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The Hon Scott Morrison MP, Prime Minister
The Hon Angus Taylor MP, Minister for Energy and Emissions Reduction
Senator the Hon Marise Payne, Minister for Foreign Affairs
The Hon Christian Porter MP, Attorney-General
By email

Dear Prime Minister and Ministers,

Following media reports both during and in the aftermath of the 25th meeting of the Conference of the Parties to UN Framework Convention on Climate Change in Madrid last December, and after further consideration and discussion of the issue in academic circles this year, we are compelled to convey our views regarding the Government's proposal to use "carryover units" or "credits" from the first and second commitment periods under the Kyoto Protocol to assist Australia in meeting its emissions reduction obligations under the Paris Agreement.

Our considered view is that the proposed use of these "Kyoto credits" to meet targets under the Paris Agreement is **legally baseless** at international law.

The Kyoto Protocol and the Paris Agreement are entirely separate treaties. There is no provision in the Paris Agreement that refers to the Kyoto Protocol, nor to the units established under it.

In our view, units assigned to Australia under the Kyoto Protocol may only be used for the purpose of complying with the Paris Agreement if the Paris Agreement itself expressly allows it (which it does not), or if there is a clear and affirmative decision taken by all Parties to the Paris Agreement to allow this practice.

It is clear that no such consensus exists. Senior Australian government officials acknowledged in a Senate Estimates Hearing on 21 October 2019 that there was no other country intending to use "Kyoto carryover" to assist in meeting targets under the Paris Agreement. In addition, 32 governments declared in the "San Jose Principles for High Ambition and Integrity in International Carbon Markets"

in December 2019 that any use of Kyoto units and allowances in the context of the Paris Agreement should be prohibited.

There are further significant legal obstacles to Australia's proposed use of so-called "carryover" derived from projected over-achievement on targets under the Kyoto Protocol.

First, the Doha Amendment to the Kyoto Protocol that created the second commitment period (for 2013 to 2020) is not in force and may not enter into force prior to the expiry of the second commitment period at the end of this year. If the Doha Amendment fails to enter into force, the assigned amount units (AAUs) envisaged to be issued to Australia for compliance with its target in the second commitment period will never materialise, leaving Australia without two-thirds of the 411 MtCO₂-e in carryover that the Department for Energy & the Environment referenced in its "Australia's emissions projections 2019" report.¹

Second, we recall that a decision was taken in 2015 by the Parties to the Kyoto Protocol that any Kyoto units not used for compliance with targets under the second commitment period "shall be cancelled".² In joining the consensus on this decision, the Australian Government accepted that any Kyoto units remaining after compliance with targets under the second commitment period would never be used again in the absence of a third commitment period under the Kyoto Protocol.

Finally, we note recent suggestions by the Minister for Energy and Emissions Reduction that Australia will only use Kyoto carryover credits "if we have to".³ Current analyses suggest that Australia is not on track to meet its target for 2030, with recent projections from the then Department of the Environment and Energy estimating that Australia's emissions will be at 511 MtCO₂-e in 2030, which is only 16 per cent below emissions in 2005.

It follows that any expression of an intention or potential reliance on invalid Kyoto allowances or credits for meeting Paris Agreement targets conveys a message to the world that Australia wishes to reserve the right to avoid a significant proportion of the mitigation effort needed to meet its 2030 target under the Paris Agreement.

¹ <https://www.environment.gov.au/climate-change/publications/emissions-projections-2019>.

² Decision 3/CMP.11, Annex 1, paragraph 14 [as contained in document [FCCC/KP/CMP/2015/8/Add.1](https://unfccc.int/kyoto_protocol/annexes/annex_1/decision_3_cmp11_annex_1.html)], which, inter alia, amended paragraph 36 of the annex to Decision 13/CMP.1.

³ https://www.skynews.com.au/details/_6125086905001.



This sets a dangerous precedent that might lead other countries to exploit loopholes or reserve their right not to comply with the Paris Agreement, in turn increasing the already-significant gap between the aggregate effect of countries' emission reduction targets and the level of reductions required to achieve the temperature goals in the Paris Agreement. The IPCC has already made clear that a global halving of emissions by 2030 is required to be on track to limit warming to the 1.5°C limit, so a ratcheting up of Australia's 2030 target is needed rather than efforts to water down Australia's commitments.

Bearing in mind the issues raised above, we consider it important that Australia urgently clarify its position in relation to Kyoto carryover, both to ensure that the Government is not seen as advocating positions that are plainly inconsistent with international law, and to avoid any further damage to Australia's reputation.

A clear statement that Australia categorically rules out the use of Kyoto carryover allowances or credits for Paris Agreement compliance, and is committed to "meeting and beating" its targets through **real** mitigation effort, would help to build confidence in Australia's contribution to the global effort, and in turn encourage other governments to abide by their own commitments. It would also serve to clear diplomatic uncertainties surrounding negotiations on broad rules for carbon markets pursuant to Article 6 of the Paris Agreement, and help to build momentum for operationalisation of the Paris Agreement and success at COP26 in Glasgow.

We stand ready to engage with the Government on this issue, and look forward to a clarification of Australia's position in the very near future.

Yours faithfully,

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