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Wednesday 28 September 2016

Committee Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

2015 Paris Agreement on Climate Change

Thank you for the opportunity to present evidence to the Joint Standing Committee on Treaties in its public hearing in Sydney on Tuesday 27 September.

I write to provide a written submission to the Committee, and to provide further details in respect of questions asked by Committee members during the public hearing.

I teach and research in international law at the Sydney Law School at the University of Sydney. I also currently serve as President of the Australian and New Zealand Society of International Law (ANZSIL), which brings together many of the region's practitioners and academics in international law. I hold postgraduate qualifications in geography (from the University of Cambridge) and international law (from the University of Sydney).

In this submission I outline the status of the Paris Agreement, why it is significant, and I also highlight the need for legislative and policy change if Australia is to meet its commitments under the treaty. This submission reflects my views, and should not be attributed to the University of Sydney or to ANZSIL.

I am generally in agreement with the National Interest Analysis for the Paris Agreement which sets out Australia's strong national interest in joining the treaty and participating fully in global efforts to address climate change.

Status of the Paris Agreement

The Paris Agreement was concluded in December 2015 and opened for signature in April 2016. The treaty has attracted unprecedented levels of global support – very few multilateral agreements have been signed and ratified so widely and rapidly by the international community.

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The Paris Agreement may enter into force before Australia joins the treaty, unless Australia moves swiftly with its ratification process.

The Paris Agreement will enter into force when at least 55 states accounting for at least 55 per cent of global greenhouse gas emissions have joined the agreement.¹ As of 28 September 2016 there are 185 signatories to the Agreement, including Australia, and of these 61 states have already deposited instruments of ratification, acceptance or approval and account in total for 47.79 per cent of global greenhouse gas emissions.² India has announced that it will ratify the Paris Agreement on 2 October 2016,³ and as India accounts for 4 per cent of global greenhouse gas emissions its ratification would take the total to around 52 per cent of global emissions.

It is quite possible that the conditions for entry into force will be met in early October. As a consequence, the 22nd Conference of the Parties to the UN Framework Convention on Climate Change, which will meet in Morocco in November, may serve as the first meeting of parties for the Paris Agreement.⁴

The global support for the Paris Agreement can be attributed to several factors, including the shared commitment of the world's two largest emitters (the United States and China) to act, and above all to the rapid increase in global average temperatures. NASA has recently reported that August 2016 was the world's hottest month on record, and 2016 is highly likely to be the third consecutive warmest year on record.⁵ The Bureau of Meteorology in its 2015 annual climate statement observed that 2015 was the warmest year on record globally, and that eight of Australia's ten warmest years on record have occurred since 2002.⁶ The National Interest Analysis identifies the range of risks to Australia from failing to take collective global action against climate change under the Paris Agreement.⁷

Significance of the Paris Agreement

As Prime Minister Malcolm Turnbull noted in his address to the UN General Assembly in New York on 22 September 2016, the Paris Agreement is a 'pivotal global agreement on climate change'. The Prime Minister further observed that climate change puts at stake 'the future of generations around the globe and the wellbeing of our planet itself'.⁸

The Paris Agreement's key elements include (1) the setting of a collective objective to limit global temperature increases to well below 2°C, and ideally below 1.5°C; (2) the requirement that all countries, both developed and developing, communicate their intended actions to address climate change (Nationally Determined Contributions (NDCs) every five years, and to make these progressively stricter over time; (3) strengthened reporting and transparency provisions to promote the effective implementation of the Agreement, and (4) a five-yearly global stocktaking process (commencing in 2013) to track progress towards the goals of the Agreement.



The Paris Agreement recognises that the world must achieve carbon net neutrality this century.⁹

Legal and Policy Settings for Implementing the Paris Agreement

The Keating government supported the Rio Earth Summit in 1992. In the same year, it signed and ratified the UN Framework Convention on Climate Change. That agreement gave rise to the international climate regime of which the Paris Agreement is now the most important component.

In 1997, the Howard government negotiated and signed the Kyoto Protocol, in the process winning major concessions that allowed Australia to increase its emissions rather than reduce them. Despite this, the Howard government declined to ratify the Kyoto Protocol. The Kyoto Protocol entered into force in 2005, after Russia ratified the protocol. It was not until 2007, following the election of the Rudd government, that Australia ratified the protocol.

In 2011 the Gillard government introduced an emissions trading scheme with an initial fixed carbon price to ensure Australia could meet its Kyoto commitments and deliver deeper cuts over time, as by itself Kyoto has achieved minimal emissions reductions. The Abbott government repealed this measure in July 2014 and replaced it with the Direct Action policy. Several years later this policy remains a work in progress.

The Paris Agreement is flexible and allows parties a wide margin of discretion in their NDCs and adopting policies to meet their NDCs. Nonetheless, an NDC that falls substantially short of comparable action by other parties, and domestic policies that are ineffective at achieving Australia's NDC, will inevitably raise questions as to Australia's good faith commitment to meet the goals of the Paris Agreement.

