2 October 2015

Via Electronic Mail

Ms. Victoria Tauli-Corpuz, Special Rapporteur on the rights of indigenous peoples
c/o OHCHR-UNOG, Office of the High Commissioner for Human Rights, Palais Wilson
1211 Geneva 10, Switzerland
indigenous@ohchr.org

Re: *Submission regarding Australia's failure to protect the Wangan and Jagalingou People's rights to culture and to be consulted in good faith about, and give or withhold consent to, the development of the destructive Carmichael Coal Mine on our traditional lands*

Dear Special Rapporteur Tauli-Corpus:

We, the indigenous Wangan and Jagalingou people, write to you in urgent and worrying times as our traditional lands, connection to country and cultural identity are under imminent threat of irreversible destruction from an international coal mining venture that also has significant implications for global climate change. Attached to this letter is a detailed submission that requests your urgent intervention in this matter. We are also sending this submission to the UN Special Rapporteur in the field of cultural rights and to the UN Working Group on the issue of human rights and transnational corporations and other business enterprises because the issues our submission raises are also relevant to those mandates.

Our ancestral homelands in central-western Queensland, Australia, are threatened with devastation by the proposed development by a private company, Adani Mining, of the massive Carmichael Coal Mine. If developed as proposed, the mine would be among the largest coal mines in the world. It would permanently destroy vast swathes of our traditional lands and waters, including a complex of springs that we hold sacred as the starting point of our life and through which our dreaming totem, the *Mundunjudra* (also known as the Rainbow Serpent) travelled to form the shape of the land. We exist as people of our land and waters, and all things on and in them – plants and animals – have special meaning to us and tell us who we are. Our land and waters are our culture and our identity. If they are destroyed, we will become nothing.

We have not consented to the development of the Carmichael mine or any other proposed mine on our traditional lands. We will never consent to such development, which would destroy our culture and identity. Our people twice rejected indigenous land use agreements with Adani Mining. Despite this, the Federal government of Australia and the State government of Queensland have granted or indicated their intention to grant primary approvals for the mine.

Throughout the approval process, Adani Mining has failed to respect our human rights and has negotiated and consulted with us in bad faith. The company has ignored our people's decisions and has publicly claimed that it has the authority to determine who may speak for us and what our position is. It has attempted to undermine our internal decision-making processes and institutions of representation.

The development of the Carmichael Mine in the absence of our consent would violate our right to free, prior and informed consent, including our rights to be adequately consulted in good faith about, and to give or withhold our consent to, the development of significant extractive industries on our land. It would also violate our right to enjoy our culture and transmit it to future generations. By supporting and facilitating the Carmichael Coal Mine, Australia is thus violating its duty to protect our fundamental, universally recognized human rights.

The issues raised in this letter also demonstrate the inconsistency of Australian native title law generally with Articles 5(a), 5(d)(v) and (5)(d)(vi) of the Convention on the Elimination of All Forms of Racial Discrimination and Articles 10, 12(1), 17, 19, 26, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples. The Australian process for granting approval for development activities on indigenous peoples' traditional lands urgently requires scrutiny for compliance with Australia's international obligations.

For these reasons, which are described in more detail in the attached submission, we respectfully request that you investigate the issues set out in this letter and call on Australia to ensure the protection of our human rights. We believe that an expression of concern from you would help convince the Australian and Queensland governments to reassess their approvals of the mine in light of its effect on our human rights, and would also help dissuade potential investors from supporting this disastrous mine and the resulting destruction of our culture and lands.

Sincerely,

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Cc (via electronic mail):

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Submission to the United Nations Special Rapporteur on the rights of indigenous peoples

SUBMISSION REGARDING AUSTRALIA'S FAILURE TO PROTECT THE WANGAN AND JAGALINGOU PEOPLE'S RIGHTS TO CULTURE AND TO BE CONSULTED IN GOOD FAITH ABOUT, AND GIVE OR WITHHOLD CONSENT TO, TO THE DEVELOPMENT OF THE DESTRUCTIVE CARMICHAEL COAL MINE ON OUR TRADITIONAL LANDS

Submitted
2 October 2015

SUMMARY

We are the Wangan and Jagalingou – the Weirdi-speaking people. Our ancestral homelands in the central-western part of the state of Queensland, Australia, are threatened with destruction by the proposed development of the massive Carmichael Coal Mine by Adani Mining – which would be among the largest coal mines in the world – and at least five other proposed mines. If developed, the Carmichael Coal Mine would permanently destroy vast swathes of our traditional lands and waters, including Doongmabulla Springs, which we hold sacred as the starting point of our life and from where our dreaming totem, the *Mundunjudra* (also known as the Rainbow Serpent) travelled to shape the earth. *We have never consented to the development of this mine, and we never will*.

Mining on our ancestral lands will violate our human right to culture

Our land and waters are our culture, and our special relationship with them tells us who we are. Our culture is inseparable from the condition of our traditional lands. Unfortunately, our lands are located in a coal-rich area known as the Galilee Basin where the Australian and Queensland governments have approved or proposed to approve five coal mines; the environmental assessment for a sixth mine is underway. All of these mines are or would be located on our traditional lands, and although the development of any one of them would irreversibly harm our traditional lands and waters, the cumulative impact of all these projects would ruin them.

This submission focuses on the proposed development of the Carmichael Coal Mine because its development would set the precedent for and build the infrastructure necessary for the development of other mines on our lands. Moreover, although the Carmichael Mine has not yet been developed, its approvals are moving forward and if they are not stopped soon, it will be too late to save our lands, waters and culture.

The development of the Carmichael Mine would tear the heart out of our country, rendering our land unrecognisable, and devastating the places, animals, plants and water-bodies that are so essential to us and our culture. The mine, which includes six open-cut pits and five underground mines, together with associated infrastructure including a coal handling and processing plant, water supply infrastructure, waste rock dumps, and a rail line, would harm approximately 30,000 hectares of land, the bulk of which are our traditional lands, including Doongmabulla Springs, one of our most sacred sites.

We have not been consulted in good faith or given our free, prior and informed consent to the development of the Carmichael Mine

We have not been consulted in good faith and we have not given our consent to mining on our lands. We have a right under international human rights law to be consulted in good faith about resource exploitation on our traditional lands, particularly when that exploitation threatens our culture. Unfortunately, the proponent of the Carmichael Coal Mine, Adani Mining, has consulted with us in bad faith, as it has unabashedly attempted to undermine our institutions of representation and decision-making. These actions include undermining and challenging the right of our authorised senior spokesperson to speak and be consulted, undermining our democratic processes by choosing whom to consult and negotiate with rather than respecting our choices, presenting false information to the public about our peoples' position on the Carmichael Coal Mine, and sabotaging our meetings. These bad faith actions have disrespected the will of our people, which was expressed unambiguously in October 2014 when we refused to vote in favour of the indigenous land use agreement proposed by Adani Mining and

more recently when we filed a challenge in federal court to the National Native Title Tribunal's decision that the mining leases could be granted.

International human rights law also prohibits the development of the Carmichael Coal Mine without our explicit consent because this massive mine will cause significant, direct, and foreseeable harm to our ancestral homelands. As former Special Rapporteur James Anaya explained in his 2013 report on extractive industries and Indigenous peoples, where 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 – as is the case here – Indigenous consent to the impacts is *required*, beyond simply being an objective of consultations. *Despite the fact we have never consented to the mine, Adani Mining is proceeding with its development with governmental support.*

Our fight to protect our ancestral homelands is urgent

Both the Federal government of Australia and the State government of Queensland strongly and publicly support the development of the Carmichael Coal Mine and other coal mines in the Galilee Basin and both governments have taken steps to approve the mine. Also, we are currently appealing the decision of a tribunal in April 2015, which found that the mining leases for the Carmichael Coal Mine could be granted under Australia's native title legislation despite our people withholding our agreement to the grant. If we are unsuccessful, the tribunal's decision stands, our rights will be overridden, and the development of the mine will be one step closer.

Request for intervention

By supporting and facilitating the proposal and planned development of Carmichael Coal Mine, the Australian government has failed, and continues to fail, to meet its obligations under international human rights law to protect our fundamental and universally recognised human rights, including our rights to culture and to free, prior and informed consent, which includes our rights to be properly consulted in good faith about, and to give or withhold our consent to, the development of significant extractive industries on our ancestral homelands. This violation of international human rights law arises from the actions of both the Australian Federal and Queensland governments, for which Australia is responsible under international law.

In light of these violations, we respectfully request that you further investigate the issues raised in this letter, including by visiting Australia and meeting with our representatives and by sending an urgent appeal to the Australian government expressing your serious concern that the human rights of our people are being violated through the approval of the Carmichael Coal Mine. We would welcome your recommendation to Australia that it ensure the protection of our rights to enjoy our culture and transmit it to future generations, and to be adequately consulted in good faith in relation to, and to give or withhold our consent to, the development of significant extractive projects like the Carmichael Coal Mine on our ancestral homelands. In particular, we would welcome your action to encourage Australia to require that the federal government, the Queensland Government, and Adani Mining Pty Ltd:

- do not proceed with the development of the Carmichael Coal Mine on our ancestral homelands without our consent;
- ensure that no activities that pose a risk of environmental harm to our ancestral homelands, and consequently a risk to our culture, are permitted on our lands in the absence of our free, prior and informed consent; and

- ensure adequate and meaningful consultation in good faith with us in relation to all development activities proposed on our ancestral homelands.[1]

[1] The Wangan and Jagalingou People are grateful for the assistance of Earthjustice (www.earthjustice.org) in the preparation of this submission. For information: intloffice@earthjustice.org.

I. FACTUAL BACKGROUND

A. The Wangan and Jagalingou and our ancestral homelands

Since time immemorial, we Wangan and Jagalingou have lived in the flat arid lands in what is now central-western Queensland.[2] Our ancestral homelands are characterised by open woodlands, rocky outcrops, and grasslands that have been cleared for grazing by pastoralists. Some rivers and creeks, including the Carmichael River, traverse our lands, and there are a number of springs that have created oases in our otherwise dry lands. Today, we number around 400 people from 12 family groups.

Our land is located on what is now known as the Galilee Basin, an area with globally significant coal reserves which, if extracted and burned, would be disastrous for the global climate.[3]

Location of our traditional lands[4]

Although we were forcibly removed from our lands prior to and during the 1920s and 1930s by discriminatory policies as a result of the non-indigenous colonization of Australia, and despite the fact

[2] A video about the Wangan and Jagalingou people is available at http://wanganjagalingou.com.au/.
[3] *See generally*, Australian Government, Geoscience Australia and Bureau of Resource and Energy Economics, *Australian Energy Resource Assessment* (2014), page 149, http://www.ga.gov.au/corporate_data/79675/79675_AERA.pdf; Green Institute, *Cooked by coal – The global significance of Australia's Galilee Basin* (June 2013), https://www.greeninstitute.org.au/sites/default/files/wp-files/2009/09/Galilee-Basin-backgrounder-June-2013.pdf; Climate Council, *Galilee Basin – Unburnable coal* (2015), https://www.climatecouncil.org.au/uploads/af9ceab751ba2d0d3986ee39e1ef04fd.pdf (all accessed July 23, 2015).
[4] Wangan & Jagalingou Family Council, *Map*, http://wanganjagalingou.com.au/map/ (accessed July 13, 2015).

that today some of us are unable to live on our lands, the Wangan and Jagalingou remain strongly connected to our ancestral homelands. We frequently visit the region and are in the early stages of a "return to homelands" movement within our people. In addition, through asserting our rights in our ancestral lands under Australian law, and through a longer-term strategy of land restitution, we are building a contemporary cultural, economic and community base for our people, which will give ongoing expression to our deep connection to Country and ancient laws and customs.

