Environmental Defenders Office

Submission in response to the Safeguard Mechanism Reform Consultation Paper

20 September 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.
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Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Australian Government's Consultation Paper on reforms to the Safeguard Mechanism.

The Safeguard Mechanism has the most potential out of all policy commitments currently in the Powering Australia Plan to result in real emissions mitigation and abatement, if reforms are prudent and ambitious.

While other commitments are welcomed, such as investment in clean jobs and renewable energy, there is no other legal mechanism readily available to tangibly rachet-down emissions in Australia. As such, what comes next is vital to the future of Australia's abatement task.

Historically, the Safeguard Mechanism has been characterised by over-saturation with flexibility measures, making compliance optional, and by supplantation of real abatement with Australian Carbon Credit Units (**ACCUs**) that are neither real nor additional.

The result has been a 4.3% increase in emissions covered by the Safeguard Mechanism between 2017 and 2021.[1] Clearly, the scheme needs more than tweaking to achieve its objectives; it needs profound reform.

While existing defects must be corrected for the success of the scheme, so too must new ambitions be met. A Safeguard Mechanism with the object of ratcheting down Australia's emissions must be equipped to do so with teeth. It will require a meaningful baseline decline rate, vigilance over new entrants and a well-resourced regulator with integrity.

Whether a production-adjusted or fixed approach to baselines is taken, the ultimate focus must be that emissions reduce, in a way that is real, absolute, and additional.

With just 7 years in between the commencement of the proposed reforms and the 2030 emissions reduction target milestone, there is no option but for the Safeguard Mechanism to be designed to carry out its purpose courageously and with precision.

In these reforms, we see an opportunity for this Government to provide clarity and certainty for business and community by leading the way to real net-zero.

[1] RepuTex Energy, "Potential futures for Australia's Safeguard Mechanism" (Carbon Market Institute, June 2022) (**Reputex Modelling**), 10, available at https://www.reputex.com/research-insights/report-modelling-potential-futures-for-australias-safeguard-mechanism/.

Context of submission

EDO's submission is couched in the context of our Roadmap for Climate Reform (**Roadmap**). We advocate for reform that is science-aligned, prudent and ambitious enough to meet the scale of the climate crisis.

Urgency for comprehensive reform

"We need to limit warming of average surface temperatures to no more than 1.5°C above pre-industrial levels. The window of time to achieve this goal is closing, we need to act now." – EDO Roadmap, 2022

This summer will bring the third consecutive La Niña event after the second caused severe flooding on the east coast of Australia earlier this year. 2019 was Australia's warmest and driest year ever recorded and saw the commencement of the Black Summer bushfires which continue to affect communities to this day. The recent Australia State of the Environment Report has revealed that every part of our environment – except the urban environment – has deteriorated since the previous report in 2016.

Large parts of Australia are positioned to feel the full brunt of the predicted global impacts of climate change given our unique geographical and climatic conditions. The people who will be most affected are the young, the elderly, the disabled, disadvantaged, rural and First Nations communities.

These stakes call for a precautionary approach to emissions reduction that should be reflected in all environmental law reform.

Reforms must align with science-based targets

"Mechanisms in climate legislation for emissions budgets and interim and long-term targets should clearly link to a temperature outcome corresponding to the goal of the Paris Agreement." – EDO Roadmap, 2022

EDO supports the Government's initiative to improve and legislate Australia's emissions reduction target after years of inaction, but recommends that the target must accord with the science. A target that aligns with the current advice of Australian scientists calls for a reduction of 74% below 2005 levels by 2030 and reaching net-zero emissions by 2035 to limit global warming to 1.5°C.[2] We refer to this as the "**Paris-aligned target**" in this submission.

[2] Climate Targets Panel, *Australia's Paris Agreement Pathways: Updating the Climate Change Authority's 2014 Emissions Reduction Targets* (Report, January 2021) (**Climate Targets Panel Report**) 10, available at https://www.climatecollege.unimelb.edu.au/files/site1/docs/%5Bmi7%3Ami7uid%5D/ClimateTargetsPanelReport.pdf.

A 43% emissions reduction by 2030 as legislated in the *Climate Act 2022* is a minimum standard as drafted in the legislation: "a floor not a ceiling". It should be treated as such, leaving room for new law, regulation and policy to be drafted ambitiously, drawing on the best available scientific knowledge, as set out in the Objects of that Act.[3]

Reforms must be designed to achieve *real* net-zero

"Genuine or real net zero targets and pathways do not rely on these assumptions or false narratives. They do require a stop to new fossil fuels, and a phase out of existing fossil fuels consistent with the science." – EDO Roadmap, 2022

Achieving real net-zero requires a plan that relies on mitigation and abatement measures that are certain to result in a steep and immediate decline in greenhouse gas emissions, rather than over-reliance on emergence of new unproven technologies and offsets. The more our plan to reach net-zero relies on offsetting rather than real emissions reduction, the more we risk overshoot.

Businesses have had decades to prepare for the inevitable transition away from fossil fuels and it is reasonable to expect them to rapidly adapt to significant legislative reform.

In this context, this submission identifies **7 areas for reform**:

[3] *Climate Act 2022,* s 3.

Overview of recommendations

Recommendation 1 – Broaden scope and oversight

a. No ceiling on ambition
b. Decrease the threshold of 100,000 t by staggered commencement
c. Compulsory registration of all emitters under NGERs above 10,000 t p.a*[4]
d. Review into emissions reporting methods, including fugitive emissions*

Recommendation 2 – Reduce flexibility measures to ensure actual emissions reduction

a. Remove headroom and set baselines at current emissions
b. No special treatment for emissions intensive trade-exposed facilities
c. No inter-temporal flexibility
d. Penalise exceedances according to the social cost of carbon

Recommendation 3 – Limit offsetting and improve integrity

a. Cap on Australian Carbon Credit Units (**ACCUs**) as alternative to meeting baselines at 5% or less
b. Safeguard Mechanism Credits (**SMCs**) used before ACCUs
c. Introduction of strict integrity measures for ACCUs following the Chubb Review
d. No international offsets

Recommendation 4 – Set an ambitious decline rate

a. Decline to align with Paris Agreement goals
b. Decline to commence in reporting year commencing 1 July 2023
c. Nationally Determined Contribution updates trigger a review of decline rates to align with a new level of ambition
d. Ambition cannot be eroded by Ministerial discretion

Recommendation 5 – Restrict new entrants

a. Restrict baselines of new entrants
b. Set scheme-wide absolute emissions reduction target
c. Assessment trigger for new entrants (including expansions) according to principles of Ecologically Sustainable Development*

Recommendation 6 – Ensure coordinated reform to achieve emissions reduction targets

a. Redraft the objects of NGER Act*
b. Amend the enabling provision for the Safeguard Rules*
c. Consequential reforms of EPBC Act, NGER Act, NGERDs*

Recommendation 7 – Ongoing integrity assurance

a. Early review into SMCs
b. Independent and well-resourced regulator

[4] Recommendations marked with an asterisk require reform beyond the Safeguard Mechanism Rules.

Recommendations for 7 areas of reform

1. Broaden scope and oversight

The Government's emissions reduction target of 43% below 2005 levels by 2030 comes from modelling the reductions that would be achieved by the Powering Australia policy.[5]

The Government has considered the sectors and policies that will be responsible for the reductions necessary to reach its 2030 and 2050 targets,[6] leading to the proposition in the Consultation Paper that Safeguard Mechanism reductions will account for 28% of Australia's abatement task.

