

THE ROLE OF NATIONAL FRAMEWORK LEGISLATION IN IMPLEMENTING AUSTRALIA'S EMISSION REDUCTION COMMITMENTS UNDER THE PARIS AGREEMENT

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The Paris Agreement has been widely recognised as a significant step forward in efforts to address climate change. However, the success of the agreement in achieving its global goals will depend critically on the implementation of sufficiently ambitious nationally-determined commitments ('NDCs') made under the Agreement. This article explores the potential for national legislation to support the Paris Agreement by guiding the development of NDCs and establishing political and legal accountability mechanisms to ensure that they are achieved. It also examines particular design issues that arise in an Australian context.

INTRODUCTION

The *Paris Agreement*¹ entered into force on 4 November 2016 and was ratified by Australia on 9 November 2016.² As at October 2017 it had been ratified by parties responsible for 87 per cent of global greenhouse gas emissions.³ While President Trump has threatened to withdraw the United States from the agreement,⁴ he would need to win a second Presidential term to do so.⁵ At least for the time being,

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1. *Paris Agreement* [2016] ATS 24, entered into force 4 November 2016 (UNTS number not yet assigned).

2. United Nations, *Status of Agreements: Paris Agreement* <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVII-7-d&chapter=27&clang=_en>.

3. World Resources Institute, *Paris Agreement Tracker* (2 October 2017) <<https://cait.wri.org/source/ratification/#?lang=en>>.

4. Michael D Shear, 'Trump Will Withdraw US from Paris Climate Agreement' *New York Times* (online), 1 June 2017 <<https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>>.

5. The United States has indicated that 'unless the United States identifies suitable terms for reengagement, the United States will submit to the Secretary-General, in accordance with Article 28, paragraph 1 of the Agreement, formal written notification of its withdrawal as soon as it is eligible to do so': Karl Mathiesen 'Trump Letter to UN on Leaving Paris Climate Accord – In Full', *Climate Change News* (7 August 2017) <<http://www.climatechangenews.com/2017/08/07/trump-tells-un-intention-leave-paris-climate-accord-full/>>. Under Article 28.1 the United States is eligible to withdraw '[a]ny time after three years from the date on which this Agreement has entered into force...'. Article 28.2

the *Paris Agreement* remains at the centre of international efforts and the world's best hope for limiting anthropogenic climate change.

The *Paris Agreement* endorses two important global goals: to restrain global warming to 'well under' 2°C relative to pre-industrial levels, and to achieve a balance between anthropogenic sources and sinks of greenhouse gas emissions in the second half of this century. Central to achieving these goals is the pledge-and-review mechanism, under which parties must submit 'nationally-determined contributions' ('NDCs') every five years, following global stocktakes of progress. The success or failure of the *Paris Agreement* in achieving its global goals will turn on the adequacy of successive emission reduction commitments in NDCs, and on their effective implementation. At the same time, the agreement leaves a great deal of discretion to parties to determine the nature and scale of their commitments and contains soft enforcement mechanisms, such as reporting and expert review, to ensure that parties follow through on their commitments.

This article explores the potentially important role that national framework legislation can play in supporting the pledge-and-review mechanism by encouraging nations to submit adequate targets and ensure adequate implementation. It also examines some of the key design issues that Australia would need to address in developing framework legislation of this kind. While framework legislation also has the potential to play an important role with respect to climate change adaptation, the focus here is on mitigation: that is, reducing greenhouse gas emissions.⁶

The article is structured as follows. Part I focuses on the *Paris Agreement*. It outlines the goals of the agreement, the central role of the pledge-and-review mechanism, and the risks that the pledge-and-review mechanism will be undermined by free-riding behaviour resulting in inadequate national targets and implementation. Part II considers the potential for national framework legislation to help avoid this scenario by guiding responsible target-setting and implementation. It examines the emergence of framework legislation as a significant regulatory strategy; the functions it can serve; and the ways in which it can be aligned with, and support, the goals and processes of the *Paris Agreement*. Part III turns the focus to Australia,

further provides that any such withdrawal will take effect upon the expiry of one year from the date of receipt. The combined effect of these provisions is that the earliest date for withdrawal is 4 November 2020, one day after the next US election: see Fred Pearce, 'With the U.S. Out of Paris, What Is the Future for Global Climate Fight?' *Yale Environment 360* (8 June 2017) <<http://e360.yale.edu/features/with-the-u-s-out-of-paris-what-is-the-future-for-global-climate-fight>>. There were other possible options for withdrawing earlier, namely withdrawing from the *United Nations Framework Convention on Climate Change* or asserting that the *Paris Agreement* had not been adopted in accordance with US Constitutional requirements, but it appears that the Trump Administration has elected not to pursue these options.

6 For ease of reference, 'reducing emissions' is used in this article as shorthand for both reducing anthropogenic greenhouse gas emissions and increasing greenhouse gas removals (e.g. through revegetation).

with a consideration of three issues that would be especially important in the development of national framework legislation in this country: the constitutional basis for the legislation, the role the Australian Parliament should have in target-setting decisions, and the scope for the legislation to impose duties on public officials to ensure that targets are achieved.

I THE PARIS AGREEMENT

A *The Goals of the Paris Agreement*

The principal goal of the *Paris Agreement* is an ambitious one:

[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.⁷

This long-term temperature goal was informed by the evolving scientific understanding of the impacts associated with different average global temperatures, including impacts on water availability, extreme weather events, agricultural yield, species and ecosystems.⁸ At a political level, the reference to 1.5°C was also driven by the demands of island states and least developed countries most vulnerable to the impacts of climate change.⁹

Some sense of the scale of the emissions reduction challenge implied by the long-term temperature goal is provided by estimates of the emissions budget that humanity must stay within to meet that goal. The concept of an emissions budget (or carbon budget as it is often called)¹⁰ is useful because it is cumulative emissions to the atmosphere, rather than just emissions in a single year, that result in the atmospheric greenhouse gas concentrations responsible for climate change.¹¹ In 2014, Australia's Climate Change Authority considered what global emissions budget would be consistent with a 2°C goal. Drawing on work by Meinshausen et al,¹² the Authority found that:

7 *Paris Agreement* art 2.

8 Carl-Friedrich Schleussner et al, 'Science and Policy Characteristics of the Paris Agreement Temperature Goal' (2016) 6 *Nature Climate Change* 827, 827-8.

9 Ralph Bodle, Lena Donat and Matthias Duwe, 'The Paris Agreement: Analysis, Assessment and Outlook' (2016) 10(1) *Carbon and Climate Law Review* 5 7; Sara Phillips, 'Paris Climate Deal: How a 1.5 Degree Target Overcame the Odds at COP21', *ABC Online*, 13 December 2015.

10 A carbon budget is literally 'a mechanism for accounting for the net sources of carbon to the atmosphere': R Quentin Grafton et al, *A Dictionary of Climate Change and the Environment: Economics, Science and Policy* (Edward Elgar Publishing, 2012) 49. However the term is often used to refer to global emissions budgets covering all greenhouse gases: Climate Change Authority, 'Reducing Australia's Greenhouse Gas Emissions - Targets and Progress Review Final Report' (2014) 47.

11 For an outline of the scientific basis for carbon budgets and the different methods for their calculation see Joeri Rogelj et al, 'Differences Between Carbon Budget Estimates Unravelling' (2016) 6(3) *Nature Climate Change* 245.

12 Malte Meinshausen et al, 'Greenhouse-gas Emission Targets for Limiting Global Warming to 2 C' (2009) 458(7242) *Nature* 1158, 1161.

[a] global emissions budget that provides at least a likely (67 per cent probability) chance of limiting warming to less than 2 degrees above pre-industrial levels...equates to a global budget of no more than 1,700 Gt CO₂-e emissions of Kyoto gases from 2000 to 2050.¹³

The Authority further found that approximately 36 per cent of this global budget had already been used between 2000 and 2012.¹⁴ Given that this leaves a little over 1000 Gt CO₂-e, and that annual global emissions currently exceed 50 Gt CO₂-e,¹⁵ this implies that very substantial emission reductions would be needed to live within the remaining budget associated with 2°C of warming, let alone a goal of closer to 1.5°C.

