

# Proposal for a Victorian Climate Charter

**Australian Conservation Foundation, Environment Victoria, Friends of the Earth and Environmental Justice Australia support the Climate Charter as world-leading legislation for Victoria and urge the Victorian Government to adopt it as part of improved climate change laws.**

## **About the author**

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect the environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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# 1 The Climate Charter at a glance

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We, the people of Victoria, recognise the overwhelming threat that climate change poses to our State, our country and the world. We are committed to taking responsibility for our State's contribution to climate change. We recognise that this is a responsibility shared by all levels of Government, the community and industry, and each must play its part. Victoria is committed to being a climate leader and to taking strong action to reduce greenhouse emissions to ensure environmental justice is achieved for current and future generations.

The Victorian Government is making decisions now which will have the effect of increasing our emissions for decades. Examples include:

- the extension of the Urban Growth Boundary and associated transport projects which will increase transport emissions, encourage further urban sprawl, and reduce farmland close to population centres;
- the continued logging and clearing of native forest and native vegetation which releases emissions and reduces vital carbon sinks;
- allowing the Hazelwood power station to continue operating until 2031 despite its being the highest emitting power station in any developed country; and
- issuing new licences to explore for coal in Gippsland. This demonstrates that the Government is not properly considering climate change in its decision-making.

It is clear that more proactive measures must be taken.

Right now, there is an excellent opportunity for Victoria to lead the way within Australia and the world, by establishing a robust framework to guide our path to a low carbon future.

The proposed Climate Charter sets up a legal framework to ensure Victoria is proactively addressing climate change. **The framework will make Victoria a world leader on climate change. It will ensure Victoria can significantly reduce its emissions, and make its best effort to adapt to unavoidable climate impacts.**

Inspired by the landmark Victorian Human Rights Charter, the Climate Charter also draws on some of the major climate change legislative frameworks around the world. It is designed to work with or without a national emissions trading scheme, meaning that if a future Federal Government brought in an emissions trading scheme, the Victorian Government would not need to repeal the Charter. This gives business and the community certainty in light of shifting Federal priorities, and means that State action does not need to keep being delayed while hoping for Federal action.

The Charter has seven key elements:

1. Binding **climate principles** which set out how climate change is to be addressed in Victoria.
2. Binding **emission reduction targets** (suggested as 25% of 2000 levels by 2020 and net zero emissions by 2050).
3. A requirement that **Victorian legislation and policy must be interpreted consistently with the principles of the Climate Charter**.
4. A '**climate test**' which must be implemented by all public authorities in major government financial decisions and administrative decision-making.
5. A requirement to develop a **climate strategy** to enable Victoria to meet its targets.
6. The establishment of the **Victorian Climate Authority** to advise, oversee and report on climate action.
7. **Power for Victorian citizens to take the Victorian government to court** if it is not meeting its climate obligations.

## 2 Why does Victoria need climate laws?

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The current climate science indicates that massive emission reductions are needed to avoid dangerous climate change. Recent CSIRO projections for climate change show that the trend of decreased rainfall will continue, with winter and spring rain dropping by 15% by 2030<sup>1</sup>. In addition, average temperatures will continue to increase in all seasons, which will result in more hot days and dry spells. Without urgent movement to reduce emissions, we are predicted to experience temperature increases of 2C–6.2C in 2100.<sup>2</sup>

Victoria has experienced severe bushfires in recent years. A recent report released by the Climate Council shows that the 2013 heatwave would have been ‘virtually impossible’ without climate change.<sup>3</sup> The Council also warned that such extreme heat would become a normal summer by the middle of the century.<sup>4</sup>

State Governments have a critical role to play in reducing Australia’s emissions for two key reasons. Firstly, at a Federal level, despite clear scientific evidence, climate change policy has been dismantled by the Abbott government. Given the Federal policy vacuum, it is up to State Governments to take a leadership role to reduce Australia’s emissions. Secondly, most of the decisions that result in increases or decreases to Australia’s greenhouse gas emissions are made at a State level. Strong State action is therefore important and necessary to ensure Australia takes responsibility for its contribution to climate change.

