



Accountability for damage

Taking responsibility for damage must be a core contributor towards poverty alleviation

Submission to Joint Standing Committee on Foreign Affairs and Trade,
Inquiry into the role of the private sector in promoting economic growth and
reducing poverty in the Indo-Pacific region

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WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹



SUMMARY OF RECOMMENDATIONS

1. In cases where poverty has increased as a result of the negligent acts of another, it is inappropriate for the generous and socially responsible private sector to bear the burden of responsibility of another party's negligence that has occurred via act or omission.
2. In the Indonesian province of East Nusa Tenggara, economic loss has been estimated at AU\$1.5 billion per year from 2009, following actions in Australian territory of a private company. We believe that the Australian government should ensure that the company responsible fund an independent investigation to determine the scope of damage, with the mutual agreement of all affected parties and their agents.
3. Investment in solving another company's mistakes is no incentive for the private sector to become further involved in international development. Ensuring that companies are held responsible and are deterred from negligent acts will also ensure private sector confidence that their investments will be sustainable and continue uninhibited into the long term.

INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade in its inquiry into the role of the private sector in promoting economic growth and reducing poverty in the Indo-Pacific region.

We provide a short submission to the Inquiry, and also annex our previous submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade regarding Australia's overseas development assistance, which we provide as a supporting element of this submission.

We note that this Inquiry examines how the private sector may accelerate the pace of economic growth and reduce poverty in developing countries in the Indo-Pacific region.

We applaud the government's efforts to seek out innovative solutions to poverty alleviation in the Asia Pacific region.

However, we believe that any discussion regarding the role of the private sector in accelerating poverty alleviation must include acknowledgement of the capacity of the private sector to also reap enormous damage via actions (such as unethical investment) or omission (such as a breach of duty of care).

Such a discussion is necessary to ensure that the private sector will have confidence in the quality of their investment and expected social gains and returns.

We note that this Inquiry is placed in a unique position to make positive recommendations for change in this area, at little to no cost to the Australian taxpayer.

We note that significant and severe economic loss and increased poverty is being experienced in the province of East Nusa Tenggara, Indonesia following the actions of a private company while operating in Australia, with economic loss estimated province-wide at AU\$1.5 billion per year, every year, since 2009.²

This example is potentially one of the most expensive and recent man-made disasters in the Indo-Pacific that is currently requiring vital assistance.

We note that the Australian aid program in and of itself is insufficient to rectify the severe damage that has been wrought upon the province of East Nusa Tenggara, Indonesia.

East Nusa Tenggara is listed by DFAT as one of the five top priority provinces in Indonesia requiring overseas development assistance. Proposed country expenditure for 2013/2014 was cited to be \$583.6 million,³ with none of this expenditure specifically targeting the environmental and economic damage sustained in the region.

In this case, it is essential that the journey back to economic growth and poverty reduction commence via a full investigation of the extent of the damage.

We recommend that the Australian government ensure that the company responsible funds an independent investigation of the scope of the damage, with the mutual agreement of all affected parties and their agents.

We believe that it is appropriate for the private sector to fund comprehensive investigations of damage that has resulted from their own negligent actions.

It is inappropriate for operating companies to escape liability for their actions, and thus expect other dedicated members of the private sector to invest in a geographical area to 'clean up' their mess.

THE MONTARA OIL SPILL

In August 2013, a delegation from the Australian Lawyers Alliance met with communities and governmental officials in East Nusa Tenggara province, Indonesia, who testified as to the severe impacts sustained to the local economy and environment following the Montara oil spill.

These impacts have included:

- Significant economic loss, following the devastation of the local seaweed farming and fishing industries, estimated at AU\$1.5 billion every year since 2009;
- Mass migration of families who are leaving the province in order to find work elsewhere;
- Loss of education for children, as their families cannot afford basic health costs;
- Respiratory conditions, skin conditions;
- Severe food poisoning requiring hospitalisation; and
- Suspicious deaths.

