

## APPENDIX C - TEMPLATE FOR SENATE AND HOUSE OF REPRESENTATIVES COMMITTEE QUESTIONS ON NOTICE

### Environment and Communications Answers to questions on notice Environment and Energy portfolio

**Inquiry name:** Australia's faunal extinction crisis

**Hearing date:** Thursday 14 February 2019

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**Question Date:** Thursday 14 February 2019

**Question Type:** Written

#### **Senator Rice asked:**

**CHAIR:** Okay. I will kick off. We had hearings in Brisbane two weeks ago and had a site visit at Toondah Harbour. Essentially, we are looking at it as a case study for how the EPBC Act applies with the protection of species. The eastern curlew, in particular, is a critically endangered, threatened species. I just wanted to start off with some questions about Toondah Harbour. Following up, we have had other evidence given to us this afternoon by the Australian Conservation Foundation. Just to set the scene, at the Toondah Harbour site we have a range of threatened species which use that site; is that correct? Would someone like to share with us the range of threatened species that are known at the Toondah Harbour site?

**Mr Tregurtha:** My area undertakes the assessment of that site, but I'm not in a position to work through those individual species this evening. But certainly, when an environmental assessment is undertaken of a proposed project, that environmental assessment is required to identify and assess all Commonwealth listed species in that project area.

**CHAIR:** I know the critically endangered eastern curlew are the threatened species, and it's a Commonwealth listed Ramsar site—correct?

**Mr Tregurtha:** That's correct.

**CHAIR:** So there is the development site, Ramsar site and eastern curlew habitat. So we've got this development that, as we all know, is now going out under consideration, under an environmental impact statement. Going back to when it was first referred to the department, it was first referred in November 2015?

**Mr Tregurtha:** That's correct.

**CHAIR:** Then consideration of it was deferred six times from that first referral?

**Mr Tregurtha:** That's correct. Ultimately that referral was withdrawn by the proponent.

**CHAIR:** We were given evidence this afternoon that it's not usual for an application to be deferred that many times. Can you talk us through why it was deferred those six times.

**Mr Tregurtha:** I don't have those specific details with me, but generally the department will work with a proponent in relation to a referral where there are questions around the amount of information that's been provided or considerations to, I guess, assist. As you know, each referral has to be published for 20

business days, which results in a public comment period, so during that time the department is in regular communication with proponents. There could be a range of reasons why individual referrals are deferred over time, but if you wanted the specific details I'd have to take that on notice.

**CHAIR:** That would be good if you could take it on notice as to why it was deferred six times.

**Mr Tregurtha:** Sure.

**Response:**

Each extension of the timeframe for a decision on the original 2015 referral for the proposal (EPBC 2015/7612) was at the request of Walker Group.

**CHAIR:** The evidence that ACF gave us is that that's quite unusual. Would you agree with them that it's quite unusual for a project to be deferred six different times?

**Mr Tregurtha:** The department's had over 6,000 referrals, and I couldn't speak to whether that was unusual or not without reviewing all of those referrals to determine it. We often defer referrals for a range of reasons, so I couldn't proffer a view without undertaking a review of all of those referrals to determine whether it happens regularly or not.

**CHAIR:** Okay. Would you be able to give us on notice then, the—

**Mr Tregurtha:** Senator—

**CHAIR:** I don't want you to go back over the whole history of the EPBC Act and every referral and how often they've been deferred. But how many referrals would you get per year?

**Mr Tregurtha:** There have been 6,000 referrals over the past almost 20 years, so that would be around 300 a year.

**CHAIR:** Would it be possible to look back over the last year?

**Mr Tregurtha:** I'd have to take that on notice, with a caveat about the amount of resources that it could well take to go back and review those referrals. Those referrals are in our database, but the database effectively just tells us whether or not, when the decision was made on those referrals, it was determined to be a controlled action. There wouldn't be a list of deferrals. Without going through each one individually, I doubt we could arrive at how many times an individual referral had been deferred, for whatever reason that deferral might take place. So I'm happy to take it on notice and have a look at it, but what I'm indicating is that it is potentially beyond our resources to be able to do that.

