



**Request to the United Nations Committee on the Elimination of Racial Discrimination
for Urgent Action under the Early Warning and Urgent Action Procedure**

By the Wangan and Jagalingou People

In Relation to Australia

July 31, 2018

I. Introduction and Summary

We are Wangan and Jagalingou – we are Wiirdi-speaking people. We write on behalf of the Wangan and Jagalingou Traditional Owners Family Council, the representative and decision-making body of our people, to respectfully request that the Committee on the Elimination of Racial Discrimination (“Committee”) use its early warning and urgent action procedures to help stop the irreparable and devastating harm to our people and culture by: (1) the imminent destruction of our ancestral homelands, waters, and sacred sites – and with them our culture – by the development of the massive Carmichael Coal Mine and Rail Project (“Carmichael Coal Mine”) in the state of Queensland, Australia; and (2) the imminent extinguishment under law of our rights and interests in part of our ancestral homelands.

If developed as proposed by Adani Mining Pty Ltd (“Adani”), the Carmichael Coal Mine would be among the largest coal mines in the world. It would permanently destroy vast swathes of our ancestral homelands and waters and everything on and in them, likely including our most sacred site, Doongmabulla Springs, from where our spiritual ancestor – the *Mundunjudra* (Rainbow Serpent) – travelled to shape the land. We also face the imminent and permanent extinguishment of our rights and interests in part of our ancestral homelands by the Queensland government and the transfer of tenure in those lands to Adani. Because our lands and waters embody our culture and are the living source of our customs, laws, and spiritual beliefs, their destruction by the Carmichael Coal Mine and the extinguishment of our rights and interests in a part of our lands will also destroy our culture.

We have not been consulted in good faith about the development of the mine or the extinguishment of our rights and interests in our ancestral homelands, nor have we given our free, prior, and informed consent to these actions – and we never will. To the contrary, we have rejected several agreements proposed by Adani under negotiation processes established by Australia’s *Native Title Act*. Adani has brought two judicial proceedings under that law in which the National Native Title Tribunal has held that the Queensland government could grant mining leases to Adani, despite explicitly finding that our people did not consent to the grants. Notwithstanding our persistent objections, the Queensland government has now issued all the leases required for the mine and we are also facing the imminent extinguishment of our native title rights and interests in a part of our ancestral lands.

Throughout the negotiations, Adani has used the coercive power of Australia’s *Native Title Act* to its advantage. That law gives developers the right to seek the approval of the National Native Title Tribunal

in the absence of agreement by affected Indigenous peoples. Because the tribunal almost always allows the project to proceed, even over the Indigenous peoples' explicit objection, and has no authority to order royalty-type payments, many Indigenous groups feel compelled to agree to the project during the negotiation period so that they can be assured of obtaining at least some royalty-type benefit rather than risk a likely adverse tribunal decision. This system makes good faith negotiations to obtain free, prior, and informed consent almost impossible.

Adani has also acted in bad faith in its negotiations with us. For example, the company has manipulated meetings of our people in which decisions concerning the mine were to be considered. Among other bad-faith actions, it has provided transportation to and lodging at meetings for people who support the company's position, including for people who are not entitled to 'speak for country' under our laws and customs and who are not people who held or were likely to hold native title, to participate in some of the decisions in question. The company has also excluded our authorised senior spokesperson from important meetings with our people.

On the basis of these fraudulent meetings, Adani claims to have entered into an agreement with our people that would give our agreement to the permanent extinguishment of our native title rights to a section of our ancestral homelands that is necessary for critical mine infrastructure in exchange for payments that an independent expert has found to be clearly inadequate. Despite Adani's bad faith actions and our repeated rejection of the purported agreement, Adani applied to register the agreement with the National Native Title Tribunal, which registered the agreement in December 2017. Our appeal of this decision to the Federal Court of Australia is pending.

In these circumstances, the development of the Carmichael Coal Mine violates Australia's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination ("Convention"). Specifically:

1. Australia is violating its obligation to eliminate racial discrimination against Indigenous peoples by failing to protect our culture, cultural resources, and sacred sites;
2. Australia is violating its obligation to eliminate racial discrimination against Indigenous peoples by failing to consult with us in good faith or obtain our free, prior, and informed consent;
3. Australia is violating its obligation to eliminate racial discrimination against Indigenous peoples by failing to fully and effectively protect our rights to own, control, develop, and use our traditional lands;
4. Australia is violating its obligation to guarantee our rights to equality before the law;
5. Australia is violating its obligation to amend, rescind, or nullify legislation that perpetuates racial discrimination; and
6. Australia is violating its obligation to not sponsor, defend, or support racial discrimination by any persons or organisations, or to permit public authorities to promote racial discrimination.

Although we alerted this Committee to our situation in November 2017 during Australia's last periodic review under the Convention, Australia has not acted on the Committee's recommendations, and since that time our situation has worsened. The Committee's urgent intervention is now necessary and warranted. These are serious violations of the Convention, and the scale and gravity of our situation is

extreme: the mine would cause irreparable harm and violence to our ancestral homelands, and with it our culture, erasing everything that makes us Wangan and Jagalingou. We would be unable to pass our culture onto our children and grandchildren. Our existence as a people would be destroyed.

Our situation is also urgent, because Adani remains steadfastly determined to develop the mine as soon as possible, backed by the support of the Australian and Queensland governments. At any time now, we also expect the Federal Court to issue its judgment in our challenge to the validity of the agreement that Adani claims to have with our people, but which was obtained by Adani's bad faith manipulation of our people's decision-making processes. If the court finds this purported agreement valid, we will be taken to have consented to the permanent extinguishment of our native title rights and interests in a part of our lands – even though we have never given our free, prior, and informed consent and have on multiple occasions resolved to reject agreements with Adani.

If the court finds the purported agreement invalid, the Queensland government has indicated it will issue a freehold tenure to Adani which will have the effect of extinguishing our native title rights and interests in that part of our lands and waters. In any event, the Queensland government argued during the court hearing that, *even if the court finds that the Adani ILUA is invalid*, it still has power to accept the purported surrender of our native title and issue freehold tenure to Adani *at any time*, thereby extinguishing our native title because it can rely on the prior registration of the Adani ILUA and because, even if the court found that the Adani ILUA was invalid, the court had no power to strike the ILUA from the register in this case.

In light of the seriousness and urgency of the threats to our fundamental human rights, our ancestral lands, and our culture resulting from violations of the Convention arising out of actions and omissions of the Australian federal and Queensland state governments, as well as Adani, we respectfully request the Committee to consider our situation at its ninety-sixth session in August 2018, and to urgently call upon Australia to ensure that:

1. No part of our ancestral homelands is compulsorily acquired or transferred to Adani, and that our native title rights and interests are not extinguished, without our free, prior, and informed consent;
2. All permits and approvals for the Carmichael Coal Mine are immediately suspended and a full review is conducted in collaboration with our people of the violations of our right to free, prior, and informed consent, and alternatives are identified to the irreversible destruction of our lands;
3. The development of the Carmichael Coal Mine, or any other development project on our ancestral homelands, is prohibited in the absence of good faith negotiation and our free, prior, and informed consent obtained through our own decision-making processes;
4. No public money is used to support the development of the Carmichael Coal Mine, or any other development project on our ancestral homelands, in the absence of good faith negotiation and our free, prior, and informed consent obtained through our own decision-making processes;
5. Measures to fully and effectively protect our rights to own, control, develop, and use our ancestral homelands are adopted and implemented;

6. Measures to fully and effectively protect our cultural rights, sacred sites, and cultural resources are adopted and implemented;
7. The 2017 recommendations of the Committee to ensure that the principle of free, prior, and informed consent is incorporated into the *Native Title Act* and other legislation as appropriate and fully implemented in practice, is complied with, and that projects that jeopardise Indigenous peoples' culture and religion are not permitted in the absence of their free, prior, and informed consent;
8. Legislative reform is undertaken to guarantee our equality before the law, notably in the enjoyment of our rights to equal participation in cultural activities and freedom of religion;
9. The principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples are respected and applied in legislation and policy, and a review of compliance of legislation with the Declaration is undertaken; and
10. Actions and language by public authorities, private companies, and industry bodies that have the effect of perpetuating racial discrimination are not permitted or supported.

II. The Convention on the Elimination of All Forms of Racial Discrimination and the Committee's Early Warning and Urgent Action Procedures

A. Obligations under the Convention to eliminate racial discrimination

The Convention on the Elimination of All Forms of Racial Discrimination ("Convention"), which Australia ratified in 1975, imposes a wide range of obligations upon state parties to eliminate racial discrimination. Under Article 2, "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races."¹ To this end, under Article 2(1), state parties undertake: (a) "to engage in no act or practice of racial discrimination against persons [or] groups of persons ... and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;" (b) "not to sponsor, defend or support racial discrimination by any persons or organizations;" (c) "to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;" and (d) "[to] prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."²

In addition, Article 5 provides that "[i]n compliance with the fundamental obligations laid down in article 2..., *States Parties undertake to prohibit and eliminate racial discrimination in all its forms* and to guarantee the right of everyone ... to equality before the law, notably in the enjoyment of" the rights to freedom of religion and equal participation in cultural activities.³ Finally, under Article 4(c), state parties agree not to "permit public authorities or public institutions, national or local, to promote or incite racial discrimination."⁴

B. Racial discrimination against Indigenous peoples and state party obligations under the Convention when Indigenous peoples' traditional lands are threatened by natural resource exploitation

The Convention defines racial discrimination as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁵

¹ International Convention on the Elimination of All Forms of Racial Discrimination ("Convention"), Article 2(1).

² *Id.*, Articles 2(1)(a)-(d).

³ *Id.*, Articles 5(d)(vii) and (e)(vi) (emphasis added).

⁴ *Id.*, Article 4(c).

⁵ *Id.*, Article 1(1).

Indirect or *de facto* racial discrimination also violates the Convention. This occurs when an “apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons.”⁶

The Committee has long recognised that “discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.”⁷ Indigenous peoples

have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular ... they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.⁸

The Committee has expressed particular concern about the racially discriminatory impact on Indigenous peoples of mining on their traditional lands, and has identified certain state party obligations under the Convention that are implicated by such mining. Each of these obligations is discussed below.

1. Requirement to protect Indigenous peoples’ culture, cultural resources, and sacred sites

The Committee has recognised that, without free, prior, and informed consent, the destruction of Indigenous peoples’ culture, cultural resources, and sacred sites is inconsistent with the Convention’s mandate to eliminate racial discrimination. In General Recommendation No. 23, the Committee called upon state parties to “[r]ecognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and ... promote its preservation.”⁹ The Committee also called upon state parties to “[e]nsure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.”¹⁰ The Committee has made clear that state parties should act in accordance with General Recommendation No. 23 when fulfilling their obligations under the Convention.¹¹

⁶ Committee on the Elimination of Racial Discrimination (“Committee”), *Concluding observations of the Committee on the Elimination of Racial Discrimination (“Concluding observations”) – United States of America* (CERD/C/USA/CO/6) (May 8, 2008), para. 10.