In the words of our senior spokesperson Adrian Burragubba, "Our land is the starting point of our life. This is the place we come from, our dreaming, and it is who we are. The spirits of our ancestors travel through our country and dwell there indefinitely." Today, we visit our ancestral homelands to practice ceremony and cultural rites, to monitor land use and impacts on our totemic beings, and to educate our young people about their ancestry, history and connection to Country. This ancient connection, through to the present, endows us with the knowledge of our traditional ownership and of our distinct identity as Wangan and Jagalingou – the Weirdi-speaking people.

Our senior spokesperson, Adrian Burragubba, has said,

> The sacred belief of our culture, our religion, is based on where the songlines run through our country. These songlines connect us to Mother Earth, and we have a sacred responsibility to protect our lands. Trees, plants, shrubs, medicines we know are on country, waterholes, animals, habitats, aquifers – all have a special religious place in our land and culture and are connected to it. Our land teaches us how to belong, when to sing or dance or practise culture.

Wangan and Jagalingou authorised spokesperson
Adrian Burragubba at Doongmabulla Freshwater Springs[5]

[5] Wangan & Jagalingou Family Council.

Our society is divided into two groups, called moieties, each with specific dreaming totems belonging to it. Our totems represent the original form of an animal, plant or other object as it was in the dreaming period, and many places on our lands are associated with our dreaming totems. The Wangan people are the bottletree people who own the fire, and their totemic beings manifest through the possum, the bee, and the sand goanna. The Jagalingou people are the eel people who own the water, and are associated with the carpet snake, scrub turkey and echidna. Their tree totems are the waxy cabbage palm and melaleuca, which only come to life and flower in water. Our totems protect us and maintain our social order: we cannot kill our totems, and they inform our land interests and our associated decision-making and ceremonial responsibilities. At birth, each child is given a totem, and we have ceremonies near the trees where we are born to pay respect to our totems. We are connected to those trees and, when we die, we return to the spirit dreaming and our connection to those trees remains.[6]

Performing a ceremony on our ancestral lands[7]

[6] *See generally*, Wangan & Jagalingou Family Council, *Statement by the Wangan and Jagalingou people about the Carmichael Mine* ("*Statement*") (March 26, 2015), http://wanganjagalingou.com.au/stories-two/ (accessed July 23, 2015).

[7] Wangan & Jagalingou Family Council, *Gallery*, http://wanganjagalingou.com.au/gallery/ (accessed July 27, 2015).

One of our most sacred places is the Doongmabulla Springs complex, where over 60 individual freshwater springs have created an oasis of around 10.3 hectares in a dry land.[8] These springs are

Water lilies at Doongmabulla Springs

the starting point of our life, and our dreaming totem, 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 the shape of the land, and tell us how to move through our country. The *Mundunjudra* also has the power to control the sites where we are born into our totem. We perform ceremonies and rituals at the springs and other sacred places, like along the Carmichael River, to obtain access to the *Mundunjudra* and other ancestral beings and spiritual powers. These ceremonies give us access to the animal spirits that go through our bodies at birth and connect us to our totems.[9]

[8] Fensham, Dr. R., and Wilson, B., *Joint Experts Report: Springs Ecology* (January 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; Holt QC, S., and McGrath, Dr. C., *Closing submissions on behalf of the first respondent* (May 14, 2015) ("*Closing submissions*"), paras. 152-153, filed in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. & Ors*, http://envlaw.com.au/wp-content/uploads/carmichael51.pdf (both accessed July 23, 2015).

[9] *See generally,* Wangan & Jagalingou Family Council, *Statement*, above n. 6.

Aerial view of a lagoon at Doongmabulla Springs[10]

Our land is our culture, central to our physical and spiritual well-being, and to our ability to pass our culture onto our children. We are stewards of our land: we have been, and will forever be, responsible for protecting it. This is our spiritual belief. We want to continue enjoying our culture long into the future, and ensuring our children and grandchildren can do so too. Our land is who we are.

Today, the representative and decision-making body of our people is the Wangan and Jagalingou Traditional Owners Family Council (the Council). The Council speaks on behalf of our people, and it has authorised a senior spokesperson, Adrian Burragubba, who speaks about the decisions of the Council. The Council has also appointed another spokesperson to convey the views of our younger generation, Murrawah Johnson.

Because of our historic and ongoing connection to our traditional lands, in 2004 we lawfully petitioned to have our relationship to our traditional lands officially recognised under Australian law.[11] Under the federal *Native Title Act 1993* (Cth) ("Native Title Act"), we asked for recognition of our traditional rights

[10] Environmental Law Australia, *Carmichael Coal Mine case*, http://envlaw.com.au/carmichael-coal-mine-case/ (accessed July 25, 2015).

[11] National Native Title 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 (accessed July 17, 2015).

and interests (called "native title")[12] over 30,277 km^2 of our ancestral lands,[13] including Doongmabulla Springs and the Carmichael River. The relevant governmental authorizing and regulatory body, the National Native Title Tribunal ("NNTT"), registered our native title claim in 2004.[14] Although the NNTT has not yet decided our claim,[15] registration provides us certain procedural rights in relation to activities that might affect our native title, such as the grant of mining and pastoral leases and other land uses.[16] The native title process and the limitations of these procedural rights are discussed further at section I.C.

[12] Native title is the recognition by the common law of Australia of a set of rights and interests of indigenous people in relation to 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 1993* (Cth) ("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.comlaw.gov.au/Details/C2014C00631; National Native Title Tribunal, *Native title: an overview*, http://www.nntt.gov.au/Information%20Publications/Native%20Title%20an%20overview.pdf; The Aurora Project, *What is native title?* http://www.auroraproject.com.au/what_is_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.") (all accessed July 25, 2015).

[13] Queensland South Native Title Services, *Wangan and Jagalingou People*, http://www.qsnts.com.au/index.cfm?contentID=84 (accessed July 13, 2015).

[14] National Native Title Tribunal, *Register of Native Title Claims Details – QC2004/006 – Wangan and Jagalingou People*, above n. 11. To be registered, a native title claim must meet procedural and prima facie factual requirements, which include showing an association with the area, and that the claimant observes traditional laws and customs: Native Title Act, above n. 12, Part 7 and especially ss. 190B and 190C.

[15] It is not unusual for claims to take many years to be decided. *See generally*, National Native Title Tribunal, *Annual Report 2011-2012* (2012), page 20, http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202011-2012.pdf ("[I]t usually takes years to resolve claimant applications. Of the 36 claimant applications the subject of determinations registered during the reporting period, 19 had been filed at least 10 years before the determination date.") (accessed July 16, 2015).

[16] Acts that may affect native title are called "future acts:" see generally, Native Title Act, above n. 12, s 233 and Part 2, Division 3. For a useful overview of future acts and procedural rights, *see generally*, The Aurora Project, *Future acts*, http://www.auroraproject.com.au/node/1120#Fact_sheet__Future_Acts_for_PBCs; National Native Title Tribunal, *About future acts*, http://www.nntt.gov.au/futureacts/Pages/default.aspx (both accessed July 17, 2015).

A lagoon at Doongmabulla Springs[17]

B. The proposed Carmichael Coal Mine

The Carmichael Coal Mine is a massive AU$16.5 billion coal mine proposed by Adani Mining,[18] which is part of the Adani group of companies that are headquartered in India.[19] The mine will be among the largest coal mines in the world, producing up to 60 million tonnes of coal per year for up to 60 years, and disturbing around 30,000 hectares, the vast bulk of which will be on our ancestral homelands.[20] The mine will consist of, among other things, six open-cut pits that will destroy up to 8,331 hectares; five underground mines that will disturb 7,786 hectares; five mine infrastructure areas for power, fuel and water supplies and waste disposal facilities (among other things); a coal handling and processing plant; a heavy industrial area including a concrete batching plant, hot mix bituminous plant, and bulk fuel

[17] Environmental Law Australia, *Carmichael Coal Mine case*, above n. 10.

[18] *See generally*, Queensland Government, Department of State Development, Infrastructure and Planning ("Qld Dept. of State Development"), *Carmichael Coal Mine and Rail project: Coordinator-General's evaluation report on the environmental impact statement ("Report on Carmichael EIS")* (May 2014), pages 10, 14, 205, http://www.statedevelopment.qld.gov.au/resources/project/carmichael/carmichael-coal-mine-and-rail-cg-report-may2014.pdf; Adani, *Carmichael Coal Mine and Rail Project – About the EIS*, http://www.adanimining.com/environment-eis; Adani Australia, *Carmichael Coal Mine and Rail Project – About the project*, http://www.adaniaustralia.com.au/project.php?id=1; Rollo, W., ABC News, *Carmichael Coal Mine and Rail Project: Queensland mine gets Federal Government approval* (July 28, 2014), http://www.abc.net.au/news/2014-07-28/carmichael-coal-mine-project-gets-federal-approval/5628584; Rankin, J., The Guardian, *The financial case against Australia's largest coal mine* (May 14, 2015), http://www.theguardian.com/environment/2015/may/14/the-financial-case-against-australias-largest-coal-mine (all accessed July 23, 2015).

[19] *See generally*, www.adani.com (accessed July 25, 2015).

[20] Qld Dept. of State Development, *Report on Carmichael EIS*, above n. 18, pages 2, 9, 10, 223.

storage; out-of-pit dumps destroying up to 8,308 hectares; coal stockpiles; tailings storage cells; other infrastructure including a workers accommodation village, an airport, and water supply infrastructure to allow for extraction, storage and delivery of up to 12.5 gigalitres per year; and a 189 kilometre rail line with five quarries adjacent to it to extract fill materials.[21]

Although rehabilitation of the mine is proposed, this will not happen for at least 60 years,[22] and could never adequately restore the land and our sacred sites.