**CHAIR:** I'm just trying to get something that, yes, does not take a ridiculous amount of your resources are limited. I'm trying to get a sense of how usual it is for a project to be deferred six times, if you could take that on notice.

**Mr Tregurtha:** Certainly.

**Response:**

It is not unusual for the legislative timeframe to be paused prior to a referral decision. This timeframe can be extended to seek further information under section 75(6) of the Act, or by agreement with the proponent under section 75(7) of the EPBC Act.

In 2018, the timeframes for 13 proposals were paused before the referral decision was made while the Department sought additional information (s75(6)), no referral decision timeframes were deferred by mutual agreement (75(7)).

**CHAIR:** I understand the particular mechanism that was used is the suspension of the referral decision time frame. How often is this mechanism used?

**Mr Tregurtha:** That can be a statutory decision by the minister or their delegate, so again I would have to take that on notice as to how often that particular instrument's been used.

**Response:**

See previous response.

**CHAIR:** Okay, if you could take that on notice, then. Thank you. With regard to this first referral, could you outline the briefings that were given to the two ministers—Minister Hunt and Minister Frydenberg, I understand—in relation to the first referral.

**Mr Tregurtha:** When you say, 'outline the briefings', Senator—

**CHAIR:** You said in estimates in May that you didn't provide a formal briefing for a referral decision on that proposal and then the ACF provided evidence to us that, in fact, the minister—I can't remember whether it was Hunt or Frydenberg—was actually briefed. It came out in the FOI document. Yet in estimates he said there wasn't a formal briefing. I'm just interested as to what briefings there were.

**Mr Tregurtha:** I haven't got my team of branch heads with me tonight, so I'm not in a position to go into the detail of that question. I would have to take that on notice.

**Response:**

The following briefs were provided that were of relevance to the proposal (EPBC 2015/7612).

- 17 February 2016 – Meeting Brief provided to Minister Hunt in relation to a meeting with Mayor Karen Williams, Redlands City Council
- 2 February 2016 – Information brief to Minister Hunt
- 3 March 2016 – Information brief to Minister Hunt
- 29 November 2016 - Information brief to Minister Frydenberg
- 11 July 2017 – Meeting brief to Minister Frydenberg in relation to meeting with Walker Group and Mr Andrew Laming MP

**CHAIR:** You could take that on notice, then. You don't know whether, in terms of it not being a formal briefing, there was discussion or advice or debate? Again, this is how the EPBC Act and our environment act work. I think it's important to know. There is certainly a lot of criticism of it not acting to protect threatened species at the moment. It's important for us to see what the pathways are—the way it is and isn't being used. In this example, or in other examples, where you potentially have formal briefings, what sort of discussion or advice or debates are had with the minister over an application of this significance?

**Mr Tregurtha:** I can say that the department regularly keeps the minister's office and the minister's advisors apprised of all of the referrals and, indeed, environmental assessments that we have on hand. We keep them apprised of how those are tracking and issues that are arising from them. We have a regular conversation with the minister's advisors to ensure that the office is apprised of what the department has on hand in terms of managing the pipeline of work and ensuring that there's visibility of that work. The minister, as you know, is the decision-maker under the act, albeit the department does make a very large number of decisions under delegation, but we continue to keep the minister's office apprised of all of the matters that we have at hand and, as I said, where they are in the process.

**CHAIR:** Are they documented? Is that a transparent process—that advice—

**Mr Tregurtha:** We would have a regular verbal meeting. We would have a regular meeting with the advisors. We wouldn't consider that to be a formal briefing in the same way that we brief the minister in relation to a project. When the minister is going to be the decision-maker on a project, we would arrange a formal briefing for the minister, both in paper and at the minister's request in verbal terms, before the minister proceeded to make a formal approval decision on a project.

**CHAIR:** Right, but what you're saying is that there will be informal discussions, advice or keeping the minister's advisors up-to-date as to how things are going prior to that formal briefing?

**Mr Tregurtha:** I would say that the department continues to provide advice to the minister's office in relation to the projects we have on hand and how they're tracking within the department.

**CHAIR:** The ACF found evidence of the formal briefing through a freedom of information request. I presume those sorts of informal briefings, advice or chatting, or keeping the minister's advisors up-to-date, isn't transparent and wouldn't be able to be transparent with the community, even through freedom of information?

