EC20-14

8 May 2020

Mr John Connor
Chief Executive Officer
Carbon Market Institute

Sent via email to: code.administrator@carbonmarketinstitute.org

Clean Energy Regulator submission to the Independent Review of the Australian Carbon Industry Code of Conduct

Dear Mr Connor

The Clean Energy Regulator (CER) welcomes the opportunity to make a submission on the independent review of the Carbon Market Institute's (CMI) Australian Carbon Industry Code of Conduct (Code). We note the Code is still relatively early in its evolution and that the purpose of the review includes strengthening administration and establishing compliance arrangements ahead of the transition to the operational stage. We also note that, while the CER has assisted in the review to date by providing some resources to the review process, we have not sought to influence the writing of the report beyond feeding in views as a part of the consultation undertaken by the independent review team. Accordingly, please accept this submission as the first substantive CER response to the review proposals.

The CER strongly supports the concept of the Code as it can provide confidence to carbon market participants. By becoming signatories, industry members have agreed to be held to objective standards in the Code beyond that prescribed in legislation. We note the recommendations in the review propose to lift those standards further in relation to eligible interest holder consents and model contracts with persons who hold the legal right to Australian carbon credit units that may be created as a result of project activities. We broadly support these recommendations.

It is our view that the Code is an industry based self-regulatory tool. With support from industry there is an opportunity to evolve and position the Code as a co-regulatory arrangement with the CER administration of the *Carbon Credits (Carbon Farming Initiative)* Act *2011* (CFI Act). The broad legal framework for such a co-regulatory arrangement already exists because general administrative law principles require that the CER must take account of "relevant considerations" in order to make valid legal decisions. The existence of the Code and compliance with it by a signatory would be such a relevant consideration in our view. For clarity, the CER is required to make statutory decisions but we could have regard to requirements of the Code, assessments and complaint handling processes in making our decisions.

A co-regulatory arrangement supported by the Code that has been co-designed would provide further assurance to the market and enhance the integrity of the scheme. A strong Code and appropriate behaviour is in everyone's interests.

In that context we support the draft report emphasis on congestion busting and reducing duplication with CFI Act requirements (Recommendation 20). It may be possible, for example, under an established co-regulatory approach for the CER to regard a person, who has a good Code compliance history and who is fully accredited and fully compliant with the Code, as, prima facie, fit (in a fit and proper person sense) to participate in the ERF. While the assumption could be displaced by other matters or evidence, it would be a useful starting point for the CER's assessment and a highly relevant consideration.

It may be worth considering a staged transition to a co-regulatory approach as the Code evolves in its operational stage. This could start with the CER explicitly recognising the existence and relevance of the Code as an input to fit and proper assessments on our website. Over time as co-regulatory arrangements are settled, the CER could publish postures and guidance on how we would take account the Code's requirements, compliance and administration in our statutory decision making.

We also welcome the draft report recommendations on model contracts (Recommendations 12 and 22). CER has seen contracts in the market that could be considered to create a power imbalance; risking participation by landholders and others if they believe contracts offered by a carbon service provider may not be fair and reasonably. Major banks have also advised the CER that their processes for giving consent for land-based sequestration projects are often delayed because non-standard contracts can involve the bank obtaining bespoke legal advice before consent is given. A contrast can be drawn with the high degree of standardisation for many other transactions involving interests in land. Our view is that the industry could reduce project cycle times and reduce costs if there were model contracts with standard variation clauses. Hence, we believe there are solid commercial grounds for signatories to consider using model contracts and suggest model contracts may also be relevant to recommendation 33.

Recommendation 21 relates to efficiencies in obtaining data direct from the CER but does not specify what data is required or in what form. The CER notes that there are legislative requirements to the provision of some data it collects for the ERF. That said, the CER is open to exploring how best to provide CMI with data that is in the public domain or obtaining relevant consents to share information. If an enhanced co-regulatory arrangement is pursued, we would also wish to discuss options for obtaining data from CMI.

As you aware the CER values highly the role the CMI plays in supporting and enhancing the carbon market. The relationship between our two organisations is a genuine partnership and one I am keen to see develop and strengthen over time.

I congratulate you on the draft review report and look forward to the outcomes helping the CMI enhancing its role as the carbon market continues to evolve and grow.

I would be happy to discuss any of the above matters with you.

Yours sincerely

David Parker AM
Chair, Clean Energy Regulator
8 May 2020