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Case Reference: NV/2020/0045

First-tier Tribunal
(General Regulatory Chamber)
Environment

Heard on 29 April 2022 and by written submissions provided on 13 April 2023
Decision given on: 27 September 2023

Before

JUDGE NEVILLE

Between

MANOR FARM FEEDS LIMITED

Appellant

and

ENVIRONMENT AGENCY

Respondent

Decision: The appeal is dismissed. The penalty notices are confirmed.

REASONS

1. This is an appeal by Manor Farm Feeds Limited ("Manor Farm Feeds") against two Fixed Penalty Notices issued by the Environment Agency. Each notice was issued in response to inaccurate reporting by Manor Farm of its emissions, a breach of its obligations under a climate change agreement with the Environment Agency.

The power to impose a penalty notice for inaccurate reporting

2. In Environment Agency v Amphenol Invotec Ltd [2022] UKUT 318 (AAC), the Upper Tribunal cited the following description of climate change agreements:

> *3. Climate change agreements are described on the www.gov.uk website:*
>
> *Climate change agreements are voluntary agreements made between UK industry and the Environment Agency to reduce energy use and carbon dioxide (CO2) emissions. In return, operators receive a discount on the Climate Change Levy (CCL), a tax added to electricity and fuel bills. The*

Environment Agency administers the CCA scheme on behalf of the whole of the UK.

4. *Reporting is an important feature of a climate change agreement, because it is a condition for the reduction in the climate change levy. As www.gov.uk explains:*

An operator that has a CCA must measure and report its energy use and carbon emissions against agreed targets over 2-year target periods up to the end of 2022.

If an operator has more than one eligible facility in the same sector it can hold an individual CCA for each facility, or choose to group them together under one CCA. Where facilities are grouped under one CCA the target is then shared across the grouped facilities.

Once a facility, or group of facilities, is included in a CCA, it is referred to as a target unit.

If the operator's target unit meets its targets at the end of each reporting period, the facilities continue to be eligible for the discount on the CCL.

3. The operation of climate change agreements is governed by the Climate Change Agreements (Administration) Regulations 2012. So far as is relevant, the regulations provide as follows:

14. Terms to be included in an underlying agreement relating to the provision of information

(1) An underlying agreement must contain the terms set out in paragraph (2).

(2) The terms referred to in paragraph (1) are that the operator must—

(a) provide to the administrator on or before 1st May following the end of a target period such information as has been requested by the administrator in order to determine whether progress towards meeting the target is, or is likely to be, taken to be satisfactory; and

(b) provide any other information requested at any time by the administrator by the date specified in the request to enable the administrator to determine that—

(i) the target has been met; or

(ii) the operator is complying with the terms of the underlying agreement.

15. Financial penalties

(1) The administrator may impose a financial penalty on an operator if the operator —

(a) fails to provide information in accordance with regulation 14(2)(a) or (b);

(b) provides inaccurate information under regulation 14(2)(a);

(c) provides inaccurate information under regulation 14(2)(b); or

(d) fails to make any other notification required under the terms of an underlying agreement.

(1A) This paragraph applies in respect of a penalty that may be imposed under paragraph (1)(a) on—

(a) the operator of a target unit which does not include a greenfield facility; or

(b) the operator of a target unit which includes a greenfield facility, if the penalty notice is served at any time after the expiry of the 12 month period starting on the date of an underlying agreement.

(2) If paragraph (1A) applies, the amount of the financial penalty that may be imposed under paragraph (1)(a) is the greater of—

(a) £250; or

(b) 0.1 x (X-Y)

where X represents the amount of levy that would have been payable on supplies of taxable commodities to the target unit during the base year for the relevant target period if the supplies were not reduced rate supplies, and where Y represents the amount of levy that would have been payable on supplies of taxable commodities to the target unit during the base year for the relevant target period if the supplies were reduced rate supplies.

(2A) This paragraph applies in respect of a penalty which may be imposed under paragraph (1)(a), (c) or (d) on the operator of a target unit which includes a greenfield facility, if the penalty notice is served at any time during the 12 month period starting on the date of an underlying agreement.

(2B) If paragraph (2A) applies, the amount of the financial penalty that may be imposed under paragraph (1)(a), (c) or (d) is the greater of—

(a) £250; or

(b) 0.1 x (A-B).