**Mr Tregurtha:** As I said, this is more about tracking the progress of those applications. It's not about making formal decisions with regard to how those applications are handled.

**Senator DUNIAM:** Chair, could I just seek some clarification. Mr Tregurtha, I understood that you were talking about two streams: one where the minister makes a decision; the other, under delegation, is where the department makes a decision.

**Mr Tregurtha:** That's correct.

**Senator DUNIAM:** You're talking about providing information to a minister or their staff about where the department sits on those delegated decisions? Is that right? You just update on a regular basis: 'This is where we're at'?

**Mr Tregurtha:** On both streams, as we move through the process. For example, when we make a project a controlled action and it moves through the assessment process, we would keep the minister's office up-to-date—for example, to let them know that the public comment period on a particular project was ending in the next week. It's that type of advice.

**Senator DUNIAM:** That's a one-way flow of information: 'Here's where we're at.'

**Mr Tregurtha:** It's the department just keeping the minister's office apprised of the timing for those projects.

**Senator DUNIAM:** Sorry, I thought it was perhaps a two-way flow. But I understand. Thank you.

**CHAIR:** So you're keeping the minister up-to-date. I'm particularly interested in this example—the Toondah Harbour example—where it hadn't been delegated to the department. When was the decision made that the minister was going to make a decision on this and it was not a delegated decision?

**Mr Tregurtha:** There's a general power of delegation for EPBC Act decisions, but there's also a general position that the minister, as the owner of that delegated power, can determine to exercise that power on projects that they feel they need to make a specific ministerial decision on.

**CHAIR:** When was that decision then made by the minister?

**Mr Tregurtha:** It can be made at a number of different points in the process.

**CHAIR:** Was it made early in the process, in this case?

**Mr Tregurtha:** I would have to take that on notice. I don't have that detail with me, particularly in relation to something that happened close to four years ago.

**Response:**

[For the second referral for the Toondah Harbour proposal \(EPBC 2017/7939\) the Department briefed the Minister to make the decision on 5 June 2017.](#)

**CHAIR:** It's certainly very timely, and there's quite a lot of discussion at the moment. You are saying there was no formal briefing, but in those informal discussions with the minister, on that first referral, was it at any point communicated to the minister that the department felt that the first referral should be ruled as clearly unacceptable?

**Mr Tregurtha:** I will have to take that on notice because I was not present at any informal discussions with the minister. I don't have the relevant people here with me.

**Response:**

Yes.

**CHAIR:** In April 2016, I understand that Matt Cahill from your department wrote to the Walker Corporation that the department was going to rule the project as clearly unacceptable. Was this a formal communication or an informal communication?

**Mr Tregurtha:** I don't have that letter with me. I again would like to take that on notice to ensure I don't mislead the committee.

**Response:**

[On 15 April 2016, Mr Matt Cahill, then First Assistant Secretary of the Environment Standards Division, wrote to Walker Corporation indicating that the Department intended to advise the Minister that, in the Department's view, the proposal was clearly unacceptable.](#)

**CHAIR:** Okay. Was the minister briefed, informally or formally, about the intent to communicate this with the Walker Corporation?

**Mr Tregurtha:** Again, I would have to take that on notice. I wasn't in that position at the time.

**Response:**

Yes.

**CHAIR:** Also, who else in the department knew that Mr Cahill had communicated with the Walker group?

**Mr Tregurtha:** Again, we'll have to take that on notice.

**Response:**

Relevant senior executive officers of the Department were aware that Mr Cahill had written to Walker Group in April 2016.

**CHAIR:** Was anyone in the department aware of the donation from Walker group on 31 May 2016 to the Liberal Party of \$200,000?

**Mr Tregurtha:** Certainly, I was not aware of that donation, Senator. In terms of whether anyone in the department was, we would have to ask every single—

**CHAIR:** Who else potentially would have known and could have been influencing the advice being given to the minister?

**Mr Tregurtha:** I couldn't speculate and nor would I. I'm not aware of anyone who had any knowledge of that particular fact at the time. As I said to you, I wasn't involved in the process. Again, in order to determine anything like that, we would have to ask people.

