



October 31, 2017

To: Committee on the Elimination of Racial Discrimination

Re: Australia's Periodic Review: *Australia's ongoing violation of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and its failure to protect the Indigenous Wangan and Jagalingou People from human rights violations arising from the development of the Carmichael Coal Mine on our ancestral homelands*

We are Wangan and Jagalingou.¹ In this submission, we alert the Committee on the Elimination of Racial Discrimination ("Committee") to Australia's violations of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("Convention") resulting from the imminent destruction of our ancestral homelands – our lands, waters, sacred sites, and culture – through development of the massive Carmichael Coal Mine and Rail Project in the state of Queensland. We have not been consulted in good faith about the mine, nor have we given our free, prior, and informed consent to its development – and we never will.

If developed as proposed by Adani Mining Pty Ltd ("Adani"), the Carmichael mine would be among the largest coal mines in the world, and would permanently destroy vast swathes of our ancestral homelands and waters, which embody our culture and are the living source of our customs, laws, and spiritual beliefs. This includes harming, and possibly destroying, our most sacred site, a complex of springs called Doongmabulla Springs, which 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 shape the earth.

Our situation is dire, as we understand from media reports that Adani intends to commence construction this month.

As the Committee has long recognised, discrimination against Indigenous peoples falls under the scope of the Convention. In particular, the Committee has made clear that, to fulfill its obligations under the Convention to eliminate racial discrimination, a State Party must ensure that Indigenous peoples are consulted in good faith and their free, prior, and informed consent obtained with respect to development projects on their traditional homelands, and that adequate measures are taken to protect sacred sites and cultural resources that are essential for the preservation of Indigenous peoples' culture from the impacts of development projects. This is consistent with the Committee's General Recommendation XXIII on the Rights of Indigenous Peoples ("General Recommendation No. 23") and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), both of which the Committee has reiterated that State Parties should act in accordance with when fulfilling their obligations under the Convention.

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



In addition, under the Convention, State Parties agree to guarantee the right of everyone to equality before the law in the enjoyment of the rights to equal participation in cultural activities and freedom of religion, and to amend or rescind legislation that perpetuates racial discrimination. Parties also agree not to sponsor, or permit public authorities to promote, racial discrimination.

As described in this submission, Australia is failing to comply with all of these obligations. It has failed to obtain our free, prior, and informed consent to the development of the Carmichael mine, or to ensure we are consulted in good faith about its development. It has not ensured the protection of sacred lands and waters that embody our culture. In addition, by permitting the destruction of our traditional lands and sacred sites without our free, prior and informed consent, Australia is failing to guarantee our right to equality before the law, because non-Indigenous Australians' rights to culture and religion do not depend on maintaining a connection to the land the way ours do.

Australia also violates the Convention by maintaining a legal regime – the *Native Title Act 1993* – that creates and perpetuates racial discrimination by allowing projects like the Carmichael mine to proceed even in the absence of good faith negotiation and the free, prior, and informed consent of the affected Indigenous peoples. Finally, Australia violates its obligations not to sponsor, or permit public authorities to promote, racial discrimination, by permitting members of the government, Adani officials, and other influential people to use false assertions to sow doubt about our independence and integrity.

For these reasons, we respectfully request that, during Australia's periodic review in November 2017, the Committee investigate and denounce these violations. We encourage you to recommend that Australia fulfill its obligations under the Convention, including by:

- Prohibiting the development of the Carmichael mine on our ancestral homelands in the absence of good faith negotiation and our free, prior, and informed consent obtained through our own decision-making processes;
- Adopting and implementing adequate measures to effectively protect our ancestral homelands, sacred sites, and cultural resources;
- Taking steps to guarantee our equality before the law, notably in the enjoyment of our rights to equal participation in cultural activities and freedom of religion;
- Reforming the *Native Title Act 1993* (Cth) to require a good faith negotiation and free, prior, and informed consent process that conforms to international law and ensures that projects that jeopardise Indigenous peoples' culture and religion are not permitted in the absence of their free, prior, and informed consent; and
- Not permitting or supporting actions and language by public authorities, private companies, and industry bodies that have the effect of perpetuating racial discrimination by engaging in a public campaign of misinformation intended to create the false impression that our people support the mine.



