# REGULATORY REFORM OF AUSTRALIA'S OFFSHORE OIL AND GAS SECTOR AFTER THE MONTARA COMMISSION OF INQUIRY: WHAT ABOUT TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT?

SIMON MARSDEN[†]

The huge scope of environmental harm from the Montara and Deep Water Horizon oil spills in Australia's northern waters and the Gulf of Mexico in 2009 and 2010 respectively, and the need to improve the regulatory frameworks in respect of each, provide a timely opportunity to examine how best to avoid transboundary harm and consequent liability. In Australia, a Commission of Inquiry reported on the Montara incident in 2010 and it is anticipated that the Australian Government will have completed the implementation of the accepted recommendations by the end of 2013. This article considers these recommendations and their implementation, focusing in the final section on the striking absence of transboundary environmental impact assessment (transboundary EIA) either in relation to the original permitting of Montara, the findings of the Inquiry, or subsequent reform.

## I INTRODUCTION

Regulation of Australia's offshore oil and gas industry underwent significant reform following a major uncontrolled release at the Montara oilfield in the Timor Sea in 2009, which caused environmental harm to the marine environment and allegedly

[†] Simon Marsden is an Associate Professor in the School of Law, Flinders University, Adelaide, Australia.

extended as far as Indonesia and East Timor.[1] This article examines this reform and implications for Australia and its neighbours, in particular whether anything has been done to ensure that states such as Indonesia are given prior notice of proposed offshore oil and gas development, in particular the opportunity to take part in the process known as transboundary environmental impact assessment (EIA). This process was strikingly absent from the regulatory regimes enabling Montara, and as this article will show, continues to be ignored by Australian policy makers and legislators despite the Montara spill.

Transboundary EIA is a precautionary decision-aiding tool which assesses the environmental impacts of activities conducted by one or more nations upon others.[2] The failure by France to appropriately inform Australia about French nuclear tests in the South Pacific first introduced Australia to the importance of this process.[3] More recently, the huge scope of environmental harm from the Montara and Deep Water Horizon oil spills in Australia's northern waters and the Gulf of Mexico, highlighted the need to improve regulatory frameworks and provided a timely opportunity to examine how best to avoid transboundary harm and consequent liability.[4] As the focus of most legal analysis has been on the latter,[5] including a proposal for a convention on offshore hydrocarbon leaks,[6] this contribution emphasises in the final section the relevance of precautionary approaches, in particular the role of transboundary EIA.

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1 David Weber, 'Timor Sea Oil Leak Reached Indonesia,' *ABC News*, 25 May 2011.

2 Kees Bastmeijer and Timo Koivurova (eds), *Theory and Practice of Transboundary EIA* (Martinus Nijhoff, 2008); Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press, 2008).

3 *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253

4 Tina Hunter, 'The BP Oil Spill and Australia...Is There a Connection?' (2010) 16 *The National Legal Eagle.*

5 Shane Bosma, 'The Regulation of Marine Pollution arising from Offshore Oil and Gas Facilities – an Evaluation of the Adequacy of Current Regulatory Regimes and the Responsibility of States to Implement a New Liability Regime' (2012) 26 *Australian and New Zealand Maritime Law Journal* 89.

6 Steven Rares, 'An Offshore Convention on Offshore Hydrocarbon Leaks' (2012) 26 *Australian and New Zealand Maritime Law Journal* 10.

Transboundary EIA is relevant because of reports from Indonesia and East Timor of impacts upon marine and coastal environments. While criticism of poor management was levelled at the owners/operators of the rig rather than the Australian government, there is clear potential for state liability in relation to the spill and hence potential for transboundary EIA to be applied in the future to assist in prevention of future spills. The article therefore examines Australia's position and the effectiveness of the domestic regulatory regime. Reform options in regard to the offshore oil and gas industry and applicable environmental controls are outlined and evaluated.