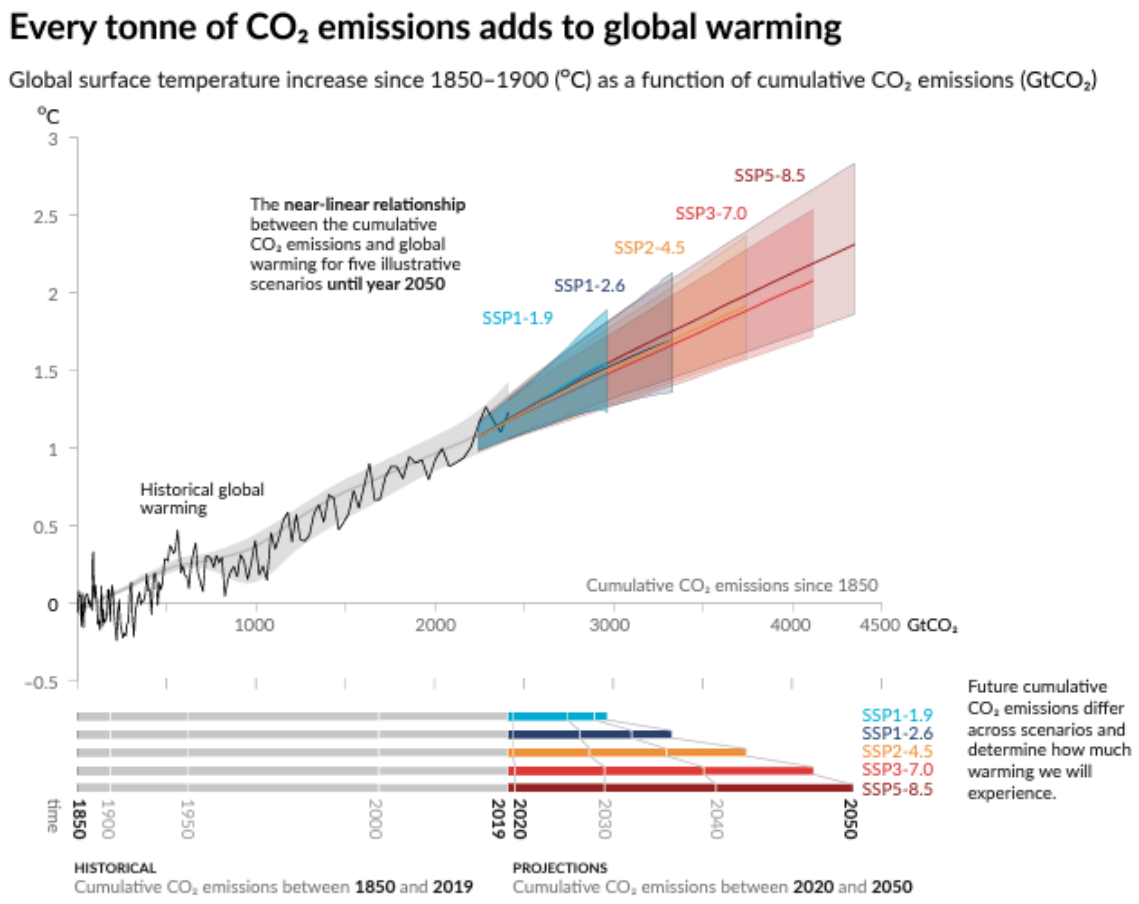
This approach is distinct from a carbon budget approach that measures necessary reductions against tonnes of emissions[7] that can be released before a certain temperature threshold is met, be it 1.5°C, well-below 2°C, or higher.

With the Government's approach, the policy-defined responsibility of the sector is the starting point for the ambition of the scheme. With the carbon budget approach, the starting point is the temperature goal derived by scientists to avoid the worst impacts of dangerous climate change.

EDO's view is that the overarching ambition of the Safeguard Mechanism should be to deliver an emissions reduction trajectory that aligns with the Paris Agreement's goal of limiting global warming to 1.5°C.

To make law and policy that aligns with the goals of the Paris Agreement, the scope of the Safeguard Mechanism and the powers of the regulator should be expanded, understanding that every tonne (**t**) of carbon dioxide, or equivalent (**CO_2-e**), is important.

[5] RepuTex Energy, *The Economic Impact of the ALP's Powering Australia Plan* (Report, 3 December 2021) 5, available at https://www.reputex.com/research-insights/report-the-economic-impact-of-the-alps-powering-australia-plan/.
[6] See ALP, Powering Australia Plan, available at https://www.alp.org.au/policies/powering-australia.
[7] Tonnes of emissions as referred to in this submission, or acronym "t" is a reference to **CO_2-e.**



Source: IPCC AR6 Summary for Policymakers p. 28

In this context, it is crucial that the reforms account for the fact that hundreds of thousands of tonnes of emissions in Australia escape regulation, or even monitoring,[8] every year.

For the Safeguard Mechanism to be genuinely tied to a Paris-aligned target, all relevant Australian emissions must be counted and monitored (as far as technologically possible), and a margin of error built into the ambition of reforms.

The **scope of the scheme and oversight of emissions** should be a key feature of the Safeguard Mechanism reforms and broader *National Greenhouse Gas and Energy Reporting* scheme (**NGERs**) reforms.

Recommendation 1(a) – No ceiling on ambition

The Consultation Paper has asked for feedback on what proportion of the legislated emissions reduction target should be borne by the Safeguard Mechanism, with the suggestion of 28% based on sector responsibility.

[8] See analysis of NGERD emissions below at Recommendation 1(d).

Recommendations are made below that, by design, would increase the ambition of this target, or the speed at which it is achieved.

The reforms should be drafted to avoid creating a ceiling on ambition, i.e., not setting a cap on the ultimate responsibility of facilities under the Safeguard Mechanism to a joint 28% abatement task, and specifically providing for this ambition to be ratcheted-up as required (see **Recommendation 4(c)**).

This is especially important when considering the approach the reforms ultimately take to new entrants. RepuTex Energy (**RepuTex**) has predicted that by 2030, industrial emissions covered by the Safeguard Mechanism are projected to grow to over one-third of national emissions (34%) under current policy.[9] On that scenario, a cap of ambition to 28% of the legislated target would seriously jeopardise the achievement of a Paris aligned target; even the legislated target.

We make specific recommendations below at **Recommendation 5** regarding new entrants.

Recommendation 1(b) – Decrease the threshold of 100,000 t by staggered commencement

The proposal to maintain the threshold of 100,000 t p.a. as the entry point for facilities captured by the Safeguard Mechanism should be revised considering the introduction of the rachet-down mechanism.

The nature of a rachet-down mechanism is that eventually, facilities currently over the threshold of 100,000 t p.a. will fall below that threshold. Currently, there is no plan to ensure continued emissions reduction by those facilities from the day that their emissions fall to 99,999 t p.a.

A real net-zero goal will require ongoing oversight of facilities until that goal is achieved. Without this, the Government loses sight of facilities with still-significant emissions that will go unabated at a critical time.

It is recommended that the threshold be gradually lowered to avoid a significant blind spot in the regulatory capabilities of the Safeguard Mechanism.

This reform can be implemented in a way that provides clarity and certainty to the industry and business communities by introducing fixed dates upon which the threshold will be lowered, commensurate with the emissions reduction task required by the 2030 and 2050 emissions reduction target milestones.[10]

[9] RepuTex Modelling, 21.

[10] EDO's primary position is that the currently legislated target under the *Climate Bill 2022* is insufficient, and its ambition must be increased to a Paris-aligned target (see definition on page 5 of this submission). This reform could be made commensurate with the Paris-aligned target.

The emissions baselines (**baselines**) of new facilities must also be restricted to align with the downward trajectory required for industries to sustain steady and predictable emissions reductions in line with a Paris-aligned target. That is discussed in greater detail below at **Recommendation 5**.

Recommendation 1(c) – Compulsory registration of all emitters above 10,000 t p.a. under the NGER scheme*

Eventually, all emitters must be required to reach net-zero emissions.

Every industry and business sector participant has a part to play in achieving net-zero and will be able to prepare to do so if given clear indicators as to future expectations.

Introducing compulsory registration of emitters above 10,000 t p.a. (scopes 1, 2 and 3) under NGERs will allow the Government and the public to have greater visibility over nation-wide emissions, which is vital to future regulatory capability as the Safeguard Mechanism eventually extends to capture smaller emitters as recommended above at **Recommendation 1(b)**.

Recommendation 1(d) – Conduct a robust scientific review into the methods and requirements for reporting emissions under NGERDs, including fugitive emissions*

There are serious deficiencies in the current *National Greenhouse and Energy Reporting (Measurement) Determination 2008* (**NGERD**) methods for measuring the fugitive methane emissions of coal mines, which has led to significant under-reporting.

