

## Inputs for HRC March Session Thematic Report

28 October 2024

Submission by Jubilee Australia Research Centre

### Introduction

Jubilee Australia Research Centre welcomes the opportunity to provide a submission to the Human Rights Commissioner's March Session Thematic Report on Oceans and Human Rights.

#### *About us*

Jubilee Australia Research Centre is an NGO based in Sydney, Australia. Jubilee Australia engages in research and advocacy to promote economic justice for communities in the Asia-Pacific region and accountability for Australian corporations and government agencies operating there.

Jubilee Australia Research Centre works with Indigenous communities and civil society organisations in the Pacific who are advocating against the extractive industry impacting upon their oceans, surrounding environments and human rights. This includes:

- a) the legacy impacts of black sand mining in Fiji, including to livelihoods, as well as community resistance to future black sand mining projects proposed for the Sigatoka and Ra regions on the island of Viti Levu;
- b) opposing the plans of two Australian companies to dump 360 million tonnes of toxic mining waste into the ocean via Deep Sea Tailings Placement in Papua New Guinea, which would have subsequent catastrophic impacts on livelihoods and on human health; and
- c) supporting Tiwi Islands traditional owners and clan groups to ensure protection and justice for the Timor Sea in the face of offshore gas expansion, especially in terms of community consultation requirements, movement-building and political engagement;
- d) working with Indigenous communities in the Sepik region of PNG who are concerned about the risk of tailings dam collapse if the current tailings dam plans for the proposed Frieda River mine go ahead.

In October 2024, an Oceans Declaration was historically agreed at the Commonwealth Heads of Government Meeting in Samoa. Part of the Prelude to the Agreement notes that:

*'We recognise the great environmental, social, cultural, and economic value and benefits linked to the ocean. We cherish our special relationship with the ocean as it is essential to life on our planet. For many of us, we are the ocean; the ocean is in us.'*<sup>1</sup>

For the communities with which Jubilee works, the ocean is more than an environment - it is an important part of people's identity, livelihood and culture. Many other socioeconomic rights flow directly from communities' dependence upon and interconnected relationship with the ocean.

Jubilee Australia seeks that there would be genuine 'ambitious, innovative and transformative action for our ocean towards a true "Common Wealth" of shared prosperity, resilience, and sustainability.'

Jubilee Australia will address terms of reference (1) and (4) in our submission.

**(1) Information regarding effective measures, policies, and laws, for the protection, conservation, and restoration of oceans that incorporate a human rights approach. This includes measures based on the precautionary principle and other international law standards.**

#### **The importance of oceanographic data**

Jubilee Australia emphasises the importance of communities being able to gain access to independent oceanographic data to support their claims regarding concerns about human rights impacts of legacy or proposed projects.

In 2024, Jubilee Australia commissioned oceanographic modelling and animation to ascertain where tailings proposed to be dumped into the ocean of the Huon Gulf in Papua New Guinea would go. (This was subsequently provided in evidence to the Australian National Contact Point for Responsible Business Conduct.) This was an important step in holding the companies' assertions and inadequate scientific modelling that there would be no impact, to account.

Communities seeking to protect their environments (especially Indigenous people) are often under-resourced when it comes to opposing the science of large companies, who may largely minimise the potential impacts through adjusted science. Independent oceanographic modelling, through modelling currents and wind, is incredibly powerful in supporting communities with an evidence base for their advocacy. This is in relation to future projects as well as events that have already occurred, to prove that pollutants did reach communities' shores.

Oceanographic data was also used effectively also by the Fight for the Bight campaign in 2016 while seeking to stop BP from drilling in the Australian waters of the Great Australian Bight, and in legal proceedings following Australia's 2009 Montara oil spill, which impacted communities in Indonesia.

***Recommendation: The international community establish resources and funding opportunities for communities to be able to pay for oceanographic modelling. This is an important step in supporting them to access just outcomes, and to protect their environments.***

**(4) Main challenges for the protection and prevention of damages to the ocean and coastal areas, in relation to the effective implementation of the human rights to clean, healthy and sustainable environment, including ongoing policies or efforts to overcome these.**

#### **Deep Sea Tailings Placement**

Deep Sea Tailings Placement (DSTP) is only practiced in a few nations of the world, including Papua New Guinea and Indonesia. DSTP involves the dumping of tailings, and sometimes also waste rock, as well as processing chemicals (which can include cyanide) into the ocean.