Victoria currently has climate change legislation. The *Climate Change Act 2010* was brought in by the previous Labor Government, and then significantly weakened by the Victorian Coalition Government. Although it made some tentative inroads into addressing Victoria’s emissions, the original Act was still not up to the task of driving emissions reduction. In its current weakened form, the Victorian Climate Change Act is wholly inadequate as a response to the urgency of climate change. It does not position Victoria as a climate leader. A committed State Government can do much more.

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1 ‘Climate Change in Australia; Projections for Australia’s NRM Regions’, CSIRO, <http://www.climatechangeinaustralia.gov.au/en/regional-climate-change-explorer/super-clusters/?current=SSC&tooltip=true&popup=true>

2 ‘The Critical Decade 2013; Climate Change, Science, Risks and Responses’, page 4

3 2013 record heatwave ‘virtually impossible’ without climate change, Climate Council of Australia report says, ABC News, <http://www.abc.net.au/news/2015-02-07/record-heat-virtually-impossible-without-climate-change-report/6077634>

4 For further discussion of why Victoria needs to act now, see Environment Victoria’s report *Six Steps to Climate Leadership: The Path to a Cleaner, Healthier, and More Prosperous Victoria* July 2015 at <http://environmentvictoria.org.au/six-steps-to-climate-leadership>

### 3 What is the gap that the Climate Charter will fill?

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The Victorian Government is making decisions now which will have the effect of increasing our emissions for decades. Examples are the extension of the Urban Growth Boundary and associated transport projects which will increase transport emissions, encourage further urban sprawl, and reduce farmland close to population centres; the continued logging and clearing of native forest and native vegetation which releases emissions and reduces vital carbon sinks; allowing the Hazelwood power station to continue operating until 2031 despite it being the highest emitting power station in any developed country; and issuing new licences to explore for coal in Gippsland. These demonstrate that the Government is not properly considering climate change in its decision-making. It is clear that more proactive measures must be taken.

Right now there is an excellent opportunity for Victoria to lead the way within Australia and the world by establishing a robust framework to guide our path to a low carbon future.

The Climate Charter proposed sets up a legal framework to ensure Victoria is proactively addressing climate change.

**The framework will make Victoria a world leader on climate change. It will ensure Victoria can significantly reduce its emissions, and make its best effort to adapt to unavoidable climate impacts.**

The Charter is inspired by the Victorian Human Rights Charter which was landmark Victorian legislation. It also draws on some of the major climate change legislative frameworks around the world. It is designed to work and make a valuable contribution with or without a national emissions trading scheme, meaning that if a future Federal Government brought in an emissions trading scheme the Victorian Government would not need to repeal the Charter. This gives business and the community certainty in light of shifting Federal priorities, and means that State action does not need to keep being delayed while hoping for Federal action.

## 4 Contents of the Climate Charter

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The concept for the Climate Charter is based on the Victorian Human Rights Charter<sup>5</sup>. The Climate Charter is overarching legislation that requires all other Victorian legislation to be interpreted and implemented in a way that is consistent with the Charter. It implements a structure for decision-making that properly factors in climate mitigation and adaptation. It also requires the Government to proactively develop solutions that will lead Victoria to a low carbon future.

Importantly, the Charter gives Victorian climate action legal force through implementation in legislation.

There are seven key elements to the Charter:

1. Charter principles which set out how climate change is to be addressed in Victoria.
2. Binding emission reduction targets (suggested at 25% of 2000 levels by 2020 and net zero emissions by 2050).
3. A requirement that Victorian legislation and policy must be interpreted in a manner that is consistent with the principles of the Climate Charter where possible.
4. A 'climate test' which must be implemented by all public authorities in major government financial decisions and administrative decision-making.
5. A requirement to develop a climate strategy to enable Victoria to meet its targets.
6. The establishment of the Victorian Climate Authority to advise, oversee and report on climate action.
7. Compliance and enforcement mechanisms to ensure the Act is implemented and applied.

