

End of Mission Statement by the UN Special Rapporteur on Toxics and Human Rights, Marcos A. Orellana, on his visit to Australia, 28 August to 8 September 2023

Canberra, 8 September 2023

I wish to start this debrief by thanking the Government of Australia for inviting me to undertake an official visit to the country. I also wish to express my sincere gratitude to the Federal, State and Territory Governments for their high level of cooperation throughout the visit.

During the last two weeks since 28 August, I met high-level representatives of the Federal, State and Territory Governments, members of Parliament, members of the Judiciary, the Australian Human Rights Commission, Indigenous people, civil society organizations, workers unions, academicians, and industry representatives.

I would like to extend my special appreciation to the Department of Climate Change, Energy, the Environment and Water for its help in organizing this visit. I also wish to thank the UN Information Center in Canberra and the UN Office of the High Commissioner for Human Rights for their valuable support in the preparation and duration of the visit.

I held meetings in the Australian Capital Territory, New South Wales, Tasmania, Victoria, South Australia and Western Australia. I met with a number of communities, including in Sydney, Hobart, Adelaide, Melbourne, and Perth to hear about their concerns. I held meetings with several Indigenous Peoples from the Northern Territory and heard about their concerns and priorities. I also visited a number of sites, which are adversely affected by toxic pollution and hazardous wastes. I would like to thank all the community members in all these places for their time, their openness and their sharing of experiences concerning toxic substances.

In this final phase of my official visit, I am pleased to share today my preliminary observations. A full report on my visit to Australia will be presented to the UN Human Rights Council in September 2024.

Introduction

There is a deep disconnect or distance between the government and community narratives concerning toxics. Where the government sees efforts towards stronger regulations to address the risks of chemicals and pollution, communities and civil society denounce the capture of the State for the benefit of mining, oil, gas, agrochemical and other corporate interests.

This disconnect appears particularly acute between Indigenous Peoples and the government. For example, where the government perceives instances of the “not-in-my-back-yard” phenomenon in regards to the siting of radioactive wastes, representatives of First Nations have spoken to me

about the ongoing colonization of their territories. It is instructive that all siting initiatives by the government for a radioactive waste repository have failed.

The recent case of Kimba, where the Barngarla Indigenous people in South Australia mounted legal resistance to the siting of radioactive wastes in their lands, is also instructive. I wish to applaud the decision of the Federal Government to not appeal the Federal Court's judgment that found apprehension of bias in the decision-making process. There are various lessons that can be taken from this case, such as the need to align all regulations and practices with the standards of the UN Declaration on the Rights of Indigenous Peoples, including the right to free, prior and informed consent.

In this regard, I welcome the government's efforts and goodwill for a constitutional amendment to secure a voice for Indigenous Peoples, through the creation of an advisory body to the Parliament. In my meetings with Indigenous people, I have heard time and again about the need for respect of their rights, including the right to live in a clean and healthy country.

Respect for human rights is a critical step in healing open wounds of past environmental injustices. The loss of life resulting from exposure to hazardous pesticides, such as 2, 4-D distributed by the State Government in the late 1970s and early 1980s in the Kimberley region in the north of Western Australia, is still an open wound in the community's memory. Similarly, the loss of life due to mesothelioma resulting from asbestos exposure in Wittenoom, also in Western Australia, is not only a thing of the past, as the present contamination is still inflicting harm.

I have also seen a disconnect in the relations between companies and workers. There is a great distance between the work imagined by regulations and company policies, and the lived experiences of workers exposure. The West Gate Tunnel project in Melbourne is an example. Much effort has been placed in securing a healthy working environment. Also, significant resources have been spent in addressing the risk of PFAS in the spoil. At the same time, I heard about multiple instances of exposures to hazardous silica dust.