## II THE MONTARA OIL AND GAS SPILL AND COMMISSION OF INQUIRY

On 21 August 2009 there was an uncontrolled release of oil and gas from the Montara Wellhead Platform in the Timor Sea, operated by PTTEP Australasia (Ashmore-Cartier) Pte Ltd, which continued unabated for ten weeks. It was the worst incident of its kind in Australia's offshore petroleum history and the third largest oil spill in Australia's history, following two oil tanker incidents in 1975 and 1991. The oil spill raised many issues needing to be investigated, a role tasked to the Montara Commission of Inquiry, which was established two days after the leak was stopped on 5 November 2009 and which was given the powers of a Royal Commission to ensure a rigorous and comprehensive investigation was undertaken. The proceedings of the Inquiry were followed by the USA White House Commission investigating the Deepwater Horizon rig incident in 2010 and both had implications for regulatory reform in Australia.[7]

The Commission examined whether the owner/operator had

[7] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling*, Final Report, Report to the President, (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011), <http://www.oilspillcommission.gov/final-report>.

exercised its responsibilities diligently and whether regulatory oversight was also diligent. Submissions were invited, notices seeking documents issued and a public hearing was conducted resulting in the release of a public report.[8] Conclusions reached included that the operator did not observe sensible oilfield practices, with major shortcomings in the company's procedures being 'widespread and systematic', and 'directly leading to the blowout.' It was also found that the Northern Territory Department of Resources was 'not a sufficiently diligent regulator,' which should not have approved a phase of the drilling program as it did not reflect sensible oilfield best practice. Overall, it also adopted a 'minimalist approach to its regulatory responsibilities.'[9]

## III REGULATORY REFORM OF ENVIRONMENTAL PROTECTION REQUIREMENTS

Although the focus of the Commission was upon the roles of the operator and the Northern Territory regulator, other regulatory shortcomings came to light, resulting in recommendations for reform of environmental protection requirements, the overall focus of this article. Of particular relevance are the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act), and the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (OPGGS Act), both national statutes. The first provided for the initial approval for the operator to develop the Montara Oilfield on 3 September 2003. The application of this is explained to proponents in advice to applicants intending to apply for a permit to explore and develop offshore acreage, which contains a section on environment protection requirements.[10] This ensures that development in a Commonwealth marine area is classed as a matter of National

[8] David Borthwick, *Report of the Montara Commission of Inquiry* (Commonwealth of Australia, 2010) ('*Inquiry Report'*).

[9] Ibid 6.

[10] Department of Resources, Energy and Tourism, *Offshore Petroleum Acreage Release: Exploring and Investing in Australia (Overview for Applicants)* (Commonwealth of Australia, 2010).

Environmental Significance and hence requires permission from the Australian Government before it can proceed.

The Commission agreed with the now Department of Sustainability, Environment, Water, Population and Communities (SEWPaC, the national department responsible for the EPBC Act) that it would not have been possible to impose different conditions to the six attached to the initial approval of the Montara Oilfield that would have prevented the blowout, and in fact these conditions were met by the operator. The difficulty was that once development was approved under this statute the compliance, offence and penalty provisions only related to the specific conditions of the approval. As such, action could not be taken against the operator because there was no breach of any condition. This was the conclusion of Finding 87, which stated: 'It is extraordinary that despite the environmental consequences, in the case of the Blowout there seems to be no ground for action under the Commonwealth's premier environmental legislation.'[11]

Other deficiencies identified in the application of the EPBC Act were that there was no equivalent state or territory legislation that would also apply in the case of Commonwealth marine areas. The Montara Commission of Inquiry Report comments:

> In short, there is a major gap in the application of environmental legislation applying to Commonwealth waters. The environmental regulation needs to be equivalent to that which would apply if the oil spill had been on land or in state waters. This should include a capacity to issue fines for pollution on a no-fault basis.[12]

Recommendations in the Hawke Report, (which evaluated the effectiveness of the EPBC Act), for Environment Protection Orders to stop or remediate environmental harm are endorsed by the Inquiry

[11] *Inquiry Report*, above n 8.
[12] Ibid 25.

