

# Carbon Market Institute: Competition Law (Anti-Trust) Policy

Carbon Market Institute (CMI) Ltd, ABN 11 146 804 668, Hub Southern Cross, Level 2/696 Bourke St, Melbourne VIC 3000 (we, us and our) understand that adhering to competition law is paramount. This policy sets out how we handle competition law as a member-based institute.

## BACKGROUND

CMI is an independent, member-based institute with a mission to accelerate the use of market-based solutions and support best practice in decarbonisation. Since 2011, it has played an important role as an inclusive forum for business, but also as an advocate for policy that drives investment in emissions reduction and removal.

Our members benefit from direct engagement with market participants, forums and roundtable discussions, specialist working groups and taskforces, real-time market intelligence on emerging opportunities and risks, as well as bespoke services adding value to their organisation and people.

CMI has over 150 members, including primary producers, carbon project developers, Indigenous corporations, legal, technology and advisory services, insurers, banks, investors, as well as emission-intensive industries which are developing and deploying decarbonisation and carbon credit strategies.

We facilitate engagement between members and key stakeholders to build capacity and knowledge-sharing in the market, supporting our members to make informed decisions and address the real-world challenges that climate change presents.

Our leading industry events, market research, online tools, resources, and member-only initiatives are designed to maximise outcomes for market participants across a range of themes, including market development initiatives, climate policy direction, corporate climate leadership, as well as nature and cultural repair.

CMI's policy positions represent what the Board considers to be best practice in line with CMI's mission, and do not represent any CMI individual, member company, or industry sector.

## PURPOSE OF THIS POLICY

CMI and its member organisations are bound by Australian competition law including the Competition and Consumer Act 2010 (the CCA). The CCA is administered by the Australian Competition and Consumer Commission (ACCC).

The purpose of this document is to stipulate CMI's policy on competition law issues and give guidance to its staff and its members in meeting requirements of competition law. It is CMI's policy to comply with competition law and to implement procedures to ensure compliance with this law. CMI does not engage in, nor participate in, activities or agreements which are contrary to competition law rules.

At CMI, each staff member and member organisation who participates in CMI business (for e.g., meetings, telephone calls, events, working groups, taskforces, forums) must be mindful of and comply with competition law.

This policy provides a strategic overview of competition law and how it applies to CMI staff and CMI members. This policy does not anticipate all factors that could arise to competition law concerns. This policy does not constitute legal advice and where necessary, CMI and its members should seek independent legal advice from a qualified practitioner.

## **OVERVIEW OF THIS POLICY**

CMI staff and its members must not use CMI working groups, taskforces, forums, or events to come to arrangements or understandings or engage in concerted practices between themselves to lessen competition by:

1. Fixing prices by charging the same prices.
2. Restricting or inhibiting the production or supply of a good or services or restrict the supply to a particular person. This could include boycotts or agreeing that a business will be able to supply or obtain goods or services at a particular set price, or not at all.
3. Sharing a market by allocating clients, suppliers, regions, or territories with which each party will deal.
4. Rigging the outcome of a tender process, for e.g., by agreeing not to enter a bid or to enter a bid with the intention that it is rejected.
5. Disclosing future prices to competitors in private or give away commercially sensitive information intending competitors to act upon it.
6. Disclosing information (in public or in private) for the purpose of substantially lessening competition in a market.

## **CARTELS AND MISUSE OF MARKET POWER**

### **Restricting Competition**

It is important that the CMI and its members do not impede competition by:

1. Imposing rules that are overly restrictive.
2. Setting industry standards that are overly restrictive; or
3. Other types of conduct this is overly restrictive.

It is important that members of the CMI and Signatories to the Australian Carbon Industry Code of Conduct do not impede competition by:

1. Using the association network, working groups and taskforce meetings as an opportunity and venue to make anti-competitive agreement(s); or
2. Using the association network, workings groups and taskforce meetings as an opportunity to engage in a concerted practice relating to cartel conduct by:
  - Price fixing.
  - Setting output restrictions.
  - Market sharing; or
  - Bid rigging which that has the purpose, or likely effect of, substantially lessening competition.

CMI reserves the right to suspend or remove an organisation from the CMI membership or a signatory to the Australian Carbon Industry Code of Conduct where CMI observes conduct that risks breaching these grounds.

### **Cartel Provisions relevant to the CMI**

Cartel provisions which are found in Part IV, Division 1 of the *Competition and Consumer Act 2010* (see section 45) contains a parallel civil and criminal regime for cartel conduct. The prohibitions against entering into agreements with competitors or engaging in concerted practices are broadly categorised into 4 types of cartel conduct, which are subject to both civil and criminal penalties, and apply to both organisations and individuals.

This cartel conduct includes:

1. Price fixing: agreeing with a competitor to charge the same prices.
2. Output restrictions: agreeing with a competitor to restrict the production or supply of goods or services, or to restrict the supply to persons. This may also take the form of boycotts, that is, agreeing that a particular business will only be able to supply or obtain goods or services at a particular set price, or not at all.
3. Market sharing: agreeing with a competitor to allocate customers, suppliers, or territories with which each party will deal.
4. Bid-rigging: making an agreement with a competitor that has the effect of rigging the outcome of a tender process, such as by agreeing not to enter a bid or to enter a bid with the intention that it is rejected.

