



Environmental
Defenders Office

**Submission to the Senate Standing Committee on
Environment and Communications inquiry into the
Safeguard Mechanism (Crediting) Amendment Bill 2022**

25 January 2023

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:

Committee Secretary

Senate Standing Committees on Environment and Communications

PO Box 6100

Parliament House

Canberra ACT 2600

By upload only to:

www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Safeguardmechanism

For further information on this submission, please contact:

Rachel Walmsley

Director Policy and Law Reform

Gadi/Sydney

T: (02) 9262 6989

E: rachel.walmsley@edo.org.au

Briana Collins

Solicitor, Safe Climate

Meanjin/Brisbane

T: 1800 626 239

E: briana.collins@edo.org.au

Executive Summary

EDO is supportive of the suite of reforms to the Safeguard Mechanism with crucial caveats.

While the bulk of the Safeguard Mechanism will reside in subordinate legislation (**the Rules**), strong drafting of the enabling legislation (**the Bill**) will serve as the parentheses between which it can operate as Parliament intends.¹

In our view, there is a risk that the Bill as drafted allows for the establishment of Rules that hinder the achievement of its proposed objects, which require emissions decline.²

The **major risks** for the attention of the Committee are that the Bill:

- 1) allows for the Safeguard Mechanism to disincentivise real emissions reduction; and
- 2) misses the opportunity to appropriately regulate new entrants.

EDO's recommendations remedy these risks. They focus on restricting facilities' use of offsets to comply with the Safeguard Mechanism, disfavouring new entrants that are advantaged by improved technologies that facilitate genuine business transformation.

This approach reflects the **mitigation hierarchy** recommended by experts³ – which calls for climate policy to prioritise mitigation of emissions, followed by high integrity offsets; where offsets which are speculative are treated as a last resort for hard-to-abate emissions.

Throughout the consultation process, we have observed clear policy intent to reventilate aspects of the Safeguard Mechanism that have concerned stakeholders, including reliance on offsets, at the next review,⁴ or after 2030.⁵

While we support regular review of the Safeguard Mechanism, it is our firm recommendation that resolution of the issues discussed in this submission is not deferred.

The Committee will be aware that we are quickly running out of time to reduce emissions to stabilise the planet at 2°C. We have more than likely lost the opportunity for 1.5°C, the aim agreed in the Paris Agreement.

¹ EDO's submission in response to the Safeguard Mechanism Reform Consultation Paper (**EDO Consultation Paper Submission**), dated 20 September 2022, can be found here: <https://www.edo.org.au/publication/edo-submission-in-response-to-the-safeguard-mechanism-reform-consultation-paper/>.

² The Bill, Item 1 Subsection 3(2).

³ See EDO Consultation Paper Submission, 19 – 20.

⁴ DCCEEW, Safeguard Mechanism Reforms Position Paper, 1.

⁵ DCCEEW, Safeguard Mechanism Reforms Position Paper, 3.

As stated in the Sixth Assessment Report of the Intergovernmental Panel on Climate Change:

All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and in most cases immediate GHG emission reductions in all sectors. Modelled mitigation strategies to achieve these reductions include transitioning from fossil fuels without CCS to very low-or zero- carbon energy sources, such as renewables or fossil fuels with CCS, demand side measures and improving efficiency, reducing non-CO₂ emissions, and deploying carbon dioxide removal (CDR) methods to counterbalance residual GHG emissions.

Overshoot of 2°C, even 1.5°C, will have disastrous effects on Australian people, lifestyle, and the economy.

As such, piecemeal improvements to the Safeguard Mechanism are not a luxury we can afford when they can be legislated now.

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

EDO welcomes any opportunity to further assist Parliament as negotiation on the Bill continues.

Summary of Recommendations

- 1) Amend **s 21** of the NGER Act to require facilities to make reports to the Regulator about their emissions reduced and removed through onsite projects before they can access carbon credit purchasing options.
- 2) Amend **ss 22XK** and **22XM** of the NGER Act to:
 - a. require covered facilities to surrender a greater number of SMCs alongside ACCUs;
 - b. expressly provide that the total share of prescribed carbon units able to be surrendered against a facility's obligations can be determined by the Minister via regulation;
 - c. provide that new entrants after 1 July 2023 may only surrender SMCs for the purpose of reducing their net emissions, with provision for the Minister to make exceptions for hard-to-abate industries such as steel and cement.
- 3) Further amend **s 3** of the NGER Act to harmonise the purpose of the Act with the *Carbon Credits (Carbon Farming Initiative) Act 2011 (CFI Act)*.