In April 2022, the Australasian Centre for Corporate Responsibility (**ACCR**) published an analysis that targeted under-reporting of methane emissions in Australia.[11] Their report exposed that in 2019 and 2020, Australian Government figures recorded only **a third** of the methane emitted in Queensland's Bowen Basin according to satellite data obtained by energy analytics firm, Kayrros. The International Energy Agency (**IEA**) estimated that Australian coal mines emitted 1.8 million tonnes of methane in 2021; double the reported amount.[12]

Some of the problems with the NGERD methods include that estimation of methane emissions does not require continuous measurement and does not capture the high variability of methane concentrations within different coal deposits. Global Thinktank, Ember, published research in June 2022 which showed that the worst performing coal deposits emit over 10 times more methane than the least emitting.[13]

[11] ACCR, *Glencore's methane problem: Analysis of Glencore's underreporting of methane emissions* (Report, April 2022), available at https://www.accr.org.au/downloads/glencore-s-methane-problem-20-apr-2022.pdf.
[12] IEA, 'Methane Tracker Data Explorer', *IEA Data Tools* (Database, 1 September 2022), available at https://www.iea.org/data-and-statistics/data-tools/methane-tracker-data-explorer.
[13] Dr Sabina Assan, 'Tackling Australia's Coal Mine Methane Problem' (Research Article, Ember, 7 June 2022), available at https://ember-climate.org/insights/research/tackling-australias-coal-mine-methane-problem/.

Another significant flaw that is hampering efforts to reach real net-zero is that, under the NGERD method, closed underground mines are required to estimate and report methane emissions only for 20 years after closure. However, research has shown that some mines can continue emitting methane indefinitely.[14] A full review of NGERD should be undertaken to understand the errors in the methods that are affecting our ability to understand the true extent of Australia's emissions and the state of our carbon budget (incorporating all greenhouse gases as CO_2-e).

For the long-term success of the Safeguard Mechanism, the NGERD methods for measuring emissions must be reconfigured so that all emissions are properly and accurately accounted for.

2. Reduce flexibility measures to ensure actual emissions reduction

Australian businesses and industrial facilities have been aware of their impact on climate change via fossil fuel use and production for at least 40 years.[15]

In 2016, the ratification of the Paris Agreement sent a clear signal to business and industry that Australia would participate in global efforts to rapidly reduce emissions.

In 2021 the International Energy Agency set clear guidelines (**IEA Roadmap**) for the global energy sector to meet net-zero by 2050.[16] The IEA Roadmap stated that no new oil, gas, or coal projects are needed beyond 2021.[17] That message was unambiguous – the world must rapidly transition away from fossil fuels and there is now no need for new sources of fossil fuels to be developed.

The corporate world is responding. Many businesses with Safeguard Mechanism facilities have already made voluntary net-zero commitments, including Rio Tinto's recent commitment to halve its emissions by 2030.[18] RepuTex calculates that 74% of covered facilities have adopted an emissions reduction target of net-zero emissions between 2030-2050.[19] Although the legitimacy of corporate climate pledges cannot always be taken at face value, and their feasibility and efficacy should be scrutinized, their existence indicates that the majority of businesses are already preparing to operate in an economy characterised by deep emissions reductions.

In this context, EDO **does not support** the adoption of the suggested flexibility measures for facilities to meet their baselines outlined in the Consultation Paper.

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[14] Nazar Kholod et. al, 'Global methane emissions from coal mining to continue growing even with declining coal production' (2020) 256, *Journal of Clean Production.*
[15] Benjamin Franta, Shell and Exxon's secrete 1980s climate change warnings, *The Guardian* (19 September 2018) available at https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/19/shell-and-exxons-secret-1980s-climate-change-warnings.
[16] IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Report, May 2021), available at https://www.iea.org/news/pathway-to-critical-and-formidable-goal-of-net-zero-emissions-by-2050-is-narrow-but-brings-huge-benefits.
[17] Ibid, 27.
[18] Rio Tinto, 'Our greenhouse gas emissions targets', *Climate Change* (Web Page, 2022) available at https://www.riotinto.com/en/sustainability/climate-change.
[19] RepuTex Modelling, 18.

Critically, the suite of flexibility measures offered in the existing Safeguard Mechanism framework is one of its biggest flaws. The ability for facilities to use any number of options to avoid committing to a baseline – including multi-year monitoring periods and baseline-adjusting mechanisms - has contributed to a steady rise in industrial emissions under the existing scheme, and therefore to its failure to date. Analysis by RepuTex in April 2021 concluded that compliance demand from the Safeguard Mechanism was "negligible" due to the ability for facilities to unconditionally vary their baselines.[20]

The Australian Conservation Foundation (**ACF**) Investigations Unit in partnership with Australian National University (**ANU**) students published analysis in 2022 (**ACF Report**) that compared facilities' estimated emissions, reported emissions and Safeguard Mechanism baselines, demonstrating the gross margin between current baselines and the emissions output facilities were initially approved for (described as "headroom").[21]

Maules Creek Open Cut Coal Mine was one example.[22] While its estimated emissions were 200,000 t p.a. for operations between 2016 and 2020, its baseline was set at 930,000 t, allowing it to emit between 700,000 t and 840,000 t p.a. over that time.

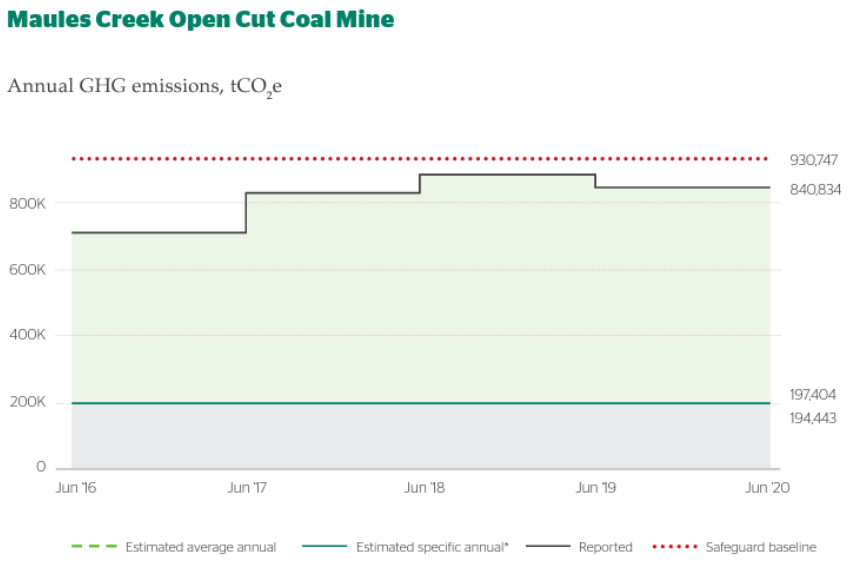

Figure 7

**Year-specific estimates are based on summing the individual scope 1 emissions for each category for each year, but as the graph shows, they are very close to the estimate average.*

***Chart:** ACF **Source:** See detailed case study below.*

[20] RepuTex Energy, 'The Safeguard Mechanism: Australia's Toothless Tiger or Sleeping Dragon? ' (21 April 2021) available at https://www.reputex.com/research-insights/the-safeguard-mechanism-australias-toothless-tiger-or-sleeping-dragon/.

[21] Australian Conservation Foundation, "Emissions expose: Australia's biggest polluters are emitting more than approved and getting away with it" (2022) (**ACF Report**), available at https://assets.nationbuilder.com/auscon/pages/19954/attachments/original/1645416337/Emissions_expose_report.pdf?1645416337.

[22] ACF Report, 9.

A similar chart based on emissions from Whitehaven's Narrabri underground coal mine demonstrates the effect of flexibility provisions where operators intend to exceed their given baseline:[23] they can simply change it.