**CHAIR:** Do you know who was involved with the process? Are they still in the department?

**Mr Tregurtha:** In my division, there is a Queensland and sea-dumping branch. A section of that branch is responsible for undertaking the assessment and approval in relation to the matter. We also seek advice from our colleagues in the threatened species area and the Ramsar area. So a significant range of people would have been aware of the project and the fact that it was under consideration by the department.

**CHAIR:** I'm interested to know whether those people are still in the department—most of the people who were providing advice that on first referral?

**Mr Tregurtha:** In 2015? We can take that on notice. Again, I don't know whether our staff records would go to exactly who worked on those proposals, nor am I confident about how much work it might take to arrive at that knowledge, but I can certainly take it on notice to look.

**Response:**

Most of the Department officers working on the 2015 referral are still in the Department.

**CHAIR:** Were multiple briefs prepared in relation to this specific referral?

**Mr Tregurtha:** You're talking about the 25 November 2015 referral?

**CHAIR:** Yes.

**Mr Tregurtha:** Again, I would have to take that on notice. I don't know off the top of my head.

**Response:**

The following briefs were provided that were of relevance to the proposal (EPBC 2015/7612).

- 17 February 2016 – Meeting Brief provided to Minister Hunt in relation to a meeting with Mayor Karen Williams, Redlands City Council
- 2 February 2016 – Information brief to Minister Hunt
- 3 March 2016 – Information brief to Minister Hunt
- 29 November 2016 - Information brief to Minister Frydenberg
- 11 July 2017 – Meeting brief to Minister Frydenberg in relation to meeting with Walker Group and Mr Andrew Laming MP

**CHAIR:** We heard from the ACF that the department split the brief. Would you have any idea as to why that would be done and whether it's normal practice?

**Mr Tregurtha:** When you say 'split the brief', I don't quite understand what you're referring to.

**CHAIR:** There were two separate briefs given to the minister, giving separate information. So, rather than one brief going to the minister, there were two briefs—

**Mr Tregurtha:** I'd have to take that on notice.

**Response:**

Two decision briefs were provided to the Minister for the 2017 referral, because each brief related to alternative decisions under separate provisions of the EPBC Act.

**CHAIR:** with contradictory recommendations.

**Mr Tregurtha:** Again, I'd have to take that on notice.

**Response:**

See previous response.

**CHAIR:** Do you know of any other instances where that would have occurred?

**Mr Tregurtha:** When the department advises on approval decisions to the minister, we provide a comprehensive range of advice through our briefing to the minister. In relation to the department providing—you were saying two entirely separate briefs?

**CHAIR:** Yes. That's what has been revealed through freedom of information. There were two separate briefs.

**Mr Tregurtha:** Again, I'm not aware of an instance of two entirely separate briefs being provided to a minister, completely separate from each other, on the same decision.

**CHAIR:** So it's not normal practice?

**Mr Tregurtha:** No, I didn't say that. I said I'm not aware of that occurring.

**CHAIR:** But you say there could be, over time, a range of different briefs?

**Mr Tregurtha:** This project has been referred three times in three different forms, so there would be a large number of briefs that have been prepared for it.

**CHAIR:** This is with respect to this first referral.

**Mr Tregurtha:** Again, as we move through a referral process, there is capacity for proponents to provide additional information in relation to the department's assessment decisions. It is quite possible that staff prepare a brief in a certain direction, but then, on the basis of further information and discussions, that brief has to be modified before it's put up to the minister's office. There are a range of scenarios there; there are quite a range of potential outcomes. From that perspective, I would say that—I guess that's speculation.

