

**Senate Standing Committee on Economics**

**ANSWERS TO QUESTIONS ON NOTICE**

Resources, Energy and Tourism Portfolio

Budget Estimates

28 May 2012

**Question:** **BR11**

**Topic:** **Indigenous Consultation under the EPBC Act - Ministerial Correspondence**

**Proof Hansard Page:** **121-122**

**Senator Ludlam asked:**

**Senator LUDLAM:** Thank you very much. I would like to move on. Did DRET provide any advice in relation to Uncle Kevin Buzzacotts Federal Court case against federal approval of Olympic Dam? Was RET asked to provide any advice, legal or otherwise, in relation to that case?

**Ms Constable:** No. We did not provide any advice on that matter.

**Senator LUDLAM:** I refer to a letter that Minister Ferguson wrote to Mr Burke in his capacity as environment minister on 29 September 2011. It relates to a number of things, including Indigenous consultation under EPBC Act processes. Are you aware of the letter that I am referring to? I think he canvasses a number of issues in that correspondence.

**Ms Constable:** I am not aware of the letter. I cannot recall the letter right at this time.

**Senator LUDLAM:** I am pretty sure the chair is going to close me down in a minute, so I will just get a couple of questions in on notice once you have had a chance to review the correspondence. Minister Ferguson writes to Minister Burke. He effectively is recommending a couple of things. One is a limit on the range of relevant Indigenous persons covered by consultation provisions in the proposed approval conditions for the Olympic Dam expansion. He wants the words or interests to be removed from the statement Indigenous persons with rights in the area. The original comment is or interests. Minister Ferguson says in his explanation as to why he wants interests removed:

There is danger unverified opponents not so far involved in the negotiation process could disrupt discussions between the parties.

Could you provide us with the ministers definition of unverified opponents and what exactly that phrase should be taken to mean?

**Ms Constable:** I will take that on notice.

**Senator LUDLAM:** Is there a list of such people, unverified opponents, and whether only parties in agreement with a mine expansion such as this would be invited into negotiations? According to my reading of the ministers correspondence, opponents would be automatically excluded.

**Ms Constable:** We would have to examine that letter very carefully and speak to the minister about it. We will take that on notice.

**Senator LUDLAM:** I would greatly appreciate that. It appears that the intention really is to simply restrict the number of people who might be parties to a discussion. I believe documents that were released under FOI that were received on 15 May 2012, in response to an application dated 12 December 2011, reveal that on the same day that Minister Burke signed the EPBC Act approval to Olympic Dam, which was 10 October last year, a final key change was made to the conditions of approval in accordance with, again, correspondence from the minister that you report to. Could you

confirm for us whether or not the recommended level of protection was downgraded so that the activities covered by the approval went from not resulting in "any adverse impact" to "any significant impact" on the abundance and distribution of the Australian giant cuttlefish? Mr Ferguson wrote that he believed this was critical in his correspondence to Minister Burke on 29 September 2011. Have you got anything at the table with you that could shed some light on the ministers views?

**Ms Constable:** We do not have the letter with us. The normal process on any sort of resource project is that the minister for environment would write to the Minister for Resources and Energy and ask if there are any issues that need to be taken into account before a decision is made on an EPBC matter. So that would be a normal course of correspondence that would be undertaken.

**Senator LUDLAM:** Maybe I have been out of this loop for a while. Is it normal, then, for the resources minister to write back seeking that environmental protections be downgraded for particular species?

**Ms Constable:** There are a range of issues that the minister may put back to the environment minister to make sure that he is fully informed on economic and social issues that are relevant to the particular project. So I cannot answer the question specifically about that matter, but the advice varies. It would be based on the information that we have at hand and the expertise that we have in the department that would add value to the process concerned.