Note: These agreements do not need to be in writing but include more informal ‘arrangements’ or ‘understandings. Any communication with another person which is or may be a competitor and from which each party has an expectation of how the other will act is usually sufficient.

### **Misuse of Market Power**

Misuse of market power is where a party has substantial power and makes any contract, arrangement or understanding which is likely to have the effect of substantially lessening competition. Misuse of market power can include:

1. Refusing to supply or otherwise restricting access to an essential input.
2. Anti-competitive loyalty rebates.
3. Predatory pricing.
4. Anti-competitive bundling.

The CMI as a membership association is not able to engage in such activities. Further, CMI is not to be used as a venue to facilitate the misuses of market power.

### **Cartel Conduct, concerted practices and its application at the CMI**

CMI as a membership association acts as a forum for legitimate cooperation on regulatory policy and other matters of common concern. CMI members must not use CMI forums to:

1. Arrange or reach an understanding amongst each other that leads to parallel conduct, collusion, similar pricing, or evidence of opportunities for parties to arrive at an understanding or evidence that parties are acting to avoid a plan.

Further, CMI members must not use CMI as a forum to engage in a concerted practice with the purpose, effect, or likely effect of substantially lessening competition. This could be done by cooperating with CMI members regarding decisions such as:

1. How the business determines the price of its products or services.
2. Where the business sells its products or services.
3. To whom the business sells its products or services.
4. Whether the business bids for a tender and/or the terms of a tender; or
5. The quantity of the product the business offers or produces.

Concerted practice often involves a pattern of cooperative behaviour or communication between two or more persons. It is not necessary though, for the ACCC to identify specific communications to establish the existence of a concerted practice i.e., a concerted practice may arise in a single instance of information being provided by one member to another. It may be possible for the ACCC to infer that a specific outcome or behaviour was only possible because of communication between parties.

Concerted practices are prohibited if they have the “purpose, effect or likely effect” of substantially lessening competition in the relevant market. This could include:

1. An action by a member that is intended to substantially lessen competition and succeed in lessening competition.
2. Intending to substantially lessen competition and fails; or
3. Intending to substantially lessen competition but its action have that affect.

## **CONDUCT THAT IS PROHIBITED AT CMI**

### **No price fixing**

For members of CMI, it is common for collaborative meetings to occur on a regular basis to discuss market issues and conditions that require attention. However, CMI staff and members should be careful to not engage in conduct that is considered price fixing. This includes:

1. Discussions and agreements with competitors about prices are not to be engaged in by members in CMI forums, meetings, working groups or taskforces.
2. Ensure that financial product prices are established through market mechanisms and not through discussion amongst CMI members.

### **No market sharing**

When competitors agree to divide or allocate consumers, suppliers, or territories between themselves, they are engaging in market sharing. This conduct is prohibited at CMI as it results in businesses sheltering from competition and denying clients the benefit of choice. Agreements amongst competitor members to divide or allocate any consumers, suppliers or territories are prohibited at CMI. CMI believe that markets should operate freely, and should be driven by competition, not agreements between competing members.

### **No bid rigging**

Where competitors agree to ensure that bids for a tender are submitted (or withheld) in a particular way, they are engaging in bid rigging. This is also known as collusive tendering.

These types of activities include:

1. Cover bidding.
2. Bid suppression.
3. Bid withdrawal.
4. Bid rotation.
5. Non-conforming bids.

### **No output restrictions**

Output restrictions are when competitors agree to prevent, restrict, or limit the supply of good and/or services with the purpose or effect to driving the price of these items higher due to their lack of availability. Agreement amongst members about controlling (including limiting) the supply of good or services to clients are not permitted at CMI.

### **No boycotts or exclusionary agreements**

If an agreement is made between competitors that prevents, restricts, or limits dealings with an individual supplier or client, or group of suppliers or clients, those competitors are engaging in exclusionary behaviour in breach of the CCA. CMI prohibits:

1. Making boycott agreements with your competitors for the purpose of preventing, restricting, or limiting your dealing with suppliers or consumers.
2. Inducing anyone to limit their dealing with other businesses.
3. Setting terms and conditions of your agreements with suppliers and consumer independently, while taking care that they comply with the CCA more broadly.

### **No communication on future pricing**

A practice that has the purpose of harming competition may be discerned where competitively sensitive information is exchanged between competitors. CMI members are not to communicate their future pricing. Further, other competitive sensitive information is not to be communicated in a CMI forum in a way that raised the expectation or intention that other members may act on such information.

### **Change of policy**

We may modify or amend this policy from time to time. We will display a notice on our website <https://carbonmarketinstitute.org/> for a reasonable period after any such revisions have been made. We will keep the current version of this policy on that website.

### **Contact information**

If you have any queries or complaints with regards to this policy, please contact: Samuel Dawes, Director Integrity and Compliance at [samuel.dawes@carbonmarketinstitute.org](mailto:samuel.dawes@carbonmarketinstitute.org).