Papua New Guinea lies in the waters of the Coral Triangle, a biodiverse area that is pivotal to global marine biodiversity. The region has been described as a 'global epicentre of marine

biodiversity'.<sup>2</sup> However, PNG permits (and is currently in the process of permitting further new projects) to dump hundreds of millions of tonnes of mining waste into the ocean (and into rivers, which run into the ocean).

This has been practiced in Lihir Island in PNG for decades, and in Madang province since 2014. In 2019, 200,000 litres of toxic slurry were spilled into the sea at Basamuk Bay, turning the waters bright red.<sup>3</sup> In PNG, DSTP has also been approved for Misima Island, and an open pit gold mine on Woodlark Island (2.4MT per annum over 13 years, at a depth of just 230 metres).<sup>4</sup>

To our knowledge, there has been no independent oceanographic modelling in the region for where these tailings end up. This includes transboundary impacts to the Solomon Islands or Australia – or the global impact to source reefs in these regions that are located close to large scale projects.

'DSTP' has been proposed for the Wafi-Golpu mine, which proposes to dump 360 million tonnes of tailings into the sea. The composition of the tailings to be dumped includes lead, mercury (despite the *Minamata Convention*). The companies involved are seeking to dump at an ocean depth of only approximately 200 metres.

The plan to use DSTP has been fiercely resisted by communities and the Evangelical Lutheran Church of PNG (ELC). Legal proceedings are currently on foot in PNG that challenge the validity of the Environmental Permit, as well as proceedings seeking injunctive relief against the PNG Government and its agencies to prevent a Special Mining Lease being issued for the project. A complaint has also been lodged with the Australian National Contact Point for Responsible Business Conduct by the ELC, Jubilee Australia and environmental law firm Centre for Environmental Law and Community Rights, asserting breaches of the OECD Guidelines for Multinational Enterprises by Australian companies Newcrest Mining and Harmony Gold (Australia) Pty Ltd, which are respectively owned by American mining company Newmont, and South African company Harmony.

## **FPIC and the ocean**

The right to free, prior and informed consent (FPIC) is challenging when facing oceans issues. For example, provisions surrounding FPIC in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) do not specifically make provision in relation to oceans which Indigenous people depend upon for their food and livelihood. For example, Article 29 provides that 'states shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place **in the lands or territories** of indigenous peoples without their free, prior and informed consent.'

This article appears to give weight to the territories recognised by Indigenous peoples – but in practice, this appears to be potentially largely land-based.

The ocean, while communities depend upon it for their food, livelihood, and culture, appears to in reality, be largely seen as the regulatory/ownership domain of nation states. While recognition of Indigenous rights on land has grown, there is a greater need for recognition of the connection of Indigenous peoples to the ocean, and thus extension of the 'territories' of Indigenous peoples to incorporate the ocean, in how approvals are sought for projects, and for the dumping or 'storage' of hazardous waste, in the ocean.

(In Australia, there was recognition of native title over 2 million hectares of waters however this is emerging jurisprudence,<sup>5</sup> and its intersection with the extractive industry requires further research.)

In the case of Wafi-Golpu DSTP, approximately 400,000 people depend upon the ocean of the Huon Gulf for their livelihood. However, the companies involved have stated that FPIC is not required by all of these people, as they will not be impacted by the project. Instead, the companies have described stakeholders as being from a very small number of villages localised to the project (and have not obtained FPIC from them). We attach to this submission the Yanga Statement, which was signed by 159 villagers, expressing their opposition to Wafi-Golpu DSTP.

Jubilee Australia subsequently sought review of the companies' oceanographic science by an oceanographic expert, who found that tailings will not settle in the deep sea as submitted by the Enterprises, and that there is inadequate scientific evidence to support this claim. Instead, discharged particles were modelled to move across the Huon Gulf.

By minimising the potential geographic and environmental impacts of DSTP through their scientific data, the proponent companies have also sought to limit the number of communities of Indigenous people who depend upon the ocean who are required to provide FPIC.

Strong arguments regarding FPIC still appear to be those where communities are the owners of land, rather than having a dependent relationship with the ocean (or with a river).

### **Tailings management has severe repercussions for the ocean**

Increasingly, the safe management of tailings disposal on land must also be considered as an issue impacting upon oceans and the human rights of communities who depend on marine ecosystems for the fulfilment of their socioeconomic rights.

