



PRIVILEGED AND CONFIDENTIAL

TO: Wangan and Jagalingou People

FROM: Martin Wagner and Noni Austin, Earthjustice

DATE: October 16, 2018

RE: **The international responsibility of financial institutions and other business enterprises in relation to the human rights violations resulting from the development of the Adani Group's Carmichael Coal Mine and Rail Project**

I. Introduction

Adani Mining Pty Ltd (“Adani”) proposes to build the Carmichael Coal Mine and Rail Project (“Carmichael mine”) – which would be among the largest coal mines in the world – on the ancestral homelands of the indigenous Wangan and Jagalingou People (“W&J”). Adani also proposes that the Queensland government permanently extinguish the W&J’s rights under Australian law in a part of their ancestral lands that are required for the mine to proceed. The W&J have never consented to the development of the mine or the extinguishment of their rights.

The development of the Carmichael mine on the W&J’s ancestral lands would violate certain human rights of the W&J that are protected under international law, including under human rights treaties to which both Australia and the Republic of Korea are party, and the W&J are in ongoing communication with a number of United Nations human rights bodies and mechanisms about these violations. For example, the development of the Carmichael mine would violate the W&J’s right to practice their culture and protect their cultural resources, because the mine would permanently destroy vast areas of the W&J’s lands and waters, as well as plants, animals, and sacred sites, that are the origin and living source of the W&J’s culture. This includes harming, and possibly destroying, their most sacred site, Doongmabulla Springs.

In addition, the development of the Carmichael mine violates the W&J’s right to be consulted in good faith about, and to give or withhold their consent to, its development on their lands. Despite statements to the contrary by Adani and members of the Australian government, the W&J have never consented to the development of the Carmichael mine on their ancestral homelands or to the proposed extinguishment of their rights in a part of their lands. Instead, the W&J have rejected an agreement with Adani on four occasions since 2012 and are currently in litigation before the Federal Court of Australia challenging the validity of an agreement that Adani purports to have made with the W&J.

Financial institutions and other business enterprises have a responsibility to respect human rights and ensure that their actions do not ratify or contribute to any violation of internationally recognized human rights (for example, by providing financing or engineering services to a project that would violate human rights). This corporate responsibility to respect human rights is a global standard of expected conduct

for all financial institutions and other business enterprises wherever they operate, and is set out in the United Nations Guiding Principles on Business and Human Rights, which were unanimously endorsed by the United Nations Human Rights Council in 2011 when the Republic of Korea was a member.¹

The failure of a financial institution or other business enterprise to respect human rights by, for example, providing financial or other support or services to a project that would violate human rights, increases the legal, financial, and reputational risks to that institution, as it becomes complicit in the human rights violation.

This memorandum describes:

1. the human rights violations resulting from the development by Adani of the Carmichael mine on the ancestral homelands of W&J; and
2. the responsibility of financial institutions and other business enterprises to respect human rights and avoid complicity in human rights violations, including by withholding financial or other support or services to projects that violate human rights.

II. The development of the Carmichael mine would violate the internationally-protected human rights of the Wangan and Jagalingou

The development of the Carmichael mine would violate certain human rights of the W&J that are protected under international law. The W&J are in ongoing communication with a number of United Nations human rights bodies and mechanisms about these violations, and a detailed factual background and analysis of the human rights violations is set out in these communications, including:

1. A request for urgent action to the UN Committee on the Elimination of Racial Discrimination dated July 31, 2018, available at <http://wanganjagalingou.com.au/wp-content/uploads/2018/08/Request-for-Urgent-Action-by-Wangan-and-Jagalingou-People-to-CERD-31-July-2018.pdf>; and
2. A submission to the UN Committee on Economic, Social and Cultural Rights dated May 15, 2017, available at https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/AUS/INT_CESCR_CSS_AUS_27491_E.pdf.

A summary of some of the human rights violations that would result from the development of the Carmichael mine is set out below:

1. Under international law, the W&J have the right to enjoy their culture and transmit it to future generations. The human right to culture is an “integral part of human rights and, like other

¹ The United Nations Human Rights Council is made up of 47 United Nations Member States which are elected by the UN General Assembly. Members of the Council serve for a period of three years. See United Nations Human Rights Council, *Membership of the Human Rights Council*, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx>.

rights, [is] universal, indivisible and interdependent.”² Many international instruments recognize the right to culture, including the Universal Declaration of Human Rights,³ the International Covenant on Civil and Political Rights (“ICCPR”),⁴ the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),⁵ and the Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).⁶ Both Australia and the Republic of Korea are parties to the ICCPR, ICESCR, and ICERD. The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), which the Republic of Korea voted in support of and to which Australia has given its support, also assures the cultural rights of indigenous peoples, including the right to maintain and strengthen their distinctive spiritual relationship with their ancestral lands, and to not be subject to destruction of their culture.⁷