While the long-term temperature goal is at the heart of the *Paris Agreement*, Article 4.1 sets out an important supplementary goal:

In order to achieve the long-term temperature goal as set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, *so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century...* (italics added).

As with the long-term temperature goal, this net-zero emissions goal is a collective global goal, rather than one that strictly requires each party to achieve net-zero emissions.¹⁶

B The Pledge and Review Mechanism

Unlike the *Kyoto Protocol*,¹⁷ the *Paris Agreement* does not prescribe country-specific emissions targets. Instead, each party is required to submit its own *nationally determined contribution*.¹⁸ Under Article 4.2:

13 Climate Change Authority, above n 10, 50.

14 Ibid.

15 In 2014 global greenhouse gas emissions were approximately 52.7 Gt CO₂-e (range 47.9-57.5 with a 90 per cent confidence interval): United Nations Environment Program, 'The Emissions Gap Report 2016: A UNEP Synthesis Report' (2016) 3.

16 Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25(2) *Review of European, Comparative & International Environmental Law* 142, 146.

17 *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).

18 The difference with the *Kyoto Protocol* should not be overstated. While the fact that emission reduction targets were recorded in an annex to the protocol might on the surface suggest a 'top-down' model of targets being imposed on parties, 'the reality is that 'bottom up' has always been how diplomacy works in a world that has no central government': David G Victor, 'Copenhagen II or Something New' (2014) 4(10) *Nature Climate Change* 853 1.

Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

NDCs are to be prepared by all parties, not just developed countries. However, the content of NDCs will differ. Developed countries ‘should continue taking the lead by undertaking economy-wide absolute emission reduction targets’ while developing country parties are ‘encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances’.¹⁹

While the long-term, collective goals of the *Paris Agreement* are clear enough, the agreement provides little guidance as to how the efforts to achieve these goals should be divided among nations. The closest it comes to outlining such principles is Article 4.3, which provides that:

Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

As at October 2017, 160 nations had submitted NDCs, out of a total of 166 parties that had ratified the *Paris Agreement*.²⁰ As discussed below, early estimates suggest that current NDCs are not adequate to meet the *Paris Agreement*’s goals. However, the great hope of the *Paris Agreement* is that successive NDCs will progressively strengthen mitigation efforts. The architecture of the agreement seeks to encourage this in a number of ways. Under Article 4.11 a party ‘may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition...’.²¹ Parties are also required to communicate an NDC every five years.²² Such communications will be informed, in practice, by the country’s own reporting on progress in implementing its NDCs,²³ technical expert reviews of those reports²⁴ and global stocktakes of collective progress.²⁵ The *Paris Agreement* seeks to ratchet up the level of ambition in successive NDCs through the requirements, already noted, of ‘progression’ and ‘highest possible ambition’.²⁶

19 *Paris Agreement* art 4.4. On the characterisation of the statement regarding developed country parties as a recommendation rather than a legally binding obligation see Bodansky, above n 16, 149-150.

20 UNFCCC Secretariat, *NDC Registry (Interim)* <<http://www4.unfccc.int/ndcregistry/Pages/Home.aspx>> (accessed 2 October 2017).

21 *Paris Agreement* art 4.11.

22 *Ibid* art 4.9.

23 *Ibid* art 13.7.

24 *Ibid* art 13.11.

25 *Ibid* arts 4.9, 14. Art 4.9 explicitly provides that NDCs ‘shall...be informed by the outcomes of the global stocktake ...’.

26 *Ibid* art 4(3).

The five-yearly cycle of global stocktakes and successive NDCs is illustrated in Table 1.

TABLE 1: *PARIS AGREEMENT* TIMETABLE 2018-2030

Year	Event
2018	Facilitative dialogue ¹
2020	Deadline to communicate NDCs ²
2023	Global stocktake
2025	Deadline to communicate NDCs
2028	Global stocktake
2030	Deadline to communicate NDCs

The strength of the *Paris Agreement*'s ratchet mechanism, and specifically the question of whether a party could downgrade the level of ambition in its NDC, was the subject of debate following the election of President Trump and speculation as to whether the United States could downgrade its NDC as an alternative to withdrawing from the *Paris Agreement*. On one view, it could do so because 'higher ambition is not a legal requirement, and Article 4.11 does not legally prohibit a party from adjusting its NDC in another direction.'²⁷ A different view has also been strongly argued: that on its proper interpretation, Article 4.11 'only countenances upward adjustment of NDCs'.²⁸ It is argued that this interpretation is consistent with the object and purpose of the *Paris Agreement* because it preserves the effectiveness of the ratchet mechanism that is so central to its successful operation. The alternative, of allowing parties to downgrade their emission reduction commitments at any time, would undermine the requirement that each new NDC represent a progression beyond the then current NDC.²⁹

The *Paris Agreement* does not specify the timeframe for NDCs. Competing proposals for five and 10 year NDCs were put forward in negotiations but no agreement could be reached on a preferred timeframe.³⁰ This question was effectively deferred to the first meeting of the parties,³¹ which further deferred

27 Susan Biniaz and Daniel Bondansky, *Legal Issues Related to the Paris Agreement* (Center for Climate and Energy Solutions, May 2017).

28 Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement' (2017) *Journal of Environmental Law* 1, 12.

29 Ibid; Jonathon Church, 'Guest Post: Can the US Legally Weaken its *Paris Agreement* Climate Pledge?' on *Carbon Brief* (8 May 2017) <<https://www.carbonbrief.org/guest-post-can-the-us-legally-weaken-its-paris-agreement-climate-pledge/>>; Lavanya Rajamani, 'The US and the Paris Agreement: In or Out at What Cost?' on *Blog of the European Journal of International Law* (10 May 2017) <<https://www.ejiltalk.org/the-us-and-the-paris-agreement-in-or-out-and-at-what-cost/>>.

30 Harald Winkler, 'Mitigation (Article 4)' in Daniel Klein et al (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, 2017) 157.

31 *Paris Agreement* art 4(10).

the question.³² What is clear is that by 2020 parties using a five-year timeframe must have communicated NDCs for 2021-2025 and 2026-2030, and parties (such as Australia) using a 10 year timeframe will need to communicate or update their 2021-2030 NDCs.³³ In other words, all parties must have commitments in place for the 2021-2030 period by this time.

C *Two Risks with the Pledge and Review Mechanism*

The tragedy of the commons, as described by ecologist Garrett Hardin in his famous 1968 article,³⁴ provides a useful conceptual lens through which to consider the dynamics of the *Paris Agreement* and associated national actions to reduce greenhouse gas emissions. The metaphor Hardin employs is that of cattle being grazed on a commons, ‘a pasture open to all’.³⁵ From the perspective of each herder it makes sense to graze as many cattle as possible, as individual herders have the full benefit of adding another animal but suffer only a fraction of the costs of over-grazing. However, the net result of these individual decisions is the degradation, even the destruction, of the pasture. ‘Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited.³⁶ The dynamic described by Hardin has the potential to apply to any open access resource that can be depleted by overuse. Obvious examples are shared fisheries³⁷ and water resources,³⁸ but the global atmospheric commons can be, and often has been, viewed in the same way.³⁹

The tragedy of the commons, with its focus on the often-tragic misalignment of individual incentives and collective interests, contains a powerful lesson for the implementation of the *Paris Agreement*. In a comparable way to Hardin’s herders, every country has a common *collective interest* in a sustainable outcome but an *individual incentive* to do things that will undermine that outcome. This position was not fundamentally changed by the *Paris Agreement*. International endorsement of the long-term temperature goal was a substantial diplomatic

32 Center for Climate and Energy Solutions, *Outcomes of the UN Climate Conference in Marrakech: 22nd Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change* <<https://www.c2es.org/international/negotiations/cop22-marrakech/summary>> (accessed 17 July 2017).

33 *Paris Agreement* art 4.9; 1/CP.21[23]-[25].

34 Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162(3859) *Science* 12431.

35 *Ibid* 1244.