⁷ Committee, *General Recommendation XXIII on the rights of indigenous peoples* (1997) (“*General Recommendation No. 23*”), para. 1.

⁸ *Id.*, para. 3.

⁹ *Id.*, para. 4(a).

¹⁰ *Id.*, para. 4(e).

¹¹ See, for example, Committee, *Concluding observations – Mexico* (CERD/C/MEX/CO/16-17) (Apr. 4, 2012), para. 17 (“The Committee reiterates its concern ... at the failure, in practice, to fully respect [Indigenous peoples’] right to be consulted before work starts on exploiting the natural resources in their territories. ... In light of its general recommendation No. 23, 1997, the Committee recommends that the State party should ... [e]nsure that effective consultations are carried out at each stage of the process with communities likely to be affected by projects to develop and exploit natural resources, with the aim of obtaining their free, prior and informed consent, particularly in the case of mining projects.”); Committee, *Concluding observations – Guatemala*

In various concluding observations to periodic reviews of state parties under the Convention, the Committee has raised concerns about the failures of state parties to protect the cultural rights of Indigenous peoples that are relevant to mining activities. For example, the Committee has expressed concerns about:

- Mining activities in “areas of spiritual and cultural significance to Native Americans, and the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention.” The Committee recommended that the state party “take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedure, to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.”¹²
- “[I]nsufficient measures [being] taken to protect the sacred sites of indigenous peoples that are essential for the preservation of their religious, cultural and spiritual practices against polluting and disruptive activities resulting from ... resource extraction.” The Committee called upon the state party to “[a]dopt concrete measures to effectively protect the sacred sites of indigenous peoples in the context of the State party’s ... exploitation of natural resources.”¹³
- The destruction of sacred sites and cultural resources by development projects, in the absence of free, prior, and informed consent.¹⁴

In addition, the Committee has stated that the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) should “be used as a guide to interpret the State Party’s obligations under the Convention relating to indigenous peoples.”¹⁵ Both UNDRIP and other sources of international law¹⁶ assure the cultural rights of Indigenous peoples, including the right to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters ... and other resources and to uphold their responsibilities to future generations in this regard,”¹⁷ to not be subject to destruction of their culture,¹⁸ and to practice and revitalise their

(CERD/C/GTM/CO/12-13) (May 19, 2010), para. 11 (“In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources.”); Committee, *Concluding observations – Canada* (CERD/C/CAN/CO/21-23) (Sep. 13, 2017), para. 20(a) (“Recalling its general recommendation No. 23 (1997) on the rights of indigenous peoples..., the Committee recommends that the State party ... [e]nsure the full implementation of general recommendation No. 23 in a transparent manner with the full involvement of the ... indigenous peoples and with their free, prior and informed consent on all matters concerning their land rights.”).

¹² Committee, *Concluding observations – United States of America* (2008), *supra* note 6, para. 29.

¹³ Committee, *Concluding observations – United States of America* (CERD/C/USA/CO/7-9) (Sep. 25, 2014), para. 24.

¹⁴ Committee, *Concluding observations – Canada* (2017), *supra* note 11, paras. 19-20.

¹⁵ Committee, *Concluding observations – United States of America* (2008), *supra* note 6, para. 29.

¹⁶ The right to culture is recognised in many international instruments, including Article 27(1) of the *Universal Declaration on Human Rights*, Article 27(1) of the *International Covenant on Civil and Political Rights*, and Article 15(1)(a) of the *International Covenant on Economic, Social and Cultural Rights*.

¹⁷ *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”), Article 25.

¹⁸ *Id.*, Article 8(1).

cultural traditions and customs.¹⁹ Indigenous peoples' cultural rights are an "integral part of human rights."²⁰

2. Requirement for good faith consultation and to obtain the free, prior, and informed consent of Indigenous peoples in relation to development projects on their ancestral homelands

The Committee has recognised that a state party's failure to conduct good faith negotiations and obtain the free, prior, and informed consent of Indigenous peoples with respect to development projects – particularly resource extraction projects – on their traditional homelands is inconsistent with the obligations imposed under the Convention to eliminate racial discrimination. In General Recommendation No. 23, the Committee called on state parties to ensure "that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."²¹ Indeed, the Committee has stated that the "requirement that any decision affecting the rights and interests of indigenous peoples must be subject to their free, prior and informed consent" is both "*unequivocal*"²² and a "*fundamental right*" that should be effectively implemented.²³

The Committee has repeatedly expressed concern about Australia's failure to ensure that Indigenous peoples are consulted in good faith and that their free, prior, and informed consent is obtained before projects are approved that affect their interests. For example, in its 2005 and 2017 periodic reviews, the Committee urged Australia to ensure that the principle of free, prior, and informed consent is incorporated into the *Native Title Act* and other legislation, and is fully implemented in practice,²⁴ and in 2010, the Committee recommended that Australia "enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources."²⁵ In 1999, the Committee expressed concern that Australia amended the *Native Title Act* in 1998 without the effective participation of Indigenous peoples, in breach of the Convention, and that the amendments restricted the right of affected Indigenous peoples to negotiate in relation to non-Indigenous uses of

¹⁹ *Id.*, Article 11.

²⁰ UN Committee on Economic, Social and Cultural Rights ("CESCR"), *General Comment No. 21 – Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)* ("General Comment No. 21") E/C.12/GC/21 (Dec. 21, 2009), para. 1.

²¹ *General Recommendation No. 23*, *supra* note 7, para. 4(d).

²² Committee, *Concluding observations – New Zealand* (CERD/C/NZL/CO/21-22) (Sep. 22, 2017), para. 14 (emphasis added).

²³ Committee, *Concluding observations – Ecuador* (CERD/C/ECU/CO/23-24) (Sep. 15, 2017), para. 18 (emphasis added).

²⁴ Committee, *Concluding observations – Australia* (CERD/C/AUS/CO/18-20) (Dec. 8, 2017), para. 22. *See also*, Committee, *Concluding observations – Australia* (CERD/C/AUS/CO/14) (Apr. 14, 2005), paras. 11, 16 ("The Committee recommends that the State party ... make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land.").

²⁵ Committee, *Concluding observations – Australia* (CERD/C/AUS/CO/15-17) (Sep. 13, 2010), para. 18.

their lands.²⁶ Australia rejected the Committee's findings, stating that there was a "fundamental flaw" in the Committee's assessment because it "did not take into account the significant additional benefits provided to indigenous people by the amended [*Native Title Act*]."²⁷ The government's response was criticised by the then Australian Human Rights and Equal Opportunity Commission.²⁸ In 2017, the Committee also expressed concern "about information that extractive and development projects are carried out on lands owned or traditionally used by Indigenous Peoples without seeking their, prior, free and informed consent."²⁹

The Committee has made similar recommendations in periodic reviews of other state parties. For example, the Committee has:

- Called upon a state party to "[g]uarantee, in law and in practice, the right of indigenous peoples to effective participation ... in decisions that affect them, based on their free, prior and informed consent."³⁰
- Recommended that a state party incorporate the free, prior, and informed consent principle into the legal system, ensure the free, prior and informed consent of Indigenous peoples in all matters concerning their land rights, and immediately suspend the development permits at issue whilst conducting a full review in collaboration with the affected Indigenous peoples of the violations of the principle.³¹
- Recommended that a state party fulfil "its obligation to ensure consultation, with a view to obtaining the free, prior and informed consent" of Indigenous peoples in any activities that could affect their rights, "particularly their right to the land and natural resources that they own or have traditionally used."³²
- Recommended that a state party "[i]mplement in good faith the right to consultation and to free, prior, and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands."³³

²⁶ Committee, *Decision (2) 54 on Australia – Concluding observations/comments* (CERD/C/54/Misc.40/Rev.2) (Mar. 18, 1999), paras. 7, 9.

²⁷ Australian Government, *Government response to the 16th report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Island Land Fund: CERD and the Native Title Amendment Act 1998* (Feb. 14, 2002), available to download at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/ntlf/completed_inquiries/1999-02.

²⁸ Australian Human Rights and Equal Opportunity Commission ("HREOC"), *Native Title Report 1999 – Aboriginal and Torres Strait Islander Social Justice Commissioner* (HREOC. Report No. 1/2000) (Apr. 7, 2000), https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/native_title_report_99.pdf; HREOC, *Information concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination – Submission by the Australian Human Rights and Equal Opportunity Commission* (Jan. 7, 2005), <https://www.humanrights.gov.au/cerd-index#h6>.

²⁹ Committee, *Concluding observations – Australia* (2017), *supra* note 24, para. 21.

³⁰ Committee, *Concluding observations – United States of America* (2014), *supra* note 13, para. 24.

³¹ Committee, *Concluding observations – Canada* (2017), *supra* note 11, paras. 19-20.

³² Committee, *Concluding observations – Ecuador*, *supra* note 23, para. 19.

³³ Committee, *Concluding observations – Canada* (CERD/C/CAN/CO/19-20) (Apr. 4, 2012), para. 20.

- Expressed concern about the failure of a state party to obtain the free and informed consent of the affected Indigenous group prior to the approval of projects affecting the use and development of their traditional lands and resources.³⁴

Like the right to culture, both UNDRIP and other sources of international law (which, as noted above, should be used as a guide to interpreting state party obligations under the Convention)³⁵ also assure the right to good faith consultation and free, prior, and informed consent. The UN Special Rapporteur on the Rights of Indigenous Peoples has explained that “the duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in [UNDRIP], and is firmly rooted in international human rights law.”³⁶ Article 32(2) of UNDRIP requires states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”³⁷ The special rapporteur has added that, “where the rights implicated by [extractive industries] are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations.”³⁸

³⁴ Committee, *Concluding observations – Finland* (CERD/C/FIN/CO/23) (Jun. 8, 2017), paras. 16-17.

³⁵ See also, Committee, *Concluding observations – Fiji* (CERD/C/FJI/CO/18-20) (Oct. 23, 2012), para. 14 (“The Committee ... urges the State party to enhance appropriate mechanisms for effective consultation with indigenous people around all policies affecting their identity, ways of living and resources, in line with the Convention [and UNDRIP].”); Committee, *Concluding observations – Guatemala*, *supra* note 11, para. 11 (“The Committee recommends that the State party ... [e]stablish suitable procedures, in accordance with [UNDRIP] ... to effectively consult the communities that may be affected by development projects or the exploitation of natural resources with a view to obtaining their free, prior and informed consent.”); Committee, *Concluding observations – New Zealand*, *supra* note 22, para. 19 (“The Committee recommends that the State party review, in consultation with all affected Maori, the designation of Special Housing Area 62 to evaluate its conformity with ... [UNDRIP] and other relevant international standards, and that the State party obtain the free and informed consent of Maori before approving any project affecting the use and development of their traditional land and resources.”); Committee, *Concluding observations – Canada* (2012), *supra* note 33, para. 20(a) (“[T]he Committee recommends that the State Party ... [i]mplement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards.”).