In PNG, riverine disposal of tailings has been and was used for the Ok Tedi mine, and Bougainville's Panguna mine, for decades. Ok Tedi is renowned in PNG as being a 'dead' river. So too, in Bougainville, communities assert that the mine's legacy has been damaging to the environment and to human rights.<sup>6</sup> Such rivers run into the sea. The impacts of such disposal, including on marine ecosystems, are difficult to capture, in particular, due to the lack of effective baselines.

In addition, the negligent management of tailings dams on land can have catastrophic impacts for marine environments. The collapse of the Fundao tailings dam in Brazil has been well-documented, with approximately 55 to 62 million cubic metres<sup>7</sup> of tailings surging along the Doce River, reaching the Atlantic Ocean. Scientists identified that four years after the event, tailings mud was still spreading on the Doce River shelf and that marine macrofauna was still impacted.<sup>8</sup>

The Fundão tailings dam breach 'can be considered one of the worst in the last century regarding the volume of tailings released to the environment and the magnitude of socio-economic and environmental damages.'<sup>9</sup>

Potential plans for tailings dams also threaten the ocean. For example, the Frieda River mine in the Sepik region of Papua New Guinea, proposes a tailings dam combined with hydroelectric facility, in an area prone to earthquakes and annual rainfall of 8 metres per year. If the tailings dam were to collapse, not only would the Sepik River be devastated – but so too, the marine ecosystems at the river mouth to the ocean of the Bismarck Sea – which, unusually for a major river, has no river delta whatsoever.

By contrast to the volume of tailings spilled from the Samarco dam (55 to 62 million cubic metres), in the Sepik, the Frieda River mine's tailings dam will have capacity to store 'up to

9.6 billion cubic metres of water' (which is twice the size of Sydney Harbour), and will include 'a maximum mine waste rock and tailings storage capacity of 3.3 billion cubic metres'.<sup>10</sup>

Ocean currents in the region also run seasonally north and south, with capacity for transnational damage in the event of a catastrophic event.

### **Mining for 'black sand' (magnetite)**

Jubilee Australia notes that of all the minerals being mined in the world, the most popular by far, is sand.

In Fiji, black sand mining has left environmental degradation in Ba on the island of Viti Levu. The first ever black sand mining project in the country, villagers have been experiencing impacts to their human rights as a result of this project commencing.

Since then, further companies have been seeking to commence black sand mining operations, including in the Sigatoka River – which is the gateway to Fiji's Coral Coast – and in Ra, in the island's north. In both locations, communities have been resisting companies' plans to explore for black sand.

Jubilee Australia have identified the issues raised by communities, including the impacts on human rights, in our 2021 investigative report *A Line in the Sand: Investigating black sand mining in Fiji*.<sup>11</sup>

### **Racial sacrifice and environmental sacrifice zones**

In an October 2022 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume details that environmental human rights violations are often connected to race, and racial injustice.

The report notes:

'The global ecological crisis is simultaneously a racial justice crisis... the devastating effects of ecological crisis are disproportionately borne by racially, ethnically and nationally marginalized groups—those who face discrimination, exclusion and conditions of systemic inequality because of their race, ethnicity or national origin. Across nations, these groups overwhelmingly comprise the residents of the areas hardest hit by pollution, biodiversity loss and climate change. These groups are disproportionately concentrated in global "sacrifice zones"—regions rendered dangerous and even uninhabitable due to environmental degradation. Whereas sacrifice zones are concentrated in the formerly colonized territories of the Global South, the Global North is largely to blame for these conditions.'<sup>12</sup>

According to the Special Rapporteur on the environment, '[t]oday, a sacrifice zone can be understood to be a place where residents suffer devastating physical and mental health consequences and human rights violations as a result of living in pollution hotspots and heavily contaminated areas.'<sup>13</sup> "Sacrifice zones," are more accurately described as "racial sacrifice zones."

We submit that the ocean has often been deemed an acceptable sacrifice zone, seen as so vast that it doesn't matter if hazardous waste or pollutants are dumped into it. Those who have adopted this view have thus also viewed the ocean as an acceptable racial sacrifice zone, failing to account for the rights of largely Indigenous people who depend upon the ocean for their survival.