36 *Ibid*.

37 e.g. Alison Rieser, ‘Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate’ (1999) 23 *Harvard Environmental Law Review* 393.

38 e.g. Shol Bluestein, ‘From the Bottom Up: Redesigning the International Legal Response to Anthropogenic Climate Change’ (2011) 32 *Adelaide Law Review* 316, 308.

39 e.g. Peter-Tobias Stoll, ‘The Climate as a Global Common’ in Daniel A Farber and Marjan Peeters (eds), *Climate Change Law: Volume 1* (Elgar, 2016) ; Ottmar Edenhofer et al, *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014); Barton H Thompson Jr, ‘Tragically Difficult: The Obstacles to Governing the Commons’ (2000) 30 *Environmental Law* 241, 253.

achievement. However agreement on this goal has not, in itself, changed the incentives of individual countries. It is still the case that '[e]very country has an incentive to shirk, to free-ride on the efforts of others'⁴⁰ with respect to their contribution to the collective goal. These 'others' include both other countries and future generations.

There is a very real risk that this incentive will manifest itself in two ways, in either case leading to a tragedy of the global atmospheric commons. The first risk is that NDCs will not, even if fully implemented, be sufficient to achieve the temperature goal. While countries have agreed on a global goal, there is still an incentive to free-ride by making inadequate contributions towards achieving it.⁴¹ Given that there are no clear principles in the *Paris Agreement* for translating the global goals to national commitments, there is considerable scope for this to occur. This free-riding has the potential to manifest itself in a myriad of ways, from the adoption of convenient assumptions about business-as-usual emissions,⁴² to the use of economic modelling that exaggerates the costs of achieving mitigation targets,⁴³ to the identification of 'special' national circumstances to justify modest targets.⁴⁴ The early evidence suggests that we are heading down a path of inadequate national commitments. The United Nations Environment Program's *Emissions Gap Report* (2016) found that existing mitigation commitments amount to about a quarter of what is needed to stay below 2°C and are in fact consistent with a 3-3.2°C increase in average global temperature above pre-industrial levels by 2100.⁴⁵ The great hope of the *Paris Agreement* is that successive NDCs will represent an 'upward spiral of ambition'⁴⁶ to bridge the gap between what has been committed and what is required, but it remains to be seen whether this can

40 Robert O Keohane and Michael Oppenheimer, 'Paris: Beyond the Climate Dead End Through Pledge and Review?' (2016) 4(3) *Politics and Governance* 142 2; Richard Cooper et al, 'Why Paris Did Not Solve the Climate Dilemma' in Peter Cramton et al (eds), *Global Carbon Pricing: The Path to Climate Cooperation* (The MIT Press, 2016).

41 Keohane and Oppenheimer, above n 42, 2.

42 This is especially important for countries using business-as-usual projections as part of their baseline – e.g. Korea has set a target to reduce emissions by 27 per cent *below business-as-usual levels* by 2030. A generous estimate of business-as-usual levels would make it easier to achieve that target.

43 Andrew Macintosh, 'Mitigation Targets, Burden Sharing and the Role of Economic Modeling in Climate Policy' (2013) 73 *Australian Journal of Public Administration* 164.

44 Eckersley, Robyn 'Climate Leadership Before and After the *Paris Agreement*' (Public Lecture, London School of Economics, 16 November 2016) <<http://www.lse.ac.uk/GranthamInstitute/event/public-lecture-climate-leadership-before-and-after-the-paris-agreement/>> ('there is an ever-present danger of self-differentiation degenerating into a self-serving apology for a defence of national interests narrowly conceived').

45 United Nations Environment Program, above n 15, xvi-xvii. See also Joeri Rogelj et al, 'Paris Agreement Climate Proposals Need a Boost to Keep Warming Well Below 2°C' (2016) 534(7609) *Nature* 631 (analysis based on intended NDCs submitted in the lead up to the *Paris Agreement* estimating an increase of 2.6–3.1 degrees Celsius above pre-industrial levels by 2100 if these commitments are fully implemented).

46 Ad Hoc Working Group on the Durban Platform. Parties' Views and Proposals on the Elements for a Draft Negotiating Text ADP.2014.6 (UNFCCC, 2014), cited in David MacKay et al, 'Price Carbon - I Will if You Will' (2015) 526 *Nature* 315, 315.

be achieved in the face of strong free-riding incentives.

The second risk is that adequate domestic measures to achieve NDCs will not be adopted and implemented – a form of free-riding through inadequate implementation. It is important to note, in this regard, that the *Paris Agreement* does not impose hard penalties or sanctions for non-compliance. While the agreement does create what it calls ‘[a] mechanism to ... promote compliance’, that mechanism takes the form of a ‘non-punitive’ and ‘facilitative’ expert committee that reports annually to the Conference of the Parties.⁴⁷ At most, there would adverse reputational consequences for parties that are found by this expert committee to have breached the broad duty to ‘pursue domestic mitigation measures, with the aim of achieving the objectives [of NDCs]’.⁴⁸ There is also limited scope for independent resolution of disputes concerning interpretation or application of the *Paris Agreement*.⁴⁹ Given these features of the *Paris Agreement*, governments may be tempted to accept the reputational costs of failing to meet an NDC over the economic and political costs they may face in implementing effective emission reduction measures.

While there are substantial incentives for free-riding through inadequate targets and implementation, there are also forces pulling in the other direction. It would be a mistake to assume countries will always be looking for ways to free-ride on the efforts of others. Some nations will be driven by electorates that take a moral stance on the issue, rather than narrowly conceived assessments of national self-interest.⁵⁰ Other nations will be motivated hard-headed assessments of the co-benefits of taking action – such as the economic, health and other benefits of replacing fossil fuels with renewable energy.⁵¹ While it is true that free-riding by climate laggards can undermine the *Paris Agreement*, it is also possible that action by climate leaders could provide the basis for a ‘virtuous cycle of reciprocation’ between nations.⁵²

47 *Paris Agreement* art 15.

48 *Ibid* art 4(2).

49 While the *Paris Agreement* and *UNFCCC* allow parties to submit to the jurisdiction of the International Court of Justice or an arbitral body with respect to settlement of disputes of this kind, there is no requirement to do so: *Paris Agreement* art 24; *UNFCCC*, art 14. Australia has not done so: Australian Government, *National Interest Analysis* [2016] ATNIA 10 (2016) [53].

50 David M. McEvoy and Todd L. Cherry, ‘The prospects for Paris: behavioral insights into unconditional cooperation on climate change’ (2016) 2 (08/16/online) 16056 1 (presenting survey evidence from the United States that most Americans support domestic action on climate change that is not conditional on other countries’ commitments, and that this is ‘driven by notions of responsibility, morality and global leadership’).

51 Fergus Green, *Nationally Self-Interested Climate Change Mitigation: A Unified Conceptual Framework* (2015, Grantham Research Institute) 1 (arguing that climate change is mostly not a tragedy of the commons problem because ‘the majority of emissions reductions needed to decarbonise the global economy can be achieved in ways that are net-beneficial to countries’ and that ‘the barriers to mitigation action lie, primarily, not in the macro-incentive structures of states...but rather within the domestic sphere, at the intersection of domestic interests, institutions and ideas formed in the fossil fuel age’).

52 Stefano Carattini, Simon Levin and Alessandro Tavoni, *Cooperation in the Climate*

In the face of opposing forces for free-riding and climate leadership, will the pledge-and-review mechanism end in a ‘positive spiral of strengthening trust and enhanced cooperation’ or ‘a downward spiral of weakening trust and lower ambition’?⁵³ While only time will tell, one thing is clear: that the more hopeful scenario will be more likely to be realised if parties’ domestic rules promote principled target-setting and effective implementation. The next section considers one regulatory strategy with the potential to achieve these goals and so support the *Paris Agreement*’s pledge-and-review mechanism.