(2C) In paragraph (2B)—

(a) A represents the administrator's reasonable estimation of the amount of levy that would be payable on supplies of taxable commodities to the target unit during a 12 month period starting on the date of the underlying agreement if the supplies were not reduced rate supplies; and

(b) B represents the administrator's reasonable estimation of the amount of levy that would be payable on supplies of taxable commodities to the target unit

during a 12 month period starting on the date of the underlying agreement if the supplies were reduced rate supplies.

4. As can be seen, paragraph 1 empowers the Environment Agency to impose a financial penalty in response to one of the listed breaches of the regulations, but does not oblige it do so. If the Environment Agency does decide to impose a penalty however, then the amount of the penalty is arithmetically fixed. There is no discretion to impose a different amount.

5. When the Environment Agency exercises its enforcement powers under any piece of legislation, it has regard to its Enforcement and Sanctions Policy ("ESP"). This is published online[i]. The parts of the policy most relevant to this appeal are those that state an "outcome-focused" approach to enforcement, where the Environment Agency will act proportionately, firmly but fairly, consistently, transparently and accountably.

6. Annex 2 to the policy is specifically concerned with climate change agreements. In deciding whether to impose a penalty, the Environment Agency will consider the nature of the breach, the organisations' culpability, and the relevant aggravating and mitigating factors. Each of these considerations is then subject to specific guidance. For inaccurate reporting, the Annex further provides as follows:

F3.5 Providing inaccurate information in a target period report

CCA Regulation 15(1)(b) applies where an operator provides inaccurate information about progress of its target unit towards its targets in its target period report.

Our assessment

This breach impacts the integrity of the scheme. Inaccurate information may lead to an operator gaining benefits to which it is not entitled.

When an operator discovers an error in its report, it must notify us, correct the error and pay any extra buy-out.

Generally, if an operator has over-reported its target unit's emissions, we will not normally impose a penalty. If an operator has under-reported its target unit is emissions, we will normally impose a penalty.

However, we will apply the following positions - where:

- *an under-report of emissions is a first breach of this requirement, we will not normally impose a penalty*

- *either an over or under-report of emissions relating to one target period is notified to us more than one target period later, we will normally impose a penalty, even if it is a first breach of the requirement - for example, if we are notified in target period 3 or later of an error in target period 1 data, we will normally impose a penalty.*

Appeals

7. The regulations provide a right of appeal to the Tribunal:

20 Right of appeal

(1) Where a financial penalty is imposed under regulation 15, the operator may appeal to the First-tier Tribunal ('the Tribunal') against the decision to impose the penalty.

[…]

21 Grounds of appeal

The grounds on which a person may appeal a decision under regulation 20 are—

(a) that the decision was based on an error of fact;

(b) that the decision was wrong in law;

(c) that the decision was unreasonable;

(d) any other reason.

22. Effect of an appeal

The bringing of an appeal suspends the effect of the decision pending the final determination by the Tribunal of the appeal or its withdrawal.

23 Determination of an appeal

(1) On determining an appeal under regulation 20(1) against the imposition of a financial penalty the Tribunal must either—

(a) confirm the penalty;

(b) reduce the penalty; or

(c) quash the penalty.

(2) On determining such an appeal, the Tribunal may allow an extension of time for payment of the penalty.

8. In Amphenol Invotec, the Upper Tribunal held that regulation 23(1)(b) does not empower the Tribunal to impose a different penalty from that prescribed by regulation 15. The purpose of regulation 23(1)(b) is to enable the Tribunal to correct a situation where the Environment Agency had specified the wrong penalty, or miscalculated it.

9. I have not been referred to any authority specifically concerned with how the Tribunal should approach an appeal argued on the basis that the Environment Agency should have decided not to impose a penalty at all. The starting point is the legislation. Regulation 21 appears to be aimed at permitting any argument to be pursued by an appellant, and I therefore treat this as a 'full merits' appeal rather than a review on public law grounds. The Tribunal finds the facts for itself and makes the decision it thinks fit. It will nonetheless pay heed to the same considerations as should have been considered by the original decision-maker, for example the statutory context and the enforcement policy, as well as give

appropriate weight to the view taken by the regulator, informed by its role in the statutory scheme and institutional expertise. The weight that ultimately attaches to the regulator's reasons will depend on all these circumstances, taking into account their fullness and clarity, the nature of the issues, and the evidence: R. (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] EWCA Civ 31 at [45]; Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 at [44]-[46].

