



JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE
FOREIGN AFFAIRS AND AID SUB-COMMITTEE

PO Box 6021, Parliament House, Canberra ACT 2600 | Phone: (02) 6277 2313 | Fax: (02) 6277 2221 | Email: jscfadt@aph.gov.au | www.aph.gov.au/jfadt

4 September 2014

Ms Rachel Ball
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

Dear Ms Ball

**Inquiry into the role of the private sector in promoting economic growth
and reducing poverty in the Indo-Pacific region**

I am writing to inform you of developments relating to the current inquiry by the Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade into the role of the private sector in promoting economic development and reducing poverty in the Indo-Pacific region.

As stated in my previous correspondence, the Sub-Committee has discretion whether to publish submissions received. As a general principle, the Sub-Committee aims to publish as much written evidence as possible, except where there is a legitimate reason for not doing so. Parliamentary committees can also authorise the publication of submissions with certain information removed.

After careful consideration of both the submission and responses from parties adversely reflected upon, the Sub-Committee decided to accept the Human Rights Law Centre's submission and authorise its publication. However, this was qualified by a decision to redact cases that were determined not to be directly relevant to the inquiry.

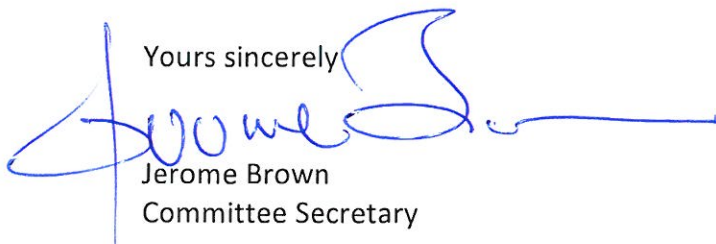
As a consequence of the Sub-Committee's decision, please be aware of the following:

1. Only the modified version of your submission attached to this letter or appearing on the Sub-Committee's website has been authorised for publication.
2. Publishing your submission in its original form, without Sub-Committee authorisation, would not attract parliamentary privilege and may amount to contempt of parliament.
3. Whilst the original version of your submission must remain confidential, copies are accessible to Sub-Committee members.
4. To the extent possible, the Sub-Committee has facilitated publication in a way that retains the essence of your submission's narrative.

Should you have questions about the status of your submission, please contact the inquiry secretary by email at vikki.darrough.reps@aph.gov.au or by phone on (02) 6277 4306.

Thank you again for your contribution to the Committee's inquiry.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jerome Brown', with a long horizontal flourish extending to the right.

Jerome Brown
Committee Secretary



Business and Human Rights in International Development

Submission on the role of the private sector in promoting
economic growth and reducing poverty in the Indo-Pacific region

May 2014

www.hrlc.org.au

Freedom. Respect. Equality. Dignity. **Action.**

About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

Follow us at <http://twitter.com/rightsagenda>

Join us at www.facebook.com/pages/HumanRightsLawResourceCentre

Contents

1.	Executive Summary	2
1.1	Background	2
1.2	Scope of this submission	2
2.	Human rights risks	4
2.1	Business' human rights impacts	4
2.2	Australian Government Exposure	6
3.	Protecting human rights	7
3.1	Australia's human rights obligations	7
3.2	The 'Protect, Respect and Remedy' framework	8
3.3	The Guiding Principles	9
3.4	Recommendations	11

1. Executive Summary

1.1 Background

The Joint Standing Committee on Foreign Affairs, Defence and Trade (the **Committee**) has called for submissions on the role of the private sector in promoting economic growth and reducing poverty in the Indo-Pacific region.