I. Background: Our ancestral homelands and the Carmichael mine

A. Our connection to our ancestral homelands

We are Wangan and Jagalingou. Our lands and waters embody our culture, and are central to our physical and spiritual well-being because they are the origins and living source of our customs, stories, laws, and spiritual beliefs. Indeed, our culture is inseparable from the condition of our ancestral homelands. In the words of our senior spokesperson Adrian Burragubba,

Our land is our life. It is the place we come from, our dreaming, and it is who we are. Plants, animals, and waterholes all have a special place in our land and culture and are connected to it. The spirits of our ancestors travel through our country and dwell there indefinitely.

One of our most sacred places is the Doongmabulla Springs, where over 60 individual freshwater springs have created an oasis in the midst of a dry land. These springs are 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.²

Our lands and waters are also essential to our ability to pass our culture on to our children and grandchildren. “We are stewards of our land: we have been, and will forever be, responsible for protecting it,” says Burragubba.

B. The impact of the proposed Carmichael mine on our ancestral homelands

Our ancestral homelands, which are located in a coal-rich area called the Galilee Basin, are threatened with imminent destruction. At least six, and possibly more, massive mines are proposed to extract coal from the Galilee Basin.³ Of these mines, the Carmichael mine is most likely to be developed first: both the Australian federal and Queensland state governments have approved the mine and publicly support its development,⁴ Adani has indicated it will commence construction this month, including building a rail

² See generally, Wangan & Jagalingou Family Council, *Statement by the Wangan and Jagalingou people about the Carmichael Mine* (Mar. 26, 2015), <http://wanganjagalingou.com.au/stories-two/>.

³ Those mines are the Alpha Coal Project, Carmichael Coal Mine and Rail Project, Galilee Coal Project (Northern Export Facility), Kevin’s Corner Project, South Galilee Coal Project, and China Stone Coal Project. See generally, Queensland Government Department of Natural Resources and Mines, *Queensland coal – mines and advanced projects* (July 2017), pages 2, 5, https://www.dnrm.qld.gov.au/data/assets/pdf_file/0011/238079/coal-mines-advanced-projects.pdf.

⁴ See, for example, U. Bhaskar, Live Mint, *Australia supports Adani’s Carmichael project, says minister* (Aug. 30, 2017), <http://www.livemint.com/Industry/8H5GWWHvjvAlzfFMXh4GIO/Australia-supports-Adanis-Carmichael-project-says-assistan.html>; M. Plane, The Morning Bulletin, *Adani: Canavan passionately defends mine on The Project* (Apr. 13, 2017), <https://www.themorningbulletin.com.au/news/adani-canavan-passionately-defends-mine-on-the-pro/3166327/>; Queensland Government, Media Statements, Premier and Minister for the Arts, The Honourable Anastacia Palaszczuk, *Palaszczuk Government welcomes royalties agreement with Adani* (May 31, 2017), <http://statements.qld.gov.au/Statement/2017/5/31/palaszczuk-government-welcomes-royalties-agreement-with-adani>.



line (for which preliminary work is underway) up to the boundary of our ancestral lands,⁵ and we understand that the Northern Australian Infrastructure Facility, a fund established under federal legislation with Australian taxpayer money, is currently considering a AUD\$900 million loan to Adani to support the development of the rail line.⁶

If developed as proposed, the Carmichael mine would be among the largest coal mines in the world. The injury it would cause us would be irreversible and cannot be mitigated. The mine would harm around 30,000 hectares of land, the bulk of which are our traditional homelands, and consist of six open-cut pits, five underground mines, a coal handling and processing plant, rail infrastructure, and other associated infrastructure.⁷ It would tear the heart out of our country, permanently destroying vast areas of our ancestral homelands and everything on them – plants, animals, water-bodies, and sacred sites. Our land and waters, which are so sacred to us and tell us who we are in the world, would simply be “disappeared.” We would not be able to pass our culture and stories on to our children and grandchildren.

The Carmichael mine would also likely devastate the Doongmabulla Springs, one of our most sacred places. Doongmabulla Springs are fed by aquifers, and the Carmichael mine will draw down billions of litres of water each year from aquifers in the area.⁸ If the mine were to deplete the aquifers that feed the springs, experts – including Adani’s own experts – agree that the springs would dry up.⁹ Once dry, even temporarily, the springs cannot be restored, and the harm would be irreparable. However, there has been no study to determine whether the mine would affect the aquifers that feed the springs.