The Fixed Penalty Notices

10. Manor Farm Feeds admits that it made inaccurate reports for the period between 1 January 2013 and 31 December 2015 (Target Period 1) and 1 January 2015 and 31 December 2016 (Target Period 2). It did so accidentally, reporting the litres of fuel it had used rather than first converting that figure to kilowatt-hours, and voluntarily notified the Environment Agency itself on becoming aware of the error.

11. Notices of Intent in respect of both target periods were duly sent. Manor Farm Feeds responded with its representations.

12. The first Financial Penalty Notice ("FPN1") is dated 20 November 2020 and explains:

> *We sent a Notice of Contravention and Intent to impose a financial penalty to Manor Farm Feeds Ltd ("you") on 3 February 2020. We issued this notice as you provided inaccurate information in your report of 23 March 2015 about the progress of the target unit (AIC/T00052) towards to [sic] its targets. Between 1 January 2013 and 31 December 2015 (Target Period 1).*
>
> *Under Regulation 15 we have discretion to waive this penalty, if we consider it appropriate to do so. Our Enforcement & Sanctions Policy Sets out our generic enforcement approach for each breach under the Regulations, which is an explanation of how we are likely to exercise our discretion.*
>
> *The table below summarises the steps we have carried out in making our decision:*

Assess the nature of the breach in line with Section F	*We will normally impose a penalty where either an over or under-report of emissions relating to one target is notified to us more than one target. Later, we will normally impose a penalty, even if it is a first breach of the requirement.*
Assess culpability category	*Culpability category – negligent*
Assess the aggravating and mitigating factors	*The aggravating factors is* [sic] *that the error was over 30% of emissions. Mitigating factors are that there has been no financial gain and was self-reported by the operator.*

Having considered Annex 2 of our Enforcement and Sanction Policy and your response to the Notice we have decided to impose the financial penalty under regulation 15(1)(b).

The most relevant factors in reaching this decision are as follows:

- *There is no evidence that avoidance of the error was not within the control of the operator.*

- *The operator is required to report energy consumption to us not the volume of fuel consumed. Gas oil is a common fuel in the CCA Scheme. The CCA Operation Manual states:*

"If available, operators should use the gross calorific value (GCV) provided by their energy supply when working out their energy consumption. Where this information is unavailable, operators should use the GCV given for the particular fossil fuel in Annex 11 of the '2012 Guidelines to Defra's /DECC's GHG conversion factors for company reporting'. These factors can be found at https://www.gov.uk/government/publications/2012-greenhouse-gas-conversion-factors-for-company-reporting. These 2012 GCV conversion factors should be used for all reporting during the four target periods.

13. The second Financial Penalty Notice ("FPN2") is also dated 20 November 2020. This is written in precisely the same terms, save that it refers to the report of 19 April 2017 concerning the target period between 1 January 2015 and 31 December 2016 (Target Period 2). Each amount of the penalty value was then calculated in accordance with regulation 15(2), being the greater of £250 or the number of tonnes CO_2e by which Manor Farm Feeds had under-reported in the relevant target period. The amount of FPN1 was calculated at £8,772 and FPN2 at £11,028. There is no dispute over the calculation of these figures.

The parties' arguments on appeal

14. I can summarise the appellant's principal contentions (so far as still pursued) as follows:

    a. The Environment Agency's discretion on whether to impose a penalty should take into account the principle of proportionality. The definition of proportionality is that contained within the ESP at section 3.1. The decision to impose a penalty in this case was unreasonable and disproportionate.

    b. Given the CCA scheme's objectives included lowering industry's carbon emissions and energy usage, issuing a penalty in response to self-reported inadvertent errors risked deterring other operators from checking and correcting previous reports. It also risked discouraging other organisations from taking part in the CCA scheme.

    c. The Environment Agency had miscalculated (or not taken account of) the applicable buy-out figures that would have applied had the errors not occurred. The amount of the FPNs was wholly disproportionate to the correct figures.