Report as consistent with provisions in the states and territories,[13] and to implement the polluter pays principle.[14] The EPBC Act requires an Oil Spill Contingency Plan as a condition of approval, which is further required under the *OPGGS (Environment) Regulations* 2009. The need to incorporate monitoring requirements in the event of an oil spill was identified by the Commission of Inquiry, and that this be consistent with the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances, a requirement under an international treaty to which Australia is a party.[15] The Regulations further require an Environment Plan for every proposed petroleum activity, which aim to reduce environmental risks and impacts to as low a level as possible.

The development of the Montara Oilfield was approved under these regulations by the Northern Territory Department of Resources, as delegate of the Designated Authority, the Australian Government. The complex inter-jurisdictional arrangements in place were criticised,[16] and the Report of the Inquiry recommended a single National Offshore Petroleum Regulator be established.[17] Two plans were considered by the Northern Territory regulator: the Production and Exploration Drilling Environment Plan, approved in 2007, and the Installation and Commissioning Environment Plan, approved in 2009. The Inquiry Report recommended a single environment plan be submitted to meet the regulatory requirements of both the OPGGS Act and EPBC Act.[18] As with the initial assessment under the EPBC Act, both of these plans examined the possibility of a large oil spill.

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13 Allan Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2009) 314 (‘*Hawke Report*’).

14 Ibid 315.

15 See Tina Hunter, ‘The Montara Oil Spill and the Marine Oil Spill Contingency Plan: Disaster Response or Just a Disaster?’ (2010) 24 *Australian and New Zealand Maritime Law Journal* 46.

16 Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (Commonwealth of Australia, 2009).

17 *Inquiry Report*, above n 8, 225, 233.

18 Ibid 316.

# IV IMPLENTATION OF THE RECOMMENDATIONS BY GOVERNMENT

The Report made 21 recommendations proposing legislative amendments to the regulatory regime for offshore petroleum and marine environment (Commonwealth waters). The Final Government Response to the Report of the Montara Commission of Inquiry (Final Government Response), which was released by the Commonwealth Government on 23 May 2011, accepted each of these,[19] and included an Implementation Plan setting out steps to be taken to ensure their operationalisation.

The Implementation Plan committed the Government to undertake by June 2012 a review of Commonwealth legislation applicable to the offshore petroleum activities and the marine environment. This review has now been concluded and a subsequent report published in September 2012 details progress against the Implementation Plan of the Final Government Response.[20] This Implementation Plan organised the recommendations into a number of key themes, including the regulatory regime.

Improvements to this regime have included amendment of the OPGGS Act to establish the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), on 1 January 2012. This is the new national regulator in Commonwealth waters for safety, well integrity, environmental regulation and day-to-day operations of petroleum activities, the viability of which has been

[19] Australian Government, *Final Government Response to the Report of the Montara Commission of Inquiry* (Commonwealth of Australia, 2011), <http://www.ret.gov.au/Department/Documents/MIR/FinalMontaraCommissionInquiryReport.pdf>.

[20] Australian Government, *Progress Report on Implementation of the Recommendations of the Montara Commission of Inquiry* (Commonwealth of Australia, 2012) ('*Progress Report*'), <http://www.ret.gov.au/Department/responses/montara/recommendations/Pages/deafult.aspx>.

questioned given the complexities of federalism in Australia.[21] A new national titles administrator, the National Offshore Petroleum Titles Administrator (NOPTA), has also been established.

On 24 August 2011, the Australian Government furthermore released its response to the Hawke Report on the effectiveness of the EPBC Act.[22] As part of this, the Government agreed to streamline the environmental approvals process between the OPGGS Act and the EPBC Act and noted options would be available under the amended EPBC Act, if approved to be known as the *Australian Environment Act*, to accredit the systems and processes administered by NOPSEMA.[23] Discussions are ongoing between NOPSEMA and SEWPaC to progress this streamlining.[24]

One of the proposals made by the Australian Government as noted in the Progress Report of September 2012 is that by June 2013, it would undertake an assessment of whether Australia's international treaty obligations relating to the marine environment that apply to offshore petroleum activities are sufficiently provided for in the marine environment and offshore petroleum legislative regimes.[25] While this is appropriate, it fails to recognise that Australia's international obligations include customary international law as well as treaty law. This is important where there may be no specific treaty obligations for transboundary EIA. Obligations in treaty law and customary international law are considered below.