We are subject to intense governmental and corporate pressure in relation to the development of this mine. The mine is located in the Galilee Basin, one of the largest untapped coal reserves on the planet, which is estimated to contain over 23 gigatonnes of recoverable coal.[23] Both the federal and Queensland governments strongly support coal exploitation and opening the basin to mining,[24] and the Carmichael Coal Mine is particularly important to the industrialisation of the basin: it is being developed in conjunction with the rail infrastructure necessary to transport coal from the basin to the coastal ports from which the majority of the coal is intended to be exported. Another Adani company is seeking to expand one of those coal ports (Abbot Point) to facilitate the export of Galilee Basin coal.[25] Although there are no mines currently operating the Galilee Basin, in addition to the Carmichael mine, four other mines in the basin have also been approved, or are proposed to be approved,[26] and another is currently

[21] *Id*., pages 5-9.
[22] *Id*., page 283.
[23] Australian Government, Geoscience Australia and Bureau of Resource and Energy Economics, *Australian Energy Resource Assessment*, above n. 3, page 149 ("While coal production from the Galilee Basin has not yet commenced, the basin is emerging as a future producer of significant tonnages of thermal coal. Between 2008 and 2012, recoverable identified resource estimates for the basin increased from 7 [gigatonnes] to 23.2 [gigatonnes]. It is likely that the identified resource base will further increase as exploration of the basin progresses.").
[24] *See generally*, Milman, O., and Jericho, G., The Guardian, *For Tony Abbott, it's full steam ahead on coal, 'the foundation of prosperity'* (July 17, 2015), http://www.theguardian.com/environment/2015/jul/17/for-tony-abbott-its-full-steam-ahead-on-coal-the-foundation-of-prosperity; Queensland Government, The Queensland Cabinet and Ministerial Directory, Media Statements – Minister for State Development and Minister for Natural Resources and Mines, the Honourable Anthony Lynham, *Galilee basin coal jobs come one step closer* (April 18, 2015), http://statements.qld.gov.au/Statement/2015/4/18/galilee-basin-coal-jobs-come-one-step-closer ("We welcome Adani's commitment to date to developing this valuable coal deposit and the related infrastructure."); Queensland Government, *Prospective areas of interest – Galilee Basin*, https://www.business.qld.gov.au/invest/investing-queenslands-industries/mining/resources-potential/prospective-areas-interest ("The Queensland Government has created the Galilee Basin Development Scheme to increase investment in the area, cut red tape, fast-track developments and lower start-up costs.") (all accessed July 24, 2015).
[25] Qld Dept. of State Development, *Report on Carmichael EIS*, above n. 18, pages 2, 4, 8, 12; Adani Australia, *Adani Abbot Point Terminal 0*, http://www.adaniaustralia.com.au/project.php?id=7; Queensland Government, Department of State Development, *Abbot Point Growth Gateway Project*, http://www.statedevelopment.qld.gov.au/major-projects/abbot-point-growth-gateway-project.html (both accessed July 24, 2015).
[26] Those mines are the Alpha Coal Project, Galilee Coal Project (Northern Export Facility), Kevin's Corner, and South Galilee Coal. *See generally*, Queensland Government, Department of State Development, *Completed EIS projects*, http://www.statedevelopment.qld.gov.au/assessments-and-approvals/completed-eis-projects.html (accessed July 23, 2015).

progressing through its environmental assessment.[27] All of these mines are located on our traditional lands, and although the Carmichael Coal Mine alone would irreversibly harm our traditional lands and waters, the cumulative impact of all these projects would ruin them. We are fighting to protect our lands against the extreme power and wealth of the Adani group – a massive global corporation – and against the state and federal governments that actively support the fossil fuel industry in their pursuit of coal exploitation our sacred traditional lands for private shareholder profit.

Adani Mining submitted its initial proposal for the mine to the Australian and Queensland governments in late 2010, and has been vigorously pursuing the mine's development since then.[28] In July 2014, the Australian government approved the mine under federal legislation,[29] and in August 2014, the Queensland government proposed to approve the mine under state legislation.[30] Both state and federal approvals are currently in litigation in the Australian courts, but we are not party to these suits.[31] In August 2015, a federal court invalidated the Federal Government's environmental approval of the mine for failure to properly consider the mine's impact on two vulnerable species, as required under the Environment Protection and Biodiversity Conservation Act.

C. The Native Title Act process and our dealings with Adani Mining

1. The Native Title Act process

As registered native title claimants since 2004, the Native Title Act gives us certain procedural rights. In particular, in relation to the grant of a mining lease that will affect our native title rights and interests, we have a statutorily established right to negotiate with the government and the resource company

[27] That mine is China Stone Coal. *See* Queensland Government, Department of State Development, *China Stone Coal Project*, http://www.statedevelopment.qld.gov.au/assessments-and-approvals/china-stone-coal-project.html (accessed July 23, 2015).

[28] *See generally*, Adani Mining Pty Ltd, *Carmichael Coal Mine and Rail Project – Initial Advice Statement* (October 22, 2010), http://www.statedevelopment.qld.gov.au/resources/project/carmichael/initial-advice-statement.pdf; Australian Government, Department of the Environment, *Referral detail – Adani Mining Pty Ltd/Mining/Moray Downs Cattle Station 160km North West of Clermont/QLD/Carmichael Coal Mine and Rail Project – 2010/5736*, http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=5736 (both accessed July 25, 2015).

[29] Australian Government, Department of the Environment, *Approval – Carmichael Coal Mine and Rail Infrastructure Project, Queensland (EPBC 2010/5736)* (July 24, 2014), http://www.environment.gov.au/epbc/notices/assessments/2010/5736/2010-5736-approval-decision.pdf (accessed July 17, 2015).

[30] Qld Dept. of State Development, *Report on Carmichael EIS*, above n. 18, pages 348-349; Queensland Department of Environment and Heritage Protection, *Draft environmental authority EPML01470513 – Carmichael Coal Mine* (August 28, 2014), http://www.edoqld.org.au/wp-content/uploads/2014/08/2014-08-28-Carmichael-Mine-Draft-EA-FINAL.pdf (accessed July 17, 2015).

[31] *See generally*, EDO Qld, *Case update: Adani Carmichael Coal Mine objection* (March 30, 2015), http://www.edoqld.org.au/news/case-summary-carmichael-mine-objection/; EDO NSW, *Mackay Conservation Group v Commonwealth of Australia and Adani Mining,* http://www.edonsw.org.au/mackay_conservation_group_v_commonwealth_of_australia_and_adani_mining (both accessed July 23, 2015).

about the grant of the lease and how it might affect our rights and interests.[32] Under the Native Title Act, negotiations must take place "in good faith" and for at least six months. If agreement cannot be reached after that time, the dispute is referred to an arbitral body (usually the National Native Title Tribunal ("NNTT")).[33] The arbitral body must determine whether the grant of the mining lease can be validly made.[34] A determination by the arbitral body that a lease may be granted does not mean that it must be granted; whether to grant a lease continues to be a matter of discretionary decision-making for the government. Consequently, the Queensland Government is the primary authority that can override and extinguish our rights in lands and waters by granting a mining lease for the Carmichael Coal Mine.

Unfortunately, the National Native Title Tribunal rarely decides that a mining lease cannot be granted.[35] Also, an arbitral body cannot impose a condition requiring the payment of royalty-type payments (*i.e.*, payments worked out by reference to profits, income, or production), even though the Native Title Act contemplates royalty-type payments to native title parties in negotiated agreements.[36] Because of the strong likelihood that the arbitral body will decide that a lease may be granted that does not require payments to the affected Indigenous community, many Indigenous communities feel they have no satisfactory choice: they must agree to the grant of tenure during the statutory negotiations with the mining company in exchange for some royalty-type payments rather than risk their claim going to arbitration. This biased and unfair process creates an element of compulsion under the so-called right to negotiate, denying us genuine free prior and informed consent. Indeed, former Special Rapporteur on indigenous peoples James Anaya noted in his country visit to Australia that he "received information during his visit that the current Native Title Act framework has serious limitations that impair its ability

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[32] *See generally*, Native Title Act, above n. 12, Part 2, Division 3, Subdivision P (ss. 25-44); The Aurora Project, *Right to negotiate (RTN)*, http://www.auroraproject.com.au/Right_to_negotiate#The_RTN_process; National Native Title Tribunal, *Negotiation*, http://www.nntt.gov.au/futureacts/Pages/Negotiation.aspx (both accessed July 17, 2015).

[33] *Id*. *See, in particular*, Native Title Act, above n. 12, ss. 27, 31.

[34] *See generally*, Native Title Act, above n. 12, ss. 35, 36, 38, 39, 41.

[35] As noted in footnote 16 above, an act that may affect native title – such as the grant of resource tenure – is called a "future act." In 2011-2012, the Tribunal found that only 4 out of 16 contested future acts were not allowed; in 2010-2011, the Tribunal found that only 1 out of 27 contested future acts was not allowed; and in 2009-2010, the Tribunal allowed all 9 contested future acts to be done. *See* National Native Title Tribunal, *Annual Report 2011-2012*, above n. 15, Table 13 (page 61); National Native Title Tribunal, *Annual Report 2010-2011*, Table 13 (page 82), http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202010-2011.pdf; National Native Title Tribunal, *Annual Report 2009-2010*, Table 23 (page 82), http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202009-2010.pdf (both accessed July 19, 2015). *See also*, Australian Lawyers for Human Rights, *Exposure Draft – Native Title Amendment Bill 2012* (October 23, 2012), para. 8, https://www.ag.gov.au/Consultations/Documents/Currentnativetitlereforms/Australian%20Lawyers%20for%20Human%20Rights%20Submission%20[PDF%20536KB].pdf (accessed July 19, 2015) ("The Tribunal (once its power to arbitrate is enlivened) almost always allows future acts to be done…."). *See also* Prendergast, J., ABC, *National Native Title Tribunal explains Weld Range Metals snub* (September 27, 2011), http://www.abc.net.au/news/2011-09-27/national-native-title-tribunal-explains-weld-range/6033984 (accessed July 29, 2015) ("For the second time in its eighteen year history, the National Native Title Tribunal has refused to allow mining, this time in [an] area of land in Western Australia.").

[36] Native Title Act, above n. 12, ss. 33(1), 38(2).

to protect the native title rights of Aboriginal and Torres Strait Islanders," and that according to "the Government's own evaluation, the native title process is complex and slow and in need of reform."[37]

The Native Title Act also provides for an alternate process for attempting to reach agreement about the grant of a mining lease: the resource company may seek to negotiate an indigenous land use agreement ("ILUA") with registered native title claimants, through which the native title claimants would agree to the grant of the mining lease and potentially other acts in the future that might affect their native title, usually in exchange for benefits such as compensation and protection of significant sites.[38] There are a number of benefits to a resource company in negotiating an ILUA, including that an ILUA can give the native title party's consent to the grant of future mining leases (in contrast to the right to negotiate agreement which only deals with the specific mining lease at issue). As with the statutory negotiation process described above, this ILUA process also creates an essentially coercive incentive for native title parties to agree to an ILUA so as to avoid referral of the matter to an arbitral body that is unlikely to decide in their favour. In his 2010 report on Australia, former Special Rapporteur Anaya noted that during his visit he

> heard concerns that indigenous rights are often inadvertently undermined because the terms of such [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 developed in ways that maximize benefits for the future generations of the indigenous peoples.[39]

2. Adani Mining's bad faith negotiations with our people

To understand the negotiating history between Adani Mining and the Wangan & Jagalingou, it is necessary to understand our main decision-making structures and procedures, particularly as they apply to Native Title and the negotiation of ILUAs. The Wangan and Jagalingou people make our decisions and represent ourselves through our own governance structures, including through the Native Title Claim Group, the Applicant, and the Traditional Owners Council. The Native Title Claim Group is all descendants of the heads of the twelve clans or families that composed the Traditional Owners at the time of British arrival. For purposes of the legal process for recognition of native title, the Claim Group authorizes a group collectively known as the "Applicant" to act on their behalf for their claim under the

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[37] Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Situation of indigenous peoples in Australia, U.N. Doc. A/HRC/15/37/Add.4 (1 June 2010), para. 26.

[38] *Id*., ss. 24BA-24EC. *See also*, The Aurora Project, *Indigenous land use agreements (ILUAs)*, http://www.auroraproject.com.au/Indigenous_land_use_agreements#Indigenous_land_use_agreements_for_PBCs; National Native Title Tribunal, *About Indigenous Land Use Agreements (ILUAs)*, http://www.nntt.gov.au/ILUAs/Pages/default.aspx (both accessed July 17, 2015).

[39] Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Situation of indigenous peoples in Australia, U.N. Doc. A/HRC/15/37/Add.4 (1 June 2010), para. 27.

Native Title Act.[40] The Wangan and Jagalingou Traditional Owners' Family Council is a family representative body that decides upon matters outside the native title claim process. The Family Council is comprised of two members from each of the twelve families from the Claim Group. Each of these bodies makes decisions by consensus, or by majority vote if consensus cannot be achieved.