³⁶ Special Rapporteur James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (“2009 Annual Report”), A/HRC/12/34 (Jul. 15, 2009), para. 38. See also para. 40 (“The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights treaties of the United Nations.”).

³⁷ UNDRIP, Article 32(2).

³⁸ Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, Report to the Human Rights Council, 21st session, A/HRC/21/47 (Jul. 6, 2012), para. 65. See also Anaya, *2009 Annual Report*, *supra* note 36, para. 47 (“A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.”); Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples*, Report to the Human Rights Council, 24th Session, A/HRC/24/41

3. Requirement to fully and effectively protect the rights of Indigenous peoples to own, control, develop, and use their traditional lands

The Committee has made clear, in both General Recommendation No. 23³⁹ and in concluding observations,⁴⁰ that state parties must fully and effectively protect the rights of Indigenous peoples to own, control, develop, and use their traditional lands, including by only confiscating ancestral homelands or forcibly evicting Indigenous peoples in exceptional cases and when they have given their free, prior, and informed consent and have been provided appropriate compensation.

UNDRIP similarly provides that Indigenous peoples have “the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use” and that they “shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”⁴¹ Articles 29(1) and 32(1) of UNDRIP also provide that Indigenous peoples have the right “to the conservation and protection of the environment and the productive capacity of their lands or

(Jul. 1, 2013), para. 28 (“It can readily be seen that, given the invasive nature of industrial-scale extraction of natural resources, the enjoyment of [rights including the right to culture] is invariably affected in one way or another when extractive activities occur within indigenous territories – thus the general rule that indigenous consent is required for extractive activities within indigenous territories.”).

³⁹ “The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.” *General Recommendation No. 23*, *supra* note 7, para. 5.

⁴⁰ Committee, *Concluding observations – Vietnam* (CERD/C/VNM/CO/10-14) (Apr. 16, 2012), para. 15 (“The Committee notes with concern the ... confiscation of ancestral lands without prior consent and appropriate compensation for confiscated lands.... The Committee calls on the State party to adopt measures to safeguard indigenous rights over ancestral lands and pursue efforts, together with communities affected, towards adequate resolution of land disputes, including the provision of appropriate compensation....”); Committee, *Concluding observations – Brazil* (CERD/C/64/CO/2) (Apr. 28, 2004), para. 15 (“[T]he Committee recommends that the State party adopt urgent measures to recognize and protect, in practice, the right of indigenous peoples to own, develop, control and use their lands, territories and resources.”); Committee, *Concluding observations – Indonesia* (CERD/C/IDN/CO/3) (Aug. 15, 2007), para. 17 (“The Committee notes with concern the plan to establish oil palm plantations ... and the threat this constitutes to the rights of indigenous peoples to own their lands and enjoy their culture.”); Committee, *Concluding observations – Peru* (CERD/C/PER/CO/18-21) (Sep. 25, 2014), para. 15 (“[T]he Committee is concerned that concessions for the extraction of natural resources continue to infringe the rights of indigenous peoples to their lands.... [T]he Committee urges the State party to ... [g]uarantee the full and effective enjoyment by indigenous peoples of their rights over the lands ... that they occupy or use....”); Committee, *Concluding observations – Argentina* (CERD/C/ARG/CO/21-23) (Jan. 11, 2017), para. 24(a) (“The Committee urges the State Party to ... [t]ake all necessary steps to ensure that indigenous peoples are protected from forced evictions....”).

⁴¹ UNDRIP, Articles 10 and 26(2).

territories and resources” and “to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”⁴²

Other UN human rights bodies, including the UN Human Rights Committee⁴³ and the UN Committee on Economic, Social and Cultural Rights (“CESCR”), have also highlighted the link between the right to culture and the right to land resources. As the CESCR has said,

The strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

...

States parties must also respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.⁴⁴

C. The Early Warning and Urgent Action Procedures

To protect the rights described above, this Committee has recognised that it is sometimes necessary for it to take urgent action “when it deems it *necessary to address serious violations* of the Convention *in an urgent manner*.”⁴⁵ To guide its actions, the Committee has identified a number of “indicators,” the presence of one or more of which supports urgent intervention.⁴⁶ One of these indicators is “[e]ncroachment on the traditional lands of indigenous peoples or forced removal of these peoples from their lands, in particular for the purpose of exploitation of natural resources.”⁴⁷

⁴² *Id.*, Articles 29(1) and 32(1).

⁴³ UN Human Rights Committee, *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights – General Comment No. 23 (50) (art. 27) (CCPR/C/21/Rev.1/Add.5)* (Apr. 26, 1994), para. 7 (“[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting....”).

⁴⁴ CESCR, *General Comment No. 21, supra* note 20, paras. 36, 49(d).

⁴⁵ See Committee, *Guidelines for the Early Warning and Urgent Action Procedures*, A/62/18, Annex III (Oct. 1, 2007), para. 12 (emphasis added).

⁴⁶ *Id.*

⁴⁷ *Id.*

Because the indicators may be present

in situations not requiring immediate attention to prevent and limit serious violations of the Convention, the Committee shall assess their significance in light of the gravity and scale of the situation, including the escalation of violence or irreparable harm that may be caused to victims of discrimination on the grounds of race, colour, descent or national or ethnic origin.⁴⁸

III. **Australia is Violating its Obligations under the Convention and Urgent Action is Required**

A. **Australia is violating its obligation to eliminate racial discrimination by failing to protect our culture, cultural resources, and sacred sites**

The development of the Carmichael Coal Mine – to which we have never consented (see section III.B below) – will extinguish our cultural identity as Wangan and Jagalingou, and we will become nothing. This is because the mine will destroy vast areas of our ancestral homelands and everything on and in them, and consequently our cultural resources, sacred sites, and culture. This destruction will prevent us from practising our cultural traditions and customs, and, without our ancestral homelands intact and healthy, we cannot pass our culture on to our future generations. The injury to us would be irreversible and cannot be mitigated. By facilitating and failing to prevent these injuries to our culture, cultural resources, and sacred sites, Australia is violating its obligations under Articles 2 and 5 of the Convention to prohibit and eliminate racial discrimination.



Location of Wangan and Jagalingou Traditional Lands

Although we were forcibly removed from our lands prior to and during the 1920s and 1930s by racially discriminatory policies associated with the non-Indigenous colonisation of Australia, we remain strongly connected to our ancestral homelands, which are located in the flat arid part of what is now central Queensland, Australia.⁴⁹ Our lands and waters embody our culture, and are central to our physical and spiritual well-being because they are the origins and living source of our customs, stories, laws, and spiritual beliefs. Our land is our life: it is the place we come from, and gives us our distinct identity as Wangan and Jagalingou.

⁴⁸ *Id.*

⁴⁹ A video about our people is available at <http://wanganjagalingou.com.au/>.



Ceremonial dance on our ancestral lands

Our land also gives us our totems. The Wangan are the bottletree people who own the fire. Their totemic beings are the possum, bee, and sand goanna. The Jagalingou are the eel people who own the water. Their totemic beings are the carpet snake, scrub turkey, and echidna, as well as the waxy cabbage palm and melaleuca, which only come to life and flower in water. Our spiritual laws prohibit us from killing our totems, and many locations on our lands are associated with them. Our totems also protect us and inform our individual land interests and social responsibilities. We hold ceremonies near our totem trees to pay our respects, and we remain connected to those trees throughout life and in death, when we return to the spirit dreaming. Our ancestors' spirits dwell in our land indefinitely. For these reasons, our culture is inseparable from the condition of our ancestral homelands.

We frequently visit our lands to perform ceremonies and cultural rites, to monitor land use by pastoralists, national parks agencies, and mining companies, and the impacts of that use on our totemic beings, and to educate our young people about their ancestry, history, and connection to their country. The preservation of our lands and waters is essential to overcome our history of dispossession and reclaim our territories, perform ceremonies, and educate our young people about their totems, sacred places, spirit dreaming stories, and knowledge of native foods and resources. We also need to live in our families and communities on our ancestral homelands to strengthen our culture, language, and spirit. This determines our ability to pass our culture on to our children and grandchildren, and so we are stewards of our land. We have been, and forever will be, responsible for protecting it.



Ceremonial dance on our ancestral lands

Unfortunately, our land is located in an area with globally significant coal reserves known as the Galilee Basin.⁵⁰ At least six, and possibly more, massive coal mines are proposed for the Galilee Basin.⁵¹ Of these mines, the Carmichael Coal Mine is the most likely to be developed first and “unlock the Galilee,” which is the policy of the Queensland government.⁵² Both the Australian and Queensland governments have approved the mine and publicly support its development (including to the extent of proposing to provide public financing to support the project),⁵³ and Adani has made clear that it is steadfastly determined to develop the mine and is intending to undertake work as soon as possible, recently stating it has completed financing for the mine and is close to securing financing for the rail line,⁵⁴ and having already undertaken preliminary works.⁵⁵

⁵⁰ Australian Government, Geoscience Australia, *Australian Energy Resources Assessment – Resources – Coal* (2018), Figure 4, <http://aera.ga.gov.au/#/coal>; Climate Council, *Galilee Basin – Unburnable coal* (2015), <https://www.climatecouncil.org.au/uploads/af9ceab751ba2d0d3986ee39e1ef04fd.pdf>.

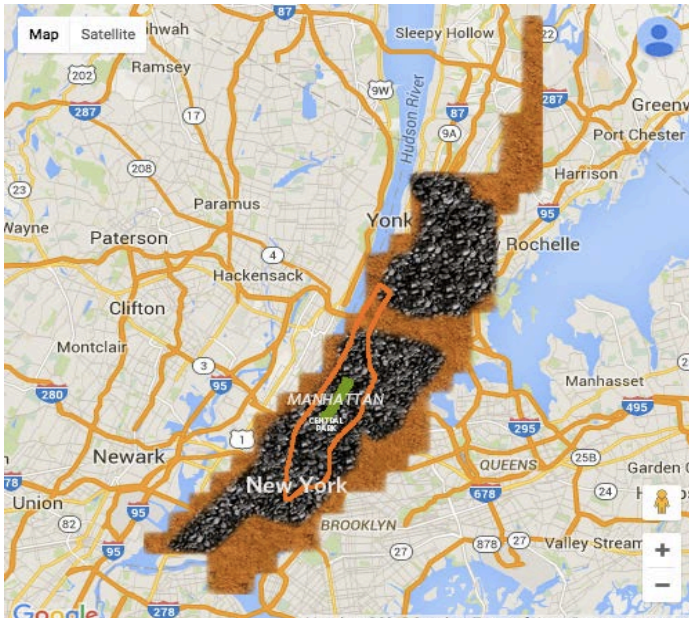
⁵¹ Those mines are the Alpha Coal Project, Carmichael Coal Mine and Rail Project, Galilee Coal Project (Northern Export Facility), Kevin’s Corner Project, South Galilee Coal Project, and China Stone Coal Project. See generally, Queensland Government Department of Natural Resources and Mines, *Queensland coal – mines and advanced projects* (July 2017), pages 2, 5, https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0011/238079/coal-mines-advanced-projects.pdf.