The risks

The Bill allows the Safeguard Mechanism to disincentivise real emissions reduction.

The Bill allows facilities to rely completely on purchase of Australian Carbon Credit Units (**ACCUs**) to meet greenhouse gas **emissions** reduction targets. At first blush, this is attractive policy, given that each ACCU *in theory* represents one tonne of real and additional abatement of emissions. In practice, this is not the case, meaning that a facility which relies on ACCU purchase to meet emissions reduction targets can meet those targets on paper while their net emissions continue to rise.

There is cause for **grave concern** regarding the integrity of ACCUs. There is a **high risk** that **70% of ACCUs derived from human-induced regeneration, landfill gas and avoided deforestation (which make up 75% of ACCUs in existence) do not represent real and additional emissions abatement.**⁶ These findings are supported by strong and reputable evidence. In any event, **carbon offsetting in general is very rarely equivalent to real emissions reduction**, for reasons including inherent uncertainties in the quantification of carbon offsets and the problem of permanence (e.g. forest fires can destroy allocated carbon sinks).⁷

If the recommendations of the Chubb Review are properly implemented, ACCU integrity has the potential to be improved. However, the efficacy of policy changes must be tested by the passage of time. **There is also no solution posed for the existing registered projects generating ACCUs where there is a risk those ACCUs do not represent real or additional abatement.** It follows that the promise of reform arising from Chubb Review recommendations does not provide assurance that ACCUs will represent reliable emissions abatement in the foreseeable future, such that their purchase by facilities in compliance with the Safeguard Mechanism should go unchecked.

The Safeguard Mechanism provides other avenues for emissions reduction, via the trade of Safeguard Mechanism Credits (**SMCs**) as well as genuine business transformation to improve the emissions intensity of operations. We prefer the use of these methods over ACCUs at present because they represent genuine emissions abatement or high integrity

⁶ See EDO Consultation Paper Submission, 17-19.

⁷ 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>.

offsetting. This flexibility is elegant in theory, as it allows businesses to decarbonise in a way that is economically efficient for each facility. **The form of credit (ie ACCU or SMC) chosen by a facility to comply with the Safeguard Mechanism would theoretically be of no consequence, if one tonne of emissions reduction/abatement across those options was like for like. But we know that not to be true.**

Instead, **the threat to real emissions reduction posed by ACCUs is exacerbated by their affordability.** The spot price of an ACCU is \$35 as of January 2023.⁸ The Australian Government will also introduce a \$75 price cap on the cost of an ACCU via the Rules. **The low cost of ACCUs compared with the cost of genuine business transformation makes it unlikely in practice (at least in the short to mid-term) that facilities will opt for business transformation, which guarantees emissions reduction.** It is unclear at this stage how the cost of an SMC will compare, but it is unlikely to initially be competitive with genuine business transformation.

The risk is increased where the Bill does not require facilities to identify any efforts made towards genuine business transformation before reliance on offsets.

These are the practical outcomes that the Bill as drafted will enable. Without the amendments recommended, there is a risk the Australian Government will legislate a theoretical Safeguard Mechanism that allows emissions reductions on paper while emissions increase in reality.

The opportunities to strengthen this weakness in the Bill are set out below.

The Bill misses the opportunity to appropriately regulate new entrants.

The International Energy Agency has found that no new coal or gas projects globally are consistent with achieving net-zero by 2050.⁹

In contrast, the Australian Government has stated that the estimated emissions of new entrants are accounted for in the trajectory to net-zero by 2050, via the proposed baseline decline rate of 4.9%.¹⁰

What is not accounted for is whether the emissions reduction of new entrants once their baselines begin to decline is real and additional.

⁸ Jarden, ACCU Platform, accessible at <https://accus.com.au/>.

⁹ International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector*, October 2021, 25, 102.

¹⁰ DCCEEW, Safeguard Mechanism Reforms Position Paper, 5.

As discussed above, the purchase of unlimited ACCUs in complete fulfilment of Safeguard Mechanism requirements is a concern in and of itself. However, **the risk to Australia's emissions reduction targets is greater where new entrants continue to enjoy the option.**

As technology improves, and the global economy decarbonises, it is imperative that new entrants be held to higher standards, by permitting less reliance on offsets in fulfilment of Safeguard Mechanism obligations.

Otherwise, there is a risk that businesses will not be incentivised to minimise the emissions intensity of their facilities at the planning stage, stalling the transition of the industry to cleaner technologies.

It is well within the scope, and ambition, of these reforms to disincentivise investment in new facilities that do not have plausible plans for real emissions reduction.