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21 Tina Hunter, 'Australian Offshore Petroleum Regulation after the Varanus Island Explosion and the Montara Blowout – Drowning in a Sea of Federalism? (2011) 25 *Australian and New Zealand Maritime Law Journal* 69.

22 Australian Government, Department of Sustainability, Environment, Water, Population and Communities, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2011).

23 *Progress Report*, above n 20, r 66.

24 Ibid part 1a.

25 Ibid.

# V WHAT ABOUT TRANSBOUNDARY EIA?

What neither the initial permitting plans of the NT regulator nor the initial EPBC Act assessment addressed were the transboundary environmental effects of a large oil spill, which should have been subject to transboundary EIA. The assessment and approvals provisions of the EPBC Act furthermore also do not contain any requirements for transboundary EIA. Neither are there any requirements for the environmental effects of these plans to be subject to any form of EIA. The Inquiry Report emphasises the need for the OPGGS plans to be consistent with the EPBC Act approval,[26] which includes publication of the plans,[27] but fails also to recognise either the practical importance of transboundary EIA, nor that since the Inquiry Report it is now a recognised obligation of customary international law by which Australia is bound, even though the content of such an obligation remains at the discretion of the states concerned.[28]

The reason transboundary EIA should have been a feature was that a large oil spill clearly had potential to affect other states, especially Indonesia. The Montara slick was claimed to have polluted 16,420sq km of Indonesian territorial waters, and the provincial government of East Nusa Tenggara, which includes West Timor, is suing the operators for about $120 million in compensation for 3500 pearl farmers, fishermen and seaweed farmers;[29] the Indonesian Government itself has also considered a claim against

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[26] *Inquiry Report*, above n 8, 312.

[27] Ibid 314.

[28] *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* (International Court of Justice, General List No 135, 20 April 2010). See Timo Koivurova, 'Transboundary Environmental Impact Assessment in International Law' in Simon Marsden and Timo Koivurova, *Transboundary Environmental Impact Assessment in the European Union: The Espoo Convention and its Kiev Protocol on Strategic Environmental Assessment* (Earthscan, 2011) 15, 23-25.

[29] Keith Orchison, 'Lessons from the Montara Spill,' *The Weekend Australian*, 26-29 August 2010.

PTTEP Australasia.[30] The Australian Government furthermore could in addition find itself liable under the rules of customary international law, in particular the need to prevent harm to its neighbours, and consideration has been given to claims from both the Governments of Indonesia and Timor Leste.[31] The position of the Australian Government has been noted by Australian politicians, who have argued more should be done in this respect including payment of compensation.[32]

Like domestic EIA, transboundary EIA evaluates likely significant environmental effects from proposals and alternatives.[33] Unlike domestic EIA, transboundary EIA obliges the state responsible for the proposal (the 'origin state') to provide information to another jurisdiction (or jurisdictions) (the 'affected state'), and allow relevant stakeholders and the public in the affected state to provide information to the decision-maker in the origin state. Transboundary EIA is most popular in regions where states share terrestrial boundaries and are concerned about the transborder effects on their land, water and air.[34] As an island with few close neighbours, Australia has relatively limited experience with transboundary EIA and transboundary environmental harm.

However examples of environmental harm involving Australia include the *Nuclear Test* cases heard by the International Court of Justice,[35] and oil and gas development under the *Timor Gap*

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30 Adianto Simamora, 'Indonesia to Make Formal Claim in Timor Spill,' *The Jakarta Post* (Jakarta), 24 August 2010.

31 Jafar M Sidik, 'Waiting for Australia's Goodwill on Montara Spill,' *Antara News*, 25 January 2010.

32 Weber, above n 1.

33 Wiek Schrage and Nicholas Bonvoisin, 'Trans-boundary Impact Assessment: Frameworks, Experiences and Challenges' (2008) 26 *Impact Assessment and Project Appraisal* 234.