⁵² See Queensland Government, *State Infrastructure Plan – Part B: Program – 2018 update* (July 2018), page 47.

⁵³ See, for example, N. Chaku, LiveMint, *Australian PM Malcolm Turnbull backs Adani’s coal mine project in Queensland* (Mar. 7, 2018), <https://www.livemint.com/Companies/Sjvg3ErWuSE0zZOescUKPP/Australian-PM-Malcolm-Turnbull-backs-Adanis-coal-mine-proje.html>; M. Ludlow and P. Coorey, Australian Financial Review, *Qld govt claims it still supports Adani* (Feb. 5, 2018), <https://www.afr.com/news/qld-govt-claims-it-still-supports-adani-20180204-h0tmrh>; SBS News, *Qld govt supports Adani: Palaszczuk* (Mar. 6, 2018), <https://www.sbs.com.au/news/qld-govt-supports-adani-palaszczuk>; N. Hasham, Sydney Morning Herald, *Federal government to lend money to Adani business associates* (Mar. 5, 2018), <https://www.smh.com.au/politics/federal/federal-government-to-lend-money-to-adani-business-associates-20180305-p4z2uy.html>; M. West, The Conversation, *Report: government won’t rule out underwriting Adani’s Carmichael coal mine* (May 22, 2017), <https://theconversation.com/report-government-wont-rule-out-underwriting-adanis-carmichael-coal-mine-78127>; U. Bhaskar, LiveMint, *Australia supports Adani’s Carmichael project, says minister* (Aug. 30, 2017), <http://www.livemint.com/Industry/8H5GWWHvjvAlzfFMXh4GLO/Australia-supports-Adanis-Carmichael-project-says-assistan.html>; M. Plane, The Morning Bulletin, *Adani: Canavan passionately defends mine on The Project* (Apr. 13, 2017), <https://www.themorningbulletin.com.au/news/adani-canavan-passionately-defends-mine-on-the-pro/3166327/>; Queensland Government, Media Statements, Premier and Minister for the Arts, The Honourable Annastacia Palaszczuk, *Palaszczuk Government welcomes royalties agreement with Adani* (May 31, 2017), <http://statements.qld.gov.au/Statement/2017/5/31/palaszczuk-government-welcomes-royalties-agreement-with-adani>.

⁵⁴ See B. Creagh, Australian Mining, *Adani chairman’s son claims Carmichael mine funded* (Jul. 18, 2018), <https://www.australianmining.com.au/news/adani-owner-son-claims-carmichael-mine-financed/>; SBS News, *Adani Qld mine rail line financing ‘close,’* (Jul. 18, 2018), <https://www.sbs.com.au/news/adani-qld-mine-rail-line-financing-close>.

⁵⁵ P. Ker, Australian Financial Review, *Soaring coal price boosts Adani mine prospects* (Jun. 11, 2018), <https://www.afr.com/business/mining/soaring-coal-price-boosts-adani-mine-prospects-20180611-h118gl>; C. Chang, News.com.au, *Pressure builds on Adani to start construction of its \$16.5 billion Carmichael coal mine* (Feb. 13, 2018), <https://www.news.com.au/finance/business/mining/pressure-builds-on-adani-to-start-construction-of-its-165-billion-carmichael-coal-mine/news-story/4c650976d7adc18799b8697e5662ba59>; Business Standard, *Adani to start work on Australian coal mine in October* (Aug. 28, 2017), <http://www.business->



Footprint of Carmichael Coal Mine superimposed over New York City
(T. Swann, *No New Coal Mines, The incredible vastness of just one Aussie coal mine* (Sep. 16, 2015),
https://www.nonewcoalmines.org.au/the_incredible_vastness_of_just_one_australian_coal_mine)

If developed as proposed, the Carmichael Coal Mine would be among the largest coal mines in the world, producing up to 60 million tonnes of coal each year for up to 60 years.⁵⁶ Its sheer scale is difficult to conceive. It would tear the heart out of our country, and with it our culture. The mine would harm around 30,000 hectares of land, the bulk of which are our traditional homelands. It would consist of six open-cut pits, five underground mines, a coal handling and processing plant, coal stockpiles, tailings storage cells, waste rock dumps, rail infrastructure, a heavy industrial area including a concrete batching plant, hot mix bituminous plant, and bulk fuel storage, a workers accommodation village, an airport processing up to 701 flights per year, water supply infrastructure for extraction, storage, and delivery of up to 12.5 billion litres of water each year, and other associated infrastructure.⁵⁷

Although rehabilitation of the mine is proposed, this will not happen for at least 60 years,⁵⁸ and could never adequately restore our land and sacred sites.

Furthermore, our people now face the imminent extinguishment under law of our native title rights and interests in a part of our ancestral homelands that is required for the mining project but is not covered by Adani's mining leases. This extinguishment, which is described in more detail in section III.B below, will forever sever our cultural connection with that area of our lands. Also, although our native title rights in the remainder of our lands covered by the mining leases would technically "revive" after the

standard.com/article/companies/adani-to-start-work-on-australian-coal-mine-in-october-117082800564_1.html;

J. Robertson, *The Guardian*, *Adani says it will break ground on Carmichael rail link 'within days'* (Oct. 13, 2017),

[https://www.theguardian.com/business/2017/oct/13/adani-says-it-will-break-ground-on-carmichael-rail-link-](https://www.theguardian.com/business/2017/oct/13/adani-says-it-will-break-ground-on-carmichael-rail-link-within-days)

[within-days](https://www.theguardian.com/business/2017/oct/13/adani-says-it-will-break-ground-on-carmichael-rail-link-within-days); D. Cameron, *Townsville Bulletin*, *Adani's Carmichael coal mine will begin work in October with first*

coal due in 2020 (Aug. 28, 2017), [http://www.townsvillebulletin.com.au/news/adanis-carmichael-coal-mine-will-](http://www.townsvillebulletin.com.au/news/adanis-carmichael-coal-mine-will-begin-work-in-october-with-first-coal-due-in-2020/news-story/6454ba1edfb58542c69702dce6af4d13)

[begin-work-in-october-with-first-coal-due-in-2020/news-story/6454ba1edfb58542c69702dce6af4d13](http://www.townsvillebulletin.com.au/news/adanis-carmichael-coal-mine-will-begin-work-in-october-with-first-coal-due-in-2020/news-story/6454ba1edfb58542c69702dce6af4d13).

⁵⁶ Queensland Government, Department of State Development, Infrastructure and Planning, *Carmichael Coal Mine and Rail project: Coordinator-General's evaluation report on the environmental impact statement* ("Carmichael EIS Report") (May 2014), pages 2, 10,

<http://www.statedevelopment.qld.gov.au/resources/project/carmichael/carmichael-coal-mine-and-rail-cg-report-may2014.pdf>.

⁵⁷ *Id.*, pages 5-6, 9.

⁵⁸ *Id.*, page 283.

expiration of the leases (having been suppressed during the life of the leases), the destruction of our lands and sacred places and our exclusion from them during the 60-year life of the mine would make this revival of title nearly useless and thus would constitute *de facto* extinguishment of our rights.

In addition to the damage to our land, the Carmichael Coal Mine would also draw down over 12 billion litres of water each year,⁵⁹ which would likely devastate one of our most sacred places: the Doongmabulla Springs, where over 60 freshwater springs have created an oasis in the midst of our otherwise dry land.⁶⁰ These springs, which are likely to be at least one million years old,⁶¹ are the starting point of our life, the place from which our spiritual ancestor – the *Mundunjudra* (also known as the Rainbow Serpent) – travelled through the springs to form the shape of the land. Today our songlines describe the path of the *Mundunjudra* and other spiritual totems through the land, which tells us the shape of our lands and how to move through them. We perform ceremonies at Doongmabulla Springs, along the Carmichael River, and at other sacred places to obtain access to the *Mundunjudra* and other ancestral beings that go through our bodies at birth and connect us to our totems.



*Cultural leader and authorised spokesperson
Adrian Burragubba at Doongmabulla Springs*

The Doongmabulla Springs are fed by aquifers. If the Carmichael mine were to deplete those aquifers, experts – including Adani’s own experts in litigation – agree that the springs would dry up.⁶² Once dry, even temporarily, the springs could not be restored,⁶³ and the harm would be irreparable. *Our most sacred site – the source of our dreaming, our culture, and ourselves – would be destroyed forever, as would our songlines.*

⁵⁹ Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, *Advice to decision maker on coal mining project – Proposed action: Carmichael Coal Mine and Rail Project, Queensland* (Dec. 16, 2013), para. 17(g), <http://www.iesc.environment.gov.au/system/files/resources/224fbb59-e5e6-4154-9dd0-8d60d7c87a75/files/iesc-advice-carmichael-2013-034.pdf>; *Carmichael EIS Report*, *supra* note 56, page 10.

⁶⁰ Dr. R. Fensham and B. Wilson, *Joint Experts Report: Springs Ecology* (Jan. 15, 2015), page 3, filed in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. & Ors*, <http://envlaw.com.au/wp-content/uploads/carmichael21.pdf>.

⁶¹ *Id.*

⁶² *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.* [2015] QLC 48 at [317], <https://archive.sclqld.org.au/qjudgment/2015/QLC15-048.pdf> (accepting that if the Doongmabulla Springs go dry, the ecological community will be lost).

⁶³ *Id.*, at [285].

Despite these potential threats to this culturally and ecologically important site, there has been insufficient study to determine whether the mine would affect the aquifers that feed the springs – a factor that is critical to understanding any potential impact of the mine on the springs.⁶⁴ Experts are unsure exactly which aquifers feed the springs, or whether there is faulting or fracturing in the underground rock that would allow water to seep between different aquifers.⁶⁵ As hydrogeology and engineering experts have noted, “Despite the large scale of the [Carmichael Coal Mine], it appears that critical scientific data required to resolve uncertainties and construct robust models of the springs’ relationship to the groundwater system were lacking at the time of approval....”⁶⁶

Although the Australian government claims to have imposed two strict conditions to protect Doongmabulla Springs,⁶⁷ each is inadequate to do so. First, Adani is prohibited from drawing down more than 20 centimetres of groundwater at Doongmabulla Springs. However, a 20-centimetre drawdown would likely be devastating. Adani’s own expert admitted in court that a drawdown of only five centimetres would cause at least some of the springs to dry up,⁶⁸ and another expert stated that a drawdown of about 20 centimetres would cause a number of the springs to dry up, though he could not say how many and which ones.⁶⁹ Second, before commencing mining, Adani must submit for government approval a research plan for determining whether the aquifers feeding the springs would be harmed. However, Adani is not required to complete the research prior to mining. This means Adani and the government are unlikely to understand the mine’s impact on the aquifers until after mining begins, too late to prevent harm.⁷⁰

Furthermore, expert evidence demonstrates that the base flow of the Carmichael River derives from Doongmabulla Springs, so if the springs dry up, the flow of the Carmichael River will at the very least be

⁶⁴ M. J. Currell, A. D. Werner, C. McGrath, J. A. Webb, and M. Berkman, “Problems with the application of hydrogeological science to regulation of Australian mining projects: Carmichael Mine and Doongmabulla Springs,” *Journal of Hydrology* 548 (2017) 674-682, pages 678-679, <https://www.sciencedirect.com/science/article/pii/S0022169417301774>.

