

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

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**Lodgment and Details**

Document Lodged: ACCC Response to ACT Questions

File Number: ACT1 of 2019

File Title: Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code and the determination made by the ACCC on 5 December 2019

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

DEPUTY REGISTRAR

Dated: 12/06/2020 1:55 PM

**Important information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

**COMMONWEALTH OF AUSTRALIA**  
**Competition and Consumer Act 2010 (Cth)**



**IN THE AUSTRALIAN COMPETITION TRIBUNAL**

File No: ACT 1 of 2019

Re: Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code

Applicant: Flexigroup Limited (ACN 122 574 583)

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S  
RESPONSE TO TRIBUNAL QUESTIONS**

**PART I INTRODUCTION**

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1. This document sets out the ACCC's responses to the written questions upon which the Tribunal sought the ACCC's assistance, on 11 June 2020.
2. Three preliminary matters arise.
3. *First*, as the Deputy President anticipated (T209:7-14) the ACCC is not in a position at this time to respond to all of the questions.
4. *Secondly*, in so far as certain questions concern what the ACCC considered in granting authorisation, the responses below do not derogate from the primacy of the Determination as the authoritative articulation of the ACCC's consideration. Section 90(4) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) requires the ACCC to provide reasons for its determination. The Determination provides those reasons.
5. *Thirdly*, the ACCC has sought to assist the Tribunal by identifying the material that is presently before the Tribunal on the subject matter of the questions asked. The ACCC does so without seeking to offer commentary on the material.

## PART II RESPONSES

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**Question 1(a):**            **Clause 3(d): was the ACCC condition intended to be additive to the November version of clause 3(d) or to replace it?**

### Short answer

6. The *effect* of the authorisation is additive: signatories have to comply with both clause 3(d) as drafted and the condition, because the condition did not simply replace clause 3(d).
7. The ACCC did not, however, *intend* either to add to or replace clause 3(d) as such. The ACCC focused on specifying a condition that would reflect what the Authorisation Applicants intended, without considering clause 3(d) as drafted.

### Explanation

8. There are difficulties with the drafting of clause 3(d):
  - 8.1. It is limited to unsolicited offers in advertisements and promotional material. There was no material before the ACCC as to the harm presented by making unsolicited offers of BNPL arrangements in advertisements and promotional material, *per se*.
  - 8.2. It refers to unsolicited offers of payments arrangements, not unsolicited offers of new energy tech (**NET**) products, as the Tribunal has noted (T109.18-26).
9. The ACCC considered that this clause did not achieve the intention of the Authorisation Applicants. The ACCC understood that intention to be to prohibit buy now pay later (**BNPL**) finance from being offered by signatories in unsolicited offers of NET products. A letter from the Clean Energy Council dated 25 September 2019 to the ACCC said [**HB 3:1244**]:

Additionally, we propose that signatories should not be able to offer finance products during unsolicited sales, unless they themselves hold an Australian Financial Services Licence. This ensures competitive neutrality, given the expanded clause 24(b). Without this additional limitation, Signatories would have only been able to offer products not regulated by the NCCPA during unsolicited sales. This would result in an unacceptable outcome and should be avoided.
10. Because clause 3(d) as drafted plainly did not achieve what the Authorisation Applicants intended, the ACCC did not focus on the clause as drafted. Instead, the ACCC focused on specifying a condition that would achieve the Authorisation Applicants' apparent intention.
11. But, by its Determination, the ACCC did not replace clause 3(d) with the specified condition. That is apparent by comparing paragraph [5.13] of the Determination with paragraph [5.12] [**HB 6:3258**]. The latter expressly replaced the November Version of clause 25 with the ACCC's own version. Because the condition did not replace clause 3(d), the effect was to add the condition to clause 3(d).

## Material before the Tribunal

12. Mr Crawshaw<sup>1</sup> and Mr Barnes<sup>2</sup> give evidence of the development of the NETCC which further supports the proposition that clause 3(d) was intended to prohibit BNPL finance in unsolicited sales of NET products.