Each of these is set out in detail below.

The Climate Charter also contains a preamble which recognises the need for Victoria to take responsibility for its own emissions, regardless of inaction at the Federal level, and the responsibility of all sectors of society to take action on climate change.

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### PREAMBLE

**The people of Victoria recognise the overwhelming threat that climate change poses to our State, our country and the world. We are committed to taking responsibility for our State's contribution to climate change. We recognise that this is a responsibility shared by all levels of Government, the community and industry, and each must play its part. Victoria is committed to being a climate leader and to taking strong action to reduce greenhouse emissions to ensure environmental justice is achieved for current and future generations.**

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<sup>5</sup> Charter of Human Rights and Responsibilities Act 2006

## 4.1 Climate principles

The Charter contains Climate Principles which set out how the Charter must be implemented and how decisions are to be made in accordance with the Charter. The principles are not discretionary objectives, they are mandatory requirements that must be complied with in implementing the Act.

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### PROVISION

In implementing the Charter and making decisions in accordance with the climate test, the following Climate Principles must be complied with:

- The Government will take action to reduce Victoria’s emissions in accordance with the legislated targets;
- The Government will take action to assist Victoria to adapt to the likely effects of climate change;
- In meeting its emission reduction targets, no more than 20% of the emissions reduction required to meet the target can be achieved through carbon offsets<sup>6</sup>;
- Any carbon offsets used to meet the targets should be certified and sourced in the following order - from within Victoria where possible, then within Australia, then internationally;
- Lack of full scientific certainty should not be used as a reason for postponing appropriate measures to prevent serious or irreversible loss or damage as a result of climate change;
- In implementing this Act, the Government must have regard to the need for expeditious action to reduce emissions and adapt to the unavoidable effects of climate change; and the need for increased cost certainty and increased risk certainty in the delivery of climate change mitigation and adaptation measures.

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## 4.2 Emission reduction target

Although there is resistance in some sectors to having emission reduction targets at the State level, targets are a useful, and indeed critical tool in climate action for a number of reasons. Firstly, the community understands them – they are used and recognised internationally and are a simple way of demonstrating a government’s level of commitment and action. Secondly, they are a useful goal-setting tool that ensures all parties are working towards the same objective and taking actions that actually reduce emissions rather than actions that are mere lip service or public relations exercises. Thirdly, they are a critical accountability measure. Without targets, governments can claim to be taking climate action through various complicated or soft measures, but the community has no standard to measure their actions against, and no way of holding governments to account for their claims.

Ultimately, there should be nothing to fear from an emission reduction target. The whole point of climate mitigation action is to reduce emissions to a ‘safe’ level by a certain date. If we are not doing this, there is little point in taking climate action at all. Governments who refuse to commit to the necessary targets are essentially stating they are not serious about reducing emissions to a safe level and instead are playing at the margins.

The Climate Charter includes emission reduction targets. Victoria should adopt targets consistent with the State’s share of national emissions reductions. Appropriate targets should be determined as part of the Climate Change Act review process. Our suggestion is that, based on the work done by Environment Victoria and others<sup>7</sup>, at a minimum these should be 25% by 2020 and net zero emissions by 2050.

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<sup>6</sup> This principle is designed to ensure that all sectors begin to build emission reductions into their operations, rather than relying on offsets. The 20% limit is included as a guide. The exact percentage can be determined by the government when developing the legislation

<sup>7</sup> See Environment Victoria, *Six Steps to Climate Leadership: The Path to a Cleaner, Healthier, and More Prosperous Victoria* July 2015 at <http://environmentvictoria.org.au/six-steps-to-climate-leadership>

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## PROVISION

Victoria is to reduce emissions by 25% by 2020 and net zero emissions by 2050. It is the duty of the Premier to ensure that these targets are met.