The Committee's inquiry provides a timely opportunity to assess the Australian Government's 'new paradigm in development assistance', which the Minister for Foreign Affairs, Julie Bishop, outlined on 29 April 2014 in her Magna Carta Lecture, titled *A new paradigm in development assistance – harnessing the private sector*.¹

The Government's new paradigm focuses on 'sustainable economic growth driven by the private sector' and directs Australia's development assistance towards the pursuit of economic growth through the promotion of free markets, trade agreements and private sector development.² The Government's aid and development agenda is also intended to align with Australia's diplomatic and security efforts and deliver economic opportunities for Australian companies.³

1.2 Scope of this submission

This submission by the Human Rights Law Centre (**HRLC**) responds to the sixth of the Committee's terms of reference, namely the 'risks related to current and possible future approaches to enhancing the role of the private sector in development, and their management', with a specific focus on human rights risks.

While the private sector has the capacity to contribute to economic growth, poverty alleviation and human development, businesses can also violate human rights. Aid effectiveness principles and Australia's international human rights obligations require that aid and development initiatives that involve supporting or partnering with corporations must incorporate effective safeguards to protect human rights and facilitate remedies for victims where violations occur.

¹ Julie Bishop, '2014 Magna Carta Lecture: A new paradigm in development assistance – harnessing the private sector' (Speech delivered at the Parliament of Victoria, 29 April 2014) available at <https://www.gov.au/government/world-location-news/transcript-magna-carta-lecture-2014>

² Ibid.

³ Ibid.

Following her Magna Carta lecture, Julie Bishop was asked about how the Government would assess and respond to the human rights risks associated with the new development paradigm. In her response, the Minister stated that Australia ‘would not partner with companies that violate human rights.’ This submission sets out ways in which the Australian Government might operationalise that commitment, primarily through identifying human rights risks, preventing violations and ensuring access to a remedy where abuses do occur.

Section one of this submission discusses the human rights risks associated with a development strategy that prioritises and promotes private sector growth. Section two outlines Australia’s obligations under the international human rights framework with particular emphasis on the UN Guiding Principles on Business and Human Rights. Section three makes recommendations for how Australia’s obligations might be met in the context of Australia’s new development paradigm.

This submission focuses on human rights compliance, rather than aid effectiveness (though there is significant overlap between the two).⁴ It does not, for example, examine the Government’s threshold assumption that economic growth is an effective strategy for poverty alleviation. However, there is a significant body of evidence that contradicts that assumption on the basis that trade liberalisation and private sector development can contribute to increased income inequality to the detriment of the world’s poor.⁵

As Ms Bishop stated in her Magna Carta lecture, ‘[r]apid economic expansion has lifted national incomes in emerging economies, but not all citizens have shared in the growth’.⁶ The HRLC urges the Committee to consider the implications of this reality when considering the emphasis placed on the role of the private sector in reducing poverty.

Recommendation 1: The Committee should consider the effectiveness of private sector development as a poverty alleviation strategy. In particular, the Committee should examine the capacity of this approach to benefit sections of the population that are less likely to participate in the formal economy or access the benefits of economic growth. These groups include women, Indigenous peoples, people with disability and people living in extreme poverty.

Recommendation 2: The Australian Government should develop a National Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights. A National

⁴ Amartya Sen, *Development as Freedom* (Oxford University Press, Oxford, 1999) 36.

⁵ See, for example, United Nations Development Program, *Humanity Divided: Confronting Inequality in Developing Countries* (2014); Turner and Rovamaa (CAFOD), *Aid for Trade: Reviewing EC and DfID Monitoring and Evaluation Practices; Reality of Aid, Aid and the Private Sector: Catalysing Poverty Reduction and Development* (2012).

⁶ Julie Bishop, above n1.

Action Plan would ensure a consistent, whole-of-Government approach to Australia's duty to protect people from corporate human rights violations.

Recommendation 3: The Department of Foreign Affairs and Trade (DFAT) should conduct its own human rights due diligence of aid and development projects and require its private sector partners to do the same.

Recommendation 4: DFAT should make a clear commitment that it will not partner with or support companies or projects responsible for human rights violations.