Article 4.2 of the Paris Agreement provides that parties 'shall pursue domestic mitigation measures, with the aim of achieving the objectives' of their NDC. Absent or manifestly ineffectual policies would not, in my view, be regarded as domestic mitigation measures, and may therefore not meet the requirements of Article 4.2. Moreover, as stated in the National Interest Analysis, although there are no hard penalties under the Paris Agreement for failing to reduce emissions in line with a declared NDC, 'reputational costs would be a serious consideration' if Australia fails to achieve its NDCs.¹⁰

Against this background it is therefore relevant in assessing the international legal implications of Australia's proposed ratification of the Paris Agreement to make some remarks on Australia's relative performance compared with other states in setting emissions targets and accompanying these with effective emissions reduction policies.



Australia is the highest per capita emitter in the OECD, and has aggregate emissions greater than every country in Europe with the exception of Germany.¹¹ Australia's NDC under the Paris Agreement is to reduce emissions by 26-28 per cent below 2005 levels by 2030. This is a lesser commitment than that recommended by the Climate Change Authority (45 per cent to 65 per cent),¹² and weaker than other states (including the United States, the European Union and New Zealand).¹³

In its planned review of climate policies in 2017, the Australian government will need to consider strengthening Australia's NDC. Under the Paris Agreement 'any Party may at any time adjust its existing [NDC] with a view to enhancing its level of ambition.'¹⁴ A number of states are already increasing their ambition. For instance, the Netherlands Parliament voted last week to reduce emissions by 55 per cent by 2030, and to close the country's remaining coal fired power plants.¹⁵

The National Interest Analysis states that '[t]he Government has existing legislation, policies and measures to enable it to achieve Australia's NDC and support obligations, including the Emissions Reduction Fund and its Safeguard Mechanism, a Renewable Energy Target and a National Energy Productive Plan.'¹⁶ I disagree with this assessment.

As the Climate Change Authority noted in the final report of the Special Review requested by the Environment Minister: 'Australia will need policies that are capable of being scaled up to meet more ambitious goals in the decades ahead and to play its part in action to decarbonise the global economy.'¹⁷ There is broad agreement with this conclusion. Reputex, a division of Standard and Poors, has warned that Australia's emissions are rising, and on track to be just only per cent below 2005 levels by 2030.¹⁸

There are a number of legislative models to which Australia may look when fashioning a framework for the effective domestic implementation of the commitments it will assume if the Australian Government ratifies the Paris Agreement.

Australia could follow the bipartisan approach taken in the United Kingdom with respect to climate law where the Climate Change Act 2008 commits the United Kingdom to reducing emissions by at least 80 per cent in 2050, requires the government to set legally-binding carbon budgets over a five-year period on advice of the independent Climate Change Committee, and facilitates UK participation in the EU Emissions Trading Scheme.¹⁹ A number of elements of the repealed Clean Energy Act 2011 (Cth) drew inspiration from the Climate Change Act 2008 (UK).

At a minimum, the Australian Government should set a legal cap on emissions, and establish a process for determining and staying within a carbon budget to transition Australia to a net zero carbon economy consistent with the Paris Agreement. Carbon pricing or other binding emissions regulation is already in



place in most OECD members, and it has been reported that the Canadian Government is considering implementing a carbon tax or emissions trading scheme in 2017.²⁰

Such legislation need not be enacted in advance of Australia ratifying the Paris Agreement, but it will inevitably be required. I note that in the absence of Commonwealth action, the Victorian Government has recently committed to legislating a climate target for Victoria of net zero greenhouse gas emissions by 2050.²¹ When meeting is international treaty commitments it is generally desirable for Australia to take a national approach wherever possible, rather than relying on state and territory legislation.

All available evidence indicates that Australia's current mix of policies will not deliver its declared NDC, let alone future NDCs which Australia will be required to submit under the Paris Agreement.

Compliance with the Kyoto Protocol and Paris Agreement and Potential Exposure to International Litigation

During the hearing of the Committee in Sydney on 27 September 2016 I was asked several questions relating to the potential exposure of states, including Australia, should they fail to meet their obligations under the Paris Agreement and other climate treaties including the Kyoto Protocol.