**Question 1(b):** **Clause 25: should the ACCC version of 25(a)(ii) read “If ~~not licensed under the NCCPA and~~ the deferred payment arrangement is not regulated by, or is exempt from, the NCC and or NCCPA:...”? Flexigroup and Brighte are licensed, so are not actually picked up by the ACCC drafting – the relevant issue is whether the payment arrangement is regulated or not, regardless of whether the supplier is licensed**

## Short answer

13. Yes, the words “not licensed under the NCCPA and” should be deleted.

## Explanation

14. Deleting the words identified is consistent with bullet point one of paragraph [4.58] of the Determination [HB 6:3254], where the ACCC said: “[t]he ACCC considers that it is not necessary to require BNPL providers to hold a credit licence in order to provide finance under the Consumer Code”.

**Question 2(a):** **What consideration did the ACCC give to the Administrator’s ability to make (potentially exclusionary) binding standards, which could give rise to unknown public detriment over the period of authorisation?**

## Short Answer

15. In the Determination, the ACCC did not direct specific consideration to clause 61 of the NETCC.
16. Rather, it considered the Administrator’s functions under the NETCC generally, and in particular in relation to enforcement and admission to the NETCC: [4.27]-[4.31] of the Determination [HB 6:3250].

## Explanation

17. During the authorisation process, the ACCC considered the Administrator’s role under the NETCC generally in response to concerns expressed during that process about that role.<sup>3</sup>

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<sup>1</sup> Statement of Jacqueline Amy Crawshaw dated 5 May 2020 at [95] [HB 3:876], [105]-[106] [HB 3:878-879]

<sup>2</sup> Statement of Benjamin Charles Barnes dated 5 May 2020 at [112]-[114] [HB 3:1369].

<sup>3</sup> [HB 2:1229], [HB 2:1231-1232], HB 3:3341. Payright Submission to ACCC dated 12 November 2019 at 7 [HB 6:3519]; flexigroup Submission to ACCC dated 8 November 2019 [HB 6:3497]; Brighte Submission to ACCC dated 8 November 2019 at [2.1]-[2.3] [HB 6:3492].

Such concerns extended to clause 61.<sup>4</sup> The Determination focused on particular aspects of that role.

18. The ACCC considered that there were disciplines on the Administrator's conduct generally as follows:
  - 18.1. The Administrator's performance was subject to review by the "Code Monitoring and Compliance Panel", which is "appointed by the Council and compris[es] industry and consumer representatives and independent persons with relevant expertise": clause A28 [**HB 6:3275**].
  - 18.2. A review of the NETCC is to be performed every three years, which the ACCC considered would encompass a review of the Administrator's conduct: clause A28(h) [**HB 6:3289**].
  - 18.3. In developing standards, the Administrator was required to consult with stakeholders, including government: clause A17 [**HB 6:3287**].
  - 18.4. If the Administrator engaged in egregious conduct, that may prompt variation or revocation of the authorisation under ss 91, 91A, 91B and 91C of the CCA.
  - 18.5. The authorisation is for a period of five years. The necessity to obtain a further authorisation in five years' time is likely to act as a constraint upon conduct during the period of the existing authorisation.

**Question 2(b):      The Code commits signatories to compliance with the ACL provisions on unsolicited sales (and convey them to customers through the Consumer Information Product), but seems to do no more. If it is the case that merchants are able to charge higher prices for unsolicited sales because of the behavioral biases involved in those sales (which the ACL provisions are attempting to address), should the Code go a bit further and require merchants to draw consumers attention specifically to the cooling off period that would "nudge" them to shop around while they still can?**

19. The ACCC is not in a position at this time to respond to this question.
20. To the extent it assists, the Tribunal will be aware that the ACL recognises the utility for consumers of cooling off periods. Unsolicited sales are subject to regulation under Division 2 of Part 3.1 and Division 2 of Part 3.2 of the Australian Consumer Law (**ACL**), being Schedule 2 to the CCA. Among those provisions are ss 76 and 82 on cooling-off periods.
21. The explanatory memorandum accompanying the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (Cth) said:<sup>5</sup>

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<sup>4</sup> See AGL Submission to ACCC dated 22 May 2019 [**HB 6:3301-3302**].

