

MALAYSIA'S CLIMATE CHANGE ACT? WHAT TO EXPECT

The National Policy on Climate Change was introduced in 2009 to mainstream climate change, provide policies, and strengthen institutions to reduce climate change impacts. Ten years later, the government announced that efforts were in place to introduce a Climate Change Act.

Changes in Government led to some delays but encouragingly the Ministry of Environment and Water confirmed in late 2020 that the Act was still in consideration. In September 2021, the Government announced under the 12th Malaysia Plan that legislation on climate change would be formulated to increase coordination and enhance the effectiveness of climate change actions. Most recently, the Ministry of Environment and Water announced that the ministry and other agencies are presently drafting the National Climate Change Legal Framework, which will set the foundation for a Climate Change Act that is expected to come into force in 2024.

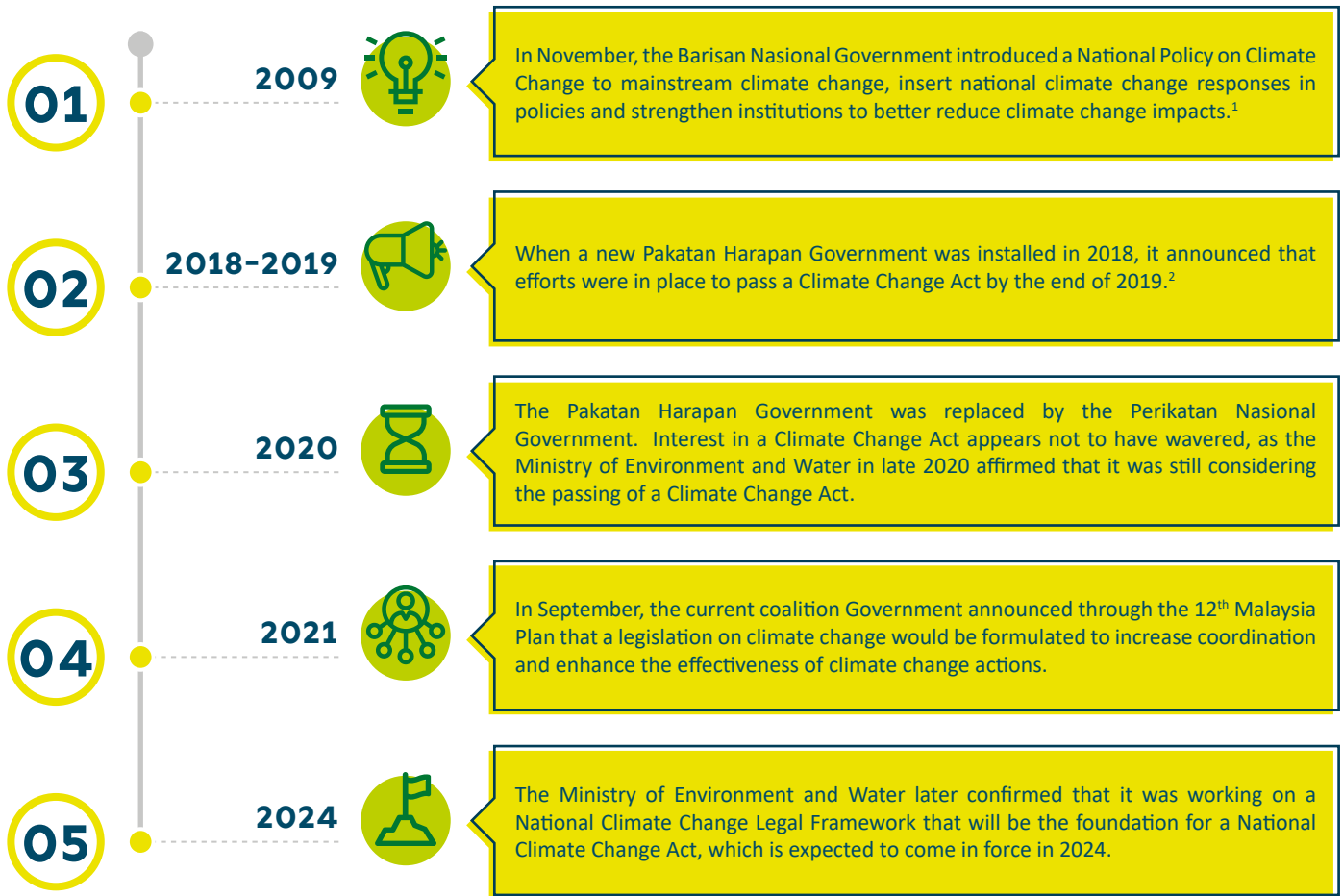
While there is little public information on the contents of the proposed Act, we can arrive at some views on what should be included in the Act by looking at other jurisdictions, such as the UK and Australia.