The opportunities to strengthen this weakness in the Bill are set out below.

The opportunities

Policy aligned with a 'mitigation hierarchy'.

The Safeguard Mechanism provides an opportunity to strongly incentivise real emissions reduction while encouraging investment in decarbonisation technologies. Offsets, where appropriately employed, can assist with abatement in hard-to-abate sectors and through transition periods. Decarbonisation technologies will be important to the achievement of climate stability as the chance of surpassing 2°C is startlingly high and drawdown will be required to meet that target on any plausible scenario.¹¹

In this context, **all good climate policy should be premised on a mitigation hierarchy** i.e., first mitigate, then offset what cannot be mitigated.

In the context of the design of the Safeguard Mechanism, the mitigation hierarchy should be as follows:

- 1) **mitigate** by incentivising real emissions reduction and disincentivising new entrants that have no plausible path to real emissions reduction; then

¹¹ Intergovernmental Panel on Climate Change, Assessment Report 6, Working Group III, Summary for Policy Makers, 33 [C.3.5]; 36 [C.4.1], [C.4.4]. Accessible at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf.

- 2) **trade SMCs** (offsets with high integrity); and finally
- 3) **trade ACCUs** (offsets with lower integrity).

The recommendations that EDO makes below to the Committee are designed to allow for the Safeguard Mechanism as a whole to operate in a mitigation hierarchy framework.

In keeping with the spirit of the NGER objects

The Bill will introduce new objects to the NGER Act that require emissions covered by the Safeguard Mechanism to decline.

Current NGER Act, s 3	Draft amendment to NGER Act, s 3
(2) The second object of this Act is to ensure 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) The second object of this Act is to contribute to the achievement of Australia’s greenhouse gas emissions reduction targets by ensuring that: <ul style="list-style-type: none"> (a) net covered emissions of greenhouse gases from the operation of a designated large facility do not exceed the baseline applicable to the facility; and (b) aggregate net covered emissions from the operation of designated large facilities decline.

The risks posed by the current drafting of the Bill, discussed above, have the potential to conflict with the spirit of its objects. Put simply, if the Bill allows the unlimited use of offsets, which threaten the achievement of real emissions reduction, the Safeguard Mechanism will not ensure the decline of aggregate net covered emissions from the operation of facilities.

The recommendations that EDO makes below to the Committee will better harmonise the substance of the Bill with its objects, improving the coherence of the legislation.

EDO also recommends amendments to the draft objects below which would further strengthen the NGER Act and its congruity with the related CFI Act.

Recommendations

Recommendation 1 – require facilities to prove their efforts towards onsite mitigation to the Regulator.

The NGER Act already provides for the provision of reports to the Regulator relating to the reduction of greenhouse gas emissions (s 21(1)(a)) and removal of greenhouse gas emissions (s 21(1)(b)).

Amendments to s 21 can strengthen the foundation of the Safeguard Mechanism by:

- **first**, making yearly reporting mandatory where civil penalties apply;
- **second**, making access to carbon credit purchasing options in any year conditional upon the provision of a properly made report and approval by the Regulator;
- **third**, where a properly made report is a report based on methods determined by the Minister;
- **fourth**, where the Regulator may only approve a report where satisfied that genuine attempts have been made to mitigate emissions onsite;
- **fifth**, where the Regulator can request further information from a facility operator where it considers the information provided to be insufficient for the purposes of assessing it; and
- **sixth**, where all reports must be published online.

These amendments will incentivise facilities to consider their options for genuine abatement on a regular basis, while facilitating transparency and accountability.

Recommendation 2 – limit offsetting.

Sections 22XK and 22XM of the NGER Act function to allow ACCUs and SMCs to contribute to the calculation of a facility's net emissions without limitation.

The following recommendations propose restrictions on the use of offsetting that are tailored to:

- **first**, the relative difficulty of onsite abatement within different sectors; and
- **second**, whether a facility is existing or new after the commencement of the Safeguard Mechanism reforms.

Such restrictions will recognise that some facilities will be financially disadvantaged by genuine business transformation compared with others, without detracting from the overall ambition of the scheme.

a.) Require surrender of SMCs alongside ACCUs.

Amendments to ss 22XK and 22XM, or insertion of new provisions to the same effect, can specify that ACCUs can only be surrendered in tandem with a greater number of SMCs.

Such an amendment would ensure, in line with the mitigation hierarchy, high integrity offsets are prioritised over offsets that are less likely to guarantee real and additional abatement. It would also ensure Safeguard Mechanism facilities are foremost responsible for their own emissions reduction internally to the scheme, rather than outsourcing the burden of their emissions reduction obligations to offsite projects.

b.) Empower the Minister to determine the share of prescribed carbon units able to be surrendered by a facility in fulfilment of their obligations.