**Senator LUDLAM:** I appreciate that. You do not have the letter in front of you. What it looks like-tell me if this is an incorrect evaluation of what has gone on-is Minister Ferguson has lobbied the environment minister and said, 'It's critical that we downgrade protection for this particular cuttlefish species in the Spencer Gulf'. Then Minister Burke, upon receipt of that correspondence, overturns department of environment express advice in a brief to the minister and, accordingly, downgrades protection to that species. I am interested to know whether it was the ministers intention to downgrade environmental protection for a particular species, because it appears to have been successful.

**Ms Constable:** That is an interesting turn of phrase that you are using-downgrade.

**Senator LUDLAM:** Sure.

**Ms Constable:** I am very concerned about that use of language.

**Senator LUDLAM:** Did it upgrade the protection?

**Ms Constable:** It would be very unusual for the minister to specifically use those words in a letter back to Minister Burke. I am not saying that it was not

**Senator LUDLAM:** I have used the word downgrade.

**Ms Constable:** You are paraphrasing.

**Senator Chris Evans:** I think you have characterised something in a way that is a bit conspiratorial. The officer does not have the letter in front of them, so I think the officer has to probably note your comments, I suspect.

**Senator LUDLAM:** Whether it was the ministers intention to downgrade or weaken-I can table the letter for you now if that would make life a little easier. Maybe we can come back to this question tomorrow if the same officers are at the table. If I am being conspiratorial, perhaps you could provide us with a correct evaluation of what Minister Ferguson was up to in that correspondence on this particular matter.

**Ms Constable:** I will take that on notice.

**Answer:**

On 28 September 2011, the Minister for Resources and Energy responded to the Minister for Sustainability, Environment, Water, Population and Communities' invitation to comment on his proposed approval of BHP Billiton's expansion of operations at Olympic Dam, South Australia. This consultation is provided for under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Part 9 – Approval of Actions.

The Minister's comment on Indigenous consultation related to matters concerning Aboriginal heritage and the operations of the *Aboriginal Heritage Act 1988* (SA). Under section 3 of that Act, a traditional owner of an Aboriginal site or object means an Aboriginal person who, in accordance with Aboriginal tradition, has social, economic or spiritual affiliations with, and responsibilities for, the site or object. Further, the Act distinguishes between (i) traditional owners and (ii) other Aboriginal persons who have a particular interest. The Act is quite specific in stating that no person other than a traditional owner is entitled to call into question acts or determinations of the Minister on the grounds of a failure to consult with or obtain approval from traditional owners.

The Minister's comment with regard to the relevant draft Environmental Conditions was –

“These conditions appear to duplicate State based conditions. Under the *Aboriginal Heritage Act 1988* (SA), the State has responsibility for monitoring activities in this area.

The use of the word ‘or interests’ in regard to relevant Indigenous persons has much broader implications than perhaps intended by the condition. There is danger unverified opponents not so far involved in the negotiation process could disrupt discussions between the parties. It is recommended these words be removed to read...Indigenous persons with a right in an area...”

The phrase ‘unverified opponents’ was made in the context of the operation of the *Environment Protection and Biodiversity Conservation Act 1999* and its interaction with the *Aboriginal Heritage Act 1988*. There is no list of ‘unverified opponents’. The Minister's suggestion if adopted would have in no way limited the capacity of Indigenous persons holding rights in the area subject to the proposed mine from exercising such rights.

Senator Ludlam sought to understand why the Minister's letter suggested a change from ‘adverse impact’ to ‘significant adverse impact’ in some of the draft Environmental Conditions. The Minister's letter raised the need for consistency in language that defined those outcomes. For example, the draft Environmental Conditions he was responding to variously referred to ‘adverse impacts’, ‘significant impacts’, and ‘significant adverse impacts’.

The Minister's comment is based on the fact that the adoption of ‘significant impact’ is consistent with the provisions of the *Environment Protection and Biodiversity Conservation Act 1999*. ‘Adverse’ is used as a descriptor of the significant impact. That is actions that have, will have or are likely to have a “significant impact” on a matter of national environmental significance or Commonwealth land.