Although the Australian government claims to have imposed two strict conditions to protect Doongmabulla Springs,¹⁰ each is inadequate to do so. First, the conditions prohibit Adani from drawing

⁵ Business Standard, *Adani to start work on Australian coal mine in October* (Aug. 28, 2017), http://www.business-standard.com/article/companies/adani-to-start-work-on-australian-coal-mine-in-october-117082800564_1.html; J Robertson, *The Guardian*, *Adani says it will break ground on Carmichael rail link ‘within days’* (Oct. 13, 2017), <https://www.theguardian.com/business/2017/oct/13/adani-says-it-will-break-ground-on-carmichael-rail-link-within-days>; D. Cameron, *Townsville Bulletin*, *Adani’s Carmichael coal mine will begin work in October with first coal due in 2020* (Aug. 28, 2017), <http://www.townsvillebulletin.com.au/news/adanis-carmichael-coal-mine-will-begin-work-in-october-with-first-coal-due-in-2020/news-story/6454ba1edfb58542c69702dce6af4d13>.

⁶ See Australian Government Department of Industry, Innovation and Science, *Northern Australia Infrastructure Facility*, <https://industry.gov.au/industry/Northern-Australia-Infrastructure-Facility/Pages/default.aspx>; M. Slezak, *The Guardian*, *Government loan to Adani could be tainted by interference, economists say* (Aug. 2, 2017), <https://www.theguardian.com/business/2017/aug/03/government-loan-to-adani-could-be-tainted-by-interference-economists-say>.

⁷ Queensland Government, Department of State Development, Infrastructure and Planning, *Carmichael Coal Mine and Rail project: Coordinator-General’s evaluation report on the environmental impact statement* (May 2014), pages 5-6, 9, <http://www.statedevelopment.qld.gov.au/resources/project/carmichael/carmichael-coal-mine-and-rail-cg-report-may2014.pdf>.

⁸ *Id.*, pages 5-6.

⁹ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.* [2015] QLC 48 at [317], <https://archive.sclqld.org.au/qjudgment/2015/QLC15-048.pdf> (accepting that if the Doongmabulla Springs go dry, the ecological community will be lost).

¹⁰ See Australian Government Department of the Environment, *Approval – Carmichael Coal Mine and Rail Infrastructure Project, Queensland (EPBC 2010/5736)* (Oct. 14, 2015), conditions 25-28,

down more than 20 centimetres of groundwater at Doongmabulla Springs. However, a 20 centimetre drawdown would likely be devastating: Adani's own expert admitted in court that a drawdown of only five centimetres would cause at least some of the springs to dry up,¹¹ and another expert opined that a drawdown of about 20 centimetres would cause a number of the springs to dry up, though he could not say how many and which ones.¹² Second, the conditions require that, prior to commencing mining, Adani submit for government approval a research plan for determining whether the aquifers feeding the springs would be harmed. However, Adani is not actually required to implement the plan prior to mining, meaning it is unlikely it would understand the mine's impact on the aquifers when it begins mining.¹³

C. We have not been consulted in good faith about, and have not given our free, prior and informed consent to, the development of the Carmichael mine

Our people have not given our free, prior, and informed consent to the mine, and have not been consulted in good faith about its development. Indeed, a consultation process that conforms to international law is almost impossible under Australian law.

The law that governs the consultation process between a project developer and the Indigenous peoples whose interests in their traditional lands are likely to be affected by projects like the Carmichael mine is called the *Native Title Act 1993* (Cth) ("Native Title Act").¹⁴ Under this law, the project developer must negotiate with the affected Indigenous group for a minimum of six months, with a view to securing that group's agreement to the grant of a mining lease by the state to the project developer.¹⁵ The project developer may also enter into an agreement with the affected Indigenous group called an Indigenous Land Use Agreement ("ILUA").¹⁶ In an ILUA, the Indigenous group agrees to the grant of the mining lease, and potentially to other acts in the future that might affect their interests in their traditional lands, such as additional or different mining leases.¹⁷

If the Indigenous group does not agree to the grant of the mining lease after the six month negotiation period, the project developer can refer the matter to the National Native Title Tribunal ("Tribunal") for determination.¹⁸ In these proceedings, the Tribunal almost invariably determines that the mining lease

<http://epbcnotices.environment.gov.au/entity/annotation/0b3953c8-e472-e511-a947-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1491600590213>.

¹¹ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.* [2015] QLC 48, above n 9, at [242].