On 31 August 2009, the Montara wellhead, operated by PTTEP Australasia, exploded and spilled thousands of litres into the Timor Sea. The spill continued to flow unabated for 74 days until 3 November 2009.

The Montara Commission of Inquiry established by the Australian government, held that the company 'did not come within a bulls roar of sensible oilfield practice'⁴ and was subsequently fined \$450,000 under the previous legislation.

The Commission of Inquiry further noted that 'what happened...was an accident waiting to happen; the company's systems and processes were so deficient and its key personnel so lacking in basic competence, that the Blowout can properly be said to have been an event waiting to occur.'⁵

The Montara Commission of Inquiry also held that the oil entered the waters of Indonesia and Timor Leste 'to a significant degree'⁶.

No further effort has been made following the Montara Commission of Inquiry to

follow the oil to Indonesia and Timor Leste and investigate its reach and impact.

While the company responsible has funded an environmental monitoring program within Australian waters, we note that research regarding the projected movement of the oil was not sufficiently comprehensive to be relied on by the Australian government as satisfactory.

We note that two studies were undertaken that mapped the progress of the oil's movements. Both of these studies were trajectory modelling studies, incorporating incomplete data inputs:

- no data from Indonesian waters was entered into the studies;
- no data appears to have collected from water samples, and was determined via overflight and satellite data only;
- data was only collected for upto approximately four weeks following the spill's cessation; and
- conditions were predicated as calm, in a period renowned for monsoon season, in which three cyclones swept through the Timor Sea in November 2009 – March 2010.

The studies concluded that no oil reached the Australian or Indonesian coastline.

However, Indonesian communities formally reported to authorities that:

- just a few days after the spill commenced, oil was reported in Indonesian fishing grounds;
- a coastal community reported waves of milky oil washing up on their coast;
- since the spill, seaweed farming, which supports over 37,000 farmers in East Nusa Tenggara, has proven untenable, with dramatically reduced yields. In some villages, annual harvests have dropped from 500 tonnes (pre-spill) to 3 tonnes (2013);
- since the spill, fishermen report that there are no fish to catch in their fishing grounds.

We see that there are four clear alternatives in this situation:

1. Nothing is done, leading to continuing and significant increases in poverty within the closest Indonesian province to Australia;



2. Increased support from the Australian aid program, to either provide small solutions or to fund an initial study that investigates the scope of damage;
3. Private sector investment in funding a study of the quantum of damage to begin the process of assisting poverty alleviation in the area;
4. For the Australian government to compel the company responsible to fund an independent and comprehensive investigation of the affected areas, with the mutual agreement of all affected parties and their agents.

THE APPROPRIATE BURDEN OF RESPONSIBILITY

We submit that the cost of further independent investigation and remediation should be borne by the company responsible.

The independent investigation would need to be convened by an independent body set up and comprised of affected parties and their various agents.

We estimate that an initial study may benchmark at \$8 million.

Requiring the company responsible to fund such a study would be an appropriate step in ensuring that remediation and poverty alleviation in the area is not jeopardised by a lack of understanding as to core environmental issues contributing to poverty.

Furthermore, it is inappropriate that damage sustained in another sovereign nation by actions incurred within the Australian exclusive economic zone continue to avoid investigation.

We recommend that the Australian government adopt a more proactive position that where damage occurs within Australian waters as a result of offshore exploration, the company responsible must fund a full and comprehensive investigation of all reported impacts, and the Australian government must liaise with other sovereign nations to work towards full, comprehensive and independent research with the agreement of all affected parties and their agents.

It is inappropriate for operating companies to escape liability for their actions, and thus expect other dedicated members of the private sector to invest in an area to 'clean up' what is essentially their mess.

Such an approach is antithetical towards true sustainability and poverty alleviation.

While we support any increase in overseas development assistance support, we

also believe that it must be anchored in genuine empowerment and a human rights approach to poverty alleviation.

FUTURE RISKS POSED BY CLIMATE CHANGE

We submit that one of the largest contributors to poverty in the Indo-Pacific region in the foreseeable future, will be climate change. One likely consequence of climate change will be associated storm damage wreaked upon offshore exploration rigs, thus leading to increased risk of oil spills; environmental damage; severe economic loss and poverty.

If such situations occur, targeted and strategic private investment in income generation projects may be rendered ineffective, as income generation projects dependent upon the sea as a resource for aquaculture or fishing industries, will suffer irreparable damage.

Generous contributors from the private sector with a focus on corporate social responsibility must not bear the burden of another company's breach of duty of care.

In moving forward, there must be a significant deterrent and understanding given to companies that any damage resulting from their own negligence must be effectively investigated and remunerated.

THE NEED FOR AN INTERNATIONAL CONVERSATION

Given that the offshore exploration industry is expanding in the waters of Timor Sea, and in the Asia-Pacific region, there is a need for further consideration of issues regarding transboundary damage and the subsequent position that governments may take to ensure that polluting companies are expected to be held responsible to a high degree; thus ensuring an effective deterrent against negligent operations.

We note that no international convention regarding transboundary damage currently exists.

With Australia possessing one of the largest coastlines and exclusive economic zones in the world, we are well placed as a nation in contributing to an international conversation about damage springing from offshore exploration rigs, including

transboundary damage.

This issue also has relevance to the Australian economy, with proposed expansions in the Timor Sea; South Australian Bight; and in waters of the Northern Territory, with Australian businesses threatened by a lack of appropriate protections.

CONCLUSION

In the US, following the BP Deepwater Horizon spill in the Gulf of Mexico in 2010, President Barack Obama ensured that the company responsible for the spill, BP, paid \$20 billion into a trust fund for clean up costs and compensation for survivors.⁷

We note the deep contrast with Australia, in which the company responsible has not paid a cent of compensation to communities claiming to be affected in East Nusa Tenggara, Indonesia.

Furthermore, recent media reports indicate that the company is attempting to sell down its assets in the Montara field.⁸

One major impediment upon the private sector engaging effectively in international development, is any perceived 'undoing' of positive and sustainable work. This would occur in situations of damage and injury which are caused by the acts and omissions of other companies who have not been held appropriately responsible.

We submit that the Committee considers further the issues that we have raised. We are happy to elaborate upon any of the issues that we have raised at subsequent public hearings.

REFERENCES

¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

² ABC News, 'Australian oil disaster 'costing Indonesians billions'', Thursday 26 July 2012. Accessed at <http://www.abc.net.au/news/2012-07-26/australian-oil-disaster-costing-indonesians-billions/4155474>

³ Australian Government, Department of Foreign Affairs and Trade, *Indonesia, 'How we are helping'* <http://aid.dfat.gov.au/countries/eastasia/indonesia/Pages/home.aspx> last reviewed 18 January 2014, accessed 3 February 2014.

⁴ Report of the Montara Commission of Inquiry, (2010) at 11.

⁵ Report of the Montara Commission of Inquiry, (2010) at 11.

⁶ Report of the Montara Commission of Inquiry (2010) at 26.

⁷ Tim Webb and Tim Hill, 'BP to pay out \$20bn over oil spill after Obama meeting,' *The Guardian*, 17 June 2010. Accessed at <http://www.theguardian.com/environment/2010/jun/16/bp-20bn-trust-oil-spill>



⁸ Peter Slinger, 'Timor Sea up for grabs,' *The West Australian*, 10 April 2014, <https://au.news.yahoo.com/thewest/business/wa/a/22515134/timor-sea-stake-up-for-grabs/>; Bridget Carter and Matt Chambers, 'Thais in \$2 billion WA gasfield sell off,' *The Australian*, 28 March 2014, <http://www.theaustralian.com.au/business/mining-energy/thais-in-2bn-wa-gasfield-selloff/story-e6frg9df-1226866833239#>.