The targets may be altered by regulation if there have been significant developments in scientific knowledge about climate change that justify doing so. Before making regulations that alter the target the Premier must obtain and take into account advice from the Victorian Climate Authority.

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### 4.3 Legislation to be consistent with the Climate Charter

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## PROVISION

All Victorian legislation and policy must be interpreted in a way that is consistent with the principles in the Climate Charter.<sup>8</sup>

The Supreme Court has jurisdiction to determine whether legislation has been interpreted consistently with the Climate principles if the question arises in a proceeding before a court or tribunal.<sup>9</sup>

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### 4.4 Decision-making – the climate test

The climate test is the key element of the Climate Charter. The Climate Charter requires government decision-makers to act in a way which will reduce Victoria's emissions and will prepare Victoria for the likely impacts of climate change. This requirement is called the climate test. It is the primary tool to ensure climate change is embedded in government decision-making. The climate test applies to all government administrative decisions<sup>10</sup> and all government financial decisions over a certain threshold<sup>11</sup> (meaning government contracts, government grants, and government procurement decisions). The test provides a mechanism that links government decisions with Victoria's emission reduction target, to ensure Victoria will meet its target.

The climate test consists of two elements – a climate mitigation element and a climate adaptation element.

Although this test is limited to public authorities,<sup>12</sup> the Charter allows any entity (for example a private company) to ask the Minister to declare that the entity is subject to the climate test.<sup>13</sup> This will allow corporations who are committed to taking positive action on climate change to publicly demonstrate their commitment and is aimed at raising the bar among the corporate sector.

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<sup>8</sup> This is based on the obligations in the Human Rights Charter s 32.

<sup>9</sup> This is based on the obligations in the Human Rights Charter s 33.

<sup>10</sup> An administrative decision is a decision made by a public authority that can be challenged for legal error in the Supreme Court.

<sup>11</sup> The government could determine an appropriate threshold – say \$500,000.

<sup>12</sup> 'Public authority' under this Charter has the same meaning as s 4 of the Charter of Human Rights and Responsibilities but does not include the Victorian Police or Parliamentary Committees.

<sup>13</sup> A similar provision is found in s 40D of the *Human Rights Act 2004* (ACT).

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## PROVISION

In making an administrative decision or financial decision, a public authority must assess whether that decision will enhance or reduce Victoria's ability to achieve the 2020 and 2050 emission targets.

If the effect of making the decision will be to reduce Victoria's ability to meet the targets, the subject of the decision must be modified until it does not reduce Victoria's ability to achieve the 2020 and 2050 targets. This can include the limited use of offsets, provided emission reduction strategies are implemented first, and the offset is related to the decision.

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The test requires government to reduce emissions from its own projects and activities, and put the onus on proponents to reduce emissions from private projects before they are approved. It also allows government to go ahead with activities that will cause an increase in emissions despite measures to reduce emissions from the project, provided that those emissions are offset in a way that is related to the decision.

In order to reduce unnecessary administrative burden that will have no impact on emissions, the legislation could provide that certain types of decisions are exempt from the climate test. However this should be limited to those decision that the Victorian Climate Authority has determined are unlikely to have a significant impact on Victoria's emissions, such as arts grants and minor projects. The exemption should not be available to exempt projects and decisions that will significantly contribute to Victoria's emissions, but that the government wants to go ahead for political or economic reasons.

In order to reduce administrative burden it is envisaged that public authorities would develop policies to guide their decision making. These would contain principles and benchmarks that will ensure decision-makers meet the climate test, rather than having to consider this afresh for every decision. The Victorian Climate Authority would have a role in assisting agencies to do this.

### EXAMPLES

A planning decision to approve the building of a housing development will have to consider all factors that may increase carbon emissions such as the energy efficiency of the buildings, clearing of native vegetation which results in release of emissions, and connection to public transport which will minimise transport emissions. If the assessment concludes that the housing development will reduce Victoria's ability to meet the emissions targets it must be redesigned so that it does not reduce that ability, and/or the developer must implement an offset that is directly related to the housing development (for example, solar power for all houses, replanting of an equivalent number of trees and an offset for public transport).