    d. The Environment Agency had not given consideration to the energy efficiency measures in which Manor Farm Feeds had invested, such as a wind turbine and a biomass boiler. Coupled with Manor Farm Feeds not having made any financial gain

as a result of the under-reporting, imposing a penalty undermined rather than supported the CCA scheme.

e. Manor Farm Feeds had attempted to comply with its obligations by its director providing the figures to its CCA regional representative, who had then reported them to the Environment Agency. It has been clarified that this regional representative is an employee of the Sector Association that covers Manor Farm Feeds.

f. The two penalties represent a continuation of the same error, so have no regard to the principle of totality.

g. Insofar as Manor Farm Feeds was able to obtain the relevant data, it appeared that only a small minority of cases of self-reported error had been met with penalties.

15. The Environment Agency's rule 23 Response counters as follows:

a. The objectives of the CCA scheme are not to lower industry's carbon emissions and energy usage. It is an energy efficiency scheme, as set out in the government's response to the consultation on the scheme[ii]:

The CCA scheme, first established in 2001, serves the dual purpose of incentivising energy and carbon savings through setting energy-efficiency targets whilst also helping to reduce energy costs in sectors with energy intensive processes by providing a significant discount to Climate Change Levy (CCL). The current targets provide a basis on which organisations can make improvements to the energy-efficiency of facilities included in agreements over an 8-year period, ensuring their contribution to UK-wide goals, in return for savings worth nearly £300m annually.

b. As the CCA scheme had been closed to new entrants on 31 October 2018, issuing penalties could not have a deterrent effect on participation.

c. Inaccurate reporting undermines the scheme even where targets are met, giving incorrect data on how the scheme is performing overall and affecting the reporting of UK-wide CO_2e emissions. These adverse effects are relevant to the delay in Manor Farm Feeds correcting its reports, coming more than one target period after the errors occurred. The incorrect reporting would have actually undermined the accuracy of the information on the performance of the CCA scheme that was published by the Environment Agency. Both under-reporting and over-reporting have this effect, and the Environment Agency is justified in responding to both with a penalty notice where appropriate.

d. Manor Farm Feeds still enjoyed a net financial benefit from being members of the scheme, even after paying the FPNs. This was calculated by deducting the amounts of each FPN from the CCL reduction to which Manor Farm Feeds was entitled in the relevant period.

e. The ESP was clear that while an under-reporting of emissions as the first breach would not normally attract a penalty, inaccurate reporting notified more than one target period later would. The ESP had been correctly applied.

f. Investment in energy efficiency already brought benefits to Manor Farm Feeds through reduced energy bills, and does not justify deciding not to impose the FPNs.

Indeed, more up-to-date Environment Agency figures showed that Manor Farm Feeds' energy efficiency performance had actually reduced since Target Period 2. The CCA Operations Manual confirmed that energy generated from on-site renewable sources should be treated the same as energy sourced from the national grid:

The CCA scheme is not designed to provide additional incentives for renewables beyond Feed-in Tariffs (FITs), Renewable Obligation Certificates (ROCs) or the Renewable Heat Incentive (RHI). The aim of the CCA scheme is to encourage energy efficiency.

g. While the error may have been inadvertent, it was still negligent given the clear instructions in the CCA Operations Manual concerning conversion (set out in the FPNs).

16. In response to case management directions, further information was provided by the Environment Agency:

    a. On dates of reporting and correction:

        i. The original report for Target Period 1 had been provided on 23 March 2015;

        ii. The original report for Target Period 2 have been provided on 19 April 2017;

        iii. The errors in those reports had been notified on 11 September 2019 – this was partway through Target Period 4, so over four years after the Target Period 1 reporting deadline and over two years after the Target Period 2 reporting deadline.

    b. The Environment Agency wished to clarify that when deciding to impose the FPNs it had taken account of there being no previous history of non-compliance, that Manor Farm Feeds had cooperated with correcting the error, and that the company was not in financial distress.

    c. In support of the assertion in the FPNs that Manor Farm Feeds had been negligent, the Environment Agency referred to the definition in the ESP:

    "… failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence."

    d. It observed that no evidence had been provided to show that avoidance of the reporting error had not been within Manor Farm Feeds' control, or that proper systems had been put in place to avoid it.