34 See *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 30 ILM 800 (entered into force 10 September 1997).

35 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New*

*Treaty*.[36] Treaty law and customary international law may also require the application of EIA in certain circumstances, including in a transboundary context. Under the *UN Convention on the Law of the Sea* (UNCLOS) for example, Article 206 makes specific provision for EIA, as follows:

> When states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments.[37]

The limitations of this obligation have been discussed in the literature, and include its subjectivity.[38] Calls for more specific treaty obligations in the context of offshore oil and gas development have suggested UNCLOS as a framework treaty for this purpose,[39] but have focused on liability rather than precaution, ignoring the importance of transboundary EIA in assisting to prevent disasters in the first place. Harm can certainly be caused to or by Australia and liability and compensation are important issues.[40] However there is substantial potential for much greater use of transboundary EIA in this region. Australia shares maritime boundaries with Indonesia, East Timor, Papua New Guinea, the Solomon Islands, New Zealand, and France (New Caledonia and the Kerguelen Islands). Australia is also active in the protection of Antarctica. Underwater pipeline

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*Zealand v France)* [1995] ICJ Rep 288; see also, *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253.

36 See 'Application by Portugal', *East Timor (Portugal v Australia)*, International Court of Justice, General List No 84, 22 February 1991.

37 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force generally 16 November 1994).

38 Warwick Gullett, 'Transboundary Environmental Impact Assessment in Marine Areas' in Robin Warner and Simon Marsden, *Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives* (Ashgate, 2012) 269, 289-290.

39 Rares, above n 6, 12.

40 Purnama Dadang, 'Review of Transboundary Environmental Impact Assessment: A Case Study from the Timor Gap' (2004) 22 *Impact Assessment and Project Appraisal* 17.

projects,[41] and offshore oil and gas development[42] are particularly relevant to Australia's international situation.

With respect to customary international law, this has received recent attention by the International Court of Justice in the *Pulp Mills* decision. In the case, the Court opined that it was now:

> a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party … did not undertake an environmental impact assessment on the potential effects of [the project].[43]

It is therefore strongly recommended that additional reform of oil and gas regulation and to national environmental law give serious consideration to the introduction of requirements for transboundary EIA whenever projects with potential for transboundary harm are considered by regulators. This should supplement and detail obligations in existing provisions of treaty law and customary international law, providing procedural content lacking in these international obligations. While Australia may not have been challenged directly by the Indonesian authorities for breaching its international responsibilities on this occasion, the incident should serve as a cautionary reminder that activities within Australian territorial waters may have implications beyond our borders resulting in tangible damages claims.[44]

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[41] Timo Koivurova and Ismo Pölönen, 'Transboundary Environmental Impact Assessment in the Case of the Baltic Sea Gas Pipeline' (2010) 25 *The International Journal of Marine and Coastal Law* 151.

[42] Mehrdad Nazari, 'The Transboundary EIA Convention in the Context of Private Sector Operations Co-financed by an International Financial Institution: Two Case Studies from Azerbaijan and Turkmenistan' (2003) 23 *Environmental Impact Assessment Review* 441.

[43] *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* (International Court of Justice, General List No 135, 20 April 2010), 204.

[44] Tim Stephens, 'A Model Litigant? Australia's Record in Transboundary Environmental Litigation' in Robin Warner and Simon Marsden,

# VI CONCLUDING COMMENTS

The Montara oil spill of 2009 and regulatory reform for offshore oil and gas and national environmental law has made a number of significant improvements to the previous regimes, as outlined in sections 3 and 4 of this article. As discussed in section 5 however, regulatory reform also provides a valuable opportunity to address the issue of transboundary EIA, which is currently absent in applicable legislative frameworks. International customary obligations in particular requiring that harm to neighbours be prevented and that (potentially) EIA be applied to projects with a transboundary dimension, suggest Australia may be found in breach if challenged by its neighbours in incidents such as this. While Australia's geographical situation as an island state may limit the potential for such incidents, the rapid expansion of the oil and gas industry in this area is a concern for Australia's northern neighbours which should be recognised by a greater degree of their involvement in permitting requirements applied at the outset, therefore including participation in transboundary EIA. Failing to involve those potentially affected at this time leaves Australia open to international claims which a focus on risk management at an earlier time could avoid.

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*Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives* (Ashgate, 2012) 247, 264-265.