II FRAMEWORK LEGISLATION FOR CLIMATE CHANGE MITIGATION

A *The Emergence of Framework Legislation*

How can domestic laws guide the setting of responsible national emission reduction targets and help ensure that these targets are achieved? One way to do so is to directly address these questions in domestic law through ‘framework legislation’ for climate change mitigation.⁵⁴ The value of such legislation has been highlighted in publications by the Grantham Institute and Inter-Parliamentary Union,⁵⁵ but has been largely overlooked in the Australian policy debate.⁵⁶ For

Commons (Grantham Research Institute on Climate Change and the Environment, 2017) 2. On the need for trust and reciprocity see Elinor Ostrom, ‘A Polycentric Approach for Coping with Climate Change’ (2014) 15(1) *Annals of Economics and Finance*; Daniel H. Cole, ‘Advantages of a Polycentric Approach to Climate Change Policy’ (2015) 5(2) *Nature Climate Change* 114.

53 Robert Falkner, ‘The Paris Agreement and the New Logic of International Climate Politics’ (2016) 92(5) *International Affairs* 1107, 1121.

54 Michal Nachmany et al, ‘The 2015 Globe Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries’ (Grantham Research Institute on Climate Change and the Environment, GLOBE and Inter-Parliamentary Union, 2015) 13 (‘Framework legislation has been defined as a law or regulation with equivalent status, which serves as a comprehensive, unifying basis for climate change policy, which addresses multiple aspects or areas of climate change mitigation or adaptation (or both) in a holistic, overarching manner.’) Legislation sharing some of these features has also been described as ‘emissions reduction target legislation’ or ‘flagship legislation’: see Rob Fowler, ‘Emission Reduction Targets Legislation’ in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (The Federation Press, 2007) 104 (using the term ‘emissions reduction target legislation’ to describe legislation that incorporates ‘emission reduction targets and timetables’); Terry Townshend et al, ‘How National Legislation Can Help to Solve Climate Change’ (2013) 3(5) *Nature Climate Change* 430 (describing a ‘flagship law’ as ‘a piece of legislation or regulation with equivalent status that serves as a comprehensive, unifying basis for climate change policy’).

55 Alina Averchenkova and Samuela Bassi, ‘Beyond the Targets: Assessing the Political Credibility of Pledges for the Paris Agreement’ (2016); Alina Averchenkova and Sini Matikainen, ‘Assessing the Consistency of National Mitigation Actions in the G20 with the Paris Agreement’ (2016) 6, 17, 22; Nachmany et al, above n 54, 13.

56 An exception is the submission by the Environmental Defender’s Offices of Australia to the Commonwealth Government’s review of climate policies: EDOs of Australia, *Submission on Australia’s Climate Change Policy Review*, 5 May 2017 <<http://www.environment.gov.au/submissions/climate-change/review-climate-change-policies-2017/environmental-defenders-offices-of-australia-edoa.pdf>>.

example, a major report published by Australia's Climate Change Authority following the Paris Conference focused exclusively on the 'toolkit' of policy and regulatory measures that should be available to the Australian Government, and did not consider the higher level question of what overarching framework should guide successive governments in setting, planning for and achieving its emission reduction targets.⁵⁷

The concept of entrenching national or sub-national greenhouse gas emission reduction targets in legislation (or in instruments made under legislation) pre-dated the *Paris Agreement*, but is, nevertheless, a relatively recent policy innovation. Writing in 2007, Fowler observed that '[w]hile the need for targets and timetables with respect to greenhouse emissions reductions has been recognised for many years, it is only most recently that the idea of enshrining targets within legislation has been pursued.'⁵⁸ Noting a flurry of proposals for legislation of this kind being debated in Europe, the United Kingdom, Canada and South Australia in March 2007, Fowler suggested that these proposals 'may be part of a wider trend to develop such legislation in many jurisdictions over the next few years.'⁵⁹ This prediction has been borne out by subsequent events. Legislation that contains national emission reduction targets, or establishes a process for setting such targets, has now been enacted in the United Kingdom (2008), New Zealand (2008), South Korea (2010), Austria (2011), Mexico (2012), Switzerland (2013), Bulgaria (2014), Denmark (2014), Finland (2015), France (2015), Norway (2017) and Sweden (2017).⁶⁰ A number of sub-national parliaments have also passed legislation of this kind, including in Australia,⁶¹ the United States⁶² and Canada.⁶³

57 Climate Change Authority, 'Towards a Climate Policy Toolkit: Special Review on Australia's Climate Goals and Policies' (Commonwealth of Australia, 2016).

58 Fowler, above n 54, 120.

59 Ibid.

60 London School for Economics and Grantham Institute, *Climate Change Laws of the World* (accessed 29 September 2017) <<http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world>>; Boot, Pieter *Climate Legislation in Europe: Work In Progress* (19 June 2017) <http://eeac.eu/wp-content/uploads/2016/04/Presentation-Pieter-Boot-climate-legislation-June-2017-2.pdf>>; Government Offices of Sweden, 'Riksdag Passes Historic Climate Policy Framework' (15 June 2017) <<http://www.government.se/press-releases/2017/06/riksdag-passes-historic-climate-policy-framework/>>. New Zealand is listed as having adopted emission reduction target legislation in 2008 because s 224 of the *Climate Change Response Act 2002* (NZ), which provides for the gazettal of targets, was inserted by legislative amendment in 2008: *Climate Change Response (Emissions Trading) Amendment Act 2008* (NZ) s 50.

61 *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA); *Climate Change (State Action) Act 2008* (Tas); *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) s 6; *Climate Change Act 2017* (Vic).

62 Center for Climate and Energy Solutions, *Greenhouse Gas Emissions Targets* (August 2016) <<https://www.c2es.org/us-states-regions/policy-maps/emissions-targets>> (identifying States with legislated targets as Maine, Connecticut, California, Vermont, Minnesota, New Jersey, Oregon, Washington, Hawaii and Maryland).

63 e.g. *Greenhouse Gas Reductions Targets Act*, SBC 2007, c 42; *Climate Change and Emissions Management Act*, SA 2003, c 16.7; *Climate Change and Emissions Reductions Act* SM 2008 c 17; *Environmental Quality Act* SQ 2015 c 12; *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016 c 7.

B The Functions of Framework Legislation

While the contents of these laws differ, it is possible to identify four main functions that can be served by framework legislation for climate change mitigation. First, it can provide a transparent and principled way to set emission reduction targets. Where targets are directly specified in the legislation, there will at least be an assurance of parliamentary scrutiny. Where targets are set under delegated authority, a number of different techniques can be used to ensure transparent and principled decision-making. These can include a requirement for a decision-maker to apply, or take into account, specified principles or considerations; requirements to obtain and publish independent advice; and requirements to engage in public consultation.

Second, by setting statutory targets rather than just policy-based targets, framework legislation can signal a greater level of commitment to emission reduction goals. This is recognised, for example, in the Grantham Institute's assessment of the political credibility of intended NDCs submitted prior to the Paris Conference, which draws a distinction between 'targets that are formally anchored in laws passed by parliaments or executive regulation enacted by governments' and 'targets that are only included in non-mandatory documents (e.g. white or green papers), in government announcements (e.g. a speech by a head of state) or recorded in voluntary international agreements, but not enshrined in national legislation'.⁶⁴ Statutory targets are seen to 'strengthen policy credibility because they are mandated by law and therefore, in principle, are much more difficult to breach or revise'.⁶⁵

Third, framework legislation can facilitate planning for greenhouse gas mitigation, including through coordination of regulatory mitigation tools. As Peel correctly identified in 2008, 'climate change regulations have tended to be adopted in an ad hoc fashion, rather than as part of a coordinated system or strategic plan oriented towards the achievement of particular goals'.⁶⁶ Legislation that requires governments to plan for how emission reduction targets will be achieved can address this problem by ensuring a more coordinated and strategic approach.⁶⁷ In this way, climate change mitigation laws can catch up with other more established areas of environmental law – such as the law concerning the management of water resources, fisheries and (to some extent) ambient air quality – where the use of planning instruments already plays an important role in identifying precise goals and coordinating the use of measures to achieve them.

⁶⁴ Averchenkova and Bassi, above n 55, 15.

⁶⁵ Ibid.