**Senator DUNIAM:** And hypothetical too.

**Mr Tregurtha:** Yes, that is hypothetical.

**CHAIR:** We've got information that there are two separate briefs—

**Senator DUNIAM:** He has taken it on notice.

**CHAIR:** with contradictory recommendations.

**Senator DUNIAM:** If he's taken it on notice, we should allow him to get the information.

**CHAIR:** Okay. Then we've got the first version of the project. That was withdrawn in June 2017, I understand.

**Mr Tregurtha:** I don't have the exact date with me, but that sounds right.

**CHAIR:** Can you tell us more about how and why it was withdrawn?

**Mr Tregurtha:** Proponents withdraw projects for a range of reasons. That's really an issue for a proponent. I wouldn't want to speculate on behalf—

**CHAIR:** So it sat with the department for two years, and then the proponent decided to withdraw it?

**Mr Tregurtha:** It's not unusual for projects to sit with the department for quite a deal of time: financing doesn't come through; plans change; staff of proponents move on. It's not unusual for us to have a number of projects on our books that are a number of years old, and, eventually, a proponent will get in touch and say: 'We just want to withdraw. We don't want to proceed with that project.' Indeed, at times in the past, the department has written to proponents of those projects, asking them whether they intend to proceed. In many cases they don't, and so those proposals are withdrawn.

**CHAIR:** Presumably, if they'd been advised that the department was going to rule that the project was clearly unacceptable, in the previous year, that may influence them to withdraw that proposal?

**Mr Tregurtha:** The department, as I said earlier, certainly discusses proposals with proponents. If a proponent forms a view that a referral is likely to be unsuccessful, it is certainly open to them to withdraw that proposal so they can review and amend it.

**CHAIR:** We had a second referral in May 2017. What's the current status of that second referral of the Toondah Harbour project?

**Mr Tregurtha:** That referral is still on our books.

**CHAIR:** Still on the books?

**Mr Tregurtha:** Sorry, I should say that that referral was determined to be a controlled action. That controlled action decision—so that referral is still on the department's books.

**CHAIR:** We've got a third referral as well. What's the relationship between the second referral and the third referral?

**Mr Tregurtha:** The relationship is that they are both in relation to actions that are similar but not the same.

**CHAIR:** And it's the third referral that has now gone to the EIS process?

**Mr Tregurtha:** That is correct.

**CHAIR:** So it's similar but not the same. What was the position of the department on the second referral?

**Mr Tregurtha:** On the second referral, the department recommended that the proposal was clearly unacceptable.

**CHAIR:** Were split briefs also prepared in relation to this referral?

**Mr Tregurtha:** I'd have to take that on notice. I don't have that detail in front of me.

**Response:**

[See above.](#)

**CHAIR:** So, on the second referral, the department's advice is it's clearly unacceptable. That's been communicated to the proponent?

**Mr Tregurtha:** No. That proposal was determined by the minister to be controlled action on the basis it was likely to have a significant impact on the ecological character of the Moreton Bay Ramsar site listed threatened species and listed migratory species.

**CHAIR:** But the fact that the department was going to declare it as clearly unacceptable—

**Mr Tregurtha:** No, the department doesn't get to declare it as anything. It's the minister's decision.

**CHAIR:** So the department advised—

**Mr Tregurtha:** The department recommended—

**CHAIR:** recommended to the minister that it be considered clearly unacceptable?

**Mr Tregurtha:** That's correct.

**CHAIR:** And then the minister decided it was a controlled action?

**Mr Tregurtha:** Correct.

**CHAIR:** Then we've got this third referral. I'm still confused about why that second referral didn't proceed to an EIS. We've got a third referred project.

**Mr Tregurtha:** That's correct.

**CHAIR:** Are they still both operational?

**Mr Tregurtha:** The current referral, the third one, was submitted on 5 June 2018 and determined a controlled action on 23 July 2018. The terms of reference for the preparation of an environmental impact statement for this referral are yet to be issued to the proponent but are under development by the department. The issuing of those terms of reference is generally the step that occasions the commissioning of that work by a proponent. At the moment the second referral is sitting on the department's books, but it's my expectation that the proponent will proceed to do the work under the third referral. But it's up to the proponent to withdraw from the second referral. We have this scenario occurring—it's not a regular occurrence, but it's also not unheard of—where a proponent submits a change in circumstances and just neglects or doesn't withdraw the preceding action until they have a view about how their revised action will proceed.

**CHAIR:** What are the differences between the second referral and the third referral?

**Mr Tregurtha:** The design is substantially reduced and different to the 2017 referral. It incorporates waterways and conservation areas, it reduces the development footprint and it reduces the proposed marina from 400 berths to 200 berths.