⁶⁵ *Id.* See also, *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.*, *supra* note 62, at [172]-[173] (“It appears ... that there has been no direct investigation by [Adani] of the [Doongmabulla Springs Complex] area to gather further information about the likelihood of faulting in the area. ... I consider that the lack of direct investigation or modelling is concerning.”); Australian Government Department of the Environment, *Statement of reasons for approval of a proposed action under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (Oct. 14, 2015), paras. 108-113, <https://www.environment.gov.au/system/files/pages/cb8a9e41-eba5-47a4-8b72-154d0a5a6956/files/carmichael-statement-reasons.pdf>.

⁶⁶ Currell *et al.*, “Problems with the application of hydrogeological science to regulation of Australian mining projects,” *supra* note 64, page 674.

⁶⁷ See Australian Government Department of the Environment, *Approval – Carmichael Coal Mine and Rail Infrastructure Project, Queensland (EPBC 2010/5736)* (Oct. 14, 2015), conditions 25-28, <http://epbcnotices.environment.gov.au/entity/annotation/0b3953c8-e472-e511-a947-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1491600590213>.

⁶⁸ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.*, *supra* note 62, at [242].

⁶⁹ See Australian Conservation Foundation and EDOs of Australia, *Licence to Kill: Commonwealth environmental approval for Adani’s Carmichael coal mine project* (2016), page 9, http://www.edoq.org.au/documents/ACF_ANEDO_CarmichaelFederalConditionsReport_201609.pdf.

⁷⁰ *Id.*

heavily impacted.⁷¹ This will in turn harm the Carmichael River's waxy cabbage palm population – the totem of the Jagalingou.⁷²



Cultural leader Adrian Burragubba providing cultural teachings to Wangan and Jagalingou young men on our ancestral lands

Finally, although Adani has proposed to move sacred objects to avoid their destruction, to refrain from disturbing a small area of particular importance to us, and to provide offsets for damaged land,⁷³ this would not protect the cultural and sacred values of our land. Whilst protecting specific sacred sites and objects is very important to us, our culture is connected to our ancestral homelands as a whole, not just to particular sites or objects. Moreover, Adani has argued that it is “not always practical” to avoid destroying cultural heritage material, suggesting it will be unwilling to take possibly protective actions that it considers “impractical.”⁷⁴

Accordingly, by allowing the destruction of our ancestral homelands and waters – and with them our culture – in spite of our vehement opposition, Australia is violating its obligation under the Convention to eliminate racial discrimination by failing to protect our right to our culture, cultural resources, and sacred sites.

B. Australia is violating its obligation to eliminate racial discrimination by failing to consult with us in good faith or obtain our free, prior, and informed consent

Australia has failed to ensure that we be consulted in good faith, and that our free, prior, and informed consent obtained, with respect to the development of the Carmichael Coal Mine and the extinguishment under law of our native title rights in part of our ancestral homelands. Instead we have

⁷¹ S. Holt QC and Dr. C. McGrath, *Closing submissions on behalf of the first respondent* filed in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. & Ors* (May 14, 2015), pages 134-139, <http://envlaw.com.au/wp-content/uploads/carmichael51.pdf>.

⁷² *Id.*

⁷³ Adani, *Carmichael Coal Mine and Rail Project – Environmental Impact Statement – Indigenous and Non-Indigenous Cultural Heritage* (Volume 1, section 5), pages 5-8 to 5-10, <http://eisdocs.dsdp.qld.gov.au/Carmichael%20Coal%20Mine%20and%20Rail/EIS/EIS/Project%20Wide/05-cultural-heritage-project-wide.pdf>.

⁷⁴ *Id.*, page 5-8.

rejected agreements with Adani on four occasions, and, as described below, the consultation and consent cited by Adani and the governments of Queensland and Australia as justification for the mine's development have been obtained in bad faith and delegitimised by fundamental flaws in Australian legislation that make genuine consultation and consent nearly impossible (see section III.E below). These failings violate Australia's obligations under Articles 2 and 5 of the Convention to prohibit and eliminate racial discrimination.

Our people have a registered native title claim under Australia's *Native Title Act 1993* (Cth) ("*Native Title Act*") over 30,277 square kilometres of our ancestral homelands, including our most sacred site – the Doongmabulla Springs.⁷⁵ "Native title" is the recognition under Australian law of Indigenous peoples' traditional rights and interests in their ancestral homelands.⁷⁶ Registration of our claim gives us certain procedural rights in relation to activities that might affect our native title, such as the grant of mining leases.⁷⁷ In particular, under the *Native Title Act*, the developer of a project like the Carmichael Coal Mine must negotiate in good faith with the affected Indigenous group for a minimum of six months, with a view to securing that group's agreement to the grant of a mining lease to the project developer by the state.⁷⁸ This is called the "right to negotiate process." If the Indigenous group does not agree to the grant of the mining lease after the six-month negotiation period, the project developer can refer the matter to an arbitral body, the National Native Title Tribunal ("*Tribunal*"), for determination.⁷⁹ A

⁷⁵ National Native Title Tribunal ("*Tribunal*"), *Register of Native Title Claims Details – QC2004/006 – Wangan and Jagalingou People*, http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/RNTC_details.aspx?NNTT_FileNo=QC2004/006. Registration of our native title claim indicates that the Tribunal was satisfied that our claim met *prima facie* factual requirements, including showing our association with the area and our observation of traditional laws and customs. See generally, *Native Title Act 1993* (Cth), Part 7, especially ss 190B and 190C. We are still waiting for the Tribunal to determine our claim, and it is not uncommon for claims to take over a decade to be determined. See, for example, Australian Government, Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report 126, Apr. 2015), paras. 3.61-3.79, https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_126_final_report.pdf.

⁷⁶ Native title is the recognition by the common law of Australia of a set of rights and interests of Indigenous peoples in relation to the land and waters where they have practised, and continue to practise, traditional laws and customs. Native title is sometimes referred to as a "bundle of rights," and the content of that bundle depends on the native title holders' traditional laws and customs and the extent (if any) to which native title has been extinguished by acts inconsistent with the exercise of native title rights. The *Native Title Act* sets out how native title operates and establishes, among other things, a statutory process through which Aboriginal people can lodge claims for recognition of their native title. See generally, *Native Title Act*, <https://www.legislation.gov.au/Series/C2004A04665>; Tribunal, *Native title: an overview*, <http://www.nntt.gov.au/Information%20Publications/Native%20Title%20an%20overview.pdf>; The Aurora Project, *What is native title?*, <https://auroraproject.com.au/what-native-title>; National Native Title Tribunal, *Glossary*, <http://www.nntt.gov.au/Pages/Glossary.aspx> ("Extinguishment is ... when Australian law does not recognise native title rights and interests because some things governments did, or allowed others to do in the past, have made recognition legally impossible.").

⁷⁷ See generally, *Native Title Act*, Part 2, Division 3, Subdivision P (ss. 25-44).

⁷⁸ *Id.*, especially ss. 25, 29, 31.

⁷⁹ *Id.*, ss. 35, 38.

decision by the Tribunal that a mining lease may be granted does not mean it must be granted; the relevant state government retains discretion over whether to grant a lease.

Separate to the right to negotiate process, the *Native Title Act* provides for an alternate type of agreement called an Indigenous Land Use Agreement (“ILUA”).⁸⁰ Unlike the right to negotiate process, an ILUA benefits a project developer by enabling it to secure the affected Indigenous group’s agreement not only to the grant of the mining lease at issue, but also to other acts in the future that might affect the Indigenous group’s interests in their traditional lands.⁸¹

In our case, we rejected agreements with Adani in December 2012 and October 2014.⁸² Adani brought two separate proceedings before the Tribunal in 2013 and 2015, and each time the Tribunal held that the Queensland government could grant mining leases to Adani under the *Native Title Act*.⁸³ The Tribunal made the 2015 ruling despite explicitly finding that our people did not consent to their grant.⁸⁴ Notwithstanding our persistent objections, the Queensland government has now issued all the leases required for the mine.⁸⁵

Throughout the negotiation process, Adani has acted in bad faith, using the coercive power of the native title system to its advantage.⁸⁶ For example, during the 2012 negotiations, Adani gave us just two weeks to agree to its proposed ILUA.⁸⁷ When we asked for more time, the company’s lawyers threatened that if we did not agree, the Queensland government would compulsorily acquire parts of our land,⁸⁸ which would have prevented our people from bargaining for benefits in exchange for losing our rights to part of our land. In 2015, Adani attempted to manipulate a meeting of our people relating to the structure of

⁸⁰ *Id.*, ss. 24BA-24EC.

⁸¹ *Id.*

⁸² See Wangan & Jagalingou Family Council, *Brandis intervenes in W&J court action against Adani* (May 18, 2017), <http://wanganjagalingou.com.au/brandis-intervenes-in-indigenous-court-action-against-adani/>.

⁸³ *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTA 30 (Mar. 31, 2013), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/NNTA/2013/30.html?context=1;query=wangan>; *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTA 52 (May 7, 2013), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/NNTA/2013/52.html?context=1;query=wangan>; *Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People* [2015] NNTA 16 (Apr. 8, 2015), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/NNTA/2015/16.html?context=1;query=wangan>.

⁸⁴ *Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People*, *supra* note 83, at [32].

⁸⁵ See *The Guardian*, *Adani’s Carmichael coalmine leases approved by Queensland* (Apr. 3, 2016), <https://www.theguardian.com/environment/2016/apr/03/adanis-carmichael-coalmine-leases-approved-by-queensland>.

⁸⁶ For more detailed information, see our submission to the Special Rapporteur on the Rights of Indigenous peoples (Oct. 2, 2015), pages 15-19, <http://wanganjagalingou.com.au/wp-content/uploads/2015/10/Submission-to-the-Special-Rapporteur-on-Indigenous-Peoples-by-the-Wangan-and-Jagalingou-People-2-Oct-2015.pdf>.

⁸⁷ *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTA 30, *supra* note 83, at [37], [40] (see paraphrase of letter dated Sep. 24, 2012).