In this article, our Partner Amin Abdul Majid of the Infrastructure, Energy and Utilities Practice Group of Zaid Ibrahim & Co. (a member of ZICO Law) will discuss the common ingredients of climate change legislation that can be an indicative guide to what should be expected in our Climate Change Act.

— DECEMBER 2021



The last 10-15 years has seen climate change rise in prominence as an important policy issue in Malaysia, receiving the firm support of successive Malaysian Governments.



The consistent backing across party lines is encouraging, particularly when local and international climate change concerns become more pressing. One would hope that regardless of the political climate in Malaysia, there will continue to be universal support from members of Parliament for a Climate Change Act, if and when it is tabled, so that the country can effectively mitigate climate change while adapting to changes brought about by its impacts.

At present, there is little public information on the proposed Climate Change Act. Although the Ministry of Environment and Water has referred to elements such as private sector reporting and economic instruments, no legislative bill or other draft has been shared or discussed with the public as yet. This is in spite of recent trends of increasing stakeholder engagements by the Malaysian Government for legislative changes, as seen in the case of proposed revisions to the Environmental Quality Act 1974.

It is difficult to gaze into a crystal ball and predict the precise contents of the prospective Climate Change Act. Although Government statements have been made, there is not enough to allow an informed deduction of the proposed legislation.

There are several climate change laws in other jurisdictions that can be useful as an indicative guide to what Malaysians can expect and hope to see in our own Climate Change Act.

Through the common threads in other existing legislation, one can also analyse features that may already exist in Malaysia so that an informed assessment can be made on the general direction and distance of travel.

¹ Prime Minister's Office of Malaysia, 'National Policy on Climate Change' (12 July 2019) <<https://www.pmo.gov.my/2019/07/national-policy-on-climate-change/>> accessed 27 September 2021.
² Sim Leoi Leoi, 'Act-ing on climate change' The Star (12 December 2018) <<https://www.thestar.com.my/news/nation/2018/12/12/acting-on-climate-change-malaysia-drafting-laws-in-efforts-to-overcome-any-possible-scenario/>> accessed 27 September 2021.

COMMON INGREDIENTS OF CLIMATE CHANGE LEGISLATION



Setting of GHG emission targets/caps for both short and long term.

Setting out the responsibility and accountability to achieve the targets.

Creation of relevant institutions for independent and expert advice on climate change.

Provisions on emissions trading schemes or systems where GHG emissions are capped.

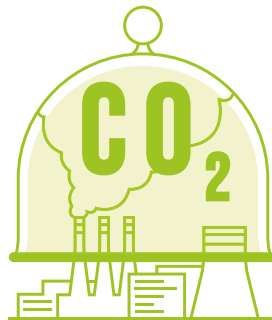
TARGETS

Perhaps the most common and key ingredient of climate change legislation is an emission target or cap, both for the short and long terms.



UNITED KINGDOM

Targets features prominently in the United Kingdom's Climate Change Act passed in 2008, arguably the world's first significant and long-term legal framework addressing climate change.³ One of its key provisions is a long-term scientifically-backed **target to reduce all greenhouse gas ("GHG") emissions by 2050 by at least 80% on 1990 levels.** In 2019, this target was increased to 100%. It applies to the entire economy and is further broken down into shorter targets called carbon budgets, which are caps on GHG emissions, applicable to all sectors.



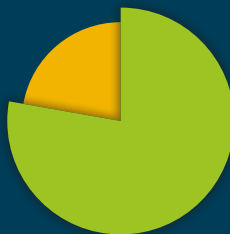
AUSTRALIA

Victoria's Climate Change Act 2017 provides a long-term emissions reduction **target of net zero GHG emissions by 2050.**⁴ Five-year targets are also set to ensure long-term targets are met.

Data in 2019 has already shown that Victoria is on track to achieve this target, and more data will be forthcoming next year.

Malaysia similarly has its own targets on GHG emissions. Its Intended Nationally Determined Contribution submitted to the United Nations Framework Convention on Climate Change ("UNFCCC") in 2015 set these out.

Target to reduce GHG emissions intensity of GDP **by 45% by 2030**, relative to the GHG emissions intensity in 2005.