Recommendation 5: DFAT should establish a grievance mechanism for its aid and development program. The grievance mechanism should be effective, transparent and accessible for people affected by DFAT projects and should be responsible for investigating and remedying human rights abuses when they occur.

2. Human rights risks

2.1 Business' human rights impacts

In the course of globalisation, the impact of business activity on the world's poor has increased and has not been matched by a globalisation of business regulation. As a result, corporate activity has, in some cases, led to significant human rights violations, particularly in conflict zones or places with weak governance.

Australian business enterprises and their subsidiaries have been directly involved in corporate human rights abuses overseas, and indirectly involved as investors, importers or financial service providers. The following examples illustrate the potential for Australian business to contribute to human rights violations overseas.

(a) *Funding land grabs*

In April 2014 Oxfam Australia released a report accusing Australia's big four banks of backing companies responsible for land grabs in developing countries.⁷

⁷ Oxfam Australia, *Banking on Shaky Ground – Australia's big four banks and land grabs* (2014).

(b) Rana Plaza

On 24 April 2013, Rana Plaza, an eight storey building in greater Dhaka, Bangladesh, collapsed killing 1100 workers and injuring 2,500. The Rana Plaza housed several garment factories which reportedly supplied major global brands, including Benetton, Primark and Walmart.

Reports emerged following the collapse that the building was structurally unsound and that, despite the appearance of cracks, a factory manager had assured workers that it was safe to enter.

(c) Kilwa Massacre

On 14 October 2004 there was a small-scale uprising in the town of Kilwa in the Democratic Republic of the Congo (DRC). The following day soldiers from the Congolese Armed Forces (FARDC) moved into the town and captured or killed the rebels as well as a significant number of civilians. At the end of the FARDC raid, over 70 people had been killed and many more raped and injured by the troops.⁹

⁹ United Nations Organization Mission in the Democratic Republic of Congo (MONUC), 'Report on the conclusions of the Special Investigation into allegations of summary executions and other violence of human rights committed by the FARDC in Kilwa' (Province of Katanga) on 15 October 2004.

2.2 Australian Government Exposure

DFAT programs that seek to harness the private sector (including the Mining for Development Initiative, the 'aid for trade' policy and increased private sector involvement in the delivery of aid) expose DFAT to the risk of supporting or being complicit in corporate human rights abuses. This risk is most clearly illustrated in DFAT's financial support for large-scale mining operations in developing countries through the Mining for Development Initiative and other development programs. Mining projects have long been associated with multiple negative development and human rights outcomes collectively referred to as the 'resource curse'. Key attributes of the resource curse include forced displacement, violent suppression of anti-mining activists and environmental damage. Negative impacts are often acutely felt by the most vulnerable, particularly Indigenous communities and women.¹¹

Without proper scrutiny of the human rights risks and impacts of a mining operation, the Australian Government risks lending its support to companies that violate human rights and threaten economic and social development.

For example, in 2012 DFAT's Direct Aid Program provided money to Paladin to support one of its corporate social responsibility programs in Malawi.¹² Aside from being corporate welfare under a guise of development assistance, this partnership provides tax-payer funded support for a highly controversial mining project. Paladin's operations in Malawi have been criticised by international experts and civil society actors who claim that they have performed poorly in the area of corporate social responsibility and that they operate on extremely favourable terms, paying very little tax on earnings in Malawi.¹³ It is unclear what, if any, assessment of the human rights and development impacts of the mine was carried out before the Government decided to lend its support.

¹¹ See, for example, Macartan Humphreys, Jeffrey D. Sachs, and Joseph E. Stiglitz (eds.), *Escaping the Resource Curse* (2007); Special Rapporteur on the rights of indigenous people, *Extractive industries and indigenous peoples*, UN doc A/HRC/24/41, 1 July 2013; Ingrid Macdonald and Claire Rowland (eds), *Tunnel vision: women, mining and communities* (Oxfam, 2002).