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- <sup>1</sup> APIA Commonwealth Ocean Declaration, available at [https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2024-10/apia-commonwealth-ocean-declaration.pdf?VersionId=t4pZxoddFss6F9LH7Pnt1\\_mfdC9OWFOK](https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2024-10/apia-commonwealth-ocean-declaration.pdf?VersionId=t4pZxoddFss6F9LH7Pnt1_mfdC9OWFOK)
- <sup>2</sup> WWF Australia, 'Coral Triangle,' available at <https://wwf.org.au/what-we-do/oceans/coral-triangle/> (accessed 28 October 2024)
- <sup>3</sup> 'Chinese owned mine in PNG spills 200,000 litres of toxic slurry,' *ABC News*, 30 August 2019, <https://www.abc.net.au/news/2019-08-30/chinese-owned-mine-in-png-spills-200000-litres-of-toxic-slurry/11464108>
- <sup>4</sup> Geopacific Resources, Woodlark Gold Project: Addendum to Environmental Impact Statement (2018) <https://geopacific.com.au/wp-content/uploads/2021/12/Woodlark-Gold-Project-EIS-Addendum-2018.pdf> (accessed 28 October 2024).
- <sup>5</sup> <https://statements.qld.gov.au/statements/96697>
- <sup>6</sup> Human Rights Law Centre, *After the Mine*, available at <https://www.hrlc.org.au/reports-news-commentary/2021/7/1/after-the-mine-living-with-rio-tintos-deadly-legacy>
- <sup>7</sup> Vinicius Tavares Kütter, Gabriel Souza Martins, Nilva Brandini, Renato Campello Cordeiro, João Paulo A. Almeida, Eduardo Duarte Marques, 'Impacts of a tailings dam failure on water quality in the Doce river: The largest environmental disaster in Brazil,' *Journal of Trace Elements and Minerals*, Volume 5, 2023, 100084, ISSN 2773-0506, <https://doi.org/10.1016/j.jtemin.2023.100084> (<https://www.sciencedirect.com/science/article/pii/S277305062300037X>)
- <sup>8</sup> Rodolfo Leandro Nascimento, Paulo Ricardo Alves, Maikon Di Domenico, Adriane Araújo Braga, Paulo César de Paiva, Marcos Tadeu D'Azeredo Orlando, Athur Sant'Ana Cavichini, Cybelle Menolli Longhini, César C. Martins, Renato Rodrigues Neto, Caroline Fiório Grilo, Kyssyanne Samihra Santos Oliveira, Valeria da Silva Quaresma, Eduardo S. Costa, Renata Caiado Cagnin, Cesar Alexandro da Silva, Fabian Sá, Leila de Lourdes Longo, 'The Fundão dam failure: Iron ore tailing impact on marine benthic macrofauna,' *Science of The Total Environment*, Volume 838, Part 3, 2022, 156205, ISSN 0048-9697, <https://doi.org/10.1016/j.scitotenv.2022.156205>. (<https://www.sciencedirect.com/science/article/pii/S0048969722033022>)
- <sup>9</sup> Geraldo Wilson Fernandes, Fernando F. Goulart, Bernardo D. Ranieri, Marcel S. Coelho, Kirsten Dales, Nina Boesche, Mercedes Bustamante, Felipe A. Carvalho, Daniel C. Carvalho, Rodolfo Dirzo, Stephannie Fernandes, Pedro M. Galetti, Virginia E. Garcia Millan, Christian Mielke, Jorge L. Ramirez, Ana Neves, Christian Rogass, Sérgio P. Ribeiro, Aldicir Scariot, Britaldo Soares-Filho, 'Deep into the mud: ecological and socio-economic impacts of the dam breach in Mariana, Brazil,' *Natureza & Conservação*, Volume 14, Issue 2, 2016, Pages 35-45, ISSN 1679-0073, <https://doi.org/10.1016/j.ncon.2016.10.003>. (<https://www.sciencedirect.com/science/article/pii/S1679007316301104>)
- <sup>10</sup> Frieda River, 'The Frieda River Hydroelectric Project,' available at <https://www.friedariver.com/wp-content/uploads/2022/11/Frieda-River-Limited-Fact-sheet-Frieda-River-Hydroelectric-Project.pdf>; see also Jubilee Australia, *The River is Not Ours* and *The Sukundimi Walks Before Me*, available at <https://www.jubileeaustralia.org/resources/reports>
- <sup>11</sup> Jubilee Australia, *A Line in the Sand* (2021), available at <https://www.jubileeaustralia.org/resources/publications/line-sand-2021>
- <sup>12</sup> A/77/2990: Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on ecological crisis climate justice and racial justice - Note by the Secretary-General, A/77/2990, 25 October 2022, at 12 [41] available at <https://www.ohchr.org/en/documents/thematic-reports/a772990-report-special-rapporteur-contemporary-forms-racism-racial> (accessed 5 November 2022).
- <sup>13</sup> Ibid at 7 [19].