17. I have omitted some other clarifications that have not proved material to the decision. The above comprises the parties' principal arguments. I shall include the way in which they have been subsequently developed only where necessary to explain my conclusions.

Consideration

18. I do not repeat the legal framework set out above, nor the proper approach to be taken by the Tribunal. My assessment of the issues is as follows.

19. Manor Farm Feeds' submissions headline proportionality as its principal argument. I agree that proportionality must be considered, and not only by reason of its inclusion in the ESP. That means the amount of the penalty must be considered when deciding whether to impose the penalty at all, and to the extent that the Environment Agency argues otherwise I disagree. Article 1, Protocol 1 of the European Convention on Human Rights ("A1P1") requires a reasonable relationship of proportionality between the means of enforcement and its legitimate aim: see, for example, Jahn v Germany (2006) 42 EHRR 1084, as discussed in R. v Waya [2012] UKSC 51 at [12]. It is easy to imagine a scenario in which the calculation produces a disproportionate penalty, for example a failure to include a decimal point. Notwithstanding its inability to impose a lesser sum, the Environment Agency would be bound to take the amount of the penalty into account when deciding whether to impose it at all. Beyond that point however, I consider that proportionality in the present case can be addressed in an A1P1-compliant way solely by reference to the ESP.

20. The requirement to act proportionately at paragraph 3.1 of the ESP includes taking account of, and balancing, several listed factors. In CCA appeals, Annex 2 adds that the nature of the breach will be assessed based on the impact that it has on the integrity of the scheme. I accept the Environment Agency's argument in the present case that inaccurate reporting has potential consequences that go beyond those for the individual operator. The integrity of the scheme as a means to increase energy efficiency depends on accurate information being held and published concerning its performance. I also accept that delay in correcting data aggravates this breach. Not only will overall data be inaccurate, but as time goes by it becomes more likely that action will have been taken on it. Whereas the discrepancies in this particular case are not large enough to cause nationally significant inaccuracies by themselves, the purpose of individual penalties includes enforcing wider compliance.

21. Insofar as it is material, I prefer the Environment Agency's submissions on the purposes of the scheme. Energy efficiency inevitably forms part of wider attempts to reduce carbon emissions and combat climate change, but the United Kingdom's efforts in that regard are legitimately divided into separate programmes addressing discrete objectives. In any event, I reject that imposing penalties in cases such as this will necessarily undermine the scheme's objectives by discouraging self-reporting of errors or enrolment in the scheme. In a predictive sense, it could just as easily be opined that robust enforcement will prevent such errors being made in the first place, and encourage operators to ensure that any necessary corrections are promptly identified. The same considerations apply to participation by organisations in the scheme; the continued operation of existing schemes and the introduction of new ones also depends on the integrity of their operation and performance.

22. The Environment Agency, as the regulator tasked by Parliament with administering and enforcing the scheme, has the best institutional legitimacy and expertise to judge which approach to enforcement will best support the scheme's objectives. It does so in its published policy, available to those operators who it regulates so that they can reasonably predict the consequences of any contraventions, and by then applying that policy in individual decisions.. The Tribunal will be cautious before disagreeing with a regulator on such matters of policy, and nothing in the present appeals justifies it doing so. I reject Manor Farm Feeds' argument that it is "perverse" to penalise an operator for inaccurate reporting when it has not actually breached its targets. On the contrary, it is entirely open to the Environment Agency to consider that such penalties are justified to preserve accurate reporting by all operators, including those who meet their targets.

23. I do not need to resolve a disagreement between the parties as to the benefit Manor Farm Feeds derives by reason of its membership of the scheme by way of CCL reduction. Nothing in the scheme, the ESP or common sense requires that the overall benefit derived from membership of a scheme should inform, in numerical terms, whether penalties should be imposed for breaching that scheme's discrete requirements. An exception would be where misreporting has enabled continued participation in the scheme, in which case it would be a financial gain that arose from the breach.

24. The original FPNs were made on the basis that no financial gain arose from the misreporting. The Environment Agency's arguments on appeal have (implicitly) resiled from that position by asserting that the delay in having to pay a buy-out fee and in having to undergo recertification did financially benefit Manor Farm Feeds. Whether this is right or not, the ultimate decision on this appeal would be unaffected by an additional aggravating factor.