35% ▶ To be achieved on an unconditional basis

10% ▶ To be achieved upon receipt of technical and financial support from developed countries

³ Sustainable Development Goals, 'Climate Change Act' <<https://sustainabledevelopment.un.org/index.php?page=view&type=99&nr=100&menu=1449>> accessed 27 September 2021.

⁴ https://www.climatechange.vic.gov.au/victorian-government-action-on-climate-change#toc__id_2_victoria%E2%80%99s

Reassuringly, the Malaysian Government in August 2021 recently announced that the 35% unconditional target has been increased to 45%, signalling that the country is committed and able to achieve this target in about nine years.⁵ The recently announced 12th Malaysia Plan also gives cause for optimism as the Malaysian Government has made a commitment to introduce a Nationally Determined Contribution Roadmap which will specify amounts of GHG emissions that will need to be reduced from key GHG emitting sectors.

Working on that confidence and momentum, Malaysia's Climate Change Act should be able to include clear long-term targets for GHG emissions as seen in other jurisdictions. Our expectation is also that these targets would be broken down into short-term targets grounded on scientific data.

Malaysia's targets have to be economy-wide, reliable and robust, so that the Climate Change Act would be a genuine whole-of-nation approach. It is clear that the carbon budgets in the United Kingdom painstakingly take into account all sectors of the economy. Until recently, Malaysia's

existing approach on emission reductions was wide but not as comprehensive and cohesive as it should be. In the case of energy legislation, for instance, more attention could be given to the transport sector's policies and regulations to ensure a firm reduction of overall GHG emissions, including those from vehicular combustion engines. There are positive signs that Malaysia is already leaning towards green mobility. Budget 2022 announced incentives, including full exemption from import and excise duties and sales tax for electric vehicles, together with road tax exemptions. However, substantial research is still needed to look into the detail and determine how to get us where we need to be in the future.

There must be a concerted approach to establish the optimum allocation for GHG emissions. This can be built on recent calculations of Malaysia's unconditional and unconditional targets submitted to the UNFCC. Existing statistics on energy, such as the ones available at the Energy Commission's Malaysia Energy Information Hub, would be particularly helpful to come up with clear targets for Malaysia's prospective Climate Change Act.

ACCOUNTABILITY

Of course, having targets in and of itself would be rather pointless without the responsibility and accountability in achieving them.



NEW ZEALAND

New Zealand's Climate Change Response Act 2002 provides useful guidance by having clear provisions on monitoring and reviewing the Government's progress towards emission reductions and adaptation objectives.

Section 5X

Provides that the Minister for the Environment responsible for setting emissions budgets, (i.e. the cap for permitted GHG emissions in a given time period, expressed as a net quantity of carbon dioxide equivalent).

Section 5ZM

Provides for the consequences if such budgets are not met. Embarrassingly for the Government, this would involve a court making a declaration that the targets were not met, awarding costs, and potentially also compelling the Minister to bring the court's declaration to the attention of Parliament and to advise on how the Government will be responding.



UNITED KINGDOM

In the United Kingdom, there is a similar assignment of duties and responsibilities to ensure that targets are met. In instances where the net United Kingdom carbon account for a given period exceeds the specified carbon budget, the Secretary of State must lay before Parliament a report that sets out proposals to compensate for the excess GHG emissions.

In Malaysia, declarations and judicial review are common features in our body of case law. It goes some way to secure the accountability of public authorities. However, accountability tied to specific targets stipulated in statutes is not a familiar practice, except for instances where authorities are statutorily required to act within a given time period or make decisions based on principles that are explicitly prescribed, as is typically seen in the area of land administration. A statute committing the Government of the day to targets that extend to various economic sectors and more significantly, hinge on the actions of numerous disparate parties would be a break from precedent. Various local legislation have detailed calculations underlying their prescriptions, but they do not have quantitative targets explicitly imposed on the Malaysian Government itself. It is unclear whether the Malaysian Government would be comfortable adopting this new approach in legislation.

Despite this uneasiness, the Malaysian Government should be aware that the accountability structure described above is becoming more and more common and is in line with judicial trends around the world. For instance, recent years have seen the national Governments of the Netherlands, Germany and Belgium being separately held to account for failures to sufficiently plan or execute efforts to cut GHG emissions. Closer to home, Indonesia's Government have also been called to task for being negligent in tackling air pollution in its capital Jakarta.