Adani Mining first commenced negotiations with the Wangan and Jagalingou people in May 2011 in relation to one of the three mining leases required for the Carmichael Coal Mine. We did not reach agreement with Adani Mining and rejected an ILUA in December 2012. Adani then took the matter to the National Native Title Tribunal (NNTT). In May 2013, the NNTT decided against our arguments regarding lack of good faith in negotiations, and determined that the grant of that mining lease could be validly made under the Native Title Act.[41]

Adani Mining then resumed negotiations with us in relation to the other two mining leases required for the mine, and proposed an indigenous land use agreement as a means to tie up the whole mine complex on our lands. During this time, the Wangan and Jagalingou People were represented in this native title negotiation process by three people who together comprised the Applicant on our native title claim. One of these three was Adrian Burragubba who, as instructed by the Wangan and Jagalingou Traditional Owners Family Council, opposed the mine. The other two people comprising the Applicant also opposed the mining proposal but favoured of an agreement with Adani Mining, apparently because their understanding of certain legal advice led them to believe that opposition to the Carmichael Mine was futile and an agreement with Adani Mining would provide benefits not otherwise attainable. (This is an example of the coercive incentive system established in Australia's Native Title System's, described above, in which Indigenous people are forced to negotiate away their land rights to avoid a worse outcome.)

Although two of the three members of the Applicant favoured an agreement with Adani Mining, the Wangan and Jagalingou decision-making processes prohibit entering into any such agreement without consideration and approval by the entire Wangan and Jagalingou Claim Group. Recognizing this, Adani Mining called for such a meeting in October 2014. At this meeting, the Claim Group formally rejected an indigenous land use agreement (ILUA) proposed by Adani Mining in which we would have given our consent to the grant of mining leases on our traditional lands.[42] The proposed ILUA would have bound

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[40] The Applicant on a native title claim is the person or persons authorised by to make the native title claim by the group of people who, according to their traditional laws or customs, hold rights and interests in the area the subject of the native title claim. *See generally*, Native Title Act, above n. 12, s 61(1) and (2).

[41] *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTTA 30 (March 31, 2013), http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/NNTTA/2013/30.html?stem=0&synonyms=0&query=Adani; *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTTA 52 (May 7, 2013), http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/NNTTA/2013/52.html?stem=0&synonyms=0&query=title(%222013%20NNTTA%2052%22) (both accessed July 29, 2015) .

[42] *See Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People* [2015] NNTTA 16 (April 8, 2015), paras. 29, 32, http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/NNTTA/2015/16.html?stem=0&synonyms=0&query=adani; Wangan & Jagalingou Family Council, *Wangan and Jagalingou Traditional Owners Family Representative Council's authorised spokesperson* (March 26, 2015), http://wanganjagalingou.com.au/wangan-and-jagalingou-traditional-owners-family-representative-councils-authorised-spokesperson/ (both accessed July 18, 2015).

the entire Wangan and Jagalingou people, placing a constraint on any further objections and requiring our ongoing public silence about the mine's effects on our Country. Applying our agreed internal decision-making process, we decided to reject the proposed ILUA. As our senior authorised spokesperson Adrian Burragubba said, "Adani Mining and the Queensland government have not offered anything meaningful to protect and secure the future of our country and our sacred connection. The price that Adani Mining is asking us to pay includes silence in the future – not being able to object to anything they do."

Following our rejection of the agreement in October 2014, Adani Mining promptly took us to the NNTT, which, in April 2015, found that the Wangan and Jagalingou had not consented to the grant of the mining leases,[43] but nevertheless decided that the Native Title Act did not prohibit granting the mining leases.[44] We are currently in litigation in the Federal Court of Australia to challenge the NNTT's decision.[45] If we lose this litigation, the decision of the NNTT will stand, and the Australian and Queensland governments can grant the mining leases without violating the Native Title Act. We also intend to make a complaint to the Australian Human Rights Commission that the operation of the Native Title Act is racially discriminatory.

Adani Mining was not satisfied with its victory at the NNTT. Rather, the company began a process of direct interference with our internal decision-making, presumably in an attempt to undermine our ongoing litigation and our continued opposition to the grant of mining leases on our traditional lands. On 21 June 2015, the Wangan and Jagalingou met to reconsider the structure of the Native Title Claim Applicant group, because of concerns that members of that group had violated their mandate to act on the instructions of our people.[46] Adani Mining attempted to manipulate the outcome of our deliberations at that meeting by stacking the meeting in its favour. The company provided transportation to the meeting and lodging for 150 of our people who were members of the families of the two Applicant group members who had favoured an ILUA, presumably with the expectation that they would vote in support of Applicant group members who supported the mine. The company did not offer any support for people or families to attend the meeting who opposed the mine.

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[43] *Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People*, above n. 42, para. 32 ("I accept that if there was agreement to the grant of the mining leases (subject perhaps to an indigenous land use agreement or an ancillary agreement) then the matter would not be before the Tribunal. I accept that the [Wangan and Jagalingou People have] not made submissions in support of the grant of the mining leases, nor have they consented to the grant of the mining leases.").

[44] *See generally*, *id*.

[45] *See generally*, West, M., Sydney Morning Herald, *Adani shown the door by traditional owners* (July 4, 2015), http://www.smh.com.au/business/comment-and-analysis/adani-shown-the-door-by-traditional-owners-20150703-gi3y2h (accessed July 23, 2015).

[46] In the proceedings before the NNTT, the two Applicant group members in favour of an agreement with Adani Mining attempted to instruct the Wangan and Jagalingou's legal representative not to oppose the grant of the mining leases. This was in direct opposition to the clear decision of the Claim Group and the Traditional Owners Family Council, as well as the wishes of the Wangan and Jagalingou People as a whole, who oppose the mine. For this reason, the Applicant group was no longer able to represent the wishes of the Wangan and Jagalingou people as a whole. At the 21 June 2015 meeting, our people voted to restructure the Applicant group so that it would be comprised of twelve people, one from each of the twelve ancestral family groups of the Wangan and Jagalingou. The three people who formerly made up the Applicant, including our senior spokesperson Adrian Burragubba, continue to serve on the newly restructured Applicant.

Although Adani Mining representatives attempted unsuccessfully to attend the meeting themselves, they used the presence of those they had transported there to introduce an Adani-drafted memorandum of understanding (MOU) between the company and our people. Despite our previous "no" vote rejecting an ILUA in October 2014 and our federal court case challenging the NNTT's determination that the leases could be granted, the proposed MOU would have cast doubt on our objection to the mine.[47] Our people ultimately rejected Adani's attempt to introduce the MOU at the meeting. However, when the meeting had finished and the venue hire had expired, Adani Mining attempted to constitute an additional meeting to consider the MOU.

There are many other examples of Adani Mining's bad faith in its negotiations with our people. For example, the company attempted to use a divide-and-conquer tactic by excluding our senior authorised spokesperson , Adrian Burragubba, who was at the time one of the three people comprising the Applicant on the native title claim, from meetings at which Adani Mining attempted to secure agreements with the two other Applicant group members. To exclude our people's representative and spokesperson from a meeting intended to make decisions concerning our Native Title rights was unlawful and disrespectful of our internal institutions of representation and decision-making.

Adani Mining also has made several misrepresentations to the public regarding our people's position concerning the mine. For example, the company has falsely stated that it was "dealing with all duly authorised representatives"[48] of the Wangan and Jagalingou people when it was dealing only with the two members of the former Applicant group who did not represent the wishes of our people. In its public communications, Adani Mining has also used those two members' non-opposition to the grant of the mining lease in the NNTT proceedings as evidence of our people's support for the mine, despite those two members acting outside their mandate and not representing our people's wishes.[49] In addition, contrary to the clear and explicit statements of our authorised spokespersons, Adani Mining has also said that it "does not believe that the [Wangan and Jagalingou] don't want this mine, as the [Wangan and Jagalingou] have been and continue to be actively involved in negotiations around delivery of the mine on terms acceptable to [them]."[50]

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[47] *See generally*, West, M., Sydney Morning Herald, *Adani shown the door by traditional* owners, above n. 45.

[48] The Guardian, *Adani says it is negotiating with Indigenous people over coalmine* (March 26, 2015), http://www.theguardian.com/australia-news/2015/mar/26/adani-says-it-is-negotiating-with-indigenous-people-over-coalmine (accessed July 16, 2015).

[49] *See generally*, Adani, *Adani and Wangan and Jagalingou – Joint Release*, http://www.adaniaustralia.com.au/media_detail.php?mid=26 (accessed July 27, 2015). In addition, one of those former applicants has said publicly that he is resigned to the mine going ahead so is trying to get the best deal he can for our people. *See* Branco, J., Brisbane Times, *Opposition to Adani mine from Indigenous locals* (April 14, 2015), http://www.brisbanetimes.com.au/queensland/opposition-to-adani-mine-from-indigenous-locals-20150414-1ml4ld.html (accessed July 27, 2015).

[50] The Guardian, *Adani says it is negotiating with Indigenous people over coalmine* (March 26, 2015), http://www.theguardian.com/australia-news/2015/mar/26/adani-says-it-is-negotiating-with-indigenous-people-over-coalmine (accessed July 16, 2015). *See also*, Borschmann, G., ABC News, *Wangan and Jagalingou people reject $16 billion Carmichael mine to be built in central Queensland* (March 25, 2015), http://www.abc.net.au/news/2015-03-26/wangan-jagalingou-people-say-no-to-16-billion-carmichael-mine-q/6349252; Cox, L., Sydney Morning Herald, *Native title battle shaping up over Adani coal mine* (March 26, 2015), http://www.smh.com.au/federal-politics/political-news/native-title-battle-shaping-up-over-adani-coal-mine-20150326-1m8esn.html; Lateline, *Traditional owners vs. Carmichael Mine* (March 26, 2015), http://www.abc.net.au/lateline/content/2015/s4205747.htm (all accessed July 16, 2015).

Adani Mining has also attempted to question the independence of our people and create a perception that our decisions are not legitimate by asserting that the company's negotiations with our people "failed following an activist group appointing a paid, outside organiser to interfere with the process." Whilst we have reached out to the broader community for support against the significant pressure being placed upon our people to agree to the mine, we absolutely retain our autonomy to decide with whom we collaborate, and it is extremely offensive that Adani Mining would suggest we are not making our own decisions or that we are not acting in good faith during all negotiations in which we are involved regarding the Carmichael Mine and Adani's interests.

As evidenced by the preceding history, throughout the statutory negotiation process with us, Adani Mining has acted in bad faith by ignoring and disrespecting our people's traditional and contemporary forms and methods of decision-making. Despite, Adani Mining's bad faith, we are a proud people with integrity and we will continue to adhere to the law and act in good faith in these negotiations, ultimately relying on the fact that we have the support of the Australian and global community in standing up for our fundamental human rights and in the hope that, in doing so, justice will ultimately prevail for our people.

II. THE DEVELOPMENT OF THE CARMICHAEL COAL MINE WOULD VIOLATE OUR RIGHT TO ENJOY OUR CULTURE AND TRANSMIT IT TO FUTURE GENERATIONS

Our land and waters are sacred, and our culture is inseparable from the condition of our ancestral homelands. If the Carmichael Coal Mine proceeds, it will forever destroy vast swathes of our lands and waters, rendering our land unrecognisable, obliterating our songlines and thereby irredeemably destroying our cultural identities. The mine is very likely to devastate Doongmabulla Springs, which are the starting point of our life and through which our dreaming totem, the *Mundunjudra*, travelled to form the shape of the land. If our land and waters are destroyed, our culture will be lost and we become nothing. Our children and grandchildren will never know their culture or who they are, and will suffer significant social, cultural, economic, environmental and spiritual damage and loss if the mine is allowed to proceed. The development of the Carmichael Coal Mine in the absence of our consent would violate our internationally protected rights to enjoy our culture and to transmit it to future generations and, as such, Australia is failing to protect and defend those rights.