Narrabri

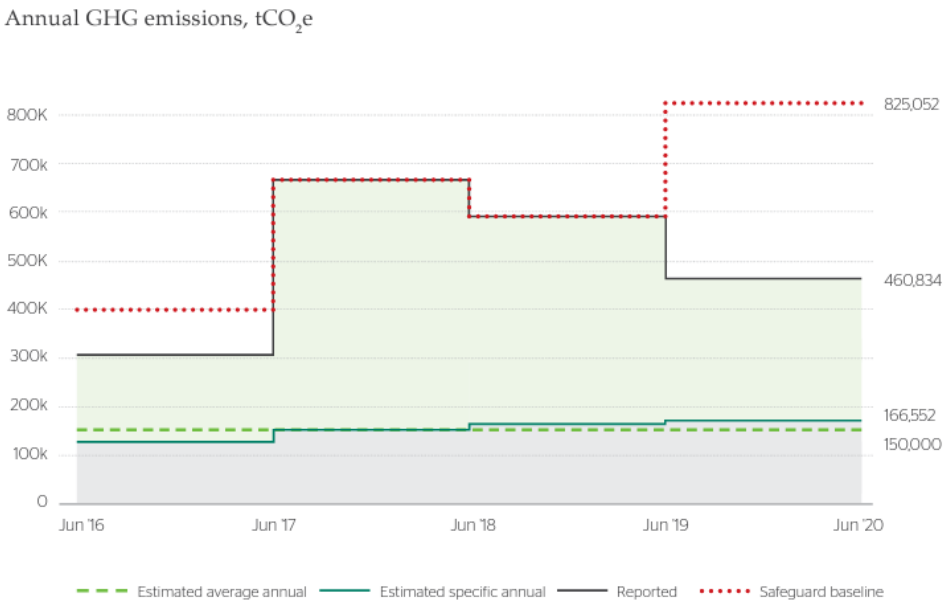

Figure 8
Chart: ACF ***Source:*** *See detailed case study below.*

Facilities under the new Safeguard Mechanism cannot be allowed to set their own rules. Production-adjusted baselines already provide an amount of flexibility, as will (limited) use of ACCUs and SMCs.

At the commencement of the reforms, **facilities should be prepared to meet their baselines unequivocally** or be required to pay the cost of the damage caused by every additional tonne of CO_2-e that goes unabated.

Recommendation 2(a) – Remove headroom and set baselines at current emissions

The Government's 43% emissions reduction target is due in only 7 years, and compliance with the goals of the Paris Agreement requires immediate decarbonisation. Therefore, it is vital to the success of the Safeguard Mechanism that real emissions reduction occurs immediately from the commencement of the reforms.

Allowing headroom between a facility's actual emissions and its baseline would result in several more years of stagnation before real emissions reduction would begin.

[23] ACF Report, 10.

It is important that headroom is removed without any like compensation for facilities, for example, through the creation of Safeguard Mechanism Credits (**SMCs**). SMCs should only be issued to facilities that have surpassed their baselines *after* headroom is removed, and real decline in emissions has commenced.

We make further comment about SMCs and ACCUs as alternative compliance options below at **Recommendation 3**.

Baselines for existing facilities should be automatically set at the actual emissions of the facility for the last reporting year, or a site-specific average of the last 5 years, to ensure immediate effectiveness of the Safeguard Mechanism.

This would be a superior approach to setting industry-average benchmark baselines as it is a realistic starting point for all facilities and creates an early signal that every facility will need to prepare for immediate decarbonisation – even those that are emitting below industry-average.

Regulatory oversight could tighten the process by an initial review into the default baselines to ensure that outliers are not disproportionately advantaged by inappropriately high baselines.

No site-specific production variables should be permitted going forward and new entrants must be held to an "industry best" standard or a hard cap (**Recommendation 5(a)**).

Recommendation 2(b) – No special treatment for EITE facilities

No funding, finance arrangements or other measures should be implemented in the reforms to favour emissions intensive trade-exposed facilities (**EITEs**).

Tailored treatment for EITEs as suggested in the Consultation Paper naturally favours large, export-directed facilities such as coal and gas projects. Approximately half of the emissions covered by the Safeguard Mechanism belong to EITEs, with approximately one quarter derived from 13 LNG facilities and a further quarter from 59 coal mines.[24]

The proposals in the Consultation Paper appear to be based on equity concerns, i.e., EITEs are the biggest emitters, so they will be most negatively impacted, and that disproportionate impact should be mitigated; or that emissions will "leak" overseas as producers will move elsewhere. But for the scheme to function it must have the effect of making reliance on fossil fuels more expensive, less practical, and less desirable for companies operating facilities. This transition is occurring all over the world, neutralising concern over carbon "leakage".

Proposals to water-down the stringency of the Safeguard Mechanism for EITEs in the context of their enormous contribution to emissions would render the Mechanism ornamental.

[24] RepuTex Modelling, 10.

It is critical that the scheme be simple and firm, especially given the history of the Safeguard Mechanism failing to cap emissions due to a surplus of carveouts available to large emitters.

Carveouts for EITEs would also have heavy flow on effects for the other smaller sectors carrying the shared burden of the national abatement task. The more EITEs are permitted to consume the carbon budget, the greater the burden that falls on non-export focused Safeguard Mechanism facilities and other sectors, disadvantaging domestic industry.

The only carveouts that could be considered in the scheme are for genuinely hard-to-abate sectors, such as cement and air travel. An example could include raising the recommended cap on ACCU use for these sectors (from 5% - see **Recommendation 3(a)**). However, it is preferable that SMCs are required to be exhausted first, as they represent real reductions by industry (**see Recommendation 3(b)**).

If such an approach were taken, it would be important to include a clear and narrow definition of "hard-to-abate" in the regulations to ensure the provisions were not misused.

Recommendation 2(c) – No inter-temporal flexibility

Inter-temporal flexibility measures, such as multi-year monitoring periods, have so far been responsible for allowing facilities to consecutively increase their emissions with no consequence.

For example, the ACF Report estimated that Anglo American at its Moranbah North coal mine used the multi-year monitoring period mechanism to emit an extra 2.5 million to 2.7 million tonnes of excess greenhouse gas emissions without penalty.[25]

No inter-temporal flexibility should be allowed by the scheme, including multi-year monitoring periods, and banking and borrowing proposals, as outlined in the Consultation Paper.

Where facilities exceed their baselines for any reporting year, they should be required to manage their emissions intensity using SMCs and via the purchase or surrender of ACCUs, subject to the reforms discussed in **Recommendation 3** below. These mechanisms allow ample flexibility and fairness while ensuring steady emissions reduction.

Where crediting options are exhausted (see **Recommendation 3(a)**), exceedances should result in serious penalties to disincentivise "breach for profit" (see **Recommendation 2(d)**).

[25] ACF Report, 18.

Recommendation 2(d) – Penalise exceedances by recognising the social cost of carbon

Historically, penalty provisions in the Safeguard Mechanism have not been used effectively to ensure compliance. This is largely because of the excessive flexibility measures available to facilities that do not meet their baselines. That issue would be addressed by the adoption of the remainder of reforms recommended in this section, and those below under **Recommendation 3**.

If a facility is not able to meet its baseline – after deploying the options available to it through purchase of SMCs (and only afterwards ACCUs) (**Recommendation 3(a)**) – the facility should be expected to pay for the climate damage that its excess emissions create.

Surrendering Australian Carbon Credit Units (**ACCUs**) is not an appropriate penalty. Market-driven carbon prices have no relationship to the cost of the damage caused by each tonne of emissions and are significantly cheaper than what most researchers have estimated as the cost of carbon. Civil penalty provisions in the current NGERs framework – while almost neverapplied – are also unrelated to the cost of damage caused.

A large body of literature has emerged regarding the actual price of the damage caused by a tonne of carbon emissions, often called a "social cost of carbon." Although the models generally used to calculate a social cost of carbon contain certain well-acknowledged limitations that lead to an underestimate of damages, apply discount rates that effectively value the lives of future generations as being worth less than current generations,[26] or do not internalise the cost of damage to cultures,[27] they nonetheless provide a useful minimum baseline for the potential cost of climate change. One highly cited publication on the topic was led by Katharine Ricke and published in 2018.[28] Ricke et. al concluded that a country-level cost of carbon analysis finds a global median price of US$417/t (approximately AUD$610/t), and an upper estimate of US$1000/t (approximately AUD$1482).

The 'polluter pays' principle is not a new concept.[29] Penalty provisions should penalise facilities in breach of their baselines at the rate connected to the highest estimates of the social cost of carbon per tonne, and should also include an amount to account for the cost of losing the opportunity to mitigate those spent emissions. Funds raised from those penalties can be directed to disaster

[26] Stern, H. & Stiglitz, J., The Social Cost of Carbon, Risk, Distribution, Market Failures: An Alternative Approach, National Bureau of Economic Research Working Paper 28472 (2021) ("Stern & Stiglitz 2021") *available at* http://www.nber.org/papers/w28472; Howard, Peter, Omitted Damages: What's Missing From The Social Cost Of Carbon (2014), available at https://costofcarbon.org/files/Omitted_Damages_Whats_Missing_From_the_Social_Cost_of_Carbon.pdf

[27] See e.g., Katharine Ricke et al., 'Country-level social cost of carbon' (2018) 8(10) *Nature Climate Change* 895-900, available at https://www.nature.com/articles/s41558-018-0282-y#change-history.

