



Environmental
Defenders Office

**Submission on Safeguard Mechanism (Crediting)
Amendment Bill 2022 and Carbon Credits (Carbon
Farming Initiative) Amendment (Safeguard Facility
Eligibility Requirements) Rules 2022**

28 October 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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Submitted to:

By email: Safeguard.Mechanism@industry.gov.au

Uploaded at: [Safeguard Mechanism reform: Consultation on draft legislation](#)

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Executive Summary

This submission is made in the context of [EDO's primary submission](#) in response to the Safeguard Mechanism Consultation Paper, lodged via online portal on 20 September 2022 (**EDO's Primary Recommendations**).

Here, we respond directly to a narrower set of proposals drafted in the Safeguard Mechanism (Crediting) Amendment Bill 2022 and Carbon Credits (Carbon Farming Initiative) Amendment (Safeguard Facility Eligibility Requirements) Rules 2022 (**the draft amendments**).

As the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) is aware, most of the reforms to the Safeguard Mechanism will be affected via subordinate instruments through the amendment of the Safeguard Rules by the Minister for Climate Change and Energy (**the Minister**). Subordinate instruments like the Safeguard Rules have the same legal force as the primary legislation under which they are created, but, unlike Bills, do not have to pass through both Chambers of Parliament to come into effect.

While this process allows for flexibility, it reduces accountability and stability. To counterbalance associated risk, it is ideal for primary legislation to confine the powers of the delegated authority, and any sub-delegations (i.e. to the Clean Energy Regulator (**the Regulator**)), to ensure that parliament has oversight of the successful operation of the subordinate legislation.

These factors are particularly relevant to ensure accountability of legislation designed to achieve Australia's emissions reduction target, and the imperative for that target to be effectively and efficiently met.

In this context, **EDO makes four specific recommendations to the draft Bills.**

1. **Redraft the objects of the *National Greenhouse and Energy Reporting Act 2007 (NGER Act)* to reflect legislated ambition**
2. **Constrain the Minister's rule-making powers to the pursuit of the objects**
3. **Define Safeguard Mechanism Credits (SMCs), including the scope of their issue and use**
4. **Standardise penalties across the scheme**

EDO relies on and reiterates its Primary Recommendations to inform the drafting of the amendments to the Safeguard Rules.

EDO's submissions are couched in the context of its [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.

1. Redraft the objects of the NGER Act

Why?

Australia's climate policy and law to date has been piecemeal, inadequate, contradictory and ineffective.

The Safeguard Mechanism Reforms paired with the commencement of the *Climate Change Act 2022 (Climate Change Act)* and fulsome reform of the *Environment Protection and Biodiversity Conservation Act 1999*, present a significant opportunity to proactively create harmony and consistency across Commonwealth environment legislation into the future, irrespective of changes to portfolios and governments.

For the efficacy of the legislative framework, each piece of relevant legislation must have at its core the achievement of Australia's greenhouse gas emissions reduction targets, which contribute to the goals of the Paris Agreement of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels" and "pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels".¹

The Climate Change Act, which already reflects these objects, is not itself capable of achieving them without their proliferation throughout coordinated reforms. It is predominately an Act of statement, not action. The Powering Australia Plan makes clear that the reformed Safeguard Mechanism will be one of the government's key modes of achieving the objects of the Climate Change Act.

Currently, the relevant object of the Safeguard Mechanism's parent act - the NGER Act - is "to contribute to the achievement of Australia's greenhouse gas emissions reduction targets by ensuring that net covered emissions of greenhouse gases from the operation of a designated large facility do not exceed the baseline applicable to the facility."² (emphasis added) This is also listed as a "second" object of the NGER Act, the first being to introduce a single national reporting framework.

The intention of the Safeguard Mechanism reforms based on the consultation process to date and the objects of the Climate Change Act – being the *overall reduction* of industry emissions – is not currently reflected in the NGER Act. It should be.

This recommendation is not made symbolically. Objects should be operationalised in decision-making and subordinate instruments. Where the large majority of the Safeguard Mechanism is governed by subordinate legislation, clear legislative objects are a safeguard against the making of rules by delegated authorities that fail to achieve those objects, absent the same parliamentary scrutiny as receives a bill.

¹ *Climate Change Act 2022*, s 3(a).

² NGER Act, s 3(2).

In these circumstances, it is both straightforward and appropriate that the objects should reflect the stated intention of the government in reforming the Safeguard Mechanism. All stakeholders are then clear as to what Safeguard Rules (made within power) should look like, regardless of the Minister of the day.

How?

