



PRIVILEGED AND CONFIDENTIAL

TO: Adrian Burragubba and Murrawah Johnson

FROM: Martin Wagner and Noni Austin, Earthjustice

DATE: January 27, 2020

RE: **The international responsibility of business enterprises to respect the human rights of Indigenous peoples protected under international law**

I. Introduction

You have instructed us that 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 People”). You have also instructed us that, in 2019, the Queensland government granted freehold title to Adani over part of the W&J People’s ancestral lands that are required for the mine to proceed, which has the effect under Australian law of permanently extinguishing the W&J People’s rights in those lands.

You have asked us to advise on the human rights of Indigenous peoples that are protected under international law, including under human rights treaties to which both Australia and Germany are party, as relevant to the W&J People in relation to the development of the Carmichael mine. In summary, under international law, the W&J People as a group have the right to:

1. be consulted in good faith about, and to give or withhold their consent to, the development of the Carmichael mine on their ancestral lands;
2. enjoy their culture and transmit it to future generations; and
3. own, control, develop, and use their traditional lands, which may only be confiscated in exceptional circumstances and when the W&J People have given their free, prior, and informed consent.

You have also asked us to advise on the international responsibility of business enterprises to respect human rights and avoid complicity in human rights violations, including by withholding services or support to projects that violate human rights.

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 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. The failure of a 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 enterprise, as it becomes complicit in the human rights violation.

II. The internationally protected human rights of Indigenous peoples

International law protects a range of human rights of Indigenous peoples. A summary of internationally protected human rights relevant to the W&J People in the face of the development of the Carmichael mine is set out below:

1. Under international law, Indigenous peoples have the right to be consulted in good faith about the development of extractive industries on their ancestral lands, and, in some circumstances, to give or withhold their consent to, the development of such industries. 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.¹ For example, it is grounded in the International Covenant on Civil and Political Rights (“ICCPR”), International Covenant on Economic, Social and Cultural Rights (“ICESCR”), Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), and United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).² Both Australia and Germany are parties to the ICCPR, ICESCR, and ICERD. Germany voted in support of, and Australia has given its support to, UNDRIP.³

In addition, 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,”⁴ and that “[w]here the rights implicated [by extractive activities] 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. It is generally understood that indigenous peoples’ rights over lands and

¹ 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.

² For example, Article 32 of UNDRIP states that “States shall 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.”

³ United Nations Press Release, *General Assembly adopts Declaration on Rights of Indigenous Peoples: ‘Major step forward’ towards human rights for all, says President* (Sep. 13, 2007),

<https://www.un.org/press/en/2007/ga10612.doc.htm>; J. Macklin MP, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Apr. 3, 2009),

https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf.

⁴ 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>.

resources in accordance with customary tenure are necessary to their survival. Accordingly, indigenous consent is presumptively a requirement for those aspects of any extractive operation that takes place within the ... customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival.”⁵

To demonstrate a good faith consultation and attempt to achieve consent, non-Indigenous parties to the consultation process must fully respect Indigenous peoples’ own institutions of representation and decision-making processes. Article 18 of UNDRIP provides that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”⁶

If the W&J People can demonstrate that they have not been adequately consulted in good faith about, nor given their free, prior, and informed consent to, the development of the Carmichael mine on their ancestral lands or the extinguishment of their rights in a part of their lands, this would constitute a violation of the W&J People’s internationally protected human rights.

2. Under international law, Indigenous peoples 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 rights, [is] universal, indivisible and interdependent.”⁷ Many international instruments recognize the right to culture, including the Universal Declaration of Human Rights,⁸ the ICCPR,⁹ ICESCR,¹⁰ and ICERD.¹¹ UNDRIP 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.¹²

⁵ 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. 65, 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 1, para. 47.

⁶ Also, United Nations Special Rapporteur James Anaya has said that “[I]nternational standards require engagement with [Indigenous peoples] through the representatives determined by them and with due regard for their own decision-making processes.” Anaya, *Extractive industries and indigenous peoples*, above n 4, para. 70.

⁷ 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.

⁸ See Article 27.

⁹ See Article 27.

¹⁰ See Article 15.

¹¹ See Article 5(e).

¹² See, for example, Articles 8 and 25.