¹² See Australian Conservation Foundation and EDOs of Australia, *Licence to Kill: Commonwealth environmental approval for Adani's Carmichael coal mine project* (2016), page 9,

http://www.edong.org.au/documents/ACF_ANEDO_CarmichaelFederalConditionsReport_201609.pdf.

¹³ *Id.*

¹⁴ *Native Title Act 1993* (Cth) ("Native Title Act"), Part 2, Division 3, Subdivision P (ss. 25-44), <https://www.legislation.gov.au/Series/C2004A04665>.

¹⁵ *Id.*, especially ss. 25, 29, 31.

¹⁶ *Id.*, ss. 24BA-24EC.

¹⁷ *Id.*

¹⁸ *Id.*, ss. 35, 38.



can be granted, even if the Indigenous group objects.¹⁹ However, the Tribunal is not permitted to authorise royalty-type payments to the Indigenous group;²⁰ accordingly, many Indigenous groups feel they must agree to the project during the negotiation period so that they can obtain at least some royalty-type financial benefit from a project that appears inevitable.

In our case, our people rejected agreements with Adani in December 2012 and October 2014. However, in two separate proceedings brought by Adani in 2013 and 2015, the Tribunal found that the mining leases could be granted under the Native Title Act, despite finding in the 2015 judgment that our people did not consent to the mining lease.²¹ We have been forced into time- and resource-intensive litigation to challenge the Tribunal's decision, but have been unsuccessful to date because the legislative framework allows our rights and interests in our ancestral homelands to be overridden by private companies and the government.²²

In addition, Adani continues to seek our agreement to an ILUA which would, among other things, give our people's agreement to the surrender of our rights and interests in up to 2,750 hectares of our ancestral homelands that are needed for infrastructure critical to the mine. Without this ILUA, the Queensland government would be forced to compulsorily acquire this land, permanently extinguishing our rights and interests in the land. We rejected ILUAs with Adani in 2012 and 2014, and rejected a related agreement in 2015. During the 2012 negotiations, Adani gave us just two weeks to agree to its

¹⁹ "The Tribunal (once its power to arbitrate is enlivened) almost always allows future acts to be done....": see Australian Lawyers for Human Rights, *Exposure Draft – Native Title Amendment Bill 2012* (Oct. 23, 2012), para. 8, [https://www.ag.gov.au/Consultations/Documents/Currentnativetitleforms/Australian%20Lawyers%20for%20Human%20Rights%20Submission%20\[PDF%20536KB\].pdf](https://www.ag.gov.au/Consultations/Documents/Currentnativetitleforms/Australian%20Lawyers%20for%20Human%20Rights%20Submission%20[PDF%20536KB].pdf). Under the Native Title Act, the grant of a mining lease and other similar acts that may affect an Indigenous group's interest in their traditional lands are called "future acts:" see Native Title Act, s. 233. In 2015-2016, the NNTT found that 9 of 15 contested future acts were allowed (and the remaining 6 matters were not accepted, withdrawn, or dismissed by the NNTT); in 2011-2012, the NNTT 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 Federal Court of Australia, *Annual Report 2015-2016*, Part 5: Report of the National Native Title Tribunal, http://www.fedcourt.gov.au/data/assets/pdf_file/0004/39856/Annual-Report-2015-16.pdf; NNTT, *Annual Report 2011-2012*, Table 13 (page 61), <http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202011-2012.pdf>; NNTT, *Annual Report 2010-2011*, Table 13 (page 82), <http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202010-2011.pdf>; NNTT, *Annual Report 2009-2010*, Table 23 (page 82), <http://www.nntt.gov.au/Reporting%20Publications/Annual%20Report%202009-2010.pdf>.

²⁰ Native Title Act, above n 14, s 38(2).

²¹ *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTTA 30 (Mar. 31, 2013), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/NNTTA/2013/30.html?context=1;query=wangan>; *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTTA 52 (May 7, 2013), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/NNTTA/2013/52.html?context=1;query=wangan>; *Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People* [2015] NNTTA 16 (Apr. 8, 2015), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/NNTTA/2015/16.html?context=1;query=wangan>.