More generally, it was brought to my attention that regulations in some states do not allow effective access to justice in cases of breaches of occupational health and safety standards, since only the regulator can prosecute them. I heard from unions and others that workers' rights could only be protected where their organizations are strong, which is not the case for many small and medium-sized companies. In this regard, I wish to recall that in 2022 the International Labor Organization recognized the right to a safe and healthy working environment as one of its core rights and principles.

Underlying the distance between the State and communities is the perception of tokenistic engagement. When public participation is reduced to a checklist, instead of being conducive to a

genuine dialogue, then one of the fundamental pillars of sustainable development begins to collapse. And when that happens, dialogue is replaced by anger and distrust.

At this point I wish to make certain observations about Australia's engagement with multilateral agreements in the chemicals and waste cluster and human rights.

Multilateral Environmental and Human Rights Agreements

Australia is exercising leadership in various international arrangements for environmental protection. For example, it has led a proposal to overcome the breakdown of the science-policy interface mechanism in the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade.

Australia has also supported the negotiation of a new international treaty on plastic pollution and has joined the High Ambition Coalition of countries that wish to conclude a robust instrument that addresses the full life-cycle of plastics. In this regard, Australia has adopted in 2021 a national plastics plan. Australia is also confronting the impact of plastic litter in its outer islands as well as the leakage of microplastics and plastic feedstock from industrial facilities.

Australia has also applied significant efforts at international cooperation in the Pacific region. For example, it has supported Pacific islands in the implementation of the Waigani Convention, which bans the import into the Parties' territories of hazardous wastes and provides measures of control in the transboundary movements of such wastes. The Australian Human Rights Commission is also providing technical support to human rights commissions in the Pacific Islands Forum.

At the same time, there are several shortcomings in the implementation of multilateral environmental agreements by Australia. Australia is a party to the Stockholm Convention on persistent organic pollutants, but has not ratified the amendments that have listed new pollutants, beyond the original 12 POPs. The Stockholm Convention also requires measures to address the unintended releases of persistent organic pollutants, such as from waste incinerators. Australia's National implementation plan of the Stockholm Convention is more than 15 years old, and I have been informed of plans to install waste incinerators in various parts of the country.

While Australia is a party to the Minamata Convention on mercury, its controls on mercury emissions from coal-fired power plants have been limited or at times non-existent. While Australia is a party to the Montreal Protocol on substances that deplete the ozone layer, it has sought (and obtained) exemptions for methyl bromide, which is a hazardous pesticide, without having a substitution plan in sight. While Australia is also a party to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, it has not yet ratified the Basel Ban Amendment. This amendment entered into force in 2019 and is a key tool

under the Basel Convention to avoid the transfer of hazardous wastes from OECD to non-OECD countries.

Good practices on a range of toxics issues

During my visit I have looked for good practices that can inform other countries in their design of policies on toxics. I have found a good number of them, and wish to particularly highlight the following.

Australia has some of the oldest environmental protection agencies in the world. This speaks of vision and awareness of the fundamental role that the environment plays in sustaining human civilization. But there can be no complacency, as the toxics threats of our day are unprecedented in magnitude and severity.

Australia has enacted a ban on the export of waste materials in four streams: glass, tyres, mixed paper and plastics. This ban has been accompanied by installing capacities for the recycling of those material streams. Product stewardship approaches complement these efforts, alongside new legislation on industrial chemicals management released in 2022. I have been informed that these measures have laid the foundations for a forthcoming extended producer responsibility scheme. This all speaks of efforts to making the concept of circular economy a reality.

I have also been impressed by various examples of citizen science initiatives. The collaboration of university researchers, NGOs, community groups, and others in gathering data under scientific protocols not only enhances the ability of scientists to carry out their work, but also enhances community agency on toxics issues.

Asbestos removal plans also deserve praise. Australia enacted a total ban on asbestos 20 years ago this coming December. The threats posed by a legacy of more than 6.5 million tonnes of asbestos in the built environment are aggravated by natural disasters that cause uncontrolled exposures. I applaud the States' plans and existing programs to prioritize removal. The prioritized removal of asbestos in schools in Victoria deserves particular mention, given how children are especially vulnerable to toxics exposure.