Redraft the objects of the NGER Act to centre the goal of reducing industry emissions. For example:

Original	Recommended
<p>3 Objects</p> <p>(1) The first object of this Act is to introduce a single national reporting framework for the reporting and dissemination of information related to greenhouse gas emissions, greenhouse gas projects, energy consumption and energy production of corporations to:</p> <p>(b) inform government policy formulation and the Australian public; and</p> <p>(c) meet Australia’s international reporting obligations; and</p> <p>(d) assist Commonwealth, State and Territory government programs and activities; and</p> <p>(e) avoid the duplication of similar reporting requirements in the States and Territories.</p> <p>(2) The second object of this Act is to contribute to the achievement of Australia’s greenhouse gas emissions reduction targets by ensuring that net covered emissions of greenhouse gases from the operation of a designated large facility do not exceed the baseline applicable to the facility.</p>	<p>3 Objects</p> <p>The objects of this Act are to:</p> <p>(1) Contribute to the achievement of Australia’s greenhouse gas emissions reduction targets by</p> <p>a. ensuring that net covered emissions of greenhouse gases from the operation of a designated large facility do not exceed the baseline applicable to the facility;</p> <p>b. ensuring that net covered emissions decline overall;</p> <p>i. at least at the rate required to achieve Australia’s greenhouse gas emissions reduction targets; and</p> <p>ii. towards the goals of the Paris Agreement to hold the increase in the global average temperature to well below 2°C above pre-industrial levels, pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.</p> <p>(2) Host a single national reporting framework for the reporting and dissemination of information related to greenhouse gas emissions, greenhouse gas projects, energy</p>

consumption and energy production of corporations to:

- a. inform government policy formulation and the Australian public; and
- b. meet Australia’s international reporting obligations; and
- c. assist Commonwealth, State and Territory government programs and activities; and
- d. avoid the duplication of similar reporting requirements in the States and Territories.

2. Constrain the Minister’s rule-making powers to the pursuit of the objects

Why?

Once the objects are redrafted to solidify the new purpose of the Safeguard Mechanism, the provision that empowers the Minister to make rules should state in some way that those rules must be compatible with the objects of the Act.

Such a provision fetters discretion only to the extent necessary to ensure that the Minister is accountable to the Parliamentary intent of the Safeguard Mechanism and, in turn, the public.

This is a basic safeguard to balance the benefits of the flexibility gained in the Safeguard Mechanism as a product predominately of subordinate legislation against the risks posed by limited parliamentary scrutiny and successive governments.

How?

Redraft the provision of the NGER Act that empowers the Minister to make the Safeguard Rules to ensure those rules reflect the objects of the Act. For example:

Original	Recommended
<p>22XS Safeguard rules (1) The Minister may, by legislative instrument (and subject to subsection (2)), make rules</p>	<p>22XS Safeguard rules (1) The Minister may, by legislative instrument (and subject to subsection (2)), make rules (safeguard rules) prescribing matters:</p>

<p>(safeguard rules) prescribing matters:</p> <p>(a) required or permitted by this Act to be prescribed by the safeguard rules; or</p> <p>(b) necessary or convenient to be prescribed for carrying out or giving effect to the safeguard provisions.</p> <p>(2) To avoid doubt, the safeguard rules may not do the following:</p> <p>(a) create an offence or civil penalty;</p> <p>(b) provide powers of:</p> <p>(i) arrest or detention;</p> <p>(ii) entry, search or seizure;</p> <p>(c) impose a tax;</p> <p>(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;</p> <p>(e) amend this Act.</p> <p>(3) Safeguard rules that are inconsistent with the regulations have no effect to the extent of the inconsistency, but safeguard rules are taken to be consistent with the regulations to the extent that safeguard rules are capable of operating concurrently with the regulations.</p>	<p>a. required or permitted by this Act to be prescribed by the safeguard rules; or</p> <p>b. necessary or convenient to be prescribed for carrying out or giving effect to the safeguard provisions.</p> <p>(2) The safeguard rules must be made in the way that best achieves the objects of this Act.³</p> <p>(3) To avoid doubt, the safeguard rules may not do the following:</p> <p>(a) create an offence or civil penalty’</p> <p>(b) provide powers of:</p> <p>(i) arrest or detention;</p> <p>(ii) entry, search or seizure;</p> <p>(c) impose a tax;</p> <p>(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;</p> <p>(e) amend this Act</p> <p>(4) Safeguard rules that are inconsistent with the regulations have no effect to the extent of the inconsistency, but safeguard rules are taken to be consistent with the regulations to the extent that safeguard rules are capable of operating concurrently with the regulations.</p>
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3. Define SMCs, including the scope of their issue and use

Why?

As set out in EDO’s Primary Recommendations, the public has raised concerns around the integrity of the Regulator and its management of Australian Carbon Credit Units (**ACCUs**) (See EDO Primary Recommendation 3 – *Limit Offsetting and Improve Integrity*).