<sup>5</sup> Explanatory memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (Cth) at 467 [23.59].

Existing State and Territory unsolicited selling regimes allow for the provision of self-enforcing remedies, such as statutory cooling-off periods and the right to rescind contracts where a consumer has been misled about the identity of a salesperson or their motives for making contact. Such remedies gives consumers the opportunity to obtain adequate information about the goods or services being sold, to access information about the price and quality of similar products, or to understand the contract they have entered into, before finalising an agreement with a supplier.

22. In *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*, the Full Court considered that the trial judge gave too much weight to a contractual cooling off period in finding that no unconscionable conduct had occurred, in part because there was no evidence that the cooling off period had been brought to the consumers' attention.<sup>6</sup>
23. Among the material before the Tribunal is material from CALC that is generally sceptical of the utility of cooling off periods.<sup>7</sup>
24. The ACCC expresses no opinion on that material other than to observe that it is before the Tribunal.

**Question 2(c):**        **What harm was sought to be addressed by clause 3(d) and the ACCC's condition at [5.13] (the effect of which appears to be excluding BNPL in the context of unsolicited sales, potentially excluding many consumers from the market)?**

#### Short answer

25. Unsolicited sales financed by BNPL arrangements present a risk that consumers will make an unsuitable purchase or enter into unsuitable financing.
26. Clause 3(d) and the ACCC's condition at [5.13] were likely to achieve the public benefit of reducing that risk.
27. The ACCC did not seek to achieve competitive neutrality through clause 3(d) and the condition at [5.13].

#### Explanation

28. During the authorisation process, material was submitted to the ACCC that suggested that unsolicited sales posed a risk to consumers, because they can often feel pressured into making decisions in such situations (identified below): see Determination at [3.4(d)] [**HB 6:3242**]. BNPL finance could increase the risks of unsolicited sales, because such finance can be entered into quickly and without engaging in responsible lending considerations.

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<sup>6</sup> [2013] ATPR ¶42-447 at 43,472 [72] (Allsop CJ, Jacobson and Gordon JJ).

<sup>7</sup> CALC Submission to ACCC dated 21 May 2019 at 4 [**HB 6:2480**]; CALC Sunny Side Up Report at 43 [**HB 4:2150-2151**]; CALC Knock it off! Report at 18-23 [**HB 4:2197-2202**], 28-31 [**HB 4:2207-2210**].

And in the solar sector, those risks could be regarded as larger due to the complex nature of NET products and their cost.

29. Accordingly, prohibiting the offer of BNPL finance in such situations was thought likely to achieve the public benefit of minimising such inappropriate purchases or financing arrangements being made.
30. The Authorisation Applicants have sought to justify clause 3(d) on the basis that it achieves competitive neutrality,<sup>8</sup> in the sense of ensuring that BNPL and regulated finance were treated in the same way.<sup>9</sup>
31. The ACCC's Determination was primarily focused on consumer protection rather than the competitive neutrality contention.

#### Material before the Tribunal

32. There was material before the ACCC that is now before the Tribunal on the question of unsolicited sales.<sup>10</sup>
33. ASIC's production to the Tribunal shows some complaints being made in the context of BNPL financing of an unsolicited sale.<sup>11</sup>

**Question 2(d):**        **What consideration did the ACCC give to the harm that might arise from clause 3(d), particularly in circumstances where some licensed credit providers, such as RateSetter, do not offer credit in connection with unsolicited sales? (Such consumers would be denied information about the availability of BNPL and may look no further, whereas if BNPL makes solar affordable for those consumers and their attention was also drawn to the cooling off period, they would be able to then shop around and decide between available options.)**

34. The ACCC recognised that clause 3(d) (and the ACCC condition) would be likely to reduce the BNPL finance made available to consumers. But the ACCC considered that the likely public benefits of reducing such finance that was entered into during an unsolicited transaction outweighed any likely public detriment, however calibrated.