The development of the Carmichael mine would violate the W&J’s human right to culture, causing irreversible injury that cannot be mitigated. If developed as proposed, the Carmichael mine would be among the largest coal mines in the world, devastating around 30,000 hectares of land, the bulk of which are the ancestral lands of the W&J. It would consist of six open-cut pits, five underground mines, a coal handling and processing plant, rail infrastructure, and other associated infrastructure. The mine’s development would permanently destroy vast areas of the W&J’s ancestral homelands, waters, sacred sites, plants, and animals, which embody the W&J’s culture and are central to their physical and spiritual well-being because they are the origins and living source of their customs, laws, and beliefs. As such, the Carmichael mine threatens the preservation of the W&J’s culture and harms their ability to practice their cultural traditions and pass their culture on to future generations. The mine would also likely devastate one of the W&J’s most sacred sites, the Doongmabulla Springs, and the evidence (which is described in detail in the W&J’s request for urgent action to the UN Committee on the Elimination of Racial Discrimination dated July 31, 2018)⁸ demonstrates that the conditions imposed by the Australian government on the mine’s approval are inadequate to protect the springs. For example, expert evidence indicates that the groundwater drawdown of 20 centimetres permitted by the Australian government would likely devastate the springs.⁹

² United Nations Committee on Economic, Social and Cultural Rights, *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,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang.

³ See Article 27.

⁴ See Article 27.

⁵ See Article 15.

⁶ See Article 5(e).

⁷ See, for example, Articles 8 and 25.

⁸ See Wangan and Jagalingou People, *Request to the United Nations Committee on the Elimination of Racial Discrimination for Urgent Action under the Early Warning and Urgent Action Procedure* (Jul. 31, 2018), pages 17-19, <http://wanganjagalingou.com.au/wp-content/uploads/2018/08/Request-for-Urgent-Action-by-Wangan-and-Jagalingou-People-to-CERD-31-July-2018.pdf>.

⁹ *Id.*, page 18. See also, *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.* [2015] QLC 48 at [242], <https://archive.sclqld.org.au/qjudgment/2015/QLC15-048.pdf>; 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.edong.org.au/documents/ACF_ANEDO_CarmichaelFederalConditionsReport_201609.pdf.

2. Under international law, the W&J have the right to be consulted in good faith about, and to give or withhold their consent to, the development of the Carmichael mine. The international legal duty of a state to consult with Indigenous peoples about matters that affect them is firmly rooted in international human rights law.¹⁰ For example, it is grounded in the ICCPR, ICESCR, ICERD, and UNDRIP.¹¹ As the United Nations Special Rapporteur on the Rights of Indigenous Peoples has said, international law establishes “a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior, and informed consent,”¹² and that “[w]here the rights implicated [by extractive activities] are essential to the survival of indigenous groups as distinct peoples and foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations. ... [I]ndigenous consent is presumptively a requirement for those aspects of any extractive project taking place within the ... customary land use areas of indigenous peoples, or that otherwise affect resources that are important to their survival.”¹³

The development of the Carmichael mine violates the W&J’s right to consultation and consent. The W&J have not been consulted in good faith about, nor given their consent to, the development of the Carmichael mine on their ancestral lands or the extinguishment of their rights in a part of their lands. Rather, they have consistently opposed the mine over many years and have rejected an agreement (known under Australian law as an Indigenous land use agreement (“ILUA”)) with Adani on four separate occasions: in December 2012, October 2014, March 2016, and December 2017. Adani has also acted in bad faith during its negotiations with the W&J, including by undermining their institutions of representation and decision-making by stacking meetings in its favour with people who are not recorded as W&J, and pressuring the W&J to agree to an ILUA by telling them that the mine was inevitable whether or not they agreed. The W&J are currently in litigation before the Federal Court of Australia to challenge the validity of an ILUA that Adani purports to have made with them in April 2016.

¹⁰ United Nations 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), paras. 38, 40, http://unsr.jamesanaya.org/docs/annual/2009_hrc_annual_report_en.pdf.

¹¹ For example, Article 32 of UNDRIP states that “States shall consult and cooperate in good faith with the Indigenous peoples concern 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.”

¹² United Nations Special Rapporteur James Anaya, *Extractive industries and indigenous peoples*, A/HRC/24/41 (Jul. 1, 2013), para. 27, <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>.