[28] Katharine Ricke et al., 'Country-level social cost of carbon' (2018) 8(10) *Nature Climate Change* 895-900, available at https://www.nature.com/articles/s41558-018-0282-y#change-history.

[29] Hon. Justice Brian Preston, "Sustainable Development Law in the Court: The Polluter Pays Principle" (16th Commonwealth Law Conference, Hong Kong, 7 April 2009) available at https://www.aph.gov.au/DocumentStore.ashx?id=4536b28d-6938-406a-a759-b53229aea3be&subId=690256.

recovery or adaptation – which will become more expensive as temperatures increase and Australia's climate becomes less stable.

For penalties to work effectively as deterrents, it is vital that analysis be undertaken prior to setting an amount for penalty to ensure that non-compliance is not a more profitable option that actual emissions reduction. A provision that is drafted to apply a penalty that is "the greater of two options" could be a useful way to ensure businesses with a disproportionately high profit turnover do not have an unfair advantage.

3. Limit offsetting and improve integrity

EDO is concerned by the proposition in the Consultation Paper that the Safeguard Mechanism will not require a facility to reduce its own emissions to meet its baseline, with ACCU purchase or surrender provided as a limitless alternative. There are many issues with this approach, the sum of which could have the effect of nullifying the potential benefit of the Safeguard Mechanism.

It is our view that regulating the use of offsets in the Safeguard Mechanism reforms will be crucial to the success of the scheme. Without adequate restriction on the use of offsets, emissions reductions from the Safeguard Mechanism will likely occur in accounting terms only. Our reasons follow.

First, as this Government is aware, ACCUs are notorious for their lack of integrity. Substantial research has revealed that a large majority of ACCUs are funding Emissions Reduction Fund Projects which create only illusory emissions reductions, which are neither real (do not offset emissions) or additional (emissions would have been prevented anyway).

For example, the Australia Institute (**TAI**) and ACF research found that ACCUs generated by 'avoided deforestation' projects are largely non-additional.[30] Avoided deforestation projects make up about 20% of issued ACCUs. ANU research came to the same conclusion about other popular ACCU credited projects, such as those based on human-induced regeneration, landfill gas and plantation forestry.[31]

The Clean Energy Regulator (**CER**), along with the Emissions Reduction Assurance Committee (**ERAC**) are responsible for the issuing of carbon credits and CER has defended the 'avoided deforestation' method in a response to the TAI and ACF research. TAI has alleged that:[32]

[30] TAI and ACR, *Non-additionality in the Emissions Reduction Fund's Avoided Deforestation Method* (Report, September 2021) available at https://australiainstitute.org.au/wp-content/uploads/2021/09/ACF-Aust-Institute_integrity-avoided_deforestation_report_FINAL_WEB.pdf.
[31] Andrew Macintosh et al., *Integrity Problems with the ERF's 2022 Plantation Forestry Method* (Report, 12 August 2022) available at https://law.anu.edu.au/sites/all/files/short__integrity_problems_with_the_plantations_method_120822_final.pdf.
[32] The Australia Institute, "Statement in response to the Clean Energy Regulator" (23 September 2021) available at https://australiainstitute.org.au/post/statement-in-response-to-the-clean-energy-regulator/.

> "Regulators are meant to be impartial and at arm's length to the industries they regulate. The Clean Energy Regulator seemingly sees its role as defending the interests of the carbon industry at all costs and making methods that generate credits for non-existent abatement."

In March 2022, Professor Andrew Macintosh, the former head of ERAC, called the ACCU market "largely a sham", stating that 70-80% of ACCUs are not real or additional.[33] In a paper published by the ANU on the 'human-induced regeneration' method of carbon crediting, Professor Macintosh stated that an investigation needs to be conducted into the CER, ERAC and Department of Industry, Science, Energy and Resources, alleging that:[34]

> "All three organisations have ignored and sought to suppress a material integrity issue associated with the ERF's most popular method in circumstances where they knew, or should have known, that it was distorting the ACCU market." – Andrew MacIntosh

As such, the ACCU market is not sufficiently mature to cope with the abatement task required for Australia and risks undermining the purpose of the reformed Safeguard Mechanism. There is also significant cause for concern regarding the integrity of the CER and related regulatory bodies, which are responsible for the sound operation of the Safeguard Mechanism.

We note that the integrity of ACCUs and the carbon market is currently under review (**Chubb Review**).[35]

Second, while the EDO welcomes the initiative of the Chubb Review into ACCUs, we consider it unlikely that the integrity issues with the ACCU market emerging from the Chubb Review will be resolved in time to provide any assurance to this review that ACCUs can meaningfully contribute to Australia's abatement task in the 7 years remaining before we reach the 2030 emissions reduction milestone.

It is problematic that the Safeguard Mechanism reforms will pre-empt the independent review of the use of ACCUs, with no proposal for limiting the use of ACCUs **at least** until the resolution of the review's anticipated recommendations. In the circumstances, any proposal that continues to rely heavily on ACCUs is inappropriate.

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[33] Adam Morton, 'Australia's carbon credit scheme 'largely a sham', says whistleblower who tried to rein it in', *The Guardian,* (Web Page, 23 March 2022) available at https://www.theguardian.com/environment/2022/mar/23/australias-carbon-credit-scheme-largely-a-sham-says-whistleblower-who-tried-to-rein-it-in.

[34] Andrew Macintosh, Don Butler and Dean Ansell, "Measurement Error in the Emissions Reduction Fund's Human-induced Regeneration (HIR) Method (Australian National University, 14 March 2022), p.4. See also, Andrew Macintosh, "The Emission Reduction Fund's Landfill Gas Method: An Assessment of its Integrity" (Australian National University, 16 March 2022).

[35] See https://minister.dcceew.gov.au/bowen/media-releases/independent-review-accus.

Third, carbon offsetting **in general** is very rarely equivalent to real emissions reduction and distracts from real emissions reduction. This is because:[36]

- inherent uncertainties in the quantification of carbon offsets mean that they do not necessarily (and are unlikely to) counterbalance fossil fuel emissions on a tonne-for-tonne basis;[37]
- carbon offsets also predominately derive from natural carbon storage, which has a problem of permanence (e.g., forest fires destroying carbon sinks, such as the Amazon rainforest fires in 2020 and 2021);[38]
- natural carbon storage will become less effective over time due to over-saturation of land and ocean sinks with cumulative emissions, leading to more CO_2-e remaining in the atmosphere;[39] and
- as the global economy decarbonises, opportunities for additional mitigation that could compensate for remaining emissions will dwindle.

Some companies rely on the promise of carbon capture and storage technology (**CCS**) for offset crediting.[40] In 2021, the Morrison Government approved an Emissions Reduction Fund (**ERF**) method to credit abatement from new CCS projects.[41]

It is clear that CCS cannot be relied on to achieve emissions reduction in the short-term and the Safeguard Mechanism cannot afford to wait. The IPCC AR6 Report has confirmed that CCS involves significant risks, including "technological, economic, institutional, ecological-environmental, and socio-cultural barriers." It states that, "Currently, global rates of CCS deployment are far below those in modelled pathways limiting global warming to 1.5°C or 2°C."[42] Commensurately, CCS projects in Australia, such as the Gorgon gas projects in Western Australia, have so far been underperforming by about 50%.[43]

Importantly, because of the deep uncertainty surrounding offsets, there is emerging scientific consensus[44] that purchasing carbon credits **should only be pursued in the context of a**

[36] Derik Broekhoff, Senior Scientist at the Stockholm Environment Institute, summarised the issues in an Independent Expert Report addressed to ClientEarth (Report, 4 July 2022) (**Broekhoff Expert Report**), which EDO echoes. See Derik Broekhoff, Expert Report (4 July 2022) available at https://www.clientearth.org/media/exyfip2p/productie-4-broekhoff-expert-report-v2-2-final.pdf.
[37] Broekhoff Expert Report, 6.
[38] Broekhoff Expert Report, 9.
[39] Intergovernmental Panel on Climate Change Assessment Report 6 (IPCC AR6), WI, 20, with "high confidence".
[40] E.g., in 2021, Chevron conceded it missed its carbon capture target at the Gorgon facility in Western Australia, see Adam Morton, *A shocking failure: Chevron criticised for missing carbon capture target at WA gas project,* the Guardian (20 July 2021), available at https://www.theguardian.com/environment/2021/jul/20/a-shocking-failure-chevron-criticised-for-missing-carbon-capture-target-at-wa-gas-project.
[41] The Hon Angus Taylor MP, 'New ERF method and 2022 priorities announced', *The Hon Angus Taylor MP Media Releases* (Web Page, 1 October 2021), available at https://www.minister.industry.gov.au/ministers/taylor/media-releases/new-erf-method-and-2022-priorities-announced.
[42] IPCC AR6, WIII, Summary for Policymakers, 38.
[43] IEEFA, "If Chevron, Exxon and Shell can't get Gorgon's carbon capture and storage to work, who can?", available at https://ieefa.org/articles/if-chevron-exxon-and-shell-cant-get-gorgons-carbon-capture-and-storage-work-who-can.
[44] Broekhoff Expert Report, 6.