²² See Wangan & Jagalingou Family Council, *Fed Court decision: Adani leases issued despite Traditional Owners' express rejection* (Aug. 25, 2017), <http://wanganjagalingou.com.au/fed-court-decision-adani-leases-issued-despite-traditional-owners-express-rejection/>.



proposed ILUA and when we asked for more time its lawyers threatened that the Queensland government could compulsorily acquire our native title rights for the critical infrastructure.²³ Despite our rejections, Adani persisted, and our people again rejected an ILUA and any further dealings with Adani in March 2016.

Throughout these negotiations, Adani has acted in bad faith. It has attempted to undermine our institutions of representation and decision-making, excluded our authorised senior spokesperson from meetings and challenged his right to represent our people's views, decided to consult with people other than those we have chosen as our representatives, stacked meetings in its favour, presented false information to the public about our people's position on the mine, and questioned our people's independence by asserting we are acting at the behest of outside activists.²⁴

Adani's bad faith in purporting to consult with us culminated in a meeting it organised in April 2016. Although the company claims that our people agreed to an ILUA (known as the "Adani ILUA") at this meeting, over 80% of the participants in that meeting appear not to be members of our people's native title claim group,²⁵ despite the law requiring an ILUA to be authorised by members of the native title claim group constituted under the Native Title Act.²⁶ Also, hundreds of our people, the 'right people for right country,' did not attend this meeting.

In addition, Adani paid as much as AUD\$400 per person for transportation to the meeting for participants the company selected, and provided them accommodations at the meeting. Adani told participants that the mine would proceed whether or not our people agreed to the ILUA. The company has now sought to register the ILUA (required under the law to give the ILUA contractual effect), and so we have been forced to challenge the ILUA's validity in court. Although the litigation is ongoing, with a trial date set for March 2018, Adani has indicated it will build a rail line up to the boundary of our ancestral homelands whilst it is attempting to finalise the ILUA.²⁷

Since these events, in a February 2017 court case unrelated to us, the Federal Court of Australia ruled that certain ILUAs cannot be registered unless they have been signed by *all* members of the registered native title claimant, as authorised by the claim group.²⁸ This case immediately invalidated the purported Adani ILUA, as it was not signed by all members of our registered native title claimant.

²³ *Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland* [2013] NNTTA 30, above n 21, at [37] and [40] (see paraphrase of letter dated Sep. 24, 2012).

²⁴ See our submission to the Special Rapporteur on the rights of Indigenous peoples (Oct. 2, 2015), pages 15-19, <http://wanganjagalingou.com.au/wp-content/uploads/2015/10/Submission-to-the-Special-Rapporteur-on-Indigenous-Peoples-by-the-Wangan-and-Jagalingou-People-2-Oct-2015.pdf>.

²⁵ The attendance register for the meeting indicates that 60% of the participants had never attended any of the prior ILUA authorisation meetings and were not recorded in a database of Wangan and Jagalingou maintained by Queensland South Native Title Services, a native title representative body authorised under the Native Title Act. An additional 20% of participants did not name an apical ancestor from whom they were descended.

²⁶ *QGC Pty Ltd v Bygrave (No 3)* [2011] FCA 1457 (only members of a registered native title claim are entitled to authorise an area ILUA).

²⁷ D. Cameron, *Adani's Carmichael coal mine will begin work in October with first coal due in 2020*, above n 5.

²⁸ *McGlade v Native Title Registrar* [2017] FCAFC 10 (Feb. 2, 2017), <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2017/2017fcafc0010>.



However, less than two weeks after the court's judgment, the Australian government introduced the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth),²⁹ which included the means to retrospectively validate the invalid Adani ILUA – leaving it open to registration by the Tribunal. (As noted above, we are challenging in court, on additional grounds, the validity of the purported Adani ILUA, with the trial date set for March 2018.)

Indeed, the Australian Prime Minister is reported as having assured the chairman of the Adani corporate group that this legislation would overcome the invalid Adani ILUA and allow the mine to proceed despite our objections,³⁰ and current and former members of parliament have indicated that the legislation is specifically intended to validate the Adani ILUA.³¹ In June 2017, the amending bill was passed and became the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth)³² ("Native Title Amendment Act").

Despite the direct impact of the amending bill on our people, and despite the indications that the bill was specifically intended to validate Adani's illegitimate ILUA, the government did not consult with us on the proposed legislation as it was required to do under international law.³³ It brought the bill on for debate only one day after introducing it and, although a Senate committee conducted an inquiry into the bill, this was at the initiative of non-government members of the Senate, and the submission process was only open for two weeks, hindering our capacity to effectively engage. Such a process does not