A. The right to culture under international law

The human right to culture is an "integral part of human rights and, like other rights, [is] universal, indivisible and interdependent."[51] The right to culture is recognized in many international instruments, including the Universal Declaration on Human Rights (which protects the right "freely to participate in the cultural life of the community"),[52] the International Covenant on Civil and Political Rights ("ICCPR")

[51] UN Committee on Economic, Social and Cultural Rights ("ESCR Committee"), *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* ("*General Comment 21*"), E/C.12/GC/21 (December 21, 2009), para. 1, available to download at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang%20=en (accessed July 13, 2015).

[52] *Universal Declaration on Human Rights*, Article 27(1), http://www.un.org/en/documents/udhr/ (accessed July 13, 2015).

(which provides that members of minority groups "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language"),[53] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") (which provides that "States Parties … recognize the right of everyone [t]o take part in cultural life").[54] Australia is a party to both covenants.[55]

The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") also specifically assures the cultural rights of indigenous peoples and links those rights to the natural environment and to future generations:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[56]

UNDRIP also provides that indigenous peoples have the rights:

- not to be subjected to destruction of our culture;[57]
- to practise and revitalise our cultural traditions and customs, which includes maintaining, protecting and developing our culture;[58]
- to practise and develop our spiritual and religious traditions, customs and ceremonies, and to maintain and access in privacy our religious and cultural sites;[59]
- to revitalise, use, develop and transmit to future generations our histories, languages, oral traditions and philosophies;[60] and

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[53] *International Covenant on Civil and Political Rights* ("ICCPR"), Article 27(1), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed July 13, 2015).
[54] *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), Article 15(1)(a), http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed July 23, 2015).
[55] *See* United Nations Treaty Collection, *International Covenant on Civil and Political Rights*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en; United Nations Treaty Collection, *International Covenant on Economic, Social and Cultural Rights*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (both accessed July 13, 2015).

Although Australia has ratified the core international human rights treaties, it has failed to properly implement them in domestic law (including via a bill of rights or federal human rights act) and has been subject to ongoing robust criticism from the international community for this failure, including at Australia's first Universal Periodic Review (UPR) held on 27 January 2011. *See* Australian Human Rights Commission, Australia's Universal Periodic Review: Progress Report Prepared By The Australian Human Rights Commission On Behalf Of The Australian Council Of Human Rights Authorities (2014), https://www.humanrights.gov.au/sites/default/files/document/publication/upr-progress-report-2014.pdf. During the UPR, 52 UN member countries made 145 recommendations to Australia to improve its human rights record including many in respect to Australia's indigenous peoples. As of 2014, Australia had not implemented or only partly implemented the vast majority of these recommendations. *Id.*

[56] United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), Article 25, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed July 23, 2015).
[57] *Id*., Article 8.
[58] *Id*., Article 11.
[59] *Id*., Article 12.

- to maintain and develop our traditional knowledge, and cultural heritage and expressions, and the manifestations of our cultures, including oral traditions.[61]

"Culture" is a "broad, inclusive concept."[62] The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has stated that, as protected under the ICESCR, culture encompasses ways of life, language, oral literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, natural environments, food, customs, and traditions, "through which individuals … and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives."[63]

One of the main components of the right to take part in cultural life is access to that cultural life: the right of everyone to know and understand his or her own culture, and to follow a way of life associated with the use of cultural goods and resources such as land, water and biodiversity.[64] Another main component of the right is contribution to cultural life: the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community, which is supported by the right to take part in the development of the community to which a person belongs.[65]

The ESCR Committee has recognised that certain conditions are necessary to ensure full realisation of the right to culture.[66] These conditions include the availability of "cultural goods and services … including folklore, … nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there … [and] intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities."[67] Another condition is accessibility: effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all, without discrimination.[68]

To properly respect indigenous cultural rights, States must, among other things, refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life, and take appropriate measures aimed at the full realisation of the right.[69] States must "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,"[70] and "respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression … [including] protection from … unjust exploitation of their lands, territories and resources."[71] States must also "respect and protect cultural heritage in all its forms … [and] in economic

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[60] *Id*., Article 13.
[61] *Id*., Article 31.
[62] ESCR Committee, *General Comment 21*, above n. 51, para. 11.
[63] *Id*., para. 13.
[64] *Id*., para. 15(b).
[65] *Id*., para. 15(c).
[66] *Id*., para. 16.
[67] *Id*., para. 16(a).
[68] *Id*., para. 16(b).
[69] *Id*., para 48.
[70] *Id*., para. 49(d).
[71] *Id*., para 50(c).

development and environmental policies and programmes."[72] Positive measures by a State may well be required to ensure the rights are protected, including preventing third parties from interfering with cultural rights.[73]

For many indigenous peoples, including our people, the right to enjoy culture is linked to the natural environment of their traditional lands:

> [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…. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[74]

Interference with indigenous lands implicates the right to culture, because the use and enjoyment of traditional lands are integral components of the physical and cultural survival of indigenous peoples. This is especially so in relation to natural resource exploitation and environmental degradation: the United Nations Special Rapporteur on the rights of indigenous peoples has recognised that culture is one of the primary substantive rights that may be implicated in natural resource development.[75] Indeed, the ESCR Committee has noted that

> 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.[76]

In addition, the Committee on the Elimination of Racial Discrimination has placed special emphasis on the problem of the loss of indigenous lands and resources to, among others, "commercial companies," and the threat that such loss poses to the "preservation of their culture and historical identity."[77]

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[72] *Id*., paras. 50(a) and (b).

[73] *Id*., paras. 48 and 50. *See also* 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)* ("*General Comment 23*"), CCPR/C/21/Rev.1/Add. 5 (April 26, 1994), para. 6.1, available to download at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.5&Lang=en (accessed July 16, 2015) ("[A] State party is under an obligation to ensure that the existence and exercise of [the right in article 27 of the ICCPR] are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.").

[74] UN Human Rights Committee, *General Comment 23*, above n. 73, paras. 7 and 9.

[75] Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples* ("*2012 Annual Report*"), A/HRC/21/47 (July 6, 2012), para. 50, http://unsr.vtaulicorpuz.org/site/images/docs/annual/2012-annual-hrc-a-hrc-21-47-en.pdf (accessed July 24, 2015).

[76] ESCR Committee, *General Comment 21*, above n. 51, para. 36.

[77] Committee on the Elimination of Racial Discrimination, *General recommendation XXIII* (1997), para. 3, cited in Special Rapporteur Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, A/HRC/15/37 (July 19, 2010), para. 40, http://unsr.jamesanaya.org/docs/annual/2010_hrc_annual_report_en.pdf (accessed July 24, 2015).

Furthermore, international law has recognised the connection between the natural environment and human rights, and has acknowledged that protection of human rights often requires environmental protection. As Judge Weeramantry of the International Court of Justice has said:

> The protection of the environment is … a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[78]

B. The Carmichael Coal Mine will violate our right to enjoy, transmit, and revitalise our culture

The sheer scale of the Carmichael Coal Mine is difficult to conceive: it will be one of the largest coal mines in the world, covering a vast swathe of our land and causing extensive disturbance and devastation. It is simply not possible to build a mine consisting of six open-cut pits, five underground mines, a coal handling and processing plant, rail infrastructure, and all other necessary associated infrastructure without causing massive alteration of the environment and significant environmental harm. If the Carmichael Mine proceeds, it will tear the heart out of our country, our culture and our people. It will destroy our land and everything on it – trees, shrubs, waterholes, animals and springs – beyond recognition. Our songlines, which tell us where the *Mundunjudra* travelled and how to move through our country, will be lost forever. Our cultural identities as indigenous people will be extinguished.

In addition to the damage caused to the land's surface, the mine will draw down approximately 12 billion litres of water each year,[79] which will have very serious impacts on groundwater and the freshwater Springs. We are particularly concerned about irreversible harm to our sacred Doongmabulla Springs, which are located about eight kilometres from the western edge of the mining lease boundary.[80] Expert evidence adduced under oath in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. & Ors* (the court proceedings brought earlier this year by an environmental group against the proposed state environmental approval) shows that the mine is likely to cause the springs to dry up and that Adani Mining's groundwater modelling, which was the basis for the conclusion in its environmental assessment that the mine is unlikely to reduce the ecological value of the springs, is

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[78] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, I.C.J. Reports (September 25, 1997) (separate opinion of Vice-President Weeramantry), at ¶ A(b), http://www.icj-cij.org/docket/files/92/7383.pdf (accessed July 24, 2015).

[79] 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* (December 16, 2013), page 7 (para. 17(g)), http://www.iesc.environment.gov.au/system/files/resources/224fbb59-e5e6-4154-9dd0-8d60d7c87a75/files/iesc-advice-carmichael-2013-034.pdf (accessed July 24, 2015); Qld Dept. of State Development, *Report on Carmichael EIS*, above n. 18, page 10.

[80] Qld Dept. of State Development, *Report on Carmichael EIS*, above n. 18, page (xii).

crucially flawed.[81] As such, the mine is likely to devastate one of the most sacred places to our culture and religion: the place that is the starting point of our life, and from where the *Mundunjudra* came to shape the earth and establish our songlines. In addition, the expert evidence also shows that the permanence of the base flow of the Carmichael River derives from the Doongmabulla Springs, so if the springs dry up, the flow of the Carmichael River will at the very least be heavily impacted.[82] This will in turn harm the Carmichael River's waxy cabbage palm population – the totem of the Jagalingou – and which expert evidence indicates is the most significant population of this vulnerable species in the world and necessary for its long-term survival.[83]

The Carmichael Coal Mine will cause our land and waters to simply be "disappeared"; it will destroy our special relationship with our land and waters, which are so special to us and tell us who we are. As a result, we will become nothing. Speaking on behalf of our Traditional Owners Family Council, Adrian Burragubba says:

> If this mine proceeds, it will destroy every connection there is with our ancestors and our laws and customs. This mine will forever damage Wangan and Jagalingou sacred country, and we will have failed in our sacred responsibility to protect our lands. Harming the environment, the country, the landscape, the ecosystems, the dependent species, is harming our sacred beliefs and spiritual connections.

Murrawah Johnson, also speaking on behalf of our people, adds:

> This mine will forever interfere with our way of life and culture and traditions. It will have negative impacts on our social, cultural and economic structures. We know this because of the way Adani Mining has treated us and because of what is proposed for the future. Adani Mining has not listened to us and does not respect our views. We have seen damage already in country under cultural heritage management plans, including removal of cultural objects, land clearing for exploration and workers camps, ground drilling and water extraction, and test pits. Adani Mining and the Queensland government haven't offered anything that will actually protect our sacred connection to our land. Instead, all they want is silence from us in the future.

We need our ancestral homelands to remain intact and healthy so that our children and grandchildren can learn their stories and learn and experience their cultural identities and who they are. We do not want our culture to be lost; we want to share it with our children. Murrawah Johnson says,

> In our tribe, women teach our stories to our young people. I want my children and their children to know who they are. And if this mine proceeds and destroys our land and waters, and with it our culture, our future generations will not know who they are. Our people and our

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[81] Holt QC, S., and McGrath, Dr. C., *Summary of closing submissions on behalf of the first respondent* (May 14, 2015), para. 5(a), filed in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. & Ors*, http://envlaw.com.au/wp-content/uploads/carmichael50.pdf (accessed July 24, 2015). *See also*, Holt QC, S., and McGrath, Dr. C., *Closing submissions*, above n. 8, pages 41-134.