You have instructed us that:

- If developed as proposed, the Carmichael mine would be among the largest coal mines in the world, disturbing around 30,000 hectares of land, the bulk of which are the ancestral lands of the W&J People. The project would consist of six open-cut pits, five underground mines, a coal handling and processing plant, rail infrastructure, and other associated infrastructure. The project's development would permanently destroy vast areas of the W&J People's ancestral homelands, waters, sacred sites, plants, and animals, which embody the W&J People'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.
- The Carmichael mine would also likely devastate one of the W&J People's most sacred sites, the Doongmabulla Springs, and the conditions imposed by the Australian government on the mine's approval are inadequate to protect the springs (*e.g.*, expert evidence indicates that the groundwater drawdown of 20 centimetres permitted by the Australian government would likely devastate the springs¹³).
- The development of the Carmichael mine threatens the preservation of the W&J People's culture and harms their ability to practice their cultural traditions and pass their culture on to future generations.

In these circumstances, if the W&J People can demonstrate that they have not been consulted in good faith about, nor given their consent to, these impacts on their culture, through their own institutions of representation and decision-making, this would constitute a violation of the W&J People's internationally protected human right to culture.

3. Under international law, Indigenous peoples 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 affected Indigenous peoples have given their free, prior, and informed consent, granted through their own institutions of representation via their own decision-making processes.¹⁴ For example, the UN Committee on the Elimination of Racial

¹³ See *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.edonq.org.au/documents/ACF_ANEDO_CarmichaelFederalConditionsReport_201609.pdf.

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....").

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

If the W&J People can demonstrate that the development of the Carmichael mine prevents them from controlling and using their ancestral lands as they choose, and/or that the extinguishment of their rights in a part of their lands is a confiscation of their lands in the absence of both exceptional circumstances and their free, prior, and informed consent given through their own institutions of representation and decision-making processes, this would constitute a violation of the W&J People’s internationally protected human rights.

III. 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 business enterprises have a responsibility to respect human rights and avoid contributing to human rights violations, including by not providing services (such as engineering or labor services) or financing 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, the United Nations 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

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.

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).

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 business enterprise may contribute, or be directly linked by its business relationships, to an adverse impact if it provides services, such as engineering services or provision of labor, or financing for a project that will violate a human right.*²⁴

The responsibility of 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

To minimize risk and fulfil their responsibilities, the UN Guiding Principles specify that 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.²⁸ Human rights due diligence should involve “meaningful consultation” with potentially affected groups, with special attention to those at heightened risk of vulnerability.²⁹

If an enterprise is at risk of causing or contributing to an adverse human rights impact, it should cease or change the activity that is responsible to prevent or mitigate the chance of the impact occurring or recurring. If an enterprise is at risk of involvement in an adverse impact solely because the impact is linked to its operations, products, or services by a business relationship, it must use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence.³⁰

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 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>. See also *UN Guiding Principles FAQ*, above n 22, pages 31, 32.

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

²⁶ *Id.*, page 13.

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

²⁸ *UN Guiding Principles*, above n 17, pages 13-24.

²⁹ *Id.*, pages 19-20.

³⁰ *Corporate responsibility guide*, above n 24, page 18.

A failure of a business enterprise to respect human rights can have serious “legal, financial and reputational” consequences for that company,³¹ and can subject the company to the court of public opinion, comprising employees, communities, consumers, civil society, and investors. For this reason, a 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.”³² If a 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.³³

The UN Guiding Principles were integrated into the 2011 update to the *OECD Guidelines for Multinational Enterprises* (“OECD Guidelines”).³⁴ The OECD Guidelines are recommendations from the governments of the 36 OECD member countries, including Australia and Germany, to multinational enterprises, providing “principles and standards for responsible business conduct ... consistent with applicable laws and internationally recognized standards.”³⁵ Like the UN Guiding Principles, the OECD Guidelines recommend that enterprises respect human rights, avoid infringing on the human rights of others or causing or contributing to adverse human rights impacts, and seek ways to prevent human rights impacts that are directly linked to their business operations or services by a business relationship, even if they do not contribute to those impacts.³⁶ Also, enterprises should respect the human rights of specific groups that require particular attention, such as Indigenous peoples.³⁷

IV. Conclusion

Where a project would violate the fundamental human rights of the W&J People, any business enterprise that provides support or services to facilitate the project would be complicit in these violations, in violation of its international responsibilities to respect the W&J People’s human rights. Such complicity by any business enterprise 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.

³¹ *Id.*, page 14.

³² *UN Guiding Principles*, above n 17, Principle 23 (page 25) (emphasis added).

³³ *Corporate responsibility guide*, above n 24, page 79.

³⁴ Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2011 edition) (“*OECD Guidelines*”), Chapter IV, pages 31-34, <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

³⁵ *Id.*, Foreword, page 3.

³⁶ *Id.*, Chapter IV, page 31.

³⁷ *Id.*, para. 40, page 32.

Please contact us if you would like additional information.

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