I also wish to underline the good practice of Parliamentary inquiries and how they serve as an important tool for public debate and informed decision-making. Inquiries on toxics-related issues, such as: nuclear energy, plastics, or the Middle Arm project, to name a few recent, ongoing or announced inquiries, not only gather evidence and views on current topical issues, but they also create a record for future generations to learn about Australian history.

As the ongoing parliamentary inquiry on a human rights act illustrates, Australia is living an important moment in its journey towards strengthening human rights protections. While the

Australian Constitution could be amended to incorporate protections for fundamental rights, I have been informed that this is hard to achieve. But momentum towards a federal Human Rights Act is growing. Human Rights Acts have been passed in Victoria, the Australian Capital Territory and Queensland. These developments are auspicious and set the stage for the incorporation of the right to a clean, healthy and sustainable environment in the Australian legal order.

This reflection on human rights acts offers me an opportunity to share observations on environmental governance more generally.

Environmental Governance

There can be no doubt that access to environmental information is critical to environmental decision-making and public participation. I am troubled to learn about significant delays in the processing of requests for environmental information under freedom of information laws. The issue of costs imposed on public interest organizations also stifles access to information.

Draconian restrictions on the right to protest in several states are also very troubling. Peaceful protests are a legitimate exercise of the right to freedom of assembly, and they enable citizens to mobilize their concerns and make them visible to public authorities.

I have also been informed that judicial review of government decisions is strictly procedural. This can lead to negative environmental outcomes where political decisions do not reflect expert advisory recommendations. This links with the requirements founded on the right to science for alignment between regulatory measures and the best available scientific evidence.

The imposition of low penalties for violations of environmental licenses is another issue of great concern. Where the level of penalties is insufficient in severity to motivate compliance and secure deterrence, they are simply absorbed as a cost of doing business, while the toxic harm is imposed upon neighboring communities.

Substantive environmental standards are key to protecting the right of every person to live in a non-toxic environment. It has come to my attention that ambient air quality standards in Australia are less protective than in other member countries of the Organization for Economic Cooperation and Development (OECD). Moreover, certain industries have received exemptions from compliance with relevant standards. Where environmental standards are not robust, the outcome is legalized contamination. This can infringe on the effective enjoyment of a range of human rights.

Toxics Challenges

In light of this, I wish to pivot to discussing certain toxics issues that in my view merit greater attention and changes of approach and direction.

Coal mining and coal-fired power plants

Coal has fueled Australia's energy sector for decades. In doing so, coal mining and coal-fired power plants have enabled important economic prosperity. But the environmental health costs have often been externalized on communities, who have paid the price with premature deaths, terminal illnesses, asthma and other serious health problems.

Certain air quality standards in Australia are less protective than the World Health Organization's standards. Moreover, certain coal-fired power plants, such as Vales Point in New South Wales, have been granted exemptions from existing air pollution standards. Similarly, I have received information that for many years, coal-fired power plants in the Latrobe Valley in Victoria lacked adequate pollution controls, and that in 2021 environmental licenses were revised to strengthen such controls. Pervasive dust and particulate matter from coal mines, such as in Acland in Queensland, also have had serious adverse effects on local communities.

Ash dams from coal combustion also poses threats to groundwater and drinking water of local communities. Arsenic and selenium in groundwater have been reported. A 2021 parliamentary inquiry into the cost for remediation of sites containing coal ash repositories in New South Wales expressed concern at the "complete disregard by the Government towards the health of its citizens."

Rehabilitation is also cause for concern. Often the financial bonds for rehabilitation are insufficient to cover actual costs. The proposal to divert the Morwell River and its potential impacts on Gippsland Lakes in Victoria, which are internationally protected wetlands, are also cause for concern.