[82] Holt QC, S., and McGrath, Dr. C., *Closing submissions*, above n. 8, pages 134-139.

[83] *Id*. *See also* Wilson, B., and Olsen, Dr. M., *Joint Experts Report: Livistona lanuginosa*, lines 184-189, cited in *id*., pages 134-135.

> culture have survived for thousands of years, and I cannot allow the Carmichael Coal Mine to destroy us. I will not allow myself to be the link in the chain that breaks.
>
> Wangan and Jagalingou have in the past exercised and enjoyed our customary laws and practises in our lands including the area of the Carmichael Mine. We still do so to this day. We want to in the future, but the damage that this mine will cause to the land and the waters on the mine site and around it will make it impossible.

Furthermore, the harm that the mine will cause to our culture will be irreversible and cannot be mitigated. Moving a sacred object to another location to avoid its destruction by the mine, refraining from disturbing a small area of particular importance to us, or providing offsets for damaged land, as Adani Mining has proposed to do,[84] would not protect the sacred and cultural value of our lands. While protecting specific sacred sites and areas is very important to us, our culture is connected to our land and waters as a whole, not just particular areas or objects. Moreover, as Adani Mining itself has acknowledged, it is "not always practical" to avoid destroying cultural heritage material.[85]

We also have a responsibility under our traditional law to ensure our lands are not used to harm other people. Adrian Burragubba has stated that, "[t]he use of our land to mine coal offends our spiritual beliefs, and we cannot in good conscience allow it to be used for a project that will contribute so substantially to the unfolding and direct effects of climate change that pose such great risks to the entire planet." The joint expert evidence adduced in the *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. & Ors* litigation demonstrates that the emissions associated with the extraction, transport and combustion of coal from this mine over its proposed lifespan are 4.73 billion tonnes of carbon dioxide.[86] This is one of the highest levels of emissions associated with a single project anywhere in the world, and is a staggering 0.53-0.56% of the total *global* amount of carbon the Intergovernmental Panel on Climate Change has estimated can be emitted after 2015 for the planet to have a likely chance of not exceeding a 2°C warming.[87] Such emissions associated with our land would contribute to catastrophic, potentially irreversible global harm, and we cannot allow it.

Finally, the development of the mine would make it more difficult than it already is to access parts of our traditional lands. As it currently stands, to access our lands we must seek approval from Adani Mining, pastoral lessees, and other landholders. If the mine proceeds, it would be even more difficult to access our lands, and we would lose access to some areas altogether, because our land would be under development and access would be restricted to many areas and at different times due to mining operations and safety concerns. In parts of the proposed mine site, our native title would be extinguished under law altogether, forever alienating those parts of our country from our rightful ownership and our laws and customs.

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[84] 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://www.adanimining.com/Common/Uploads/EISDocuments/60_EISDoc_Cultural%20Heritage.pdf (accessed July 18, 2015).
[85] *Id*., page 5-8.
[86] Taylor, Dr. C., and Meinshausen, Associate Professor M., *Joint Report to the Land Court of Queensland on "Climate Change – Emissions"* (December 22, 2014), para. 17, filed in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. & Ors*, http://envlaw.com.au/wp-content/uploads/carmichael14.pdf (accessed July 20, 2015).
[87] *Id*., paras. 18, 22.

We have the fundamental and universal right to continue enjoying our culture as we have done for thousands of years, and to pass it on to our future generations. The use and enjoyment of our traditional lands and all things on them – which are our cultural goods and services – are vital to our cultural identities and survival, and must be accessible and available to us if we are to continue to realise and enjoy our right to culture. If the Carmichael Coal Mine proceeds, the extensive land disturbance and destruction would destroy our culture and prevent us from passing it on to our children. We would be unable to maintain and strengthen our relationship with our traditional lands. We have not consented to this, and we never will. As former Special Rapporteur James Anaya has concluded, certain kinds of resource extraction are "simply incompatible with indigenous peoples' own aspirations…, or may impede their access to lands and natural resources critical to their physical well-being and the integrity of their cultures."[88] In these circumstances, the development of the Carmichael Coal Mine violates our internationally protected right to culture by undermining our ability to engage in our culture, and affecting our ability to transmit our culture to future generations – a matter that is vital to our cultural survival. By promoting and facilitating the development of this mine, the Australian and Queensland governments are failing to protect and respect our right to maintain and strengthen our spiritual relationship with our ancestral lands, and are failing to ensure the availability of our cultural goods and services – our lands and waters. These governments are also failing to prevent Adani Mining from violating our cultural rights. To protect our rights, the Australian and Queensland governments must ensure that the mine is not allowed to proceed in the absence of our free, prior and consent.

III. THE DEVELOPMENT OF THE CARMICHAEL COAL MINE VIOLATES OUR RIGHT FREE, PRIOR AND INFORMED CONSENT, INCLUDING OUR RIGHT TO BE CONSULTED IN GOOD FAITH ABOUT RESOURCE EXPLOITATION ON OUR TRADITIONAL LANDS, AND TO GIVE OR WITHHOLD OUR CONSENT TO SIGNIFICANT EXTRACTIVE INDUSTRIES ON OUR LANDS

As indigenous peoples, International law recognizes our right to free, prior and informed consent (FPIC), which includes the right to be consulted in good faith about resource exploitation on our traditional lands, particularly when that exploitation threatens our culture, and the right to give or withhold our consent to the development of the Carmichael Coal Mine because of the significant, direct, permanent and foreseeable impacts that this mine will have on our ancestral homelands and the enjoyment of our rights. Unfortunately, as we have explained above, throughout its consultation process with us, Adani Mining has consult in bad faith, as it has attempted to undermine and interfere with our institutions of representation and decision-making. We have also not consented to the development of the Carmichael Coal Mine on our traditional lands. To the contrary, we have formally rejected an agreement proposed by Adani Mining under the Native Title Act processes. Despite this, the Australian and Queensland governments have approved, or proposed to approve, the mine, the National Native Title Tribunal has decided that the mining leases can be validly granted under the Native Title Act, and Adani Mining is proceeding with the mine's development. In these circumstances, Australia is failing to protect and defend our internationally protected rights.

[88] Special Rapporteur James Anaya, *Extractive industries and indigenous peoples*, A/HRC/24/41 (July 1, 2013), para. 3, http://unsr.vtaulicorpuz.org/site/images/docs/annual/2013-annual-hrc-a-hrc-24-41-en.pdf (accessed July 24, 2015).

A. Australia is violating its international legal duty to ensure we are consulted in good faith concerning the development of the Carmichael Coal Mine on our traditional lands

Under international law, States have a duty to consult with indigenous peoples in good faith about natural resource exploitation on their traditional lands, including via the doctrine of FPIC. This duty derives from the overarching right of indigenous peoples to self-determination, and is premised on the widespread acknowledgement of indigenous peoples' distinctive characteristics, their relative marginalisation in regard to normal democratic processes, and the need for special measures to address this.[89] Also, the participation of indigenous peoples in all aspects of decisions affecting them is central to realising and protecting the full spectrum of substantive indigenous rights, including rights to cultural integrity, equality and property.[90] Indeed, the consultation duty of a State is a "corollary of a myriad of universally accepted human rights"[91] and is "indivisible from and interrelated with other rights of indigenous peoples, such as their right to self-determination and their rights to their lands, territories and resources."[92]

The international legal duty of a State to consult with indigenous peoples about matters that affect them applies to Australia, as to other States. The duty is "firmly rooted in international human rights law."[93] It is, for example, grounded in core human rights treaties of the United Nations, including the ICCPR, the ICESCR, and the Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"),[94] all of which Australia is party to.[95] The UN treaty bodies established to monitor the

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[89] 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 (July 15, 2009), paras. 41, 42, http://unsr.vtaulicorpuz.org/site/images/docs/annual/2009-annual-hrc-a-hrc-12-34-en.pdf (accessed July 24, 2015). *See also* Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No. 3 – We have the right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith ("Declaration Dialogue")* (July 2013), pages 5-6, https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_3_Consent.pdf (accessed July 24, 2015).

[90] Anaya, *2009 Annual Report*, above n. 89, paras. 41, 42 and 62. *See also* Anaya, *2012 Annual Report*, above n. 75, para. 49 ("[P]rinciples of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples' substantive rights. It is a standard that supplements and helps effectuate substantive rights.").

[91] Anaya, *2009 Annual Report*, above n. 89, para. 41.

[92] Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP"), *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries* ("*2012 Report*"), A/HRC/21/55 (August 16, 2012), para. 8, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf (accessed July 24, 2015).

[93] Anaya, *2009 Annual Report*, above n. 89, para. 38.

[94] *Id*., para. 40. *See also*, EMRIP, *2012 Report*, above n. 92, Annex, paras. 11 and 25; EMRIP, *Progress report on the study of indigenous peoples and the right to participate in decision-making* ("*Progress Report*"), A/HRC/15/35 (August 23, 2010), para. 36, http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf (accessed July 24, 2015) ("International human rights treaty bodies, such as the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, have also clarified that the free, prior and informed consent of indigenous peoples is required in accordance with State obligations under their corresponding treaties.").

[95] For a list of human rights treaties to which Australia is party, *see* Office of the High Commissioner for Human Rights, *Status of ratification*, http://indicators.ohchr.org/ (accessed July 24, 2015).

implementation of each of these binding international legal treaties have, on numerous occasions, clarified that consultation with indigenous peoples on matters that affect them is required in accordance with State obligations under the relevant treaties.[96] The duty is also recognised by International Labour Organization Convention 169[97] and, although Australia is not a party to this convention, the convention is "evidence of contemporary international opinion concerning matters relating to indigenous peoples."[98] Furthermore, the duty "finds prominent expression" in UNDRIP:[99]

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 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[[100]] and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[101]

Although UNDRIP is not a legally binding instrument, it reflects international law enshrined in binding international agreements of universal resonance – such as the ICESCR, ICERD and ICCPR described above.[102] As former Special Rapporteur Jim Anaya has explained:

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[96] *See, for example*, Anaya, *2009 Annual Report*, above n. 89, para. 40; EMRIP, *Progress Report*, above n. 94, para. 36; EMRIP, *2012 Report*, above n. 92, Annex, paras. 11 and 25; Anaya, *Extractive industries and indigenous peoples*, para. 27, above n. 88.

[97] International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)* ("*ILO 169*") (1989), Article 6(1)(a), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (accessed July 24, 2015) ("[G]overnments shall … consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.").

[98] Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* ("*IACHR Report*"), (December 30, 2009), para. 14 (citations and quotations omitted), http://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf (accessed July 24, 2015).

[99] Anaya, *2009 Annual Report*, above n. 89, para. 38.

[100] "Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices." Anaya, *Extractive industries and indigenous peoples*, above n. 88, para. 27.

[101] UNDRIP, above n. 56, Article 32(1) and (2).

[102] United Nations Permanent Forum on Indigenous Issues, *Declaration on the Rights of Indigenous Peoples – Frequently Asked Questions*, page 2, http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf (accessed July 24, 2015) ("UN Declarations are generally not legally binding; however, they represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions. The Declaration, however, is widely viewed as not creating new rights. Rather, it provides a detailing or interpretation of the human rights enshrined in other international human rights instruments of universal resonance – as these apply to indigenous peoples and indigenous individuals.") *See also*, Anaya, *2009 Annual Report*, above n. 89, para. 38 ("[T]he 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.").