⁶⁶ Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32 *Melbourne University Law Review* 922; see also Alexander Zahar, Jacqueline Peel and Lee Godden, *Australian Climate Law in a Global Context* (Cambridge University Press, 2013) 7.

⁶⁷ Michael Mehling, 'Implementing Climate Governance: Instrument Choice and Interaction' in *Climate Change and the Law* (Springer, 2013) 23-28.

Fourth, emission reduction legislation can create accountability mechanisms that increase the likelihood of targets being met. As Fowler points out:

There is very little point in incorporating emission reduction targets in legislation, rather than in a policy instrument, unless the relevant legislation provides for mechanisms that can hold governments accountable for the delivery of the relevant targets.⁶⁸

Mechanisms that provide a measure of political accountability include requirements for independent advisory bodies or elected officials to report publicly on progress towards achieving targets. The use of statutory targets, with associated duties and discretions, also opens up the possibility of enabling legal accountability through the courts.⁶⁹

C Framework Legislation and the Paris Agreement

The *Paris Agreement* gives further impetus for the enactment of framework legislation that performs the functions outlined in the preceding section. Framework legislation can provide greater credibility to NDC commitments by embedding them in domestic law, together with planning and accountability requirements. Such legislation can also promote a principled and transparent approach to setting the emission reduction targets contained in NDCs. In these ways, the continuing diffusion of framework legislation among parties to the *Paris Agreement* has the potential to help underpin the most positive scenario for the pledge-and-review mechanism: one of ambitious targets, effective implementation and the realisation of the *Paris Agreement's* goals.

The architecture of the *Paris Agreement* has some important implications for the design of future framework legislation. One issue is the alignment between the target-setting provisions in framework legislation and the *Paris Agreement's* pledge-and-review timetable. The five-year pledge-and-review cycle suggests that rather than legislating fixed targets well in advance, some flexibility should be retained to set the ambition of targets following global stocktakes. This would not preclude a long-term legislated emission reduction targets, nor 'guardrail' minimum targets along the way. But it would not be consistent with the pledge-and-review cycle to set a fixed target trajectory, with no discretion for governments to commit to more ambitious targets in the light of information from global stocktakes. Table 2 provides an example of how the *Paris Agreement's* requirements for communicating NDCs could be aligned with target-setting requirements in framework legislation.

68 Fowler, above n 54, 118. See also Sarah Waddell, 'By How Much Will A 'Price on Carbon' Actually Lower Australia's Emissions?: Towards Climate Accountability for Greenhouse Gas Emissions Abatement' (2013) 16(1) *Australasian Journal of Natural Resources Law and Policy* 1.

69 Fowler, above n 56, 118.

TABLE 2: AN EXAMPLE OF TARGET-SETTING ALIGNED WITH THE
PARIS AGREEMENT

Year	<i>Paris Agreement requirement</i>	National framework legislation
By 2020	Communicate NDCs to 2030	Targets for 2021-2025 and 2026-2030
By 2025	Communicate NDCs to 2035	Target for 2031-2035
By 2030	Communicate NDCs to 2040	Target for 2036-2040
By 2035	Communicate NDCs to 2045	Target for 2041-2045
By 2040	Communicate NDCs to 2050	Target for 2045-2050

Another important question concerns amendments to targets. As we have seen, the *Paris Agreement* provides that NDCs may be amended at any time with a view to increasing their level of ambition, but there are opposing legal arguments as to whether parties can downgrade the level of ambition in their NDCs. This question will need to be considered in the drafting of any provision in national framework legislation concerning amendments to emission reduction targets. A clear statutory prohibition on amending targets to reduce their level of ambition would help build state practice that supports the *Paris Agreement*'s ratchet mechanism.

The *Paris Agreement*'s long-term temperature and net-zero emissions goals also need to be considered in the development of national framework legislation. One difficult issue here is how the long-term temperature goal can help guide national target-setting. Some ideas can be drawn from existing framework legislation. One approach is to require the target-setting decision-maker, on advice from an independent and expert body, to consider whether targets are consistent with staying within a national emissions budget. This helps to address the issue of intergenerational equity, as emissions budgets clarify trade-offs: if more of the budget is used in the next NDC cycle, less will be available for future periods. Combined with this requirement, decision-makers could be required to confront the question of what national carbon budget would represent a fair contribution, relative to the contribution of other nations, to the global temperature goal.

The target-setting provisions of the *Climate Change (Scotland) Act 2009* provide a helpful example of how this can be done. Under that Act, Scottish Ministers are required, when setting annual targets, to have regard to 'the objective of not exceeding the fair and safe Scottish emissions budget'.⁷⁰ The 'fair and safe Scottish emissions budget' is defined as

the aggregate amount of net Scottish emissions for the period 2010–2050 recommended by the relevant body as being consistent with Scotland contributing appropriately to stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous

⁷⁰ *Climate Change (Scotland) Act 2009* s 4(4)(a).

anthropogenic interference with the climate system.⁷¹

If the reference to dangerous anthropogenic interference with the climate system (drawn from Article 2 of the *UNFCCC*) were replaced with *Paris Agreement*'s long-term temperature goal, these provisions could provide a good starting point for a principled approach to translating this goal into national targets.

The task of translating global goals to a national level is simpler for the net zero emissions goal.⁷² Legislative action in the short period since the adoption of the *Paris Agreement* underlines that this can be done relatively easily. The Australian Capital Territory and Victoria enacted legislation in 2016 and 2017 respectively with targets for net-zero emissions by 2050.⁷³ As statements by responsible Ministers make clear, these legislated targets are intended to align with the net zero emissions goal in the *Paris Agreement*.⁷⁴ Sweden has gone even further, with a framework law that endorses a goal of net zero emissions by 2045.⁷⁵

Experience with existing framework legislation shows that long-term national targets of this kind can assist in guiding the setting of shorter-term emissions reduction targets. The *Climate Change Act 2008* (UK) provides a good example. Under this Act, five-year emission reduction targets, in the form of carbon budgets, must be developed by the Secretary of State 'with a view to meeting' legislated 2020 and 2050 targets.⁷⁶ These carbon budgets must be set having regard to the recommendations of an independent, expert advisory body, the Committee on Climate Change.⁷⁷ In practice, the common thread running through the Committee's carbon budget recommendations has been to identify a feasible and cost-effective path to the 2020 and 2050 targets.⁷⁸ The Committee has considered

71 Ibid s 4(6).

72 Oliver Geden, 'An Actionable Climate Target' (2016) 9(5) *Nature Geoscience* 340.

73 *Renewable Energy Legislation Amendment Act 2016* (ACT) s 4 (amending the *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) s 6); *Climate Change Act 2017* (Vic) s 6.

74 Simon Corbell MLA, 'ACT Commits to Zero Emissions by 2050' (Media Release, 3 May 2016); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 3 May 2016, 1376 (Simon Corbell); Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2017, 23 (Philip Dalidakis).

75 UN Climate Change Newsroom, 'Sweden Plans to Be Carbon Neutral by 2045: New Legislation Sets Goal 5 Years Earlier than Originally Agreed' (19 June 2017) <<http://newsroom.unfccc.int/unfccc-newsroom/sweden-plans-to-be-carbon-neutral-by-2045/>>.

76 *Climate Change Act 2008* (UK) s 8.

77 Ibid ss 9, 34(1)(a).

78 Climate Change Committee, *The Fifth Carbon Budget: The Next Step Towards a Low-Carbon Economy* (Committee on Climate Change, 2015) 13; Committee on Climate Change, *The Fourth Carbon Budget Review – Part 2: The Cost Effective Path to the 2050 Target* (Committee on Climate Change, 2013) 10-11; Committee on Climate Change, *Building a Low-Carbon Economy – The UK's Contribution to Tackling Climate Change* (Committee on Climate Change, 2008) xviii. On the prominence of the 2050 target in the *Climate Change Act 2008* (UK), and the implications for interpretation of other provisions of the Act, see Jonathan Church, 'Enforcing the Climate Change Act' (2015) 4 *UCL Journal of Law and Jurisprudence* 109, 111-12.

this question carefully, informed by numerical simulation models that identify cost-effective paths to meet the targets with given assumptions about technology cost and availability.⁷⁹ While a political judgment might favour deferring emission reductions to later years, the technocratic Committee has recommended ‘a swift pace of emission reductions in the power sector and an overall abatement path that is only slightly back-loaded’.⁸⁰ This advice has been accepted by successive governments when setting carbon budgets.