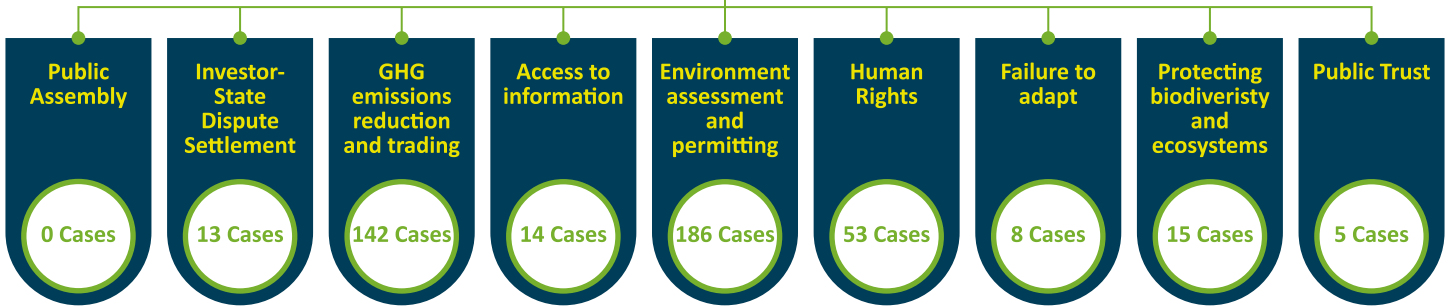
According to the Climate Change Litigation Database, there are currently no less than 142 cases around the world where Governments are being sued in connection with GHG emissions reduction and trading.⁶

⁵ Bernama, 'Malaysia updates NDC to reduce intensity of unconditional greenhouse gas emissions by 45%' The Edge Markets (4 August 2021) <<https://www.theedgemarkets.com/article/malaysia-updates-ndc-reduce-intensity-unconditional-greenhouse-gas-emissions-45>> accessed 27 September 2021.

⁶ 'Climate Change Litigation Database' (Climate Case Chart) <<http://climatecasechart.com/climate-change-litigation/>> accessed 27 September 2021.

Interestingly, there are more than 436 cases against Governments worldwide (not including the USA) relating to climate change in general.

US Climate Change Litigation (excluding USA)




Source: Climate Change Litigation Database

Of course, foreign climate change litigation would not have any direct influence on policy makers nor the judiciary in Malaysia. They would be neither binding nor persuasive precedent. But on the other hand, it is not unusual for Malaysian authorities to observe legal developments

in other countries for guidance, especially in new areas of the law. This is more likely than not to be the case for climate change and it may well be that this form of accountability for targets and objectives will be something we will soon see in Malaysia's own Climate Change Act.

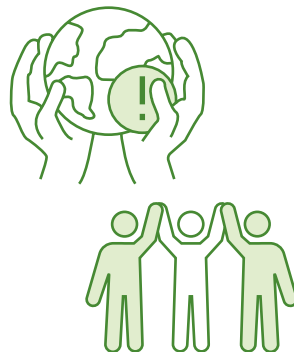
INSTITUTIONS

Another common ingredient of climate change legislation is the creation of relevant institutions so that Governments can seek independent and expert advice on climate change.



PHILIPPINES

The Philippines' Climate Change Act of 2009 created an "independent and autonomous" Climate Change Commission. This Climate Change Commission is the sole policy-making body of the Philippine Government and coordinates, monitors and evaluates Government programs and action plans on climate change. Members of the Climate Change Committee include the Secretaries or Ministers for various departments of Government including Agriculture, Energy, Environment and Natural Resources, Education, Health, Science and Technology and others.




UNITED KINGDOM

In the United Kingdom, the Climate Change Act created a Committee on Climate Change responsible for recommending carbon budgets and monitoring progress and performance on emission reduction and climate resilience. The Committee on Climate Change is also comprised of well qualified experts, especially in the areas of energy, transport, climate science and economics.

Institutions focused on addressing climate change have already been created in Malaysia, notwithstanding the absence of a Climate Change Act.

The first institution was formally created when the existing Malaysian Green Technology Corporation expanded its portfolio in October 2019 to strategise climate-resilience actions and lead inter-ministerial collaborations for climate change. It was renamed the Malaysian Green Technology and Climate Change Centre to reflect this upgraded capacity.⁷

Most recently, the Malaysian Government formed the Malaysian Climate Change Action Council ("MyCAC") whose members include the Prime

Minister, economic-related ministers and chief ministers of all Malaysian states, together with other individual experts. Among the early actions of the MyCAC is to outline key priorities to strengthen Malaysia's national climate governance, calling for the development of a green recovery plan, the implementation of a low carbon mobility development plan and also the development of a national emissions trading system.⁸

It is still too early to tell if these current institutions are enough to push through the objectives of a prospective Climate Change Act, but their existence is a good step forward in giving this subject matter the attention that it needs.