> [E]ven though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.
>
> In sum, the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of the Declaration should be regarded as political, moral and, *yes, legal imperative without qualification*.[103]

As such, the consultation duties in UNDRIP are consistent with existing obligations imposed upon Australia by other international agreements to which it is a party (and are also, as described above, a corollary of other universally accepted human rights, such as indigenous peoples' rights to self-determination, cultural integrity, and property). Furthermore, in April 2009, the Australian government (having previously voted against the adoption of the UNDRIP) "gave its support" to the declaration, in "the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust."[104]

The Inter-American Commission on Human Rights ("IACHR") has usefully described the nature of the duty to consult with indigenous peoples:

> States are under the obligation to consult with indigenous peoples and guarantee their participation in decisions regarding any measure that affects their territory, taking into consideration the special relationship between indigenous and tribal peoples and land and natural resources. This is a concrete manifestation of the general rule according to which the State must guarantee that indigenous peoples be consulted on any matters that might affect them, taking into account that the purpose of such consultations should be to obtain their free and informed consent, as provided in the ILO Convention No. 169 and in [UNDRIP]. Consultation and consent are not limited to matters affecting indigenous property rights, but are also applicable to other state administrative or legislative activity that has an impact on the rights or interests of indigenous peoples.[105]

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[103] Special Rapporteur James Anaya, *Situation of human rights and fundamental freedoms of indigenous people* ("*2010 General Assembly Report*"), A/65/264 (August 9, 2010), paras. 62-3 (emphasis added), http://unsr.jamesanaya.org/docs/annual/2010_ga_annual_report_en.pdf (accessed July 24, 2015).

[104] Australian Government, Attorney-General's Department, *Australia's Universal Periodic Review – National Report Part IV – Achievements, Best Practices, Challenges and Constraints* (October 2010), para. 145, http://www.ag.gov.au/RightsAndProtections/HumanRights/UniversalPeriodicReview/Pages/UniversalPeriodicReviewNationalReportPartIVAchievementsBestPracticesChallengesandConstraints.aspx (accessed July 24, 2015).

[105] IACHR, *IACHR Report*, above n. 98, para. 273 (citations and quotations omitted).

When the particular interests of indigenous peoples are affected, special consultation procedures are required.[106] This is partly because normal democratic and representative processes usually do not adequately address the concerns that are particular to indigenous peoples.[107] Measures that affect particular indigenous communities, "such as initiatives for natural resource extraction activity in their territories, will require consultation procedures focused on the interests of, and engagement with, those particularly affected groups."[108] The Australian Human Rights Commission (an independent body established under federal legislation charged with, among other things, promoting an understanding of human rights in Australia and investigating and resolving complaints of discrimination)[109] has stated that effective consultation must allow indigenous peoples "sufficient time to engage in their own decision-making process, and participate in decisions taken in a matter consistent with their cultural and social practices."[110] The commission sees this as part of the duty of good faith, which should assist in addressing the power imbalance between governments and indigenous peoples.[111] The commission states that, in Australia, governments have interpreted their obligation to consult with indigenous peoples as a duty to tell them "what has been developed on [their] behalf and what eventually will be imposed upon [them]."[112] The commission identifies factors that hinder indigenous peoples' capacity to effectively engage in consultation, including inadequate resources to participate effectively, and unreasonably short timeframes for responding to matters that affect indigenous peoples' rights.[113] Accordingly, the commission sets out features of meaningful and effective consultation:

> Governments need to do more than provide information about measures they have developed on behalf of [indigenous] peoples and without their input. … Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on the rights of [indigenous] peoples, and that the affected peoples do not agree to the measure. … [Indigenous] peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner. … Government consultation processes need to directly reach people "on the ground." Given the extreme resource constraints faced by many [indigenous] peoples and their representative organisations, governments cannot simply expect communities to come to them. Governments need to be prepared to engage … in the location that is most convenient for, and is chosen by, the community that will be affected by a proposed measure. … [C]onsultation must be undertaken with the indigenous peoples concerned through their own representative organisations. … [F]ree, prior and informed consent must be sought from genuinely representative organisations or institutions charged with the responsibility of acting on their

[106] Special Rapporteur Anaya, *2009 Annual Report*, above n. 89, paras. 42, 45.
[107] *Id*., para. 42.
[108] *Id*., para. 45.
[109] *Australian Human Rights Commission Act 1986* (Cth), s 11, https://www.comlaw.gov.au/Details/C2014C00684; Australian Human Rights Commission, *About the Commission*, https://www.humanrights.gov.au/about-commission-0 (both accessed July 25, 2015).
[110] Australian Human Rights Commission, *Declaration Dialogue*, above n. 89, pages 12-13 (citations and quotations omitted).
[111] *Id*., page 13.
[112] *Id*.
[113] *Id*., page 14.

behalf. … [G]overnments must provide [indigenous peoples] with full and accurate information about the proposed measure and its potential impact.[114]

The duty to consult requires that the *objective* of consultations be to obtain the agreement of the indigenous peoples concerned by building a dialogue between States and indigenous peoples to "reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples."[115] (The duty does not automatically grant a right to veto; however, as discussed in section III.B below, certain activities on traditional lands, including natural resource extraction that has a significant and direct impact on the lands, do give rise to an obligation on the State to obtain the actual consent of affected indigenous peoples.) Depending on the circumstances, a range of actions may be necessary to demonstrate a "good faith" effort to achieve consent, and to ensure that a consultation has been structured and implemented to provide a genuine opportunity for the affected indigenous peoples to influence the decision-making process along the path to reaching a mutually acceptable arrangement.[116] These include:

- *Fully respecting indigenous peoples' own institutions of representation and decision-making processes*. Article 18 of UNDRIP requires that indigenous peoples' decision-making processes are respected: "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."[117] Accordingly, the State "should make every effort to allow indigenous peoples to organize themselves and freely determine their representatives for consultation proceedings, and should provide a climate of respect and support for the authority of those representatives."[118] Indeed, "international standards require engagement with [indigenous peoples] through the representatives determined by them and with due regard for their own decision-making processes."[119] Where there is ambiguity about which indigenous representatives should be engaged, "indigenous peoples should be given the opportunity and time … to organize themselves to define the representative institutions by which they will engage in consultations over extractive projects."[120]

- Endeavouring to achieve *consensus on the consultation procedures* to be followed to ensure that the procedure is effective and to build confidence.[121]

- Ensuring that the affected indigenous peoples have *full and objective information* about the project and its impacts on their lives and environment so that they can make free and

[114] *Id*., pages 16-18.
[115] Anaya, *2009 Annual Report*, above n. 89, para. 49; *see also id*., paras. 46-48.
[116] *Id*., paras. 46 and 49; *see also id*., paras. 50-57. *See also* Australian Human Rights Commission, *Declaration Dialogue*, above n. 89, pages 8, 12-14, 16-18.
[117] UNDRIP, above n. 56, Article 18.
[118] Anaya, *2009 Annual Report*, above n. 89, para. 69; *see also id*., para. 52 ("The building of confidence and the possibility of genuine consensus also depends on a consultation procedure in which indigenous peoples' own institutions of representation and decision-making are fully respected.").
[119] Anaya, *Extractive industries and indigenous peoples,* above n. 88, para. 70.
[120] *Id*., para. 71.
[121] Anaya, *2009 Annual Report*, above n. 89, paras. 50, 51, 68.

informed decisions.[122] To this end, it is "essential for the State to carry out environmental and social impact studies so that the full expected consequences of the project can be known. These studies must be presented to the indigenous groups concerned at the early stages of consultation, allowing them time to understand the results of the impact studies and to present their observations and receive information addressing any concerns."[123]

- Providing any *financial, technical and other assistance* necessary for the affected indigenous peoples to understand and assess the project and its impacts so as to be fully informed participants in the consultations,[124] as well as to ensure the presence of indigenous representatives at all stages of the consultations.[125] Such assistance is necessary to mitigate the power imbalance between indigenous peoples, and States and/or private companies.[126] The provision of such assistance must not be used to leverage or influence indigenous positions in the consultations.[127]

A State cannot avoid its duty to consult with affected indigenous peoples through delegation to a private company or other entity: "the State itself has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples' rights and lands."[128] Furthermore, direct negotiations between companies and indigenous peoples must meet essentially the same standards governing State consultations,[129] and a private company that engages in activities affecting indigenous peoples should "endeavour to conform [its] behaviour at all times to relevant international norms concerning the rights of indigenous peoples, including those norms related to consultation."[130] As former UN Special Rapporteur Anaya has noted, "private companies that are the proponents of extractive projects should, on their part, defer to indigenous decision-making processes without attempting to influence or manipulate the consultation process."[131] Companies should not assume that compliance with State law necessarily satisfies the requirements of international law; rather, a company must perform due diligence to ensure its actions will not violate or be complicit in violating indigenous peoples' rights.[132] To comply with human rights norms, a private company should

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[122] *Id*., para. 53.
[123] *Id*.
[124] *Id*., para. 51.
[125] EMRIP, *2012 Report*, above n. 92, para. 26(b).
[126] Anaya, *2009 Annual Report*, above n. 89, para. 51; Anaya, *Extractive industries and indigenous peoples,* above n. 88, paras. 63-64; Anaya, *2012 Annual Report*, above n. 75, para. 67 ("[C]onsultation procedures should tackle existing power imbalances by establishing mechanisms for sharing information and adequate negotiation capacity on the indigenous peoples' side.").
[127] Anaya, *2009 Annual Report*, above n. 89, para. 51.
[128] *Id*., para. 54 ("In accordance with well-grounded principles of international law, the duty of the State to protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity."). *See also* Anaya, *Extractive industries and indigenous peoples,* above n. 88, para. 53 ("States are ultimately responsible for ensuring respect for human rights.") and para. 62 ("[T]he State remains ultimately responsible for any inadequacy in the consultation or negotiation procedures.").
[129] Anaya, *Extractive industries and indigenous peoples,* above n. 88, para. 62.
[130] Anaya, *2009 Annual Report*, above n. 89, para. 56.
[131] Anaya, *2012 Annual Report*, above n. 75, para. 67.
[132] Anaya, *Extractive industries and indigenous peoples,* above n. 88, para. 53.

> fully incorporate and make operative the norms concerning the rights of indigenous peoples within every aspect of [its] work related to the projects [it] undertake[s] … [and] ensure that, through its behaviour, it does not ratify or contribute to any act or omission on the part of the State that could infringe the human rights of affected communities, such as a failure on the part of the State to adequately consult with the affected indigenous community before proceeding with a project.[133]

In the case of the Carmichael Coal Mine, Australia has failed to uphold its international human rights obligations to protect our rights and ensure that we are properly consulted in good faith about the mine's development. As described in section I.C above, Adani Mining has been negotiating with us under the Native Title Act processes. However, this negotiation process has not been structured or implemented to provide us with a genuine opportunity to influence the decision-making process. Rather, Adani Mining has, in many instances, acted in bad faith during the negotiations by failing to respect, and attempting to undermine, our institutions of representation and decision-making. These bad faith actions include undermining and challenging the right of our authorised senior spokesperson to speak and be consulted, selectively choosing whom to consult and negotiate with so as to undermine our democratic processes, presenting false information to the public about our peoples' position on the Carmichael Coal Mine, and attempting to sabotage our meetings.