"mitigation hierarchy." This means that carbon credits should only be used as a last resort for genuinely hard-to-abate emissions.

"Any failure to avoid discretionary emissions today leads to a greater challenge for limiting cumulative net emissions in the future. Offsetting cannot compensate for the opportunity cost of not having avoided or reduced the emissions in the first place. Instead, the act of offsetting merely sets the world on a slightly less worse path, but one that still deviates from what is optimal."[45] – Derik Broekhoff, Senior Scientist at the Stockholm Environment Institute

A Safeguard Mechanism which allows unlimited purchase of ACCUs subverts the mitigation hierarchy recommended by the emerging scientific consensus.

Even elements of the corporate world are opposed to reliance on offsets. The Science-based Targets Initiative, for instance, under its Net Zero Standard, does not accept the use of offsets to contribute towards near-term emissions reduction targets, with credits only being accepted in relation to the neutralisation of residual emissions or to finance additional climate mitigation beyond absolute reduction targets.[46]

In summary, ACCU purchase, or surrender will not lead the emissions reduction that the Safeguard Mechanism needs to meet targets and keep warming to 1.5°C. The reliance on any offset scheme (let alone one with such significant integrity issues as the ACCU scheme) is subject to serious limitations and is no replacement for real emissions reduction. Existing integrity issues with ACCUs will not be corrected by the time the reformed Safeguard Mechanism is implemented. To avoid fatal undermining of the Safeguard Mechanism, **hard limits should be placed on the use of offsets, and only offsets with demonstrated integrity should be permitted.**

It is noted that the proposed SMCs could provide a less risky approach to sharing the burden of the abatement task between facilities, provided a scheme-wide baseline is applied to ensure the overall emissions reduction target is not jeopardized in the process (**see Recommendation 5(b)**). As noted by RepuTex, "the environmental integrity of SMCs created would be sensitive to the design of emissions baselines."[47]

The SMC market will be new and untested. To ensure they are operative and effective, we recommend an early review into SMCs following their introduction (**Recommendation 7(a)**).

[45] Broekhoff Expert Report, 6.
[46] Science Based Targets, Corporate Manual, (Version 4.1, April 2020), 32, available at https://sciencebasedtargets.org/wp-content/uploads/2017/04/SBTi-manual.pdf.
[47] Reputex Modelling, 47. See also, Adam Morton, 'Free Carbon credits could threaten Australia's emission reduction targets, Labor's advisers warn', *The Guardian* (Web Page, 19 September 2022) available at https://www.theguardian.com/australia-news/2022/sep/19/free-carbon-credits-could-threaten-australias-emission-reduction-targets-labors-advisors-warn.

Recommendation 3(a) – Cap on ACCUs as alternative to meeting baselines at 5% or less

Setting a cap on the use of ACCUs by a facility would protect the Safeguard Mechanism from failures caused by the reliance on ACCUs that lack integrity (and over-reliance on offsets generally). There is precedent for this recommendation in the Gillard Government's *Clean Energy Act 2011* (Cth), which limited the total number of carbon units in circulation at any given time.[48]

As noted above, research has demonstrated that a large amount of existing ACCUs do not result in actual abatement, but their purchase is used to justify "business-as-usual" emissions rates from regulated entities. Their limitation is a vital safeguard for the integrity of the Safeguard Mechanism, particularly given the recommendations of the Chubb Review are still outstanding.

Realistically, integrity issues with ACCUs are likely to persist for the foreseeable future and offsets currently cannot compete with mitigation brought about by actual emissions reduction. A cap on ACCU reliance will ensure emissions reduction rather than gambling on the uncertainties surrounding offsets.

Minor exceptions could be drafted to compensate for genuinely hard-to-abate sectors such as concrete manufacturing and air travel. If such an approach were taken, it would be important to include a clear definition of "hard-to-abate" in the regulations to ensure the provisions were not misused.

Recommendation 3(b) – SMCs to be used before ACCUs

A provision should be inserted to require the use of SMCs where possible before ACCUs are purchased or surrendered. This is because they are tied to real emissions reduction targets and have fewer integrity issues.

A requirement to first exhaust available SMCs to meet baselines would maximise the internalisation of the emissions reduction effort to the facilities the subject of the Safeguard Mechanism, rather than transferring the burden to other sectors and triggering the risks associated with the use of ACCUs.

An early review into SMCs as recommended at **Recommendation 7(a)** is critical to ensuring they are working as planned.

[48] *Clean Energy Act 2011* (Cth) (No longer in force) ss 101-102.

Recommendation 3(c) – Introduction of strict integrity measures for ACCUs following the Chubb Review

It is impossible to comment fully on the approach that should be taken by this Government to ACCUs without first having read the recommendations of the Chubb Review. Unfortunately, that is not possible as those recommendations are still outstanding.

The absence of the Chubb Review recommendations lends more support to the argument that reliance on ACCUs for abatement should be restricted at the commencement of the Safeguard Mechanism reforms.

EDO welcomes the Chubb Review and the opportunity to make a submission on the reforms required to resolve ACCU integrity issues.

At a minimum, it is anticipated that suitable integrity measures will include:

- a transparent and well-resourced regulatory body;
- a robust set of criteria to certify the legitimacy of offsetting projects; and
- provisions to prevent double counting.

Our primary recommendation is that ACCUs with integrity are still inferior to real emissions reduction and ACCUs should be capped at 5% of a facility's abatement task (**Recommendation 3(a)**).

Recommendation 3(d) – No international offsets

As discussed, Australian based offset schemes currently suffer from serious integrity issues and are already the subject of governmental review. The use of international offsets, beyond Australia's regulatory control, would represent even greater risk than the use of ACCUs. There is no reasonable justification to allow international offsets to be used the framework of the Safeguard Mechanism. Instead, reforms should focus on improving the integrity of ACCUs, and strengthening requirements in the Safeguard Mechanism for facilities to deliver actual and direct emissions reductions.

4. Set an ambitious decline rate

The current advice of Australian scientists calls for an emissions reduction of 74% below 2005 levels by 2030 and reaching net-zero emissions by 2035 to limit global warming to 1.5°C, which is the temperature goal required by the Paris Agreement.[49] In this submission we have called this emissions reduction target the "Paris-aligned target".

[49] Climate Targets Panel Report, 10.

As we (and others) submitted to the inquiry into the Climate Bills,[50] the Government's recently legislated commitment falls significantly short of the Paris-aligned target. But it at least reflects an ambition to commence work on Australia's emissions reduction task in earnest. That ambition can be increased and must be increased.

Critically, scientists have advised that if we overshoot the goals of the Paris Agreement, **it may not be possible to stabilise global temperatures once 2.5°C is reached**.[51] This is because there is significant uncertainty regarding the onset of various tipping points, such as degradation of large forests, and melting of polar ice and permafrost. Some experts have estimated that 6 tipping points may be triggered even at 1.5°C, including collapse of the Greenland and West Antarctic ice sheets.[52] In other words, every fraction of warming above the range of 1.5°C to well below 2°C increases the risk of feedback looping that could result in a runaway greenhouse effect human control.

This deep and significant uncertainty means that a precautionary approach is required to be adopted in the Safeguard Mechanism reforms, frontloading **deep emissions reductions in the early stages of the scheme** to foster ambition and factor in a margin for error.