The discussion to date suggests that widespread adoption of framework legislation, aligned with the goals and processes of the Paris Agreement, could play an important role in overcoming some of the weaknesses with the pledge-and-review mechanism. This is not, of course, to suggest that a series of cut-and-paste legal transplants will get the job done. Framework legislation will need to be designed having regard to each jurisdiction’s particular governmental and political context.⁸¹ In the next section we turn to consider three of the important design issues in an Australian context.

III DESIGN ISSUES FOR AUSTRALIAN FRAMEWORK LEGISLATION

A *Constitutional Basis for the Legislation*

A threshold question for any Commonwealth legislation is whether it is supported by one or more of the heads of power in section 51 of the *Constitution*. I consider below two heads of power with the potential to support national framework legislation in Australia: the external affairs power (section 51 (xxix)) and the incidental power (section 51(xxxix)).

Section 51(xxix) of the *Constitution* empowers the Commonwealth Parliament ‘to make laws ... with respect to ... external affairs’. In order to consider the scope of the external affairs power in the present context, it is necessary to review the nature of Australia’s relevant international obligations. The starting point is the *UNFCCC*, which is, as its name suggests, a framework convention imposing broad obligations on parties to the convention. These include obligations to formulate programmes with measures to address anthropogenic sources and sinks; to communicate policies and measures it has adopted; to estimate the effect that these policies and measures will have; and to maintain a national greenhouse gas inventory.⁸² The *Kyoto Protocol* establishes a more precise and detailed regime for a relatively small number of countries, including Australia. It sets

79 Samuel Fankhauser, ‘A Practitioner’s Guide to a Low-Carbon Economy: Lessons from the UK’ (2013) 13(3) *Climate Policy* 345, 347.

80 Ibid 348.

81 Alan Watson, ‘Legal transplants and Law Reform’ (1976) 92 *Law Quarterly Review* 79, 81-2.

82 *UNFCCC* arts 4.2, 12

binding emission reduction targets, together with a regime to track compliance and impose sanctions for non-compliance. The *Paris Agreement* creates a more inclusive post-2020 regime to succeed the *Kyoto Protocol*, applying to the vast majority of nations. However, the obligations imposed by the *Paris Agreement* return to the more general language of the *UNFCCC*, avoiding top-down targets and detailed implementation obligations in favour of procedural obligations to submit NDCs and a general obligation for parties to ‘pursue domestic measures, with the aim of achieving the objectives’ of NDCs.⁸³

On one view, this is a significant barrier to the enactment of national climate change legislation relying on the external affairs power. Pillai and Williams’ analysis of the *UNFCCC* supports this view. They argue that under the external affairs power ‘the treaty that the statute seeks to implement must embody precise obligations that are capable of implementation’ and that the *UNFCCC*, which they characterise as ‘purely aspirational’, fails this test.⁸⁴

Given the expiry of Australia’s emission reduction obligations under the *Kyoto Protocol* and strong parallels between the obligations imposed by the *UNFCCC* and the *Paris Agreement*, this analysis, if correct, could have significant implications for Commonwealth legislative powers with respect to climate change post-2020. Indeed, it could have implications for the operation of all Commonwealth climate change legislation since 1 January 2013. This is because the *Doha Amendment to the Kyoto Protocol*,⁸⁵ which would extend the operation of the *Kyoto Protocol* to a second commitment period (2013-2020), has not yet attracted sufficient ratifications to come into effect.⁸⁶ If the use of the external affairs power does

83 *Paris Agreement* art 4.2. This is in part a legacy of the negotiating strategy of the Obama Administration. It sought to strictly limit substantive obligations going beyond existing requirements of the *UNFCCC*, so as to argue that the agreement was not a treaty within the meaning of that term in the US Constitution, and therefore did not require the concurrence of two-thirds of the US Senate: Bodansky, above n 16, 149-150; Hari M Osofsky and Jacqueline Peel, ‘Energy Partisanship’ (2016) 65 *Emory Law Journal* 695 779; Margaretha Wewerinke-Singh and Curtis Doebbler, ‘The Paris Agreement: Some Critical Reflections on Process and Substance’ (2016) 39(4) *University of New South Wales Law Journal* 1486, 1495-6.

84 Sangeetha Pillai and George Williams, ‘Commonwealth Power and Environmental Management: Constitutional Questions Revisited’ (2015) 32(5) *Environmental and Planning Law Journal* 395, 399, citing *Victoria v Commonwealth* (1996) 187 CLR 416 at 486. Appleby has gone even further, to suggest that the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), as amended in 2014, is not supported by the *Kyoto Protocol* because the *Kyoto Protocol* ‘does not specify the way parties must reach their emissions target, providing only an indicative list of policies and measures’: Gabrielle Appleby, ‘Explainer: is Direct Action Constitutionally Valid?’, *The Conversation* (3 November 2014) <<https://theconversation.com/explainer-is-direct-action-constitutionally-valid-33676>> (citing *Pape v Commissioner of Taxation* [2009] HCA 23, [372] (Hayne and Kiefel JJ)).

85 *Doha Amendment to the Kyoto Protocol*, opened for signature 8 December 2012, [2016] ATNIF 24 (not yet in force).

86 As at 2 October 2017, 82 countries, including Australia, had ratified or otherwise accepted the *Doha Amendment: United Nations Framework Convention on Climate Change*, *Status of the Doha Amendment* (2 October 2017) <http://unfccc.int/kyoto_protocol/>

depend on the existence of binding limits under the Kyoto Protocol, then Australia's existing climate laws would have lacked that constitutional support since the end of the first commitment period.⁸⁷

However, I suggest that neither the *Paris Agreement*, nor for that matter the *UNFCCC*, can properly be described as 'purely aspirational'. Both are treaties, in the sense of being 'an international agreement concluded between States in written form and governed by international law...'.⁸⁸ Both impose at least some legally binding obligations on parties. In the case of the *Paris Agreement*, these include obligations to prepare and communicate NDCs, pursue associated domestic mitigation measures, and provide information for the purpose of tracking NDC implementation. These treaties are, therefore, distinguishable from other international instruments, such as G20 declarations, which might be properly classified as purely aspirational and insufficient to invoke the external affairs power.⁸⁹

While the application of the external affairs power does not fall at this first hurdle, there will still be the important question of whether any law that relies on it is 'reasonably capable of being considered appropriate and adapted to implementing'⁹⁰ the *Paris Agreement*. I suggest that a Commonwealth law which guides the development, implementation and monitoring of Australia's emission reduction commitments would be likely to be viewed as appropriate and adapted to the implementation of Australia's obligations under the *Paris Agreement*. The external affairs power extends beyond direct implementation of treaty obligations to matters reasonably incidental to that implementation.⁹¹ These matters are reasonably incidental to Australia's obligations to communicate NDCs, take domestic measures to implement them, and report on progress.

doha_amendment/items/7362.php>. Under articles 20 and 21 of the Kyoto Protocol, three quarters of the parties to the protocol (144 parties) need to accept the amendment before it will come into force.

87 On the difficulties with relying on the external affairs power between ratification and entry into force of a treaty see Donald R Rothwell, 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits' (1993) 15 *Adelaide Law Review* 209 225-226; Alice De Jonge, 'Australia' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011) 33.

88 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1115 UNTS 331 (entered into force 27 January 1980) art 2 (defining a treaty as 'an international agreement concluded between States in written form and governed by international law...'; Bodansky, above n 16, 144-145.

89 Compare *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23, [476]-[478] (Heydon J) (regarding a G20 declaration); discussed in Pillai and Williams, above n 84, 399-400.

90 *Victoria v Commonwealth* (1996) CLR 416, 486; [1996] HCA 56, [34] (joint judgment of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

91 *Richardson v Forestry Commission* (1988) 164 CLR 261; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook, 2014) 139.