These bad faith actions have failed to respect the will of our people, which was expressed unambiguously in October 2014 when we refused to vote in favour of the indigenous land use agreement and more recently when we filed a challenge in federal court to the National Native Title Tribunal's decision that the mining leases could be granted.

In summary, Adani Mining has failed to respect our human rights. It has ignored our people's will and has attempted to publicly claim the authority to determine who may speak for us and what our position is. It has attempted to undermine our internal decision-making processes and institutions of representation, and has failed to seek consult with and seek consent from our representative body, seizing instead upon individuals who do not speak for our people. These actions do not demonstrate good faith consultation, and are in direct contradiction of Article 18 of UNDRIP. As former Special Rapporteur James Anaya has said, a private company should defer to indigenous decision-making processes without attempting to influence or manipulate the consultation process.[134] Adani Mining has not done this, and its behaviour has proven it untrustworthy and prevented us from having a meaningful say in the development of the mine on our traditional lands. We are facing the power and tactics of a huge corporation, supported by the government, and Adani Mining's actions have done nothing to redress the power imbalance between us and them.

Although these actions were undertaken by Adani Mining, the responsibility for ensuring good faith consultation rests ultimately with the government. Indeed, "the State remains ultimately responsible for any inadequacy in the consultation or negotiation procedures."[135] In these circumstances, Australia is violating its international legal duty to ensure we are consulted in good faith about the development of the Carmichael Coal Mine on our traditional lands.

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[133] Anaya, *2009 Annual Report*, above n. 89, para. 57.
[134] Anaya, *2012 Annual Report*, above n. 75, para. 67.
[135] Anaya, *Extractive industries and indigenous peoples,* above n. 88, para. 62.

B. By allowing and facilitating the development of the Carmichael Coal Mine in the absence of our consent, Australia is violating our right to give or withhold our consent to significant extractive industries on our traditional lands

In addition to the consultation duty imposed by international law upon States, in certain circumstances international law also requires a State to obtain the actual consent of affected indigenous peoples. UNDRIP, for example, explicitly recognises two situations in which a State must obtain the consent of the indigenous peoples concerned before a project may go forward: where a project either will result in the relocation of a group from its traditional lands, or involves the storage or disposal of toxic waste within indigenous lands.[136]

However, the two situations enumerated in UNDRIP are not the only ones in which indigenous consent may be required under international law. The Inter-American Court of Human Rights has held that a government must obtain the consent of an affected indigenous people before granting mining and logging concessions that threatened the physical and cultural survival of the indigenous people on whose traditional lands the concessions were located.[137] The court explained that "large-scale development or investment projects that would have a major impact within [indigenous] territory" create an international legal duty "not only to consult with the [affected indigenous people], but also to obtain their free, prior and informed consent, according to their customs and traditions."[138] The decision of the Inter-American Court was based in part on general principles of international law as interpreted by the UN Committee on the Elimination of Racial Discrimination and the UN Special Rapporteur on the rights of indigenous peoples[139] – principles that apply equally to Australia.

Applying these and other sources of international law, former UN Special Rapporteur on the rights of indigenous peoples James Anaya has drawn out a more broadly applicable principle of international law:

> 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.[140]

The Australian Human Rights Commission has reached the same conclusion:

> [T]here appears to be a range of circumstances where States have an obligation to obtain the free, prior and informed consent of those affected. These circumstances range from cases in which States seem to have a simple duty to consult with Indigenous peoples, to cases where *consent is required with respect to development projects or projects concerning the extraction of*

[136] UNDRIP, above n. 56, Articles 10 and 29(2).
[137] *Case of Saramaka People v. Suriname*, Inter-American Court of Human Rights (November 28, 2007), para. 134, http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf (accessed July 24, 2015).
[138] *Id*.
[139] *Id*., paras. 135-136.
[140] Anaya, *2009 Annual Report*, above n. 89, para. 47.

> *natural resources on their lands*, to contemplating a more general duty to require consent before taking any decisions directly relating to their rights and interests….
> [W]ith respect to cultural rights, *when the essence of [an indigenous peoples'] cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory*.[141]

Accordingly, where the effect of an action on indigenous peoples' lives or territory is great enough, a State must obtain the actual consent of affected indigenous peoples before approving that action. In determining whether an activity – such as an extractive project – rises to the level of impact mandating indigenous consent, one consideration is the degree to which the action interferes with the rights of the affected indigenous peoples, including

> rights of participation and self-determination, rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and the right of indigenous peoples to set and pursue their own priorities for development, including with regard to natural resources.[142]

In the context of extractive activities, former Special Rapporteur Anaya has applied these principles to conclude that *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*,"[143] and that

> where 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 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 officially recognized or 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.[144]

This is because, "given the invasive nature of industrial-scale extraction of natural resources, the enjoyment of [rights including the right to self-determination and to culture] is invariably affected in one way or another when extractive activities occur within indigenous territories – thus the general rule that

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[141] Australian Human Rights Commission, *Declaration Dialogue*, above n. 89, page 10-11 (emphasis added, quotations and citations omitted). *See also id.,* pages 11-12.
[142] Anaya, *Extractive industries and indigenous peoples*, above n. 88, para. 28.
[143] *Id*., para. 27 (emphasis added); *see also id*., para. 30 ("Whereas the withholding of consent may block extractive projects promoted by companies or states,…."). *See also* Australian Human Rights Commission, *Declaration Dialogue*, above n. 89, pages 11-12 ("In some cases, the State will be required to obtain the free, prior and informed consent of the affected Indigenous peoples before proceeding with a proposed measure. This is because … Indigenous Peoples … risk a permanent loss to their livelihoods and cultures. …[T]his principle should also apply where there is a proposed significant, direct impact on indigenous peoples' lives" (citations and quotations omitted).
[144] Anaya, *2012 Annual Report*, above n. 75, para. 65.

indigenous consent is required for extractive activities within indigenous territories."[145] It is also "simply good practice" for the States or companies concerned to acquire the consent of the relevant indigenous peoples, as it provides "needed social license and lays the groundwork for the operators … to have positive relations with those most immediately affected by the projects, lending needed stability to the projects."[146] Even if the extractive activities do not take place within indigenous territory, the consent of indigenous peoples otherwise affected by those activities may nevertheless be required "depending upon the nature of and potential impacts of the activities on the exercise of their rights."[147] For example, where a large-scale resource-extraction project may harm lands that support an indigenous group's physical well-being or cultural practises in a manner that substantially affects that group's substantive rights, international law may support an argument that the group must consent before the project may go forward.[148]

The Carmichael Coal Mine is a clear example of an extractive project that requires the consent of the indigenous peoples on whose land it will be undertaken prior to its development. This is because, as described above, this large-scale mine will have a significant and direct impact on our ancestral homelands and waters, severely and permanently disturbing and destroying tens of thousands of hectares of our ancestral homelands and waters. It will also involve the storage or disposal of huge quantities of waste on our lands, some of which may be toxic.[149] In addition, the mine will substantially affect our other substantive rights that are protected under international law.[150] First, as described above in section II above, the degree and type of harm that the mine would cause places the essence of our cultural integrity at risk, threatening our right to culture – the protection of which is essential to our survival. Second, the development of the mine in the absence of our consent threatens our right to self-determination by preventing us from determining and developing priorities for the development of our lands and natural resources. The right to self-determination is unambiguously expressed in Article 1(1) of the ICCPR ("All peoples have the right of self-determination. By virtue of that right they freely

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[145] Anaya, *Extractive industries and indigenous peoples*, above n. 88, para 28.

[146] *Id*., para 29.

[147] *Id*., para 27. Even if the impacts are not significant or direct enough to require indigenous consent, "[i]n *all* instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should at least be sought." *Id.* (emphasis added).

[148] Anaya, *2009 Annual Report*, above n. 89, para. 47. *See also*, Anaya, *Extractive industries and indigenous peoples,* above n. 88, paras. 27, 28 and 31.

[149] The mine would create around 13.1 billion bank cubic metres of mining waste rock (also known as overburden and interburden) that will be stored on our lands, together with around 14.06 million tonnes per year of rejected material from the coal handling and processing plant. Qld Dept. of State Development, *Report on Carmichael EIS*, above n. 18, pages 178, 273. There is a possibility that the project will also involve the storage and disposal of toxic waste within our lands. The environmental assessment for the Carmichael Coal Mine identified "geochemical issues which could potentially result in adverse environmental impacts," including on aquatic ecology. These "geochemical issues" include that some of the mining waste rock contains substances that could be potentially acid forming ("PAF") and result in acid metalliferous drainage, that some portion of the coal and roof and floor wastes could be PAF in the long term, that future geochemical assessments may indicate PAF materials in tailings, and that some mining waste rock is a potential source of salinity. *Id*., pages 273-274.

[150] *See* Anaya, *Extractive industries and indigenous peoples,* above n. 88, para 31 ("[C]onsent may *not* be required for extractive activities within indigenous territories in cases in which it can be conclusively established that the activities will *not* substantially affect indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories – perhaps mostly a theoretical possibility given the invasive nature of extractive activities") (emphasis added, citations omitted).

determine their political status and freely pursue their economic, social and cultural development")[151] and Article 32(1) of UNDRIP ("Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.").[152] The impacts of the mine on our rights to culture and self-determination are entirely foreseeable.

In summary, international law requires our free, prior and informed consent before the mine may proceed, and our consent in this situation must be absolute. Our people have asserted this right. As our senior spokesperson Adrian Burragubba has said on behalf of our people:

> We assert our right to free, prior, informed consent, to our own economic development, and to protection of our country and culture. We object to the way in which our rights are systematically over-ridden in the process by which the State grants mining interests, and the way in which the National Native Title Tribunal is restricted by the law. We object to the way Adani Mining negotiates with us. While the legal system may weigh against us, when we say No, we mean No.

In the absence of our consent, and indeed in the presence of our strong opposition, Australia is violating its international obligation to protect and defend our right to give or withhold our consent to the development of the Carmichael Coal Mine on our ancestral homelands.

IV. CONCLUSION AND REQUEST FOR ACTION

As described above, Australia has failed, and continues to fail, to meet its obligations under international law to protect our human rights, including our rights to culture, and to free, prior, informed consent, which includes our rights to be properly consulted in good faith about, and to give or withhold our consent to, the development of significant extractive industries on our ancestral homelands. This violation of international law arises from the actions of both the Australian and Queensland governments, for which Australia is responsible under international law.

In light of these violations, we respectfully request that you further investigate the issues raised in this letter, including by visiting Australia and meeting with our representatives and by sending an urgent appeal to the Australian government expressing your serious concern that the human rights of our people are being violated through the approval of the Carmichael Coal Mine. We would welcome your recommendation to Australia that it ensure the protection of our rights to enjoy our culture and transmit it to future generations, and to be adequately consulted in good faith in relation to, and to give or withhold our consent to, the development of significant extractive projects like the Carmichael Coal Mine on our ancestral homelands. In particular, we would welcome your action to encourage Australia to require that the federal government, the Queensland Government, and Adani Mining Pty Ltd:

- do not proceed with the development of the Carmichael Coal Mine on our ancestral homelands without our consent;

[151] ICCPR, above n. 53, Article 1.
[152] UNDRIP, above n. 56, Article 32(1).

- ensure that no activities that pose a risk of environmental harm to our ancestral homelands, and consequently a risk to our culture, are permitted on our lands in the absence of our free, prior and informed consent; and
- ensure adequate and meaningful consultation in good faith with us in relation to development activities proposed on our ancestral homelands.

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

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