The starting point for any emissions reduction scenario must be that we can stabilise global warming at 1.5°C, and that any significant overshoot risks catastrophe.

Recommendation 4(a) – Baseline decline rate to start at 7.6% p.a.

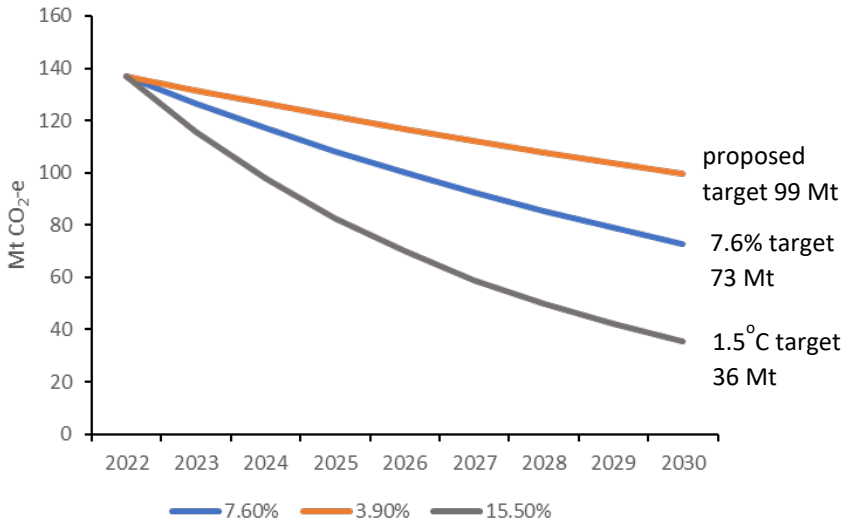
Decline rates must be science-aligned and based on temperature goals rather than policy-driven targets. A science-aligned decline rate would be significantly more ambitious than the 99 million tonne reduction by 2030 suggested in the Consultation Paper.

As a starting point, in 2019, the UN Emissions Gap Report[53] recommended an emissions reduction rate of 7.6% p.a. to achieve the Paris Agreement target of 1.5°C. However, a 15.5% per year emissions reduction rate was recommended if no action was taken before 2025.[54]

This rate represents a 74% reduction on 2005 emissions levels for the industrial sector by 2030, consistent with the target set by the 2021 Climate Targets Panel Report[55] to avoid overshoot of

[50] The Senate Environment and Communications Legislation Committee, "Climate Change Bill 2022 and the Climate Change (Consequential Amendments) Bill 2022, [3.54], 40.
[51] See evidence given in Independent Expert Report of Emeritus Professor Will Steffen, Professor John Church and Dr Bethany Warren for *Waratah Coal Pty Ltd v Youth Verdict* (judgment pending). Reference available at https://www.youthverdict.org.au/_files/ugd/b4b563_9d62930d4d5847ed93eaa0abeb3c76bf.pdf, 6, [24].
[52] David Armstrong McKay, et. al, "Exceeding 1.5C global warming could trigger multiple climate tipping points" (9 September 2022) *Science,* Vol. 377, Issue 6611, available at https://www.science.org/doi/10.1126/science.abn7950.
[53] UN Environment Programme (2019) Emissions Gap Report, 20, available at https://www.unep.org/resources/emissions-gap-report-2019.
[54] UN Environment Programme (2019) Emissions Gap Report, 12, available at https://www.unep.org/resources/emissions-gap-report-2019.
[55] Hewson, J., Steffen, W., Hughes, L, and Meinshausen, M. (2021) Australia's Paris Agreement Pathways: Updating the Climate Change Authority's 2014 Emissions Reduction Targets.

1.5°C, with the additional goal of net-zero emissions by 2035.[56] These scenarios are demonstrated in the figure below against the target proposed in the Consultation Paper.



Baseline decline rates including the proposed target of 99 Mt that represents a decline rate of only 3.9% over the 7-year period from 2023 – 2030.

The Consultation Paper has suggested a much slower decline rate of between 3.5% - 6% reductions each year.[57] Yet the RepuTex modelling estimated that the "current rate of voluntary action by industry" (based on an analysis of 150 global companies over 2015-2018) is a 6.4% decline in aggregate emissions.[58] For the Safeguard Mechanism to be an effective regulatory tool, it must be required to facilitate emissions reduction well beyond what is occurring at a business-as-usual rate. The Safeguard Mechanism should build on the momentum of those voluntary reductions and guide industries to a target that is science-aligned.

We also strongly recommended that triggers should be built into the Safeguard Mechanism so that, at a minimum, reduction rates automatically rachet-up to mirror updates to Australia's Nationally Determined Contributions (**NDC**) commitments. EDO's view is that the legislated target of 43% should be significantly and urgently increased, and the ambitions of the Safeguard Mechanism must follow suit (see **Recommendation 4(c)**).

Recommendation 4(b) – Decline to commence in reporting year commencing 1 July 2023

Facilities have had sufficient warning and are well prepared to comply with a more ambitious scheme. The urgency of the abatement task calls for the Safeguard Mechanism reforms to

[56] Even this falls short of the 87% reduction by 2030 required to then have a straight-line decline to net zero 2050. See Climate Targets Panel Report, 11.
[57] Consultation Paper, 1.
[58] RepuTex Modelling, 20, Figure 12.

commence as soon as possible. We therefore recommend that the decline in facility baselines commences in the reporting year commencing 1 July 2023.

Recommendation 4(c) – NDC updates trigger a review of decline rates to align with new ambition

It is important for the coordination of Australia's greenhouse gas reduction efforts and international obligations, and to provide clarity for businesses and communities, that domestic law reflect international law and our associated commitments.

An update to Australia's NDCs should automatically trigger a review into the decline rate under the Safeguard Mechanism, to ensure new international ambitions are matched domestically.

Recommendation 4(d) – Ambition cannot be eroded by discretionary decision making*

The operation of the Safeguard Mechanism is largely governed by regulations (as opposed to Acts of Parliament). Therefore, it is crucial to the stability and long-term success of the scheme, that restrictions are placed on Ministerial powers to make decisions that would decrease the ambition of the Safeguard Mechanism.

Section 22XS of the NGER Act should be amended to prevent a Minister from slowing declines in baselines and making other rules that are regressive for the Safeguard Mechanism.

As a starting point, section 22XS should be amended to reflect a requirement for the Minister to make rules in accordance with the Paris Agreement (see **Recommendation 6(b)**). This would capture Article 4(3) of the Paris Agreement which calls for progressive NDC ambition, stating 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".

5. Restrict new entrants

Indefinite growth of high emitting sectors, including the development of new facilities, will undermine the abatement efforts of existing facilities and could lead to overall increase in emissions over the lifetime of the reformed Safeguard Mechanism.

In August 2022, after the publication of the Consultation Paper, the New Acland Stage 3 mining lease applications in South-East Queensland were approved. This expanded facility will contribute approximately 2.4 million tonnes of additional scope 1 and 2 emissions to the atmosphere.[59] MACH

[59] See New Acland Stage 3 Project, Environment Impact Statement, Ch. 10, *Greenhouse Gas Emissions,* available at https://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects/completed-projects/new-acland-coal-mine-stage-3-project/eis-documents.

Energy's Mt Pleasant coal mine expansion in New South Wales, approved in September 2022, will result in a further 14 million tonnes of additional scope 1 emissions alone.

Woodside's Scarborough and Pluto LNG expansion in Western Australia is expected to emit approximately 4-6 million tonnes **per year** of scope 1 emissions and is currently passing through the approvals process.[60]

These calculations of course exclude CO_2-e emissions that are caused by these projects when the fossil fuels they export are ultimately combusted. The emissions exported by these Australian facilities are several orders of magnitude greater than the facilities' domestic emissions that are regulated by the Safeguard Mechanism.

These projects are also only the tip of the iceberg in terms of proposed fossil fuel expansion in Australia. The Sunrise Project in July 2022 conducted an analysis that revealed 27 existing coal development referrals for Federal government approval under the EPBC Act.[61]

The entrance of the Acland Stage 3 coal mine, Mt Pleasant expansion, and the Scarborough Development, as Safeguard facilities under the current Safeguard Mechanism will mean that overall emissions will simply rise. Under the new scheme, it will mean that overall emissions will rise and put the new abatement task of the Safeguard Mechanism further out of reach.