¹³ United Nations Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, A/HRC/21/47 (Jul. 6, 2012), para. 85, http://unsr.jamesanaya.org/docs/annual/2012_hrc_annual_report_en.pdf. The special rapporteur has similarly noted that the presumption that indigenous consent is required arises when an extractive project will cause a “significant, direct impact on indigenous peoples’ lives or territories.” Anaya, *2009 Annual Report*, above n 10, para. 47.

3. Under international law, the W&J have the right to own, control, develop, and use their traditional lands, and a government may only confiscate ancestral lands in exceptional circumstances and when the W&J have given their free, prior, and informed consent.¹⁴ For example, the UN Committee on the Elimination of Racial Discrimination has called upon state parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources,”¹⁵ and UNDRIP provides that “Indigenous peoples 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.”¹⁶

The development of the Carmichael mine would violate the W&J’s right to land because it prevents them from controlling and using their ancestral lands as they choose. Also, the proposed extinguishment of their rights in a part of the lands is, in effect, a confiscation of their lands, in the absence of both exceptional circumstances and free, prior, and informed consent.

III. Financial institutions and other business enterprises have a responsibility to respect human rights

The United Nations Guiding Principles on Business and Human Rights (“UN Guiding Principles”), the authoritative global framework to address the impacts of business on human rights, recognize that financial institutions and other business enterprises have a responsibility to respect human rights and avoid contributing to human rights violations, including by not providing financing or other types of services (such as engineering or labor services) to projects and/or companies that will violate human rights.¹⁷ This responsibility is a “global standard of expected conduct for all business enterprises wherever they operate.”¹⁸ In 2011, when the Republic of Korea was a member, the United Nations

¹⁴ See, for example, UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII on the rights of indigenous peoples* (1997) (“*General Recommendation No. 23*”), para. 5. See also, UNDRIP, Articles 10, 26(2), 29(1), 32(1); UN Committee on the Elimination of Racial Discrimination, *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....”); Wangan and Jagalingou People, *Request to the United Nations Committee on the Elimination of Racial Discrimination for Urgent Action under the Early Warning and Urgent Action Procedure*, above n 8, pages 11-12.

¹⁵ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23*, above n 14, para. 5.

¹⁶ UNDRIP, Article 10.

¹⁷ See generally, United Nations, *Guiding Principles on Business and Human Rights – Implementing the United Nations “Protect, Respect and Remedy” Framework* (“UN Guiding Principles”) (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁸ *Id.*, page 13.

Human Rights Council unanimously endorsed the UN Guiding Principles,¹⁹ and the chairperson of the UN Working Group on Business and Human Rights has said that the UN Guiding Principles are “not ‘voluntary’ guidelines. They are grounded in legally binding norms and standards and provide authoritative guidance as to the application of existing core international human rights treaties in these areas.”²⁰

As Principle 11 of the UN Guiding Principles states, “[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”²¹ Business enterprises must “[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur,” and “seek to prevent ... adverse human rights impacts that are directly linked to their operations, products or services by their business relationships,²² even if they have not contributed to those impacts.”²³ Notably, *a financial institution or other business enterprise may contribute, or be directly linked by its business relationships, to an adverse impact “if it provides financing” or other types of services – such as engineering services or provision of labor – for a project that will violate a human right.*²⁴

The responsibility of financial institutions and other business enterprises to respect human rights extends to the entire spectrum of internationally recognized human rights, including the rights of groups that require particular attention – such as indigenous peoples.²⁵ In addition, an enterprise’s responsibility to respect human rights “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations,” and “it exists over and above compliance with national laws and regulations protecting human rights.”²⁶ It also applies even where national laws offer a level of human rights protection that falls short of internationally recognized human rights standards.²⁷

¹⁹ United Nations, *Business and human rights*, <https://www.ohchr.org/en/issues/business/pages/businessindex.aspx>. See also footnote 1 above.

²⁰ Opening statement by Michael K. Addo, Chairperson of the UN Working Group on Business and Human Rights (Sept. 17, 2014), page 3, <http://www.ohchr.org/Documents/Issues/Business/AfricanForum/OpeningStatementMichaelAddo.pdf>.

²¹ *UN Guiding Principles*, above n 17, Principle 11 (page 13).

²² “A company’s ‘business relationships’ is defined broadly to encompass relationships with business partners, entities in its value chain and any other State or non-State entity directly linked to its business operations, products or services. This includes entities in its supply chain beyond the first tier and indirect as well as direct business relationships.” United Nations, *Frequently asked questions about the Guiding Principles on Business and Human Rights* (2014) (“*UN Guiding Principles FAQ*”), page 32, http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf.

²³ *UN Guiding Principles*, above n 17, Principle 13 (page 14).