**CHAIR:** But it's still on the Ramsar wetland site?

**Mr Tregurtha:** The development footprint of the new referral is 52 hectares, and includes 32 hectares of land reclamation within the Ramsar site.

**CHAIR:** Is it possible, under our Ramsar obligations, for this development to occur inside the gazetted boundaries of a Ramsar wetland?

**Mr Tregurtha:** There are two things on that. The first thing I'd say is: my staff would take advice from the Ramsar area of the department in regard to Australia's obligations under the Ramsar convention, and how it applies to this particular project. That assessment will be undertaken on the basis of an EIS, which hasn't been produced yet. So I wouldn't want to speculate in answer to that question.

**CHAIR:** Would the basis of your department previously ruling that the first and second referrals were clearly unacceptable been significantly because of the impacts on a Ramsar wetland?

**Mr Tregurtha:** It would have been in relation to the nature of the impacts of the proposal not only on nationally protected matters, one of which is the Ramsar wetland, but also on threatened species and migratory species.

**CHAIR:** It's a Ramsar wetland because it is a habitat for threatened and migratory species.

**Mr Tregurtha:** It's an internationally significant wetland—that's why it's a Ramsar wetland.

**CHAIR:** Has any project of the scale of the Walker Corporation development ever been approved inside the gazetted boundaries of a Ramsar wetland in Australia?

**Mr Tregurtha:** Not to my knowledge. We would have to take it on notice if you want me to be definitive in relation to that statement.

**Response:**

[Two proposals for commercial residential developments \(Vineyards Estate Residential development, Werribee, Victoria, EPBC 2003/960; Riverwalk Residential development, Werribee, Victoria EPBC 2006/3176\) were approved within the boundary of a Ramsar site.](#)

**CHAIR:** That would be good. Have there been any discussions between the department and the Queensland government about the boundaries of the Moreton Bay Ramsar site in the last four years, either formal or informal?

**Mr Tregurtha:** We work very closely with our counterparts in Queensland. As you're aware, the department has a bilateral assessment agreement with the Queensland government. Wherever possible, in terms of the streamlining of environmental assessments, we seek to work towards a single environmental assessment for projects with the jurisdiction in which that project is located. So we absolutely would have spoken with the Queensland government in relation to a potential environmental assessment of this proposal.

**CHAIR:** But was it particularly about the boundaries of the Ramsar site?

**Mr Tregurtha:** That forms part of the proposal, so yes.

**CHAIR:** Have there been any discussions with the Ramsar Convention Secretariat about using the 'urgent national interest' criteria in relation to the Toondah Harbour proposal?

**Mr Tregurtha:** I would defer that question to my colleagues who are responsible for our relationship with the Ramsar secretariat. They're not here.

**CHAIR:** Okay, we'll have to ask them. We're going to be back at estimates, so I might continue then. Let's move on from Toondah Harbour, and we'll hopefully be able to continue our discussion at estimates. I wanted to talk about the other issue that the ACF raised in their evidence this afternoon about the statements made about land clearing at last estimates. We were told that land clearing in Queensland had actually declined. The ACF have written to the committee to say that: yes, land clearing in Queensland declined between 2004 and 2010; 2004 was a high water mark, or a high land-clearing mark; we had a change of government in 2010; and land clearing has in fact increased since 2016. I'm just wondering

whether the department would like to change its statement that states that land clearing has actually decreased in Queensland?

**Mr Tregurtha:** Those vegetation figures are collected by the department's climate change divisions in relation to the emissions reporting framework, so the questions would, I think, probably be best directed to that area of the department.

**CHAIR:** So you can't make any comments? Is anyone here at the table able to make any comments about the rates of land clearing in Queensland? We've been given so much evidence in this committee so far about the critical importance of habitat for protecting threatened species.

**Mr Tregurtha:** As I indicated, I don't have specific figures with me today on the assessments and rates. Those figures are collated and maintained by a different area of the department.

**CHAIR:** We've got a letter that the ACF sent to the committee stating very clearly that between 2010 and 2016 there was a dramatic increase in clearing. Maybe I'll just ask you to make sure that the relevant people who will know the answers to this will be at estimates next week—

**Mr Tregurtha:** They'll absolutely be at estimates.