The incidental power provides further support for the conclusion that the Commonwealth Parliament can enact framework legislation. Section 51(xxxix) of the Constitution relevantly provides that the Parliament shall have power ‘to make laws ... with respect to ... matters incidental to the execution of any power vested by this Constitution ... in the Government of the Commonwealth.’ The power to make laws incidental to the exercise of executive power extends beyond facilitation to ‘legislative regulation of the manner and circumstances of the execution of the executive power of the Commonwealth’.⁹² It forms part of a ‘constitutional scheme ... designed to provide mechanisms for control and accountability of executive action.’⁹³ The incidental power is especially relevant to framework legislation of the kind discussed in this chapter because this legislation is specifically directed towards control and accountability of executive action – specifically, executive action that has long been undertaken by Ministers and civil servants to develop emission reduction targets and plans to achieve those target.⁹⁴ The use of the incidental power to regulate actions undertaken by the Commonwealth and Commonwealth agencies is supported by past legislative practice.⁹⁵ It provides an alternative constitutional basis, in addition to the external affairs power, to support framework legislation.

B Parliament’s Role in Setting Emission Reduction Targets

Australia has long suffered from sharp political divisions over climate change policy. However, there are some reasons to hope that national framework legislation could command bipartisan support. Both major political parties support Australia’s ratification of the *Paris Agreement*. In this context, legislation that provides a

92 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 [122] (Gageler J).

93 Dan Meagher et al, *Hanks’ Australian Constitutional Law: Materials and Commentary* (LexisNexis, 2016) 852.

94 An early example is the Hawke and Keating Governments’ endorsement of the Toronto Targets and the preparation, together with the States and Territories, of the *National Greenhouse Response Strategy* (1992).

95 One example is the *Gene Technology Act 2000* (Cth), which regulates dealings with genetically modified organisms – including, for example, release of genetically modified organisms by the Commonwealth Scientific and Industrial Research Organisation. The section outlining the constitutional basis of *Gene Technology Act 2000* (Cth) cites the application of a law to ‘the Commonwealth and Commonwealth agencies’ as a separate basis for the operation of the Act, in addition to its application to constitutional corporations and constitutional trade and commerce: *Gene Technology Act 2000* (Cth) s 13. A second example is the *Water Act 2007* (Cth), which provides for the preparation and implementation of the Basin Plan, a water resource management plan for the Murray-Darling Basin. The Act imposes an unqualified duty on agencies of the Commonwealth to perform their functions, and exercise their powers, consistently with that plan. However, duties on other agencies and persons to act in accordance with the plan are limited by the scope of relevant heads of power – for example the duty applying to other agencies and persons ‘imposes an obligation to the extent to which imposing the obligation gives effect to a relevant international agreement’: *Water Act 2007* (Cth) ss 34–36.

framework for meeting Australia's obligations under that agreement, rather than dictating that particular emission reduction targets or mitigation measures be adopted, should be able to attract support from both major parties. Among other things, it should be possible to reach agreement on replacing Australia's current *ad hoc* arrangements for setting emission reduction targets with a more predictable statutory framework governing the form of targets, when targets are set, target timeframes, and the consultation and evidence-gathering process leading up to target-setting decisions. It may even be possible for agreement to be reached on a long-term net zero emissions goal.

However, there is potential for differences over some of target-related issues, including one important question we will focus on here: the role of the Australian Parliament in endorsing emission reduction targets. There is no uniform practice in existing framework legislation on the question of Parliamentary involvement in target-setting. For example, while in the United Kingdom both Houses of Parliament must approve five-year carbon budgets, in Victoria the parliament has no decision-making role with respect to five-year emission reduction targets. The Victorian legislation requires the responsible Minister to table independent advice concerning a forthcoming carbon budget,⁹⁶ thus opening up the possibility of parliamentary debate on the issue, but this is as far as the Victorian Act goes.

As a matter of law, the likely default position is that a target determination in Commonwealth framework legislation will be a legislative instrument, within the meaning of that term in the *Legislation Act 2003* (Cth), and therefore subject to disallowance. Such a determination is an instrument made under a power delegated by Parliament.⁹⁷ It clearly applies generally rather than determining the application of the law in a particular case.⁹⁸ Assuming that targets are given legal effect, for example through a duty on the responsible Minister to achieve the target or to produce plans directed to that end, they would also have 'the direct or indirect effect of ... imposing an obligation'.⁹⁹ All of the elements of the definition of 'legislative instrument' would therefore be satisfied, and the target determination would be disallowable unless the framework Act specifically provided that such determinations were not legislative instruments,¹⁰⁰ or the operation of section 42 of the *Legislation Act 2003* (Cth) concerning disallowance were expressly excluded.¹⁰¹ The classification of emission reduction target determinations as legislative instruments subject to disallowance would be consistent with the approach adopted to date for Commonwealth ambient air quality standards,¹⁰²

96 *Climate Change Act 2017* (Vic) s 13(1).

97 *Legislation Act 2003* (Cth) s 8(4)(a).

98 *Ibid* s 8(4)(b).

99 *Ibid* s 8(4)(c).

100 *Ibid* s 8(6)(a).

101 *Ibid* s 44(2).

102 *National Environment Protection Council Act 1994* (Cth) s 21; *National Environment Protection (Ambient Air Quality) Measure* (Cth).

water resource management plans¹⁰³ and fisheries management plans.¹⁰⁴

In the partisan Australian political context, the practical implications of granting the Senate an effective veto over Australian emission reduction targets needs to be considered. This is, of course, a very real possibility, because the Senate is very often not under the control of the party in government.¹⁰⁵ If target determinations were disallowable legislative instruments, consideration could be given to setting a default set of target determinations in the legislation, to avoid a deadlock situation in which no targets could be made. There is a precedent for this, in the default national emission caps in the *Clean Energy Act 2011* (Cth) (repealed).¹⁰⁶

Pursuing a process of Parliamentary involvement raises the interesting question of whether a target endorsed under national framework legislation could or should impose a legal constraint on the Australian Government's communication of NDCs under Article 4 of the *Paris Agreement*. As a matter of law, it is likely that it could. Even if under the *Constitution* the Commonwealth Executive has 'an exclusive power to assume international obligations'¹⁰⁷ and, for that reason, the exclusive power to communicate NDCs, framework legislation would not be usurping this power but conditioning its exercise. It is generally considered that it would be constitutionally acceptable for the Commonwealth Parliament to limit or regulate even the executive's power to enter into treaties, as long as the Parliament does not itself seek to enter into a treaty.¹⁰⁸ Statutory limits on the communication of NDCs would be likely viewed in the same way. As a matter of policy and practice, it is less clear that Australian framework legislation should impose such a constraint. Critics of this approach could argue that it trespasses unduly on the Commonwealth Government's traditional role in conducting foreign affairs.¹⁰⁹ They could also point out that it would be inconsistent with Australia's treaty-making process, which does not give the Commonwealth Parliament a

103 *Water Act 2007* (Cth) s 33; *Basin Plan 2012* (Cth).

104 *Fisheries Management Act 1991* (Cth) ss 17, 19; e.g. *Bass Strait Central Zone Scallop Fishery Management Plan 2002* (Cth).

105 Features of the Australian system of government leading to this include the fact that the existing Senate continues until 1 July following a half-Senate election, the election of Senators for 6 year terms, and the system of proportional representation that makes it easier to elect minor party candidates: Joseph and Castan, above n 91, 23; Stephen Barber and Sue Johnson, *Federal Election Results 1901–2014*, Research Paper (Parliament of Australia, 2014) 4 (noting that '[s]ince the introduction of proportional representation (PR) for Senate elections in 1949, the government of the day has only had control (a majority) in the Senate during 1951–1956, 1959–1962, 1975–1981 and 2005–2007').

106 *Clean Energy Act 2011* (Cth) (repealed) ss 16, 17.

107 Hilary Charlesworth et al, 'Deep Anxieties : Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 431, citing *R v Burgess; ex parte Henry* (1936) 55 CLR 608, 644 (Latham CJ).