A recent review of the performance of parties to the Kyoto Protocol found that all parties to the Kyoto Protocol with emissions reduction targets, including Australia, have in fact complied with the Protocol.²² The Kyoto Protocol Compliance Committee has investigated a number of situations of potential and actual non-compliance with the Protocol, however these have related to technical matters (such as compliance with greenhouse gas reporting requirements) rather than emissions reduction targets.²³

Under the Paris Agreement a similar compliance process known as the 'Transparency Framework' will be established. The modalities, procedures and guidelines are to be adopted at the first meeting of the parties to the Paris Agreement.²⁴ The purpose of the Transparency Framework 'is to provide a clear understanding of climate change action in the light of the objective of the Convention...including clarity and tracking of progress towards achieving Parties' [NDCs] and Parties' adaptation actions'.²⁵

The Paris Agreement does not establish a mechanism of binding dispute settlement, and provides only that Article 14 of the UN Framework Convention on Climate Change on the settlement of disputes applies *mutatis mutandis*. Article 14 of the UN Framework Convention on Climate Change states that in the event of a dispute between any two or more parties concerning the interpretation or application of the Convention, the parties concerned shall seek a settlement of their dispute through negotiation or any other peaceful means of their own



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choice.²⁶ It also stipulates that when joining the Convention, a party may declare that it recognised as compulsory the submission of the dispute to the International Court of Justice or to arbitration.²⁷ Only three states have submitted such declarations (the Netherlands, Solomon Islands and Tuvalu).

However, as noted in my oral evidence, proceedings may conceivably be brought before the International Court of Justice by states which have accepted as compulsory the jurisdiction of the Court under Article 36.2 of the *Statute of the International Court of Justice*. Australia, and 71 other states, have accepted this jurisdiction of the International Court of Justice. Nonetheless, proceedings against Australia in the event of non-compliance with the Paris Agreement are unlikely to succeed given the flexible character of the obligations under the Paris Agreement.

Yours sincerely,

A rectangular area that has been redacted, likely containing a signature or name.

Tim Stephens

¹ Paris Agreement, Article 21.1.

² UNFCCC, Status of the Paris Agreement, http://unfccc.int/paris_agreement/items/9444.php

³ 'India to Ratify the Paris Agreement on Climate Change on Oct 2', *The Hindu*, 26 September 2016, <http://www.thehindu.com/news/national/india-to-ratify-paris-agreement-on-climate-change-on-oct-2/article9146779.ece>

⁴ The Paris Agreement will enter into force on the thirtieth day after the date on which at least 55 Parties to the UN Framework Convention on Climate Change accounting in total for at least an estimate 55 per cent of total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.

⁵ NASA, 'Visualizing the Warmest August in 136 Years', 12 September 2016, <http://earthobservatory.nasa.gov/blogs/earthmatters/2016/09/12/heres-how-the-warmest-august-in-136-years-looks-in-chart-form/>

⁶ Bureau of Meteorology, 'Annual Climate Statement 2015', 6 January 2016, <http://www.bom.gov.au/climate/current/annual/aus/2015/>.

⁷ National Interest Analysis, [2016] ATNIA 10, [10].

⁸ The Hon Prime Minister Malcolm Turnbull MP, 'Australia's National Statement in the General Assembly of the 71st Session at the UN General Assembly', 22 September 2016.

⁹ Paris Agreement, Article 4.1.

¹⁰ National Interest Analysis, [2016] ATNIA 10, [49].

¹¹ OECD, https://stats.oecd.org/Index.aspx?DataSetCode=AIR_GHG#

¹² Climate Change Authority, *Final Report on Australia's Future Emissions Reduction Targets*, 2015.

¹³ Department of the Environment and Energy, 'Australia's 2030 Climate Change Target', <https://www.environment.gov.au/climate-change/publications/factsheet-australias-2030-climate-change-target>

¹⁴ Paris Agreement, Article 4(11).



¹⁵ 'Dutch parliament votes to close down country's coal industry', *The Guardian*, 23 September 2016, <https://www.theguardian.com/environment/2016/sep/23/dutch-parliament-votes-to-close-down-countrys-coal-industry>

¹⁶ National Interest Analysis, [2016] ATNIA 10, [39].

¹⁷ Climate Change Authority, *Towards a Climate Policy Toolkit: Special Review on Australia's Climate Goals and Policies*, August 2016.

¹⁸ 'Australia facing 1 billion tonne emissions shortfall on current policies', *RenewEconomy*, 21 September 2016, <http://reneweconomy.com.au/2016/australia-facing-1-billion-tonne-emissions-shortfall-current-policies-90114>

¹⁹ <https://www.theccc.org.uk/tackling-climate-change/the-legal-landscape/global-action-on-climate-change/>

²⁰ 'Canada will impose nationwide carbon price: Minister', *Reuters*, 19 September 2016, <http://www.reuters.com/article/us-canada-climatechange-idUSKCN11O0Q3>

²¹ Government of Victoria, 'Climate Change', <http://www.delwp.vic.gov.au/environment-and-wildlife/climate-change>.

²² Igor Shishlov et al, 'Compliance of the Parties to the Kyoto Protocol in the First Commitment Period', (2016) 6 *Climate Policy* 768.

²³ Kyoto Protocol Compliance Committee, <http://unfccc.int/bodies/body/6432.php>.

²⁴ Paris Agreement, Article 13.13.

²⁵ Paris Agreement, Article 13.5.

²⁶ UN Framework Convention on Climate Change, Article 14.1.

²⁷ UN Framework Convention on Climate Change, Article 14.2.