



THE LAW SOCIETY  
OF NEW SOUTH WALES

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21 September 2022

Department of Climate Change, Energy, the Environment and Water  
John Gorton Building,  
King Edward Terrace,  
PARKES ACT 2600

By [webform](#)

Dear Sir/Madam,

### **Safeguard Mechanism Reform**

The Law Society of NSW appreciates the opportunity to comment on the consultation paper 'Safeguard Mechanism Reform', which seeks feedback on proposed changes to the Safeguard Mechanism, to deliver emissions reductions consistent with Australia's Nationally Determined Contribution under the Paris Agreement.

Many of the issues flagged in the consultation paper are of a scientific or technical nature and will benefit from feedback informed by industry stakeholders with expertise in these areas. However, we suggest that to meet the objective of delivering on Australia's international legal commitments, it is necessary for any proposed changes to promote legal certainty and be capable of enforcement.

We consider that this is particularly important given that the Safeguard Mechanism has been criticised as being ineffective in reducing emissions, as noted in the consultation paper. A key issue, acknowledged by the Minister for Climate Change and Energy, has been the ability of facilities to exceed their baseline emissions without penalty. Greater alignment of the Safeguard Mechanism structure with the now-legislated emissions reduction targets will facilitate legal certainty by providing a clear and consistent regulatory scheme. The proposed amendments aim to address this issue.

We support measures, such as the removal of 'headroom', that strengthen emissions reductions obligations for emitters, to better align with Australia's international obligations and commitments in the *Climate Change Act 2022*.

The consultation paper also flags the need for changes to primary and subordinate legislation to implement the reforms, and that more detailed feedback will be sought later this year or early next year. The Law Society would be interested in providing feedback on a more detailed design proposal accompanied by proposed changes to the Safeguard Mechanism Rule. We would be interested in reviewing these proposals and, in particular, how the Safeguard Mechanism fits in with other schemes and legislation, for example, the *National Greenhouse and Energy Reporting Act 2007* (NGER Act), the Australian Carbon Credit Unit (ACCU) scheme, and the Renewable Energy Target, noting that reducing

emissions from high-emitters will need to be matched with increasing investment in renewable energy to achieve Paris-alignment, as set out in the International Energy Agency's Net Zero Emission Roadmap, as committed to by the Government under its "Powering Australia" policy.

We have some brief general comments relating to the topics discussed in the consultation paper, rather than providing responses to the specific consultation paper questions.

### **Section 3: Setting baselines to achieve an equitable distribution of costs and benefits**

How baselines are set will be critical to determining the baseline decline trajectory. While questions relating to the technical method for determining new baseline emission levels for the 215 or so large emitters are predominantly of a scientific/technical nature, we suggest that maintaining production-adjusted baselines impacts on legal certainty, independence, and enforcement. While the consultation paper recognises benefits and disadvantages in both fixed (absolute) versus production-adjusted (intensity) frameworks, we suggest that a fixed framework can more easily balance the policy principles of 'effective, equitable, efficient and simple', than the current production-adjusted (intensity) framework, although we recognise that there are economic arguments that favour the fixed framework.

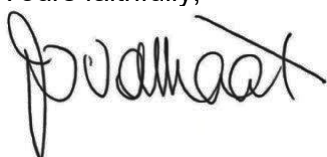
### **Section 4: lowering costs with crediting and trading, offsets and international units**

There will be a need to amend the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) and the *Australian National Registry of Emissions Units Act 2011* (ANREU Act) to facilitate the creation, transfer and retirement of a new unit type, the safeguard mechanism credit (SMC). The characterisation of the new unit (noting ACCUs are designated as financial products) and some of the important legal safeguards to be adopted to prevent market manipulation or abuse (many of which are already built into the ANREU Act) will be matters that will require close scrutiny when the draft legislation is released.

It is proposed that the Regulator will automatically issue SMCs to facilities when their emission fall below their baseline. The integrity of the SMC will therefore be closely tied to the process by which baselines are set. They are not considered 'offsets', unlike ACCUs, which will continue for the Safeguard Mechanism, but will provide an incentive for participants to reduce their own emissions and an option for particularly exposed industries to reduce overall emissions.

If you have any questions about this submission, please contact Vicky Kuek, Principal Policy Lawyer, at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au) or on (02) 9926 0354.

Yours faithfully,



Joanne van der Plaat  
**President**