108 Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Parliament of the Commonwealth of Australia, 1995) [16.16]-[16.24]; George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 38-9.

109 Brian R Opeskin, 'The Role of Government in the Conduct of Australia's Foreign Affairs' (1994) 15 *Australian Yearbook of International Law* 129, 138.

decision-making role on whether Australia will ratify a treaty.¹¹⁰ On the other hand, advocates of this approach could argue that it is desirable to ensure that the Australian executive acts consistently with legislation directed to implementing Australia's international obligations.

C Political and Legal Accountability for Achieving Targets

Framework legislation can promote greater political accountability for achieving emission reduction targets. The *Climate Change Act 1998* (UK) provides a good example of how this can be done, with techniques that would translate well to an Australian context. Under that Act, targets take the form of five-year carbon budgets expressed as the total quantity of permissible greenhouse gas emissions over the relevant period. These carbon budgets are made by the Secretary of State but must first be approved by both Houses of Parliament.¹¹¹ Once the carbon budget has been made, a set of accountability mechanisms come into play. As soon as practicable after making the carbon budget, the Secretary of State 'must lay before Parliament a report setting out proposals and policies' for meeting that carbon budget, together with other budgets in force at that time.¹¹² Progress towards meeting carbon budgets is assessed by the independent Committee on Climate Change, which must lay reports before Parliament by 30 June each year.¹¹³ The Secretary of State must prepare a response to each report, to be laid before Parliament by 15 October each year.¹¹⁴ The Secretary of State must also table statements on the 'net UK carbon account' each year and at the end of a carbon budget period.¹¹⁵ If a carbon budget has been exceeded at the end of a five-year carbon budget period, the Secretary of State must 'lay before Parliament a report setting out proposals and policies to compensate in future periods for the excess emissions'.¹¹⁶

Some framework legislation goes beyond traditional political accountability requirements such as those just described and also imposes duties on public officials to ensure that emission reduction targets are achieved. For example, the *Climate Change Act 2008* (UK) provides that '[i]t is the duty of the Secretary of State to ensure' that each carbon budget and the Act's 2050 emissions reduction target are met.¹¹⁷ How are broad duties of this kind likely to be approached by the

110 Department of Foreign Affairs and Trade, *Australia International Treaty Making Information Kit* (Commonwealth of Australia, 2000).

111 *Climate Change Act 2008* (UK) s 8.

112 *Ibid* s 14(1).

113 *Ibid* s 36.

114 *Ibid* s 37(1).

115 *Ibid* ss 16, 18.

116 *Ibid* s 19(1). The Act does not define what is meant by 'compensate', but it would presumably mean that an additional quantity of abatement, over and above than already committed to in future carbon budgets, would need to be achieved – effectively tightening a future carbon budget or budgets by the excess amount.

117 *Ibid* ss 1, 4. For other examples, see *Climate Change (Scotland) Act 2009* ss 1-3 (duty of Scottish Ministers to meet 2050 target, an interim 2020 target and annual targets); *Environment (Wales) Act 2016* ss 29-31 (duty of Welsh Ministers to achieve 2050 target,

Australian courts, and should they form part of national framework legislation in Australia?

While the target duties in the *Climate Change Act 2008* (UK) are yet to receive any detailed judicial consideration, they have been the subject of academic analysis that provides a useful starting point in considering this question. Most commentary has doubted whether the section duties could be enforced by the courts through judicial review¹¹⁸ or other means.¹¹⁹ Perhaps the most significant barrier is that the courts are likely to refuse to entertain a judicial review application because the Act provides for an alternative remedy.¹²⁰ As Macrory puts it, ‘it could be argued that the legislation explicitly envisages political accountability of government to Parliament rather than legal accountability to the courts’.¹²¹ As we have seen, this political accountability arises from the statutory reporting requirements, including a requirement that the Secretary of State report on how any exceedance of a carbon budget will be compensated for in future carbon budget periods.

While a court may be willing to give a declaration or even order of mandamus to enforce the Secretary of State’s reporting obligations, it is difficult to see how a remedy could be granted for breach of the target duty itself. On the face of it, a simple declaration that a duty has been breached would be a possible remedy but, as McHarg points out, this ‘might be seen as purely academic, since a court order would add nothing to the Act’s reporting obligations’.¹²² What about the other possibility that has been flagged by the UK government: that a court might order the Secretary of State to purchase offsets to compensate for the exceedance of the carbon budget?¹²³ There are even more substantial problems here. To start with, there would be a natural reluctance for a court to intervene with such an order, given that it would involve ‘complex and polycentric issues of policy prioritization and resource allocation which are typically regarded as

decadal targets and five-yearly carbon budgets); *Climate Change Act 2017* (Vic) s 8 (duty on Premier and responsible Minister to ensure that State achieves 2050 target); *California Global Warming Solutions Act*, as amended in 2016 by SB32 (duty on State Air Resources Board to ensure that 2030 target is met).

- 118 Richard Macrory, ‘The UK Climate Change Act - Towards a Brave New Legal World?’ in Richard Macrory (ed), *Regulation, Enforcement and Governance in Environmental Law* (Hart Publishing, 2nd ed, 2014) 255, 265-6; Mark Stallworthy, ‘Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge’ (2009) 72(3) *The Modern Law Review* 412 423-4; Peter McMaster, ‘Climate Change—Statutory Duty or Pious Hope?’ (2008) 20(1) *Journal of Environmental Law* 115; Compare Church, above n 78.
- 119 McMaster, above n 118, 116-18 (considering and rejecting the possibilities of compensation for breach of statutory duty and criminal sanctions).
- 120 Colin Reid, ‘A New Sort of Duty? The Significance of “Outcome” Duties in the Climate Change and Child Poverty Acts’ (2012) (4) *Public Law* 748, 758-9.
- 121 Richard Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Hart Publishing, 2014) 266.
- 122 Aileen McHarg, ‘Climate Change Constitutionalism? Lessons from the United Kingdom’ (2011) 2(4) *Climate Law* 469, 478.
- 123 UK, House of Commons, *Public Bill Committee on the Climate Change Bill*, 6th session, 1 July 2008 col 236 (Mr P. Woolas).

non-justiciable'.¹²⁴ Moreover, the Act already requires the Secretary of State (not the courts) to grapple with these issues in preparing a report to Parliament as to how the excess will be compensated for in future carbon budget periods. It would not be consistent with the scheme of the Act for a court to intervene before this report had been prepared, nor to second-guess, in a policy sense, the content of that report after it has been published.

While apparently sweeping legal duties to achieve targets may give rise to few, if any, practical remedies, there are two good reasons to consider including them in Australian framework legislation. The first is for signal they would send within the Commonwealth bureaucracy about the importance and priority of emission reduction goals. As was observed in the debate on the United Kingdom legislation, legal duties to achieve emission reduction targets are 'not just about the punishment in the event of failure' but about 'trying to change institutional behaviour through a change in the law'.¹²⁵ The second is the signal they would send to other nations about the seriousness with which Australia is taking its emission reduction commitments under the *Paris Agreement*.

CONCLUSION

Growing numbers of countries are enacting framework climate laws that entrench emission reduction targets, require planning for how targets will be achieved, and make governments accountable for meeting their targets. This trend pre-dated the *Paris Agreement* but has taken on a new importance post-Paris. The *Paris Agreement* endorses important global goals, but depends critically on nationally-determined targets and mitigation actions to achieve them. National framework legislation aligned with the goals and processes of the *Paris Agreement* can help by ensuring that emission reduction targets are set in a principled, transparent and evidence-based manner, and by providing greater credibility that targets, once set, will be achieved. The climate policy debate in Australia has focused almost exclusively on the 'toolkit' of instruments that should be at the disposal of governments. In the wake of the *Paris Agreement*, more attention needs to be given to the question of how laws should discipline successive Australian Governments to play their full part in achieving the global goals to which Australia is now committed.

124 McHarg, above n 122, 477-8.

125 UK, *Parliamentary Debates*, House of Lords, 27 November 2007 vol 696 col 1209; *ibid* 472.