⁷ 'Malaysian Green Technology Corporation unveils 10th IGEM' (IGEM) <<https://www.igem.my/2019/10/11/malaysian-green-technology-corporation-unveils-10th-igem/>> accessed 27 September 2021.

⁸ 'Tengku Datuk Seri Utama Zafrul Tengku Abdul Aziz, 'Closing Plenary By Minister of Finance for Joint Committee On Climate Change ("JC3") Flagship Conference 2021' (Ministry of Finance Malaysia, 24 June 2021) <<https://www.mof.gov.my/en/news/speech/closing-plenary-by-minister-of-finance-for-joint-committee-on-climate-change-jc3-flagship-conference-2021>> accessed 27 September 2021.

TRADING

To a lesser extent, provisions on emissions trading schemes or systems also appear in many climate change statutes. This would be a scheme where GHG emissions are capped and the Government or other responsible authority would simultaneously issue GHG emission "units" that would permit emitters to go beyond the prescribed caps. These GHG emission units would typically denote an emission of up to one tonne of CO₂ equivalents. The GHG emission units are given a price so that they can be purchased and traded, ultimately by an entity wishing to go beyond its emission cap. Such trading or sale and purchase solves a deeply-rooted problem that economists call externalities, because the cost of GHG emissions can now be priced and will eventually be reflected in production costs.

Provisions on the trading of emissions are a common, but by no means necessary, feature of climate change legislation. The New Zealand Emissions Trading Scheme was established through the New Zealand Climate Change Response Act 2002, albeit through an amendment made in 2008. The United Kingdom Climate Change Act 2008 similarly provides for the establishment of "trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere" but largely supplemented the rules and regulations of the European Union's

Emissions Trading System that was already in existence since 2005 as the world's first international emissions trading system.

The priority set by MyCAC on the development of a national emissions trading system suggests that it is highly likely that any prospective Malaysian Climate Change Act would contain provisions on the trading of emissions. In September 2021, it was also revealed under the 12th Malaysia Plan that a feasibility study on carbon pricing would be conducted to assess issues such as the establishment of an emission trading scheme.

An emissions trading scheme would be a welcomed development not only for the externality issue mentioned earlier, but also because it would create a more wide-ranging climate change instrument that can cut across sectors from power generation to manufacturing to forest management. It would also be reasonable to expect that this emissions trading system will be compatible with emission trading systems in other countries so that we can have cross-border transactions benefitting many. For instance, Malaysia could perhaps issue GHG emission units attributed to conservation initiatives in our forests while emitters in other countries can purchase such units to support such efforts.

EXPECTATIONS

The key ingredients discussed above should provide some light on what can be reasonably expected in Malaysia's prospective Climate Change Act. Changes that are likely are whole-of-Government efforts to establish targets, refinements on institutional arrangements and work on a national emissions trading system.

But this does not mean that a Malaysian Climate Change Act is inevitable.

A single statute on climate change is not and should not be the be all and end all of climate mitigation and adaptation.

The complexity of the problem requires a multi-pronged approach, and we have observed that many countries, including many members of ASEAN, have taken this approach without a specific climate change statute.

But if a Climate Change Act is one of the main instruments that Malaysia wishes to use, we should by now have a general idea of its key components and the Government should announce more details, preferably sooner rather than later.

If you have any questions or require any additional information, please contact Amin Abdul Majid or the Zaid Ibrahim & Co. (a member of ZICO Law) partner you usually deal with.



Amin Abdul Majid
Partner

amin.abdul.majid@zicolaw.com
t. +603 2087 9976

Amin has advised clients and stakeholders on energy and infrastructure projects for close to twenty years. He is a subject matter expert on legal and strategic issues surrounding electricity, oil and gas, coal and also renewable energy. Amin has also been active in the drafting and negotiation of engineering and construction contracts and concession agreements for expressways, rail transport and water treatment.

Amin is familiar with legislative reform having assisted in the drafting of the Malaysian Renewable Energy Act 2011 and its subsidiary legislation and also Malaysia's recent attempt to enact an energy efficiency statute.

Amin has advised on power generation projects in Myanmar, Cambodia and Kazakhstan. Amin was also a country representative in negotiations for ASEAN's regional power grid.

This article was edited by ZICO Law Knowledge Management & Training.

All rights reserved. No part of this document may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, without our prior written permission.

This article is updated as at 8 December 2021. The information in this article is for general information only and is not a substitute for legal advice. If you require any advice or further information, please contact us.

ASEAN INSIDERS,
by origin and passion