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<sup>8</sup> See Authorisation Applicants ASOFIC at [44(a)] [HB 1:124]; T15.21-29.

<sup>9</sup> Statement of Jacqueline Amy Crawshaw dated 5 May 2020 at [106(b)] [HB 3:878]. See also Clear Energy Council letter to ACCC dated 6 September 2019 at 1 [HB 3:1219].

<sup>10</sup> See CALC Knock it off! Report at 12-13 [HB 4:2191-2192], 24025 [HB 4:2203-2204]; CALC Submission to ACCC dated 21 May 2019 at 4 [HB 6:3293]; CALC Submission to ACCC dated 21 August 2019 [HB 6:3379-3380]; CALC Submission to ACCC dated 21 August 2019 at 6 [HB 6:3382]; CALC Sunny Side Up Report at 40-45 [HB 4:2147-2152]; Clean Energy Council Letter to ACCC dated 6 September 2019 at 2 [HB 3:1220]; Uniting Vic Tas Submission to ACCC dated 23 August 2019 [HB 6:3402]; Uniting Vic Tas Submission to ACCC dated 29 May 2019 [HB 6:3343].

<sup>11</sup> See 24 February 2017 [HB 8:3784], 26 May 2017 [HB 8:3785].

### Material before the Tribunal

35. There is evidence before the Tribunal, that was not before the ACCC, about the prevalence of unsolicited sales and BNPL finance.
36. Because some of that material is confidential, the ACCC provides citations rather than setting out the evidence.<sup>12</sup>

**Question 2(e):**        **What consideration did the ACCC give to the risk of detriments that might arise from clause 25 (for example, the possibility that other methods of credit assessment might be more accurate and less costly, in comparison to the NCCPA requirements)? What relevance to that consideration is the fact that ASIC is presently assessing the possible costs and benefits of regulating BNPL?**

37. As to the first question, [4.59] of the ACCC's Determination [**HB 6:3255**] reflects that the ACCC considered that the burden of strict compliance with responsible lending obligations was such that it was appropriate to require BNPL providers to comply with a "substantially equivalent" responsible lending obligation.
38. As to the second question, the ACCC is not in a position at this time to answer what relevance, if any, ASIC's ongoing assessment of possible costs and benefits of regulating BNPL should have for the Tribunal. The ACCC notes that ASIC was also engaging in that assessment when the ACCC made its Determination. However, as ASIC's assessment had not been finalised, it ultimately had no bearing on the Determination. If in the future ASIC was to take a step that resulted in a material change in circumstances, variation or revocation under ss 91, 91A, 91B and 91C of the CCA may be appropriate: see Determination at [4.22]-[4.23] [**HB 6:3249**].

### Material before the Tribunal

39. On the first day of the hearing, the Deputy President asked the Authorisation Applicants for evidence of the harms sought to be addressed by clause 25 requiring compliance with responsible lending, hardship and dispute resolution obligations (T25.34 – T26.3). To assist, the ACCC has identified citations for each subject matter. In providing them, the ACCC does not intend to offer any commentary and should not be understood as doing so.
40. As to responsible lending:
  - 40.1. There is evidence from ASIC, in particular its study of BNPL.<sup>13</sup> ASIC's production to the Tribunal shows complaints having been made relating to, broadly, responsible lending.<sup>14</sup>

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<sup>12</sup> First Statement of Taras Mysak dated 24 April 2020 at [55]-[56] [**HB 2:352**]; Statement of Chantha Lake dated 21 April 2020 at [13] [**HB 2:211**]; **HB 7:3822**; **HB 8:3994**.

<sup>13</sup> See Statement of Kevin Foo dated 5 May 2020 at [11(f)] [**HB 4:1599**]; ASIC Report 600 at [3]-[5] [**HB 4:1607**], [44]-[56] [**HB 4:1614-1616**], [75] [**HB 4:1619**], [87] [**HB 4:1623**], [126] [**HB 4:1632**], [130]-[134] [**HB 4:1633-1634**], [146]-[160] [**HB 4:1636-1639**].