Uranium mining, nuclear weapons testing and radioactive wastes

Uranium mining also poses toxic challenges to Indigenous and local communities. Despite the complex, applicable regulatory framework, there has been a persistent pattern of failure to rehabilitate uranium mines. Nevertheless, there appear to be promising developments at Ranger Mine in the Northern Territories.

Uranium closely relates to the experience of Indigenous peoples with nuclear weapons testing in their territories in the 1950s and 1960s. The detonations in the Emu Field to this date reverberate in the Aboriginal community's memory and lived experience. The loss of family members who passed away in the aftermath of the testing calls for an apology that can open a path towards healing.

Earlier in this briefing, I spoke about the Kimba case regarding siting of radioactive wastes. I have been informed that while Australia's National Radioactive Waste Management Act does not override Federal laws to protect cultural heritage, it contains racist elements that override cultural heritage protections established by the States. This shows again here the lack of alignment with the UN Declaration on the Rights of Indigenous Peoples.

It has come to my attention that 95% of radioactive wastes in Australia are of low and intermediate levels, and they are being adequately managed in the Lucas Heights facility in Sydney. In that regard, the introduction of high-level radioactive waste into Australian territory, from nuclear-powered submarines under the new AUKUS plans, poses significant management challenges.

Highly hazardous Pesticides

The widespread use of hazardous pesticides is a major source of contamination of water, soil and air. Human exposure to highly hazardous pesticides have been linked to disabilities and serious adverse health impacts, such as malformations in utero, deadly illnesses, respiratory problems and neurological impairment.

In Australia there is limited or no information on the use of pesticides that is disclosed to the public. Similarly, there is a lack of monitoring on impacts on humans of pesticide exposure. There is monitoring of impacts of certain pesticides on the Great Barrier Reef as well as evidence that pesticides are reducing the resilience of corals and thus aggravating bleaching caused by warming temperatures.

Certain hazardous pesticides that are banned in their country of origin are still imported to Australia. Industry argues that what matters is not the hazardous properties of the chemicals, but actual risk posed by their use, and that accordingly, decisions should be based on evidence regarding Australia's specific environmental situation. By contrast, organizations in civil society argue that the human body is the same for everyone in the human species, that Australia also has pollinators that are adversely impacted by hazardous pesticides, that assessments of risks depend on information that is not available, among other arguments.

What's clear is that where hazardous pesticides have been banned because of their potential adverse health impacts, that assessment should be given greater weight by the Australian regulator, to ensure protection of human health. What's also clear is that the risks of hazardous pesticides involve not only occupational exposure of workers in the fields, but also air drift and contamination of water sources, all of which is adversely affecting local communities and aggravating the loss of biodiversity.

The pesticides regulator in Australia has come under heavy criticism. An independent review of the Australian Pesticide and Veterinary Medicines Authority, released in July 2023, stated that industry interests are embedded into the Authority's regulatory priorities and culture. It also observed that the Authority's emphasis on timely registrations, assessments and approvals over monitoring, compliance and enforcement is a prioritization that best serves industry interests. As described by this review, this would appear to be a textbook case of corporate capture.

PFAS

PFAS are highly persistent, toxic chemicals. They were ubiquitous in fire foams and used in air bases and airports. Australia's Department of Defence has implemented a program for site identification and remediation. The Department has also settled various class action cases around the country. The claims brought by the Wreck Bay Aboriginal Community Council in New South Wales regarding PFAS contamination from the Jervis Bay Range Facility is an example.

The case of Pearce Base close to Bullsbrook, north of Perth in Western Australia, is also instructive. PFAS contamination from the air base has affected the neighboring community that relies on bore water for drinking, washing, cooking and feeding their pets and animals. A settlement of a class action lawsuit for economic loss is under negotiation. The government conducted an investigation into the contamination in 2016 and 2017, and during this time provided bottled water to the community. After the investigation concluded, it continued to provide bottled water to those residents whose properties revealed PFAS contamination. The government has committed to installing a water scheme (pipelines) in the community by 2025. There has not been medical monitoring, such as blood tests. There has not been another sampling of water in wells.