⁸⁸ *Id.*

our native title claim by packing the meeting with its supporters, providing transportation and lodging for the attendance of those of our people who favoured signing the ILUA, but offering no support to those who opposed the mine.⁸⁹ Adani then used the presence of those it had transported to introduce an Adani-drafted memorandum of understanding that would have cast doubt on our objections to the mine, although our people ultimately rejected the memorandum.⁹⁰ In addition to these actions, Adani has excluded our authorised senior spokesperson from meetings and challenged his right to represent our people's views; claimed that it could satisfy its obligation to consult with us by speaking with people other than those we have chosen as our representatives; presented false information to the public about our people's position on the mine; and questioned our people's independence by asserting that we are acting at the behest of outside activists.⁹¹

Despite the Tribunal's decisions in 2013 and 2015 that paved the way for the Queensland government to issue the mining leases, Adani continued its attempts to convince us to agree to an ILUA, which would likely help it secure financing for the mine.⁹² The proposed ILUA would also have us give up any right to make future objections to the mine, and would give our agreement to the extinguishment of our native title rights and interests in 2,750 hectares of our ancestral homelands (the "Surrender Area") that Adani requires in freehold tenure for infrastructure critical to the mine (such as the train loading facilities, the airport, and the workers accommodation village).⁹³ In exchange for this agreement, Adani proposes payments to our people that an independent expert, hired directly by our people, found to be well below the average for such payments.⁹⁴ For the mine to proceed without this ILUA, the Queensland government would have to compulsorily acquire land in the Surrender Area and issue freehold tenure over that area to Adani, thereby permanently extinguishing our native title in the Surrender Area.

⁸⁹ See generally, M. West, Sydney Morning Herald, *Adani shown the door by traditional owners* (Jul. 4, 2015), <https://www.smh.com.au/business/adani-shown-the-door-by-traditional-owners-20150702-gi3y2h.html>.

⁹⁰ *Id.*

⁹¹ For more detailed information, see our submission to the Special Rapporteur on the Rights of Indigenous peoples, *supra* note 86, pages 15-19.

⁹² J. Robertson and I. Roe, ABC News, *Adani mine: Traditional owners aiming to block native title ruling on mine site* (Dec. 3, 2017), <http://www.abc.net.au/news/2017-12-03/adani-mine-traditional-owners-want-to-block-native-title-ruling/9221256> ("The ILUA is critical for Adani in gaining finance for the mine, as it shows Indigenous consent without which most of the world's banks, under the Equator Principles, will not invest in resources projects."); J. Robertson, The Guardian, *Indigenous owners threaten legal action unless Adani abandons land access deal* (Feb. 6, 2017), <https://www.theguardian.com/australia-news/2017/feb/07/indigenous-owners-threaten-legal-action-unless-adani-abandons-land-access-deal> ("The land use deal is crucial for Adani. Without it, the Queensland government would need to forcibly acquire the proposed mine site and extinguish W&J native title rights. This would throw further doubt on Adani's ability to attract finance, given many international banks have pledged not to back resources projects that don't have Indigenous traditional owner support, according to energy analyst Tim Buckley. 'Consent of Indigenous owners in Australia is critical to the proposed project proceeding and the securing of finance,' he said.").

⁹³ Tribunal, *Extract from Register of Indigenous Land Use Agreements – QI2016/015 – Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA*, <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/ILUA%20Register/2016/QI2016.015/ILUAREgisterExport.pdf>.

⁹⁴ Economics Consulting Services, *Adani Carmichael Coal Mine ILUA assessment* (Dec. 2017), <http://wanganjagalingou.com.au/wp-content/uploads/2017/12/Adani-Coal-presentation-2December2017.pdf>.

In March 2016 and December 2017, our people again rejected an ILUA and any further dealings with Adani.⁹⁵ However, both Adani and the government claim that our people agreed to an ILUA (referred to here as the “Adani ILUA”) at a meeting organised by Adani in April 2016.⁹⁶ Yet Adani again acted in bad faith at that meeting, manipulating the decision-making process. Specifically, it paid as much as AU\$400 per person for transportation to the meeting for participants that the company selected, and provided those people with accommodation. Over 80% of the participants at that meeting appear not to have been members of our people’s native title claim group,⁹⁷ despite the law requiring an ILUA to be authorised by members of the native title claim group constituted under the *Native Title Act*.⁹⁸ Also, hundreds of our people did not attend the meeting, and members of our people who did attend the meeting have stated that their votes against the ILUA were not officially recorded.⁹⁹ Furthermore, Adani failed to ever provide our people with an independent economic analysis of the proposed Adani ILUA.

To increase the pressure on our people, Adani presented the mine as a *fait accompli*, suggesting that the accepting the proposed ILUA would be the only way they could to obtain some benefit from the project. As one of the participants said, “[Adani representatives] told us that the Adani mine would go ahead whether or not we agreed to approve their ILUA. They made it seem like we had no choice but to agree. They said if we didn’t agree we would miss out on money, jobs and contracts for our families.”¹⁰⁰ One of the applicants to the Wangan and Jagalingou native title claim has said he and others were pressured to come to the negotiating table: “Each of us applicants got a letter from [a Queensland government representative] saying because we weren’t willing to engage with certain people they were preparing to start proceedings to extinguish native title against all Wangan Jagalingou Country. [We] decided it’s all about having our native title recognised so we went back to Adani and said we’re willing to negotiate ILUA with you.”¹⁰¹

⁹⁵ Wangan & Jagalingou Family Council, ‘Three strikes you’re out’ – Traditional Owners reject Adani Carmichael mine for a third time (Mar. 21, 2016), <http://wanganjagalingou.com.au/no/>; Wangan & Jagalingou Family Council, W&J claimants again vote down Adani deal, seek injunction (Dec. 3, 2017), <http://wanganjagalingou.com.au/wi-claimants-again-vote-down-adani-deal-seek-injunction/>.

⁹⁶ See, for example, Bowen Basin Mining Club, *Adani welcomes indigenous land use agreement* (Apr. 16, 2016), <https://www.bbminingclub.com/news/12-news/15-adani-welcomes-indigenous-land-use-agreement>.

⁹⁷ The attendance register for the meeting indicates that 60% of the participants had never attended any of the prior ILUA authorisation meetings and were not recorded in a database of Wangan and Jagalingou maintained by Queensland South Native Title Services, a native title representative body authorised under the *Native Title Act*. An additional 20% of participants did not name an apical ancestor from whom they were descended.

⁹⁸ *QGC Pty Ltd v Bygrave (No 3)* [2011] FCA 1457 (only members of a registered native title claim are entitled to authorise an area ILUA).

⁹⁹ J. Robertson, ABC News, *Adani accused of paying people to stack its meeting on crucial mine deal* (Dec. 1, 2017), <http://www.abc.net.au/news/2017-12-02/adani-accused-of-paying-people-to-stack-meeting-on-deal/9218246>.

¹⁰⁰ Affidavit of E. G. McAvoy, filed in *Adrian Burragubba & Ors on behalf of the Wangan and Jagalingou Peoples v State of Queensland & Ors* (QUD85/2004) (Oct. 7, 2016), para. 8.

¹⁰¹ P. Malone, quoted in P. Robinson, ABC News, *Traditional owners say they were forced to negotiate with Adani for fear of losing native title rights* (Dec. 10, 2017), <http://www.abc.net.au/news/2017-12-11/traditional-owners-fear-losing-native-title-rights-adani-mine/9246474>.

Following that meeting, in June 2016 Adani notified us that it had applied to register the invalid Adani ILUA with the Tribunal. Registration is required for the ILUA to have contractual effect,¹⁰² and a registered ILUA would bind *all* Wangan and Jagalingou, including those who objected and future generations.¹⁰³ In September 2016, five of the twelve people constituting the applicant in our people's native title claim filed an objection to the registration, and the Tribunal initially told us it would not register the Adani ILUA until our objection was heard. Under pressure from Adani, through five communications from their lawyers, however, the Tribunal registered the Adani ILUA on 8 December 2017,¹⁰⁴ only days after our people met to reject the ILUA for the fourth time.¹⁰⁵ We fully informed the Tribunal of our people's decision prior to its registration of the Adani ILUA.

In March 2018, the Federal Court of Australia heard our objection to the Adani ILUA.¹⁰⁶ As of the date of this letter, we are awaiting judgment.

The processes described above have prevented us from being consulted in good faith. Adani has acted in bad faith throughout the consultation process, and we have consistently opposed the mine and formally rejected an agreement with Adani on four occasions since 2012. The consultation and consent cited by Adani and the governments of Queensland and Australia are invalid as a result of Adani's bad faith negotiations and, as described in section III.E below, are undermined by a discriminatory legislative framework that allows private companies and the government to override our rights and interests. We have not given our free, prior and informed consent, and by allowing the project to move forward without good faith consultation or consent, Australia has failed to fulfil its obligations under the Convention to prohibit and eliminate racial discrimination.

C. Australia is violating its obligation to eliminate racial discrimination by failing to fully and effectively protect our rights to own, control, develop, and use our traditional lands

Australia is violating its obligations to eliminate racial discrimination because it has failed to fully and effectively protect our rights to our land. We are unable to control our traditional lands, because to date we have been unable to stop the development of the Carmichael Coal Mine, and, with vast areas of our lands destroyed, we would be unable to develop or use our traditional lands.

In addition, we face the extinguishment of our native title within the Surrender Area which is, in effect, a confiscation of our lands because our people's purported agreement to that extinguishment has been obtained through Adani's bad faith consultation and manipulation of our people's decision-making

¹⁰² *Native Title Act*, s 24EA.

¹⁰³ *Id.*

¹⁰⁴ Tribunal, *Extract from Register of Indigenous Land Use Agreements – QI2016/015 – Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA*, *supra* note 93.

¹⁰⁵ Wangan & Jagalingou Family Council, *W&J claimants again vote down Adani deal, seek injunction*, *supra* note 95.

¹⁰⁶ Wangan & Jagalingou Family Council, *Court hearing: W&J Traditional Owners fight Adani and Qld govt* (Mar. 12, 2018), <http://wanganjagalingou.com.au/court-hearing-wj-traditional-owners-fight-adani-and-qld-govt/>.

processes, as well as the coercive nature of the native title system. The development of the Carmichael Coal Mine is not an exceptional circumstance that justifies the effective confiscation of part of our homelands, nor does the payment to our people in the Adani ILUA represent adequate compensation.

D. Australia is violating its obligation to guarantee our rights to equality before the law

The acts and omissions described above demonstrate that our rights are not on equal footing with those of non-Indigenous Australians, whose culture and religion does not arise from a connection to ancestral homelands and waters as our does. By permitting the destruction of the sacred sites and ancestral homelands that embody our culture and religion without our free, prior, and informed consent, Australia thus puts us as Indigenous peoples at a disadvantage in the exercise of our cultural and religious rights compared with non-Indigenous Australians. This violates Article 5 of the Convention, which requires Australia to guarantee our right of equality before the law in the enjoyment of our rights to cultural activities and freedom of religion.