²⁴ *UN Guiding Principles FAQ*, above n 22, pages 31, 32 (emphasis added). See also United Nations, *The corporate responsibility to respect human rights – an interpretive guide* (2012) (“*Corporate responsibility guide*”), pages 15-17, <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>.

²⁵ *UN Guiding Principles*, above n 17, pages 13-14.

²⁶ *Id.*, page 13.

²⁷ *Corporate responsibility guide*, above n 24, page 77.

A failure of a financial institution or other business enterprise to respect human rights can have serious “legal, financial and reputational” consequences for that company,²⁸ and can subject the company to the court of public opinion, comprising employees, communities, consumers, civil society, and investors. For this reason, a financial institution or other business enterprise should always “[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.”²⁹ If a financial institution or other business enterprise is at risk of being involved in an adverse human rights impact,

prudence suggests that [the company] should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable. This is so both because of the severity of the human rights abuses at stake and also because of the growing legal risks to companies as a result of involvement in such abuses.³⁰

To minimize risk and fulfil their responsibilities, the UN Guiding Principles specify that financial institutions and other business enterprises must take adequate measures to prevent adverse human rights impacts, including establishing policy commitments to meet their responsibility to respect human rights and carrying out human rights due diligence.³¹ Human rights due diligence should involve meaningful consultation with potentially affected groups, with special attention to those at heightened risk of vulnerability.³²

Like the UN Guiding Principles, the *OECD Guidelines for Multinational Enterprises* recommend that enterprises should respect the human rights of specific groups that require particular attention, such as Indigenous peoples.³³ In addition to the universally applicable responsibility of financial institutions and other business enterprises to respect human rights generally, many financial institutions around the world have made separate commitments to respect human rights. For example, 94 financial institutions in 37 countries—including the Korea Development Bank³⁴—have adopted the Equator Principles, a “financial industry benchmark for determining, assessing and managing the environmental and social risk in projects.”³⁵ The Equator Principles require the informed consultation with and participation of Indigenous peoples where a project will affect them, as well as compliance with the rights and protections for Indigenous peoples in the relevant national law.³⁶ They also require the free, prior, and

²⁸ *Id.*, page 14.

²⁹ *UN Guiding Principles*, above n 17, Principle 23 (page 25) (emphasis added).

³⁰ *Corporate responsibility guide*, above n 24, page 79.

³¹ *UN Guiding Principles*, above n 17, pages 13-24.

³² *Id.*, pages 19-20.

³³ Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2011 edition) (“*OECD Guidelines*”), page 32, <http://www.oecd.org/daf/inv/mne/48004323.pdf>. The OECD member countries, including Australia and the Republic of Korea, recommend that multinational enterprises operating in and from the territories of member countries observe the OECD Guidelines and make a binding commitment to implement them. See *OECD Guidelines*, pages 8 and 13.

³⁴ Equator Principles, *Equator Principles association members & reporting*, <http://equator-principles.com/members-reporting/>.

³⁵ *The Equator Principles* (June 2013), cover page, http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf.

³⁶ *Id.*, Principle 5 (page 7).

informed consent of Indigenous peoples where a project will have adverse impacts on them, such as significantly impacting critical cultural heritage like natural areas with cultural or spiritual value that are essential to their identity and culture.³⁷

IV. Conclusion

The development of the Carmichael mine would violate the W&J's fundamental human rights. In these circumstances, any financial institution or other business enterprise that provides financial or other support or services to facilitate the project would be complicit in these violations, in violation of its international responsibilities to respect the W&J's human rights. Such complicity by any financial institutions or other business enterprises would likely increase the legal, financial and reputational consequences for the company, as well as increase the reputational risks for the country or countries in which those companies are based and operate.

Please contact us if you would like additional information.

Kind regards,



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³⁷ *Id.*, Principle 5 (pages 7-8 and footnote 3), which defines the kind of adverse impacts that give rise to the requirement for free, prior, and informed consent by reference to the International Finance Corporation's *Performance Standard 7 – Indigenous Peoples ("IFC PS7")* (Jan. 1, 2012), para. 16 and footnote 13). Although Equator Principle 5 appears to make *IFC PS7* relevant only as defined in Principle 3 (which provides that for projects in "Designated Countries" like Australia, the applicable standards for assessing a project's environmental and social impacts are those in Australian law only, which are deemed to meet the requirements of Principle 5), Australian law does not meet the requirements of Principle 5 because, as described in this advice, the law permits projects like the Carmichael mine to proceed in the absence of good faith negotiation and free, prior, and informed consent. As the fundamental premise of Principle 3 is that *IFC PS7* represents the minimum acceptable standard, actions should be measured against that standard where Australia's domestic laws are inadequate to meet it.