A government decision to purchase fleet cars must consider whether the car fleet will reduce Victoria's ability to meet its emissions targets or not. If it does, the decision-maker must secure cars which have the lowest possible emissions that are available in Victoria and offset any remaining emissions.

A plan which sets out the logging schedule for the next 5 years must consider the emissions impacts of the logging activity. As logging of native forests increases emissions and reduces biosequestration the public authority must do everything within its power to reduce those emissions. That may require the authority to not approve the logging of the native forest.

### **Climate adaptation test**

The aim of the adaptation test is to ensure that decisions made now will not impede our ability to adapt to the most likely effects of climate change in Victoria. The ability of Victoria to adapt to climate change must be assessed against three key sectors – the ability of the State of Victoria as a whole to adapt (for example the economy, the government, government infrastructure), the ability of the people of Victoria to adapt (for example in relation to rising energy costs, health impacts, ability to source food) and the ability of Victoria’s environment to adapt (for example threatened species, ecosystems).

There are a large number of projects and activities that are going ahead at the moment which during their life will suffer consequences from climate change impacts. The climate adaptation test will only require the decision-maker to consider impacts that are relevant to that action or activity and only for the expected life of the activity. For example if a development is only expected to have a life of 30 years the decision-maker will need to consider the climate impacts at 2020 but not at 2050.

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## **PROVISION**

In making an administrative decision or procurement decision, a public authority must assess whether the action which is the subject of the decision will increase or reduce the ability of the State, the Victorian people or Victoria’s environment to adapt to the climate change impacts that are relevant to that action.

If the action will reduce Victoria’s ability to adapt to the most likely climate change impacts that are relevant to that decision, the public authority must refuse to approve that activity or action.

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It will not be feasible or desirable for every decision-maker to make their own determination of the likely climate impacts for Victoria, on which to base their assessment. Therefore the Victorian Climate Authority will assess the latest and most robust climate science relevant to Victoria and make a determination each year on what are the most likely climate impacts for Victoria. Climate adaptation test assessments will use this information to inform their assessments, negating the need for decision-makers to determine themselves what the most likely predictions and impacts are. Only this information will be able to be used to determine relevant climate impacts.

### **EXAMPLES**

A permit decision to build a housing estate on the coast will have to consider predicted sea level rise, whether it will clear native vegetation which will put added stress on threatened species, whether it is energy efficient & self powered to cope with rises in electricity prices, whether it is water efficient and recycles water to cope with water scarcity. If it will reduce the ability of Victorians or the Victorian environment to cope with predicted impacts of climate change the project must be changed or the permit must be refused.

A government decision to purchase fleet cars must consider whether the cars are fuel efficient or non-oil powered to cope with rise in oil prices that are predicted during the life of the fleet. If not a different car must be chosen (based on options currently available to the government).

A plan which sets out the logging schedule for the next 5 years must consider the added stress to ecosystems which will already be affected by climate change. If the logging will reduce the ecosystem’s ability to adapt to climate change, logging must be modified or not go ahead.

## 4.5 Policy and legislative development

Although the climate tests above will ensure that poor decisions that have a lasting climate legacy are not made, they will may be enough to ensure Victoria meets its emission reduction targets. In order to achieve the level of emission reductions required to avoid dangerous climate change the Victorian Government will need to look for opportunities and take proactive steps for large-scale emission reduction. This will be done through the Climate Strategy and the Climate Report.

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### PROVISIONS

#### *Climate strategy*

Within 1 year of the commencement of the Charter, the Environment Minister must develop a Climate Strategy which sets out how the Victorian targets are to be achieved. The Strategy must be tabled in Parliament.

The Strategy will review opportunities for emissions reduction and set out a program to achieve those reductions. It will prioritise activities that will achieve the highest emission reductions at the least cost and will provide a plan to work towards more difficult actions.

In particular, the Strategy must set out the programs and actions that the Government will embark on in the next year. The Strategy must be updated each year using an adaptive management approach to focus on the programs and actions for each coming year.