E. Australia is violating its obligation to amend, rescind, or nullify legislation that perpetuates racial discrimination

In addition to the specific acts and omissions described above, the *Native Title Act* itself creates and perpetuates racial discrimination by permitting resource extraction projects to proceed even if they violate Indigenous peoples' cultural and land rights, and even if the affected Indigenous peoples have not given their free, prior, and informed consent. By failing to amend or rescind the *Native Title Act*, Australia is therefore violating Article 2(1)(c) of the Convention, which requires it "to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." This is an ongoing violation: as noted above, in each of its 2005, 2010, and 2017 periodic reviews of Australia, this Committee recommended that Australia ensure the principle of free, prior, and informed consent is incorporated into legislation, including the *Native Title Act*, and in 1999, the Committee expressed concern that Australia amended the *Native Title Act* in 1998 without the effective participation of Indigenous peoples, in breach of the Convention, and that the amendments restricted the right of affected Indigenous peoples to negotiate in relation to non-Indigenous uses of their lands. As noted above at section II.B.2, Australia rejected the Committee's findings, a response criticised by Australian human rights institutions.

A good faith negotiation process to obtain free, prior, and informed consent is almost impossible under the *Native Title Act*. As the UN Special Rapporteur on the Situation of Human Rights Defenders has recognised, "the right to free, prior and informed consent is not protected under Australian law, and government officials frequently fail to meaningfully consult and cooperate with indigenous and community leaders."¹⁰⁷

¹⁰⁷ Special Rapporteur Michel Forst, *End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders – Visit to Australia* (Oct. 18, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>.

In addition to allowing mining to proceed in the face of vehement opposition from affected Indigenous peoples, the *Native Title Act* establishes a negotiation process that coerces Indigenous peoples into unwanted agreements with developers. This coercion exists because, in the absence of agreement, developers can transfer the matter to the National Native Title Tribunal, which almost always allows the project to proceed, even if the Indigenous group objects.¹⁰⁸ The Tribunal also cannot order royalty-type payments (*i.e.*, payments worked out by reference to income or production from the proposed project) to the Indigenous group,¹⁰⁹ even though the *Native Title Act* contemplates such payments in negotiated agreements.¹¹⁰ Accordingly, many Indigenous groups feel compelled to agree to the project during the negotiation period so that they can obtain at least some royalty-type benefit rather than risk the Tribunal's decision.

The option of negotiating an Indigenous Land Use Agreement (ILUA) does not protect against this coercion. During a 2010 visit to Australia, the UN Special Rapporteur on the Rights of Indigenous Peoples

heard concerns that indigenous rights are often inadvertently undermined because the terms of [ILUAs] are kept secret, the traditional owners have limited time to negotiate, legal representation is often inadequate and Government involvement does not always align with indigenous interests. Also, concerns have been raised that agreements have not been

¹⁰⁸ "The Tribunal (once its power to arbitrate is enlivened) almost always allows future acts to be done...."). Australian Lawyers for Human Rights, *Exposure Draft – Native Title Amendment Bill 2012* (Oct. 23, 2012), para. 8, [https://www.ag.gov.au/Consultations/Documents/Currentnativetitle reforms/Australian%20Lawyers%20for%20Human%20Rights%20Submission%20\[PDF%20536KB\].pdf](https://www.ag.gov.au/Consultations/Documents/Currentnativetitle reforms/Australian%20Lawyers%20for%20Human%20Rights%20Submission%20[PDF%20536KB].pdf). Under the *Native Title Act*, the grant of a mining lease and other similar acts that may affect an Indigenous group's interest in their traditional lands are called "future acts." See *Native Title Act*, s. 233. In 2015-2016, the Tribunal found that 9 of 15 contested future acts were allowed (and the remaining 6 matters were not accepted, withdrawn, or dismissed by the Tribunal); in 2011-2012, the Tribunal found that 12 out of 16 contested future acts were allowed; in 2010-2011, the Tribunal found that 26 out of 27 contested future acts were allowed; and in 2009-2010, the Tribunal allowed all 9 contested future acts to be done. See Federal Court of Australia, *Annual Report 2015-2016*, page 73, http://www.fedcourt.gov.au/_data/assets/pdf_file/0004/39856/Annual-Report-2015-16.pdf; Tribunal, *Annual Report 2011-2012*, Table 13 (page 61), <http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202011-2012.pdf>; Tribunal, *Annual Report 2010-2011*, Table 13 (page 82), <http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202010-2011.pdf>; Tribunal, *Annual Report 2009-2010*, Table 23 (page 82), <http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202009-2010.pdf>.

¹⁰⁹ *Native Title Act*, s 38(2) (In making determinations, the Native Title Tribunal "must not determine a condition ... that has the effect that native title parties are to be entitled to payments worked out by reference to [profits, derived income, or things produced].").

¹¹⁰ *Id.*, s 33(1) (Negotiations "may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to [profits, derived income or things produced].").

developed in ways that maximize benefits for the future generations of the indigenous peoples.¹¹¹

As a consequence of this racially discriminatory law, our people have been forced into time- and resource-intensive litigation in both state and federal courts to challenge the grant of the mining leases to Adani.¹¹² We have been unsuccessful in those proceedings, however, because the law allows private companies and the government to override our rights and interests in our ancestral homelands.¹¹³ Moreover, because the courts held that this litigation to defend our rights, ancestral homelands, and culture was not conducted in the public interest, the courts have ordered those members of our people who brought the litigation to pay hundreds of thousands of dollars in costs, which will likely bankrupt them. This outcome fails to acknowledge the history of discrimination against Indigenous peoples in Australia, particularly with respect to our traditional lands, and is particularly perverse because the litigation would not have been required if Australia had protected our right to free, prior, and informed consent in relation to decisions that affect our traditional lands and interests. Instead, the courts' decisions require members of our people to pay massive amounts of money to a wealthy corporation that is violating our human rights.

Unfortunately, Australia perpetuated the racially discriminatory operation of the *Native Title Act* last year when it passed the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth).¹¹⁴ The government introduced the amending bill less than two weeks after the Federal Court of Australia held that certain ILUAs cannot be registered unless they have been signed by *all* members of the registered native title claimant, as authorised by the native title claim group.¹¹⁵ Although this case was unrelated to us, it had the effect of immediately invalidating the purported Adani ILUA, which was not signed by all members of our registered native title claim group. However, the amending bill included the means to retrospectively validate the invalid Adani ILUA – in spite of our opposition – and the Australian Prime Minister is reported as having assured the chairman of the Adani corporate group that

¹¹¹ UN Special Rapporteur James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous: Situation of indigenous peoples in Australia* (A/HRC/15/37/Add.4, Jun. 1, 2010), para. 27.

¹¹² See *Burrage v State of Queensland* [2016] FCA 984, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca0984>; *Burrage v State of Queensland* [2017] FCAFC 133, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2017/2017fcafc0133>; *Burrage & Anor v Minister for Natural Resources and Mines & Anor* [2016] QSC 273, <https://archive.sclqld.org.au/qjudgment/2016/QSC16-273.pdf>; *Burrage & Anor v Minister for Natural Resources and Mines & Anor (No 2)* [2017] QSC 265, <https://archive.sclqld.org.au/qjudgment/2017/QSC17-265.pdf>; *Burrage & Ors v Minister for Natural Resources and Mines & Anor* [2017] QCA 179, <https://archive.sclqld.org.au/qjudgment/2017/QCA17-179.pdf>.

¹¹³ See Wangan & Jagalingou Family Council, *Fed Court decision: Adani leases issued despite Traditional Owners' express rejection* (Aug. 25, 2017), <http://wanganjagalingou.com.au/fed-court-decision-adani-leases-issued-despite-traditional-owners-express-rejection/>.

¹¹⁴ *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth), <https://www.legislation.gov.au/Details/C2017A00053>.

¹¹⁵ *McGlade v Native Title Registrar* [2017] FCAFC 10 (Feb. 2, 2017), <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2017/2017fcafc0010>.

this legislation would overcome the invalid Adani ILUA and allow the mine to proceed despite our objections.¹¹⁶ Current and former members of Parliament have also indicated that the amending legislation was specifically intended to validate the Adani ILUA.¹¹⁷

The process by which this amending legislation was passed through Parliament exacerbated the legislation's racially discriminatory operation. We were never consulted about the bill, despite it apparently being targeted at our people and directly and explicitly threatening our fundamental interests in the health of our traditional lands and the survival of our culture.¹¹⁸ Instead, the government brought the bill on for debate only one day after it was introduced to Parliament. Although a Senate committee conducted an inquiry into the bill, this was at the initiative of non-government members of the Senate. The inquiry was only open for a short two-week period, during which time we had to obtain the resources necessary to seek legal assistance to fully understand the impacts of the bill and prepare a submission. This process failed to facilitate the kind of specific and engaged consultation that is required under international law when legislation directly affects our fundamental interests.¹¹⁹

¹¹⁶ See The Hon. Malcolm Turnbull MP, quoted in, M. Safi and G. Chan, *The Guardian*, *Malcolm Turnbull tells Indian billionaire native title will not stop Adani coalmine* (Apr. 11, 2017), <https://www.theguardian.com/environment/2017/apr/11/malcolm-turnbull-tells-indian-billionaire-native-title-will-not-stop-adani-coalmine>.

¹¹⁷ See The Hon. G. Christensen MP, quoted in, J. Sferruzzi, *Chinchilla News*, *Decision that stalled Adani deal could be overturned* (Feb. 14, 2017), <https://www.chinchillanews.com.au/news/decision-that-stalled-adani-deal-could-be-overturn/3143012/> ("I spoke to the Attorney-General ... to urge immediate action be taken on changing the Native Title Act, so that Adani will not be impacted as they work towards developing" the Carmichael mine); D. Cameron, *Townsville Bulletin*, *'Critical infrastructure' status could bulldoze through native title challenge* (Feb. 12, 2017), <http://www.townsvillebulletin.com.au/news/critical-infrastructure-status-could-bulldoze-through-native-title-challenge/news-story/86d2a4ee963e50fdc3144d2daf49cd26> (Ian Macfarlane, a former federal minister and now chief executive of the Queensland Resources Council, reported as stating that he had spoken to his "good mates" in Canberra (where Australia's federal parliament is located) about amending native title laws). See also Wangan & Jagalingou Family Council, *W&J resist mining industry push to amend Native Title Act to secure Carmichael mine proposal* (Feb. 12, 2017), <http://wanganjagalingou.com.au/wj-resist-industry-push-for-amended-native-title-act-to-secure-carmichael-mine-proposal/>; Queensland Resources Council, *Statement by QRC Chief Executive Ian Macfarlane on Native Title Act* (Feb. 13, 2017), <https://www.qrc.org.au/submissions/statement-qrc-chief-executive-ian-macfarlane-native-title-act/> ("I call on all politicians from all sides of politics to raise up above politics and work to solve this problem....").

¹¹⁸ See Earthjustice, *Australia's ongoing violation of the rights of the Wangan & Jagalingou People to be adequately consulted in good faith about the development of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) and its impact on the Wangan & Jagalingou* (Mar. 1, 2017), electronic pages 29-39, <http://wanganjagalingou.com.au/wp-content/uploads/2017/03/WJ-TO-Council--Submission-to-the-Senate-Constitutional-and-Legal-Affairs-Committee-re-the-Native-Title-Amendment-Indigenous-Land-Use-Agreements-Bill-2017-complete.pdf>.