¹² Rory Callinan, 'Firms use tax money for aid projects', *Sydney Morning Herald*, 30 January 2013.

¹³ ABC News, 'Malawi missing out on fair share of mining benefits', 26 July 2013; Agence de Presse Africaine, 'Government told to renegotiate Paladin uranium deal', 7 December 2012.

3. Protecting human rights

3.1 Australia's human rights obligations

Australia has ratified and accepted obligations under all of the core international human rights treaties to protect and promote human rights, including the two main human rights treaties – the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.¹⁴

Australia is also party to five international treaties created to ensure the specific recognition and protection of particular groups and particular human rights, namely the:

- (a) *International Convention on the Elimination of all Forms of Racial Discrimination*;¹⁵
- (b) *Convention on the Elimination of all Forms of Discrimination against Women*;¹⁶
- (c) *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*;¹⁷
- (d) *Convention on the Rights of the Child*;¹⁸ and the
- (e) *Convention on the Rights of Persons with Disabilities*.¹⁹

Australia has an obligation to respect, protect and fulfil the rights contained in the treaties listed above. Under international law this includes a direct legal obligation on States to protect against the commission of human rights violations by non-State actors, including business entities, within their jurisdiction.²⁰ It also includes an obligation to assess and monitor the human rights impacts of its international cooperation and to ensure that there are adequate complaints and remedial mechanisms in place if violations do occur.²¹

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

¹⁵ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

¹⁶ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹⁷ Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁹ Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

²⁰ *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988); John Ruggie - United Nations Special Representative, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/4/35 (2007), paragraph 18.

²¹ *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, January 2013, available at <http://www.etoconsortium.org/en/library/maastricht-principles/>; Committee on

In 2010 the Committee on the Elimination of All Forms of Racial Discrimination noted with concern the absence of an adequate legal framework regulating the obligations of Australian corporations at home and overseas. The Committee encouraged Australia to:²²

take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the enjoyment of rights... and to regulate the extraterritorial activities of Australian corporations abroad.

Similarly, in 2012 the Committee on the Rights of the Child raised concerns regarding the impact of Australian corporations' activities on children, and recommended that, among other things, Australia:²³

Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations.

The obligation on States to regulate the actions of business has been the subject of detailed consideration by the UN Special Representative on Business and Human Rights and is discussed below.

3.2 The 'Protect, Respect and Remedy' framework

In 2005, the UN Human Rights Commission requested that the UN Secretary General appoint a Special Representative with a mandate to identify standards of corporate responsibility and accountability regarding human rights and the respective roles of both states and business in this area. As a result of that mandate, in 2008 the Special Representative, Professor John Ruggie, and his team produced the 'Protect, Respect and Remedy' Framework (the 'UN Framework'). The UN Framework comprises three pillars:

- **Pillar 1** - the **state duty to protect** those within the State's jurisdiction from human rights impacts, including by corporations;
- **Pillar 2** - the **corporate responsibility to respect human rights**, including the role of due diligence in meeting this obligation, and the need to avoid corporate complicity in the human rights violations of others; and

Economic, Social and Cultural Rights, Concluding Observations on China 40th session, UN Doc. E/C.12/CHN/CO/2, 23 May 2014 [12].

²² Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia, 77th session, UN Doc. CERD/C/AUS/CO/15-17, 13 September 2010.

²³ Concluding Observations of the Committee on the Right of the Child: Australia, 60th session, UN Doc. CRC/C/AUS/CO/4, 28 August, 2012

- **Pillar 3** - the need for greater **access to remedies** for those affected by corporate human rights impacts at the international, regional, national, and company levels.

3.3 The Guiding Principles

Following additional and extensive consultation with all key stakeholders – including governments, business, experts, various affected communities, and civil society – Professor Ruggie published the *Guiding Principles on Business and Human Rights*.²⁴ The UN Human Rights Council unanimously endorsed the Guiding Principles in 2011.