Such an outcome has a perverse effect on the goals of the Safeguard Mechanism, and the fairness afforded to existing facilities (and other sectors) genuinely pursuing those goals. It also fails to account for the improvements in emissions reduction technology that are more readily able to be implemented by new facilities.

The continued, unfettered growth of high emitting industries is not consistent with the emissions reduction trajectory required to achieve the Government's legislated 43% target. It is wholly incompatible with the emissions reduction trajectory necessary to meet the goals of the Paris Agreement. The proposal in the Consultation Paper suggests that new entrants could cause overall emissions to rise under the reformed Safeguard Mechanism. This is precisely the same fundamental failure that exists in the current scheme.

Ultimately, the Safeguard Mechanism will fail if emissions do not fall. For reduction targets to be met, **new entrants must be restricted.**

[60] Climate Analytics, *Warming Western Australia: How Woodside's Scarborough and Pluto Project undermines the Paris Agreement* (November 2021).
[61] Adam Morton, "Labor faces decisions on approval of up to 27 coal developments including greenfield mines", *The Guardian* (11 July 2022) available at https://www.theguardian.com/environment/2022/jul/11/labor-faces-decisions-on-approval-of-up-to-27-coal-developments-including-greenfield-mines-analysis-shows.

Recommendations 5(a) and (b) – Restrict baselines of new entrants and set a mechanism-wide emissions reduction target

If new entrants are to be permitted **and** the legislated 43% target by 2030 genuinely achieved,[62] existing facilities will have to make room for the new arrivals out of the shared pool of permitted emissions. If that is not the case, emissions will rise under the new Safeguard Mechanism. That eventuality cannot be permitted if we earnestly intend to pursue the Paris Agreement goals.

There are several ways to manage new entrants to ensure the integrity of the scheme is not eroded.

As a starting point, scope 1 emissions of new facilities must be capped to the lesser of 50,000 t p.a. or "industry best". "Industry best" is not industry average but represents the emissions of the facility with the lowest baseline in the industry at the time of entry. This approach would allow for some flexibility for smaller and hard-to-abate industries such as cement and air travel while creating a ceiling for larger industries.

There is a strong case for all new emitters to be restricted to 0 t p.a. from entry. New facilities have the benefit of new technology that they should be encouraged to implement at planning stages and factor into their project financing.[63] Minor exceptions could be made for genuinely "hard-to-abate" industries such as cement and air travel. In that case, the definition of "hard-to-abate" should be narrowly confined and carefully drafted.

In any case, a mechanism-wide emissions reduction target should be legislated to reflect the reductions required by the totality of facilities participating in the scheme to meet the overall ambition of the scheme. If the mechanism-wide target is not met at set intervals, all facilities would be made subject to correspondingly stricter baseline decline.

This would pressure facilities to work together to achieve the broader target. If a large new entrant emerges, other facilities will have to work to a steeper baseline. Laggards causing frequent exceedances would also jeopardise the scheme-wide emissions reduction target and force a heavier burden on other facilities.

This approach would foster competition and corporate policing of each other's abatement efforts, ultimately transferring some of the regulatory burden to the corporate sector.

Recommendation 5(c) – Assessment trigger for new entrants according to principles of Ecologically Sustainable Development*

More broadly, any proposed new significant emitters of greenhouse gas emissions, whether "scope" 1, 2 or 3, should be assessed against their compatibility with the goals of the Paris

[62] i.e., without outsourcing emissions reductions to junk ACCUs, see recommendation 3(a).
[63] The recommendation for a climate trigger in the EPBC Act (Recommendation 5(c)) would catch large emitters even with 0 t p.a. scope 1 emissions.

Agreement and Ecologically Sustainable Development, including the precautionary principle and intergenerational equity.

While we have used the term to engage with the questions posed by the Consultation Paper, it is our view that artificially fracturing emissions into "scopes" reflects an accounting mechanism[64] that is irrelevant, in a planning or environmental law context, to the assessment of the likely impacts of the emissions that will result from a new development on the environment or human health.

We recommend that a new environmental assessment process for high emitting proposals be established that would place the burden of proof on proponents to prove - with cogent and persuasive evidence - that proposals accord with the above principles. In addition, the approval of any such proposals should be subject to merits review with open or broad standing provisions.

Proposals that would result in emissions above a certain threshold that is deemed incompatible with the goals of the Paris Agreement would be automatically refused environmental approval. That threshold should be developed with the assistance of independent scientists to ensure its integrity.

Such a reform would require amendments to the *Environment Protection and Biodiversity Conservation Act 1999.*[65]

6. Ensure coordinated reform to achieve emissions reduction targets

Reform of the Safeguard Mechanism will take more than a redrafting of the rules. Consequential amendments to related legislation will have to be made to ensure the success of the scheme. Where amendments have been recommended that would affect different legislation in this submission, those recommendations have been marked with an asterisk.

It is important that the objects of the NGER Act and its provisions enabling the Safeguard Mechanism be reviewed to reflect the new ambitions of the scheme.

Recommendation 6(a) – Redraft the objects of the NGER Act*

It is suggested that the new objects of the NGER Act could build on those as drafted in the *Climate Act 2022*. For example:

[64] See World Resources Institute, "The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard (last updated 2015), available at https://ghgprotocol.org/corporate-standard.
[65] EDO is currently prepared a submission on the Inquiry into the Climate Trigger Bill at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/ClimateTriggerBill2022.

3 Objects

The objects of this Act are:

(aa) to advance an effective and progressive response to the urgent threat of climate change drawing on the best available scientific knowledge; and

(a) to set out Australia's greenhouse gas emissions reduction targets which contribute to the global goals of:

(i) holding the increase in the global average temperature to well below 2°C above pre-industrial levels; and

(ii) pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels; and

Such an amendment would make clear to administrative decision makers the purpose of the Safeguard Mechanism, which is to reduce emissions in line with what the best available scientific knowledge states is necessary to avoid catastrophic climate change. It would also have the effect of harmonising existing federal climate change laws.

Recommendation 6(b) – Amend s 22XS to reflect new objects*

Section 22XS of the NGER Act allows the Minister, by legislative instrument, to make rules as to the Safeguard Mechanism. The section includes limited restrictions on the rules the Minister can make in subsection 2.

Section 22XS should be amended to include mandatory considerations for the Minister when making rules for the Safeguard Mechanism that align with the recommended objects of the NGER Act.

These considerations could include compatibility with the Paris Agreement, the *International Covenant on Civil and Political Rights* and *Universal Declaration on the Rights of Indigenous Peoples*, intergenerational equity, the precautionary principle, and the best available science.

Alternatively, the Minister could be required to make rules that align with the objects and purpose of the Act, if drafted as recommended above.

Such an amendment would protect Australians from future governments making arbitrary decisions that could undermine the success and ambition of the Safeguard Mechanism, noting that the Safeguard Mechanism is predominately a product of subordinate legislation.

7. Ongoing integrity assurance

The immediate and rapid decarbonisation that the Paris Agreement demands does not leave room for ineffective regulation, and continued loopholes.

As such, the failures that characterised the Safeguard Mechanism's reliance on a poorly regulated ACCU market cannot be repeated with the introduction of SMCs. The integrity issues that the Safeguard Mechanism has faced cannot persist under the new reforms.

Proactive efforts to improve integrity and oversight should be embedded into these reforms.

Recommendation 7(a) – Early review into SMCs

Pages 23-24 of this submission highlight the need for an early review into SMCs due to their novelty.

It is suggested that an early review would take place approximately 3 years after the commencement of the scheme to ensure that problems are promptly identified and addressed.

Recommendation 7(b) – Independent and well-resourced regulator

Integrity concerns surrounding ACCUs have been well-ventilated in this submission. Those concerns extend to the regulatory body that is responsible for issuing non-additional ACCUs and developing questionable Emissions Reduction Fund methods – the CER (see pages 20-21 above). It is important that the Safeguard Mechanism reforms do not repeat the errors of the past, and pairs ambitious regulation with a staunch and independent regulatory body.

We expect that recommendations related to the integrity of the relevant regulatory bodies will be addressed in the Chubb Review, to which we will provide further comment.

Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.

We note that EDO has made 58 recommendations for comprehensive climate reform in our Roadmap for Climate Reform available at:
A Roadmap for Climate Reform - Environmental Defenders Office (edo.org.au)