The NGER Act should also provide that the Minister shall make rules stipulating the amount of carbon units able to be surrendered in fulfilment of a facility's obligations. The Rules stemming from this provision in the Bill could provide for flexibility depending on the facility's operations.

For example, hard-to-abate sectors at present, such as cement and steel, may initially be permitted to surrender a large number of offsets in fulfilment of their obligations. The Rules can easily be amended to adjust the limits based on changes in the technological landscape of different sectors, or the Minister could make rules that gradually decrease the number of offsets that can be surrendered over time.

c.) Provide that new entrants after 1 July 2023 may not surrender ACCUs in fulfilment of their obligations, with sensible exceptions.

Finally, the Bill should provide that new entrants after 1 July 2023 may not surrender ACCUs in fulfilment of their emissions reduction obligations, with the caveat that the Rules may stipulate exceptions for hard-to-abate sectors. This would set a strong market signal that new facilities will be expected at the outset to employ low-emissions technologies to support their operations.

New entrants to the Safeguard Mechanism will have the advantage of the latest technology, and clear legislative guidance regarding their obligations, at their planning

stage. It is therefore reasonable, and equitable, that expectations of emissions reductions by new entrants are higher than of facilities who must restructure existing operations.

The combined effect of these recommendations is to incentivise real emissions reduction over the reliance on offsets, where it is reasonable to expect genuine business transformation, based on the nature of the facility. It will also serve as a disincentive to new entrant facilities that have no plausible plan to reduce emissions other than by externalising their obligations through offsetting.

Recommendation 3 – strengthen the objects of the NGER Act

EDO is supportive of the proposed amendment to the objects of the NGER Act that will require aggregate net emissions of the Safeguard Mechanism facilities to decline.

Above, we have made recommendations that will better align the substance of the Act with these objects.

Here, we make a recommendation for a further amendment to the objects that would better align the NGER Act with the purpose of the CFI Act – which has overlapping jurisdiction. In particular, the governance of offsets is at the heart of the CFI Act.

The CFI Act includes strongly drafted objects that prioritise both drawdown of emissions and *avoidance of emissions*. Relevantly:

3 Objects

- (1) This section sets out the objects of this Act

Climate Change Convention and Kyoto Protocol etc.

- (2) The first object of this Act is to remove greenhouse gases from the atmosphere, and **avoid emissions of greenhouse gases**, in order to meet Australia’s obligations under any or all of the following:

- (a) the Climate Change Convention;
- (b) the Kyoto Protocol;
- (c) **an international agreement** (if any) that is the successor (whether immediate or otherwise) to the Kyoto Protocol.

Incentives

- (3) The second object of this Act is to create incentives for people to carry on certain offsets projects.

Carbon abatement

- (4) The third object of this Act is to increase carbon abatement in a manner that:

- (a) is **consistent with the protection of Australia’s natural environment**; and
- (b) improves resilience to the effects of climate change.

...

The introduction of SMCs to the Safeguard Mechanism via the Bill increases the overlap in field of operation between the NGER Act and the CFI Act.

The Bill also gives the Minister a wide discretion to make rules related to carbon crediting. The recommendations that EDO has made will widen the scope of the Minister's obligations by encouraging the Minister to make rules limiting the number of offsets a facility can rely on in fulfilment of their obligations under the Safeguard Mechanism (See Recommendation 2(b)).

As such, it is legislatively coherent to update the objects of the NGER Act to reference the relevant objects of the CFI Act, and require the Minister in s 22XS(1) to have regard to those objects particularly when making rules related to carbon crediting and offsets.

Alternatively, the reference to the objects of the CFI Act could be limited to s 22XS(1), which would still have the desired effect of ensuring the Minister will make rules related to carbon crediting and offsets compatibly with those objects.

Conclusion

The Safeguard Mechanism reforms present a significant opportunity for tangible emissions reduction in Australia. EDO is supportive of the Safeguard Mechanism reforms but concerned the pre-eminence of offsets within the proposed scheme is a serious threat to its efficacy. It could mean the industrial sector's emissions continue to rise in reality, but not on paper. The result is, we not only threaten Australia's emissions reduction targets, but do so while blindfolded.

The amendments recommended will ensure that the focus of the Safeguard Mechanism is on real emissions reduction that will guarantee Australians a safer climate.

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/A-Roadmap-for-Climate-Reform-Environmental-Defenders-Office)