¹¹⁹ See, for example, UNDRIP, Article 19 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.").

F. Australia is violating its obligation to not sponsor, defend, or support racial discrimination by any persons or organisations, or to permit public authorities to promote racial discrimination

Australia is also violating its obligations under Article 2(1)(b) and 4(c) of the Convention not to sponsor, defend, or support racial discrimination by any persons or organisations, and to not permit public authorities to promote racial discrimination.

First, both the Australian federal and Queensland governments—including the Australian Prime Minister and Queensland Premier—are strongly and publicly advocating for the development of the Carmichael Coal Mine and have granted Adani the necessary approvals for the mine’s development.¹²⁰ The federal government is also considering providing public funding to support the mine.¹²¹ Because the development of the Carmichael Coal Mine without protecting our cultural and land rights, and without our free, prior, and informed consent, is racially discriminatory, Australia is permitting public authorities to promote racial discrimination by supporting the mine’s development.

Second, Adani and the Queensland Resources Council (“QRC”), a mining industry lobby group, are attempting to portray our people’s refusal to consent to the mine as illegitimate. These public statements are racially discriminatory, as they are attempts to negate the importance of Australia’s violations of its obligation to eliminate racial discrimination and to undermine our opposition to the mine.

For example, Adani has made repeated public statements falsely suggesting that our people have consented to the mine¹²² and that we “voted overwhelmingly” to authorise the invalid Adani ILUA.¹²³ Adani has also said that it negotiated “with all duly authorised representatives”¹²⁴ of our people, when in fact it only dealt with certain individuals who were not acting in accordance with the instructions of

¹²⁰ See, for example, N. Chaku, *Australian PM Malcolm Turnbull backs Adani’s coal mine project in Queensland*, *supra* note 53; M. Ludlow and P. Coorey, *Qld govt claims it still supports Adani*, *supra* note 53; SBS News, *Qld govt supports Adani: Palaszczuk*, *supra* note 53; U. Bhaskar, *Australia supports Adani’s Carmichael project, says minister*, *supra* note 53; M. Plane, *Adani: Canavan passionately defends mine on The Project*, *supra* note 53; The Honourable Annastacia Palaszczuk, *Palaszczuk Government welcomes royalties agreement with Adani*, *supra* note 53.

¹²¹ N. Hasham, *Sydney Morning Herald*, *Federal government to lend money to Adani business associates*, *supra* note 53; M. West, *The Conversation*, *Report: government won’t rule out underwriting Adani’s Carmichael coal mine*, *supra* note 53.

¹²² See, for example, Adani, *Adani welcomes appeal court ruling* (Aug. 22, 2017) (under the links “Media” – “Latest News”), <http://www.adaniaustralia.com/>; The Guardian, *Adani says it is negotiating with Indigenous people over coalmine* (Mar. 26, 2015), <https://www.theguardian.com/australia-news/2015/mar/26/adani-says-it-is-negotiating-with-indigenous-people-over-coalmine>; Facebook – Adani Australia (Apr. 16, 2016), <https://www.facebook.com/adaniaustralia/posts/1064138620309377>; J. Robertson, *Indigenous owners threaten legal action unless Adani abandons land access deal*, *supra* note 92; ABC News, *Carmichael coal mine: Wangan and Jagalingou people plan further legal action* (Apr. 13, 2016), <http://www.abc.net.au/news/2016-04-13/wangan-and-jagalingou-plan-legal-action-carmichael-mine/7323728>.

¹²³ Facebook – Adani Australia, *supra* note 122. See also, Adani, *Adani welcomes appeal court ruling*, *supra* note 122.

¹²⁴ The Guardian, *Adani says it is negotiating with Indigenous people over coalmine*, *supra* note 122.

our people. The company has claimed that our authorised spokesperson “suggests” he is acting on our behalf but is actually acting contrary to our people’s wishes and at the behest of outside activists,¹²⁵ and that our people’s opposition is a “minority element.”¹²⁶

QRC has accused our opposition to the mine of being the tool of “foreign-funded radical activists”: “Millionaires in the United States are funding activities in Australia, including the likes of [Wangan and Jagalingou senior spokesperson] Mr. Burragubba to disrupt and delay resource projects.”¹²⁷ It has also attempted to undermine our opposition by suggesting we are “anti-coal,”¹²⁸ when our concerns are about the violations of our fundamental human rights and the protection of our country and culture from destruction. For example, QRC described one of the court cases we have been forced to fight to protect our basic human rights as “merely a tactic of the anti-coal brigade and ... straight out of the activists’ playbook.”¹²⁹

Australia has supported the racially discriminatory statements of Adani and QRC by permitting members of Parliament to reiterate the claims of Adani and QRC. For example, Senator Matt Canavan (Minister for Resources and Northern Australia and a vocal supporter of the Carmichael Coal Mine) has publicly stated that our people support the mine,¹³⁰ and the Honourable George Christensen, a federal member of Parliament, has stated that only a “minority” of our people oppose the mine, and that that minority is “funded by the extreme green movement.”¹³¹

The UN Special Rapporteur on the Situation of Human Rights Defenders has condemned this behaviour, noting that “Indigenous rights defenders ... face lack of cooperation or severe pressure from the mining industry with regard to project activities, as has been exemplified in the case of the proposed Carmichael Coal Mine.”¹³²

¹²⁵ Adani, *Adani welcomes appeal court ruling*, *supra* note 122.

¹²⁶ J. Robertson, *Indigenous owners threaten legal action unless Adani abandons land access deal*, *supra* note 92.

¹²⁷ Queensland Resources Council, *Supreme Court dismisses Adani activist claims* (Nov. 25, 2016),

<https://www.qrc.org.au/media-releases/supreme-court-dismisses-adani-activist-claims/>.

¹²⁸ Queensland Resources Council, *A double blow for anti-coal green activism* (Aug. 25, 2017),

<https://www.qrc.org.au/media-releases/double-blow-anti-coal-green-activism/>. See also, Queensland Resources Council, *Court of Appeal dismisses activist’s claim* (Aug. 22, 2017), <https://www.qrc.org.au/media-releases/court-appeal-dismisses-activists-claim/>.

¹²⁹ Queensland Resources Council, *Court of Appeal dismisses activist’s claim*, *supra* note 128.

¹³⁰ Minister for Resources and Northern Australia – Transcript – Press Conference (undated),

http://www.mattcanavan.com.au/subjects_-

[westpac s decision not to invest in new coal basins australian domestic gas security developing northern australia northern australia infrastructure facility](http://www.mattcanavan.com.au/subjects_-westpac-s-decision-not-to-invest-in-new-coal-basins-australian-domestic-gas-security-developing-northern-australia-northern-australia-infrastructure-facility).

¹³¹ Facebook – George Christensen (Apr. 16, 2016),

<https://www.facebook.com/gchristensenmp/posts/969058593149069>.

¹³² Special Rapporteur Michel Forst, *End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders – Visit to Australia*, *supra* note 107.

G. The Committee's urgent action is required

Australia's acts and omissions described above are serious violations of the Convention that will result in encroachment on our traditional lands for the purposes of natural resource exploitation, as well as extinguishment of our rights and interests in a part of our land, all in the face of our consistent and vehement opposition.

The gravity and scale of our situation is extreme. As described above, the mine's development will cause irreparable harm and violence to our ancestral homelands and our culture. Everything that makes us Wangan and Jagalingou will be gone. We will be unable to pass our culture onto our children and grandchildren, and our existence as a people will be erased. Our situation could not be more grave.

Our situation is also urgent. Adani remains steadfastly determined to develop the mine as soon as possible, recently stating it has completed financing for the mine and is close to securing financing for the rail line,¹³³ backed by the support of the Australian and Queensland governments. Furthermore, we expect the Federal Court of Australia to issue its judgment on the validity of the purported registration of the Adani ILUA at any time. If the court finds that the registration of the Adani ILUA is valid, we will be taken to have consented to the development of the mine and the permanent extinguishment of our native title rights and interests in the Surrender Area. If the court finds that the registration of the Adani ILUA is invalid, the Queensland government indicated during the court case that it considers it has the power to accept the purported surrender of our native title and issue tenure to Adani that will extinguish our native title rights and interests. We understand that Adani is threatening to sue the Queensland government if it does not do so. In any event, the Queensland government also argued that, *even if the court finds that the registration of the Adani ILUA is invalid*, it still has power to accept the purported surrender of our native title and issue freehold tenure to Adani *at any time*, thereby extinguishing our native title, because it can rely on the prior registration of the Adani ILUA and because, even if the court found that the Adani ILUA was invalid, the court had no power to strike the ILUA from the register in this case. This is why our request is urgent: the extinguishment of our native title is a clear and present threat and may occur at any time.

IV. Request for Urgent Action

In light of the seriousness and urgency of the threats to our fundamental human rights, our ancestral lands, and our culture resulting from violations of the Convention arising out of actions and omissions of the Australian federal and Queensland state governments, as well as Adani, we respectfully request the Committee to consider our situation at its ninety-sixth session in August 2018, and to urgently call upon Australia to ensure that:

¹³³ See B. Creagh, *Adani chairman's son claims Carmichael mine funded*, *supra* note 54; SBS News, *Adani Qld mine rail line financing 'close,' supra* note 54.

1. No part of our ancestral homelands is compulsorily acquired or transferred to Adani, and that our native title rights and interests are not extinguished, without our free, prior, and informed consent;
2. All permits and approvals for the Carmichael Coal Mine are immediately suspended and a full review is conducted in collaboration with our people of the violations of our right to free, prior, and informed consent, and alternatives are identified to the irreversible destruction of our lands;
3. The development of the Carmichael Coal Mine, or any other development project on our ancestral homelands, is prohibited in the absence of good faith negotiation and our free, prior, and informed consent obtained through our own decision-making processes;
4. No public money is used to support the development of the Carmichael Coal Mine, or any other development project on our ancestral homelands, in the absence of good faith negotiation and our free, prior, and informed consent obtained through our own decision-making processes;
5. Measures to fully and effectively protect our rights to own, control, develop, and use our ancestral homelands are adopted and implemented;
6. Measures to fully and effectively protect our cultural rights, sacred sites, and cultural resources are adopted and implemented;
7. The 2017 recommendations of the Committee to ensure that the principle of free, prior, and informed consent is incorporated into the *Native Title Act* and other legislation as appropriate and fully implemented in practice, is complied with, and that projects that jeopardise Indigenous peoples' culture and religion are not permitted in the absence of their free, prior, and informed consent;
8. Legislative reform is undertaken to guarantee our equality before the law, notably in the enjoyment of our rights to equal participation in cultural activities and freedom of religion;
9. The principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples are respected and applied in legislation and policy, and a review of compliance of legislation with the Declaration is undertaken; and
10. Actions and language by public authorities, private companies, and industry bodies that have the effect of perpetuating racial discrimination are not permitted or supported.

Thank you in advance for your consideration of our request. Please contact our representatives below if you have any questions or require further information.

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