<sup>14</sup> See 21 January 2016 [**HB 8:3781**], 16 May 2016, 22 August 2016, 25 January 2017, 3 June 2016, 7 July 2016, 11 July 2016 [**HB 8:3782**] 25 July 2016, 17 August 2016, 22 August 2016, 13 September 2016 [**HB**



- 40.2. There is evidence from CALC, based on a review of complaints data to external bodies<sup>15</sup> and its own casework experience.<sup>16</sup> In particular, CALC's Sunny Side Up Report provides examples of inappropriate or unaffordable finance being offered to consumers of new energy technology products.<sup>17</sup>
- 40.3. There is evidence of the assessments which BNPL providers actually carry out,<sup>18</sup> which the Tribunal might then consider could be compared with responsible lending obligations.
41. As to hardship, there is evidence from ASIC<sup>19</sup> and CALC.<sup>20</sup>
42. As to dispute resolution, there is again evidence from ASIC<sup>21</sup> and CALC,<sup>22</sup> and a submission to the ACCC from AFCA.<sup>23</sup> Further, the COAG Energy Council has made a submission to the Tribunal that explains that dispute resolution was a key area that they hoped an industry code would address. They explained that "the Council noted two key areas of concern where stakeholders considered action was needed to reduce risks to consumers", one of which was as follows:<sup>24</sup>

Accessible, simple and affordable complaints and dispute management – Energy ombudsman schemes do not handle BTM [behind the meter] related complaints and although Jurisdictional ACL regulators can receive complaints and attempt to resolve disputes they cannot force a settlement, meaning to pursue the matter further a consumer would need to go through a lengthy and costly court process. Stakeholders supported the need for simple, consistent and affordable arrangements.

43. As to the possible public detriments of clause 25:

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**8:3783**, 24 July 2017 [**HB 8:3785**], 16 October 2017 [**HB 8:3786**], 17 July 2019 [**HB 8:3769**], 29 October 2019 [**HB 8:3790**], 4 March 2020 [**HB 8:3791**].

- <sup>15</sup> Affidavit of Ursula Claire Noye affirmed on 4 May 2020 at [12] [**HB 5:2265**], [22] [**HB 5:2268**].
- <sup>16</sup> CALC Submission to ACCC dated 21 May 2019 [**HB 5:3292**]; CALC Submission to ACCC dated 21 August 2019 [**HB 6:3379**]; Affidavit of Rex Pascal Punshon affirmed on 4 May 2020 at [33(e)] [**HB 4:2101**]; CALC Sunny Side Up Report at 35 [**HB 4:2142**]. See also Affidavit of Jane Foley affirmed on 29 April 2020 at [6]-[7], [13]-[18], p 16 (within Annexure JF4) [**HB 4:1847-1849, 1861**]; Affidavit of Sue-Anne Thompson affirmed on 1 May 2020 at [8(a), (d)-(e), (g), (j)-(m)], [30] [**HB 4:2040-2041, 2046**]; Affidavit of Rex Pascal Punshon affirmed on 3 May 2020 at [7], [12], [33]-[40] [**HB 4:1873-1877, 1880-1881**], Exhibits RPP-9 [**HB 4:1884-1885**] and RPP-10 [**HB 4:1930-1932**].
- <sup>17</sup> See CALC Sunny Side Up Report at 5 [**HB 4:2112**], 12 [**HB 4:2119**], 35-36 [**HB 4:2142-2143**].
- <sup>18</sup> See ASIC Report 600 at [8] [**HB 4:1607-1608**], [23] [**HB 4:1611**], [155]-[160] [**HB 4:1638-1639**]; ASIC Submission to ACCC at [6(c)] [**HB 4:1806**], [20] [**HB 4:1808**]; Payright Submission to ACCC dated 30 August 2019 [**HB 6:3432-3433**]; Statement of Chantha Lake dated 21 April 2020 at [24]-[25] [**HB 2:214-215**], [29] [**HB 2:215-216**], [35] [**HB 2:217-218**]; First Statement of Taras Mysak dated 24 April 2020 at [26]-[28] [**HB 2:346**], [30] [**HB 2:346-347**], [60] [**HB 2:353**]; T187.13 – T188.39, T195.10 – T198.36, T200.34 – T201.3, T206.4-7 (Mr Mysak).
- <sup>19</sup> ASIC Report 600 at [60] [**HB 4:1617**], [170]-[173] [**HB 4:1641-1642**].
- <sup>20</sup> CALC Sunny Side Up Report [**HB 4:2142**]; Affidavit of Rex Pascal Punshon affirmed on 4 May 2020 at [33(e)] [**HB 4:2101**].
- <sup>21</sup> ASIC Report 600 at [60], [61(b)] [**HB 4:1617**], [168] [**HB 4:1641**]. See also ASIC's production to the Tribunal: 14 June 107 [**HB 8:3785**].
- <sup>22</sup> See CALC Sunny Side Up Report at 5 [**HB 4:2112**], 12 [**HB 4:2119**].
- <sup>23</sup> AFCA Submission to ACCC dated 12 November 2019 [**HB 6:3508**].
- <sup>24</sup> COAG Energy Council Submission dated 2 April 2020 at 1-2 [**HB 6:3050-3051**].