25. I agree with the Environment Agency that other steps taken by Manor Farm Feeds towards energy saving, such as installation of a wind turbine and a biomass boiler, are unrelated to CCA reporting and do not carry material weight as mitigation in this appeal. The penalty relates to the accuracy of reporting rather than the operator's ecological credentials more generally.

26. As already observed, during the appeal the Environment Agency sought to carify that it had taken into account the lack of any non-compliance, Manor Farm Feeds' cooperation in correcting the error, and that the company is not in financial distress. In general, the Tribunal will approach penalty notices as being issued for the reasons given at the time. In this case I do find that the first two of those matters can be reasonably inferred as having been taken into account without the subsequent clarification, and the third is not material.

27. Manor Farm Feeds denies that its error can properly be categorised as negligent. I have already set out the way in which that term is defined in the ESP, with which I agree. The way in which the administration of the scheme works is that following the end of each target period, Manor Farm Feeds must provide its performance data to a company called SLR that acts on behalf of the relevant sector association. Without wishing to do injustice to the detailed evidence and argument provided by Manor Farm Feeds on this issue, in summary it argues that SLR had repeatedly advised it that "the same methodology for base year reporting should be used for target period reporting". Base year reporting is in litres of oil, which explains why Manor Farm Feeds then did likewise with target period reporting. Nor, complains Manor Farm Feeds, did SLR provide conversion factors.

28. The Environment Agency argues that it is not SLR's function to ensure that data is correctly reported, and that responsibility lies with Manor Farm Feeds in any event. I agree. While the parties agree that SLR does a 'sense check' of high level data, it is clear in this case that the number of litres was not so dissimilar to the potential kilowatt-hours as to obviously raise alarm (compared, for example, to if it had been different by a factor of thousands from what might be expected from such a business). While a number of complaints are made by Manor Farm Feeds that it must be paying SLR for something, and pointing to both other roles it fulfils and that its involvement is a statutory requirement, this falls short of demonstrating a lack of responsibility on Manor Farm Feeds' part. I agree that Manor Farm Feeds might not be properly characterised as negligent if they had entirely subcontracted their reporting responsibilities to a consultant, and that consultant was demonstrably negligent. None of the evidence provided shows such a relationship. Furthermore, a party relying on the negligence

of a third party ought to provide evidence from that third party responding to the allegation. In the absence of any identifiable contractual provision making SLR responsible, or evidence from SLR confirming its position, I am unable to accept this argument as undermining the basis on which the FPNs were issued.

29. I reach the same conclusion on the claim to have been misled by SLR. While the factsheet from SLR is provided, how "the same methodology" should have reasonably been interpreted by the reader requires greater context and, more fundamentally, direct evidence from SLR. In summary on this topic, for the same reasons as argued by the Environment Agency I find that Manor Farm Feeds was indeed negligent in failing to accurately report the required figures.

30. I do not accept that the evidence provided of when the Environment Agency has imposed penalties shows that Manor Farm Feeds has been unfairly treated. Greater detail on the facts of other cases would be required. Nor do I accept that it was unfair to impose two separate penalties without reduction when both arose from the same methodological error. They relate to two separate reporting obligations, and disclose two separate negligent failures to properly ascertain the correct procedure. Given that the statutory scheme does not permit a reduction (akin to the principle of totality in criminal sentencing), I cannot accept that the Environment Agency should have entirely waived one of the penalties. This would be contrary to the ESP and the objectives it fulfils.

31. For the above reasons, and in agreement with those put forward by the Environment Agency, I reject each of Manor Farm Feeds' challenges to the FPNs. The issuing of the FPNs was in accordance with the ESP. The appeal is dismissed, and each penalty is confirmed pursuant to regulation 23(1)(a). Finally, I recognise the significant delay in producing this decision. This arose from a combination of factors unrelated to this appeal in particular, and I am satisfied that no unfairness arises such that the appeal should be decided by a different judge. I nonetheless provide my sincere apologies to the parties.

Signed

Judge Neville

Date:

26 September 2023

[i] https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy
[ii] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905806/cca-extension-consultation-government-response.pdf