster the bottom-up facilitatory regulatory approach, there are real risks that these laws may not drive emissions reductions as intended, or may even give a false impression of progress, and delay the implementation of more direct mitigation measures.

This article has focused on two key features of the *Victorian Act* with important implications for the effectiveness of framework laws in supporting the implementation of the *Paris Agreement*: the approach taken to align target-setting with the *Paris* temperature or net zero goals; and the adoption of a facilitatory, bottom-up regulatory approach that relies on transparency measures to drive implementation and accountability. Empirical analysis of the *Victorian Act*'s early implementation suggests that aligning domestic targets and policy with the *Paris Agreement* using framework laws is not straightforward or uncontested, and particular challenges arise at the sub-national scale. Further, the regulatory approach taken in the *Victorian Act*, with its emphasis on open-ended, bottom-up pledging, lightly constrained obligations of conduct and relatively weak transparency measures, gives rise to a range of risks and potential pitfalls.

While framework climate laws around the world vary significantly, many now adopt a similar architecture and a similar emphasis on aligning with, and supporting implementation of, the *Paris Agreement*. Therefore, there are opportunities to learn from experience in developing, implementing and enforcing framework laws in other jurisdictions to recommend reforms to the *Victorian Act* and to synthesise lessons more generally for the legal design and implementation of effective, impactful framework laws.

The objective of aligning target-setting and associated policy processes with the *Paris Agreement*'s temperature goals has clear value at both national and sub-national scales, and legislated, quantified ERTs are a key strength of framework laws. However, this analysis also suggests that it may be helpful to approach domestic legal provision for *Paris*-alignment more carefully than the approach taken in Victoria. Leading best-practice examples of framework laws now recognise that blanket provision for 'net zero by 2050' may not be sufficient to meet the more ambitious *Paris* temperature goals, nor foster an equitable and timely contribution to the emissions reductions required to avoid dangerous levels of global warming. Therefore, best-practice examples of long-term targets incorporate more nuance and ambition, as well as an option to amend long-term targets in light of scientific advances, with safeguards for non-regression. Tighter constraints on interim target-setting and associated policy-development and planning are also used in a number of jurisdictions to align domestic climate action to *Paris Agreement* goals and particularly to support

timely emissions reductions to maximise chances of achieving these goals in a fair and efficient way.

Framework climate laws are essentially about binding governments, through cyclical procedural obligations, to deliver emissions reductions. Therefore, their effectiveness is closely tied to the robustness of the obligations created for government actors and the way in which these laws hold governments to account, either politically or legally. Best-practice examples of robust (and legally enforceable) obligations of conduct and outcome have been explored here, as well as particular features within leading framework laws which can amplify transparency, such as integrating independent expertise into climate governance and providing for stakeholder engagement and participation. Such best-practice approaches represent reform opportunities for existing laws, like the *Victorian Act*, and a blueprint for the development of new climate laws.

Yet, it is also important to recognise that the form that a framework law takes, and, in particular, its implementation over time, will reflect prevailing political will. The procedural requirements of these laws can accommodate great ambition on climate action, but, depending to some degree on their form, they may also allow for lacklustre responses where there is a lack of political commitment. Best-practice examples referred to in this article may be already feasible in jurisdictions where there is strong political consensus on climate change. Indeed, many jurisdictions in Europe are leading the way with framework climate laws, reflecting the broader political context in which they are emerging. The situation is quite different in jurisdictions like Victoria, where there has been ongoing political sensitivity, a lack of bipartisan support for climate action and a marked discrepancy between national and sub-national commitments to climate action.²⁵⁷ In such a context, the more immediate question may be whether the very existence of the framework law, and its early implementation — even if suboptimal — can contribute to building political consensus on climate change and, in turn, drive the gradual improvement and strengthening of climate change responses at both a sub-national and national scale.

²⁵⁷ See above n 20.