Oil, gas and petrochemicals

Recent scientific reports suggest that temperatures in the Northern Territories could make the region uninhabitable for humans. Despite that, petrochemical and oil and gas industries are lining up massive projects in the region. This threatens to make Darwin and the region a climate change sacrifice zone.

One such project is the Barossa offshore gas extraction project. No consultations were carried out by the National Offshore Petroleum Safety and Environment Management Authority in approving the company's drilling environmental plan. The Tiwi People challenged this in Federal court, which held in their favor, recognizing the importance of cultural rights regarding sea country. However, the court's decision does not go as far as providing for free, prior and informed consent.

There is also significant concern with hydraulic fracking for gas in the Beetaloo Basin, in the Northern Territories. It has been reported that this fossil fuel extraction project would not only

adversely affect communities and ecosystems in the region, but that it would also litter the landscape with toxic ponds of contaminated water.

The Middle Arm project in Darwin, and the toxic substances it would release, raise health concerns in neighboring communities, such as asthma, heart disease and various forms of cancer. This project involves an industrial facility, in addition to a terminal for export of liquified natural gas. The project has been sited close to residential areas. It is to receive a \$1.5 billion subsidy. The greenhouse gas emissions of natural gas for export, so-called scope 3 emissions, have not been quantified.

Incineration

Waste incineration is the end of the line for fossil fuels. It reflects a linear process that is incompatible with a circular economy. Incineration imposes heavy health and other costs on local communities, and it is a significant source of greenhouse gases. It has been reported that even the most modern incinerators produce dioxins, furans and toxic ash.

The case of Tarago in New South Wales, where a waste incinerator has been proposed, is instructive on the potential health, agricultural and economic impacts. Tarago produces significant amounts of food for the State. Reportedly, the government has decided not to site incinerators in Sydney, and instead to site them in four regions, including Tarago. I heard from residents that they had not received adequate explanations for this decision, that it had been taken without consultations, and that they felt treated as second-class citizens, condemned to suffer the environmental injustice of disproportionate toxic impacts.

Conclusions

Like other industrialized countries, Australia grapples with the challenges of managing contaminated sites, industrial chemicals, closing mines, among other sources of toxic releases. And like other federal countries, the country grapples with varying environmental standards among sub-national states.

The challenges are significant. And so are the opportunities: to learn from the past; to revisit and recalibrate, and to realign with international good practices. Some stakeholders have spoken to me about the need of a national environmental regulator that can enforce harmonized national standards. I understand this would require agreement by all States.

Regardless of whether a federal environmental protection agency is created, the world needs Australia to lead on a range of toxics issues. If Australia is unable to ensure that mining does not pose toxic threats, what can we expect from other jurisdictions lacking the institutional regulatory

capacity that Australia has? The expected surge in demand of transition minerals for decarbonization makes of this an existential question for many communities.

Similarly, the world needs Australia to succeed in its phase out of fossil fuels. The commitment announced by the Australian Government to transition to net zero emissions of greenhouse gases, coupled with plans for a *just* transition in support of workers and communities, are undoubtedly steps in the right direction.

Perhaps the most immediate and momentous opportunity for Australia is to incorporate the right to a healthy environment in its domestic legal order. Doing so will require not only constitutional or statutory recognition of the right; it will also require a review of a legal framework for environmental protection that is largely reactive and beneath international best practices.

This is where human rights can guide the transformation of law and policy: to avoid legalizing hazardous levels of toxic pollution, to secure respect for the rights of Indigenous peoples, to enable informed public-participation in environmental decision-making, to ensure the internalization of environmental costs, to transition to zero waste and a circular economy, and to make the right to live in a toxic-free environment a reality for all.

Thank you for your attention. It has been an honor and a privilege for me to conduct an official country visit to Australia. I wish to conclude by warmly thanking the immense hospitality I have received from the Australian people.