#### *Climate report*

Each year the Environment Minister must table in Parliament a report on the progress in the previous year in achieving the actions set out in the Strategy.

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## 4.6 Victorian Climate Authority

The Charter sets up an independent statutory authority that will have a number of important roles in implementing the Climate Charter and ensuring that Victoria meets its emissions targets.<sup>14</sup>

The overarching mission of the Victorian Climate Authority will be to assist the Government to meet its emissions reduction targets and adaptation goals as quickly and easily as possible. Therefore the Authority will be required to proactively identify and develop guidance that will help decision-makers and the Environment Minister to achieve these goals.

The Authority will be independent, and will not be subject to direction from the Government or a Minister but will perform its functions in accordance with the provisions that set it up in the Charter. This will ensure that its only focus will be to assist Victoria to meet its emission reduction targets without political interference.

The Victorian Climate Authority will:

- assess the latest and most robust climate science relevant to Victoria and make a determination each year on what are the most likely climate impacts for Victoria. This will form the standard which the climate adaptation test will be based on. Climate adaptation test assessments will use this information to inform their assessments, negating the need for decision-makers to determine themselves what the most likely predictions and impacts are. Only this information can be used to determine relevant climate impacts;

<sup>14</sup> An alternative to setting up a new statutory body is to give this role to Sustainability Victoria or the Commissioner for Environmental Sustainability.

- produce guidance documents as necessary to assist decision-makers to make informed decisions;
- review the Government’s climate strategy before the document is tabled in Parliament and provide comment to the Environment Minister;
- be empowered to table reports in Parliament on government decisions if it does not believe that the decision properly implemented the requirements of the Act, rather than having a full review function (see further under compliance below); and
- provide advice to the Environment Minister on an area relevant to its function on request by the Minister.

## 4.7 Compliance

The Charter is not just an aspirational framework; it is a set of duties and obligations that must be carried out to enable Victoria to play its part in the required emissions reduction and to prepare it for the unavoidable effects of climate change. The Charter therefore contains mechanisms to ensure key actions are complied with.

A key aim of the Charter is to enable the required climate actions to happen as quickly and effectively as possible. Therefore the compliance and oversight mechanisms are aimed at providing incentive to comply with the Charter and oversight to ensure it is being implemented properly, while targeting that compliance and oversight to key areas of the processes.

### Breach of duty

The 2020 and 2050 targets will be legally binding and the Premier is under a duty on behalf of the Government to ensure they are met.

### *Review of decisions – judicial review and enforcement*

The public will be able to take the Government to court when the Charter is not being complied with. Judicial review and enforcement of breaches of the Act will be available where government actions do not comply with the Charter or government decisions contain a legal error. As every person in Victoria will be directly affected by climate change, the Climate Charter includes extended standing provisions allowing a broad range of people to bring an action against the Government. These are similar to the extended standing provisions in s 487 of the *Environment Protection Biodiversity Conservation Act 1999*.

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## PROVISION

1. A person or organisation may seek judicial review of a decision that the Charter applies to if the person is an Australian citizen or resident of Australia or was incorporated or established in Australia, and at any time in the 2 years immediately before the decision the person has engaged in activities or research in Victoria for the reduction of carbon emissions or adaptation to climate change.
  2. A person or organisation may bring proceedings for an order to remedy or restrain a breach of the Charter if the person is an Australian citizen or resident of Australia or was incorporated or established in Australia, and at any time in the 2 years immediately before the decision the person has engaged in activities or research in Victoria for the reduction of carbon emissions or adaptation to climate change.
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### ***Audit of decisions and implementation by the Victorian Climate Authority***

The Government must be accountable for the way it interprets and applies the Principles of the Act and the climate test. The Victorian Climate Authority will therefore be empowered to table a report in Parliament critiquing a government decision or government action if it does not believe that the decision or action properly complied with the requirements of the Act. This will include specific decisions made under the climate test.