43.1. There is evidence from Ms Lake<sup>25</sup> and Mr Mysak,<sup>26</sup> that requiring BNPL providers to comply with responsible lending obligations will deter some consumers from completing the transaction and disqualify others from obtaining finance because they cannot meet the requirements of such obligations.

43.2. There is evidence from Ms Lake<sup>27</sup> and Mr Mysak,<sup>28</sup> that requiring BNPL providers to comply with responsible lending obligations may make such arrangements slower and more expensive. This material could be evaluated against the evidence of Mr Foggo, which shows that Ratesetter’s process is not necessarily time consuming.<sup>29</sup>

**Question 2(f): If some version of clause 25 were to apply (equally to unsolicited sales as to consumer initiated sales) which would oblige BNPL providers to comply with something similar to the NCCPA requirements, would that be sufficient to address the asserted harm of offering BNPL in the context of unsolicited sales?**

44. At paragraph [4.59] of the Determination, the ACCC stated that a version of clause 25, together with clause 3 (understood as “intended to provide restrictions on BNPL finance related to unsolicited sales”) “should impose an appropriate level of protection”. It is otherwise not in a position at this time to respond to this question.

**Question 2(g): In clause 25(B) the Administrator is required to consider the approval of the unregulated deferred payment contracts. What capability and skill should be required for this role and what type of Administrator is likely to have those skills and capabilities? Is this consistent with the other skill sets required of the Administrator?**

45. Under the NETCC, it is a matter for the Council to appoint a suitably qualified Administrator: clause A2. In addition, under clause A7, the Administrator itself can engage another appropriately qualified person to assist to review deferred payment contracts and provider’s policies and processes in the transitional period to which clause 25(a)(ii)(B) is directed.

**Date: 12 June 2020**

**Ruth C A Higgins SC**

**Christopher Tran**

Counsel for the ACCC

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<sup>25</sup> See Statement of Chantha Lake dated 21 April 2020 at [35] [HB 2:217-218], [37]-[38] [HB 2:218].

<sup>26</sup> See First Statement of Taras Mysak dated 24 April 2020 at [58] [HB 2:353]

<sup>27</sup> See Statement of Chantha Lake dated 21 April 2020 at [35] [HB 2:217], [36] [HB 2:218]

<sup>28</sup> See First Statement of Taras Mysak dated 24 April 2020 at [58] [HB 2:353], [63] [HB 2:354].

<sup>29</sup> Statement of Daniel Robert Foggo dated 8 May 2020 at [18]-[19] [HB 5:2707].