In this context, and indeed generally, EDO is concerned that the draft amendments appear to give the Regulator a general, unconstrained power to issue SMCs (Division 4A, 22XNA(1)) where limitation on those powers, if any, will be born out of the Safeguard Rules (22XNA(2)-(3)).

³ See e.g., *Environmental Protection Act 1994* (Qld) s 5 for comparative language.

We acknowledge that at this stage of the consultation process and without the benefit of the draft Safeguard Rules, it is difficult to understand the proposed operation of the issuing and use of SMCs and in turn give relevant feedback.

In the circumstances, it is our view that good practice would be to fetter the powers of the Regulator in this space to ensure early SMC practice is aligned with the legislative framework.

How?

There are several options available to constrain the discretion allowed to the Regulator via the Safeguard Rules.

Our primary recommendation is that the NGER Act should prescribe fundamental aspects of the SMC scheme to protect their integrity from the outset. For example, the NGER Act should provide that:

1. one SMC is equivalent to one tonne of greenhouse gas emissions;
2. one SMC is issued for each tonne of greenhouse gas emissions below a facility's baseline;
3. SMCs are issued only to a facility that has generated them in the way described at (2); and
4. when surrendered, each SMC reduces a facility's net emissions number by one tonne of greenhouse gas emissions.

At a minimum – and given the limited information available and the scope of this submission – the NGER Act should ensure that the Regulator's role in SMC creation and use is governed by Safeguard Rules that answer to the objects of the NGER Act.

Small changes to the current drafting as demonstrated below in **green track** can improve the integrity behind the SMC framework at this early stage if coupled with the recommendations made at 1 and 2 above.

By requiring the Minister to make rules for the issuing and use of SMCs, where those rules must be made in the way that best achieves the objects of the NGER Act, where the objects of the NGER Act are linked to the achievement of Australia's greenhouse gas emissions targets and the Paris Agreement, the integrity of the SMC process is strengthened.

Revised Division 4A—Safeguard mechanism credit units

Subdivision A—Issuing safeguard mechanism credit units

22XNA Issuing safeguard mechanism credit units

- (1) The Regulator may, on behalf of the Commonwealth, issue units (to be known as **safeguard mechanism credit units**) to one or more

persons in relation to a facility **in accordance with the safeguard rules.**

Note: Safeguard mechanism credit units may be issued under this section to the Commonwealth in relation to a facility.

- (2) The safeguard rules ~~may~~ **must** make provision for, or in relation to, the issuing of safeguard mechanism credit units by the Regulator, **including**
- ~~(3) Without limiting subsection (2), the safeguard rules may make~~
provision in relation to ~~one or more of~~ the following:
- (a) applying for safeguard mechanism credit units to be issued;
 - (b) the number of such units that may be issued to a person in relation to a facility;
 - (c) how the Regulator is to determine the number of such units a person in relation to a facility;
 - (d) any conditions that may be imposed by the Regulator on a person issued with such units;
 - (e) the review or reconsideration of any decision under the safeguard rules relating to the issuing of such units.
- ~~(4) (3)~~ Without limiting paragraph (3)(c), the safeguard rules ~~may~~ **must** provide for the following in relation to a determination by the Regulator mentioned in that paragraph:
- (a) the methodology to be used by the Regulator in making a determination;
 - (b) how a person may apply for a determination;
 - (c) requiring an application for a determination to be accompanied by an audit report that is:
 - (i) prescribed by the safeguard rules; and
 - (ii) prepared by a registered greenhouse and energy auditor who has been appointed as an audit team leader for that purpose.

4. Standardise penalties across the scheme

Why?

The Safeguard Rules cannot provide for the making of penalties and, as such, any amendments to penalty provisions must occur under the parent legislation (s 22XS(2)), i.e., in this phase of the consultation process.

In EDO's Primary Recommendations, we recommended that exceedances of a facility's baseline – after deploying the options available to it through purchase of SMCs or ACCUs – should be penalised to reflect the cost of the climate damage caused by its excess emissions (See [EDO Primary Recommendations, 2\(d\)](#)). The good policy incentives for reforming penalties in the NGER Act are described in those submissions and will not be repeated here.

Upon review of the draft amendments addressed in this submission, another possible route for reform of penalties has come to our attention that could have the added benefit of standardising penalties across the Safeguard Mechanism.

How?

Update penalties for exceedances of baselines to reflect the penalties provisions under proposed s 22XNI of the NGER Act related to relinquishment of SMCs issued as a result of fraudulent conduct. In other words, if an offender exceeds their baseline, they must pay the greater of \$20 or 200% of the market value of an SMC for each tonne of emission over their limit.

In our view, this penalty better incentivises compliance, particularly for serious offenders, while achieving consistency and clarity for facilities of the consequences of offences mechanism-wide.

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 \(edo.org.au\)](https://www.edo.org.au/roadmap-for-climate-reform)