Since their publication, the influence of the Guiding Principles on national and international policy and approaches to regulation has been significant and continues to grow. The Guiding Principles represent a global standard of conduct for all business enterprises wherever they operate.

The Guiding Principles were designed to 'operationalise' the three pillars of the UN Framework; that is, to provide concrete and practical recommendations for its implementation. Each pillar is an essential component in an inter-related system of preventative and remedial measures.

Broadly speaking, under the Guiding Principles companies are expected to:

- avoid causing or contributing to adverse human rights impacts through their own activities; and
- prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not directly contributed to those impacts.

Under the Guiding Principles States are required to take all reasonable measures to investigate, prevent, punish and redress business-related human rights violations through adjudication, legislation, policies, and regulations. In the case of the extraterritorial operation of business, the Guiding Principles provide:

there are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State is itself involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

Finally, the Guiding Principles recognise that 'unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur,

²⁴ The UN Guiding Principles on Business and Human Rights are available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

the State duty to protect can be rendered weak or even meaningless.²⁵ Accordingly, States are required to ensure that remedies are available to victims of human rights abuses through accessible and effective judicial and non-judicial mechanisms.

Guiding Principles four and five are particularly relevant as they outline the steps that Governments should take when they influence or support companies' overseas operations, including conducting and requiring human rights due diligence. Human rights due diligence involves 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.²⁶

Guiding Principles four and five are set out below, along with extracts from the UN's official commentary.

- (a) *Guiding Principle Four: States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.*

Commentary to Guiding Principle 4 provides:

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, **an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations.** Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

...

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, **development agencies** and development finance institutions. **Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.**

²⁵ Ibid [25].

²⁶ Ibid [17].

Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights. [Emphasis added.]

- (b) *Guiding Principle Five: States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.*

Commentary on Guiding Principle Five provides:

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the **relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.** [Emphasis added.]

3.4 Recommendations

Australia's efforts to work with the private sector to promote economic growth and reduce poverty in the Indo-Pacific region must recognise and respond to human rights risks. The UN's former Special Representative on Business and Human Rights, Professor John Ruggie, has recommended that any partnerships between the public and private sectors should:²⁷

include in their governance arrangements measures to reinforce existing state duties as well as corporate due diligence processes to avoid adverse impacts, and to address them where they do occur. Multi-stakeholder initiatives should also ensure they have in place effective grievance mechanisms consistent with the provisions set out in the guiding principles.

Accordingly, the Human Rights Law Centre recommends the following:

Recommendation 1: The Committee should consider the effectiveness of private sector development as a poverty alleviation strategy. In particular, the Committee should examine the capacity of this approach to benefit sections of the population that are less likely to participate

²⁷ John Ruggie, "Making public-private partnerships work", 11 September 2013, available at <http://www.trust.org/item/20130911091253-vmh6s/>.

in the formal economy or access the benefits of economic growth. These groups include women, Indigenous peoples, people with disability and people living in extreme poverty.

Recommendation 2: The Australian Government should develop a National Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights. A National Action Plan would ensure a consistent, whole-of-Government approach to Australia's duty to protect people from corporate human rights violations.²⁸

Recommendation 3: DFAT should conduct its own human rights due diligence of aid and development projects and require its partners in the private sector partners to do the same.

Recommendation 4: DFAT should make a clear commitment that it will not partner with or support companies or projects responsible for human rights violations.

Recommendation 5: DFAT should establish a grievance mechanism for its aid and development program. The grievance mechanism should be effective, transparent and accessible for people affected by DFAT projects and should be responsible for investigating and remedying human rights abuses when they occur.

²⁸ For more information on National Action Plans on the implementation of the Guiding Principles on Business and Human Rights, including information on plans recently released by the UK, the Netherlands and Denmark, see the Human Rights Law Centre's briefing paper, available here: http://hrlc.org.au/wp-content/uploads/2014/04/National_Action_Plan_on_Business_and_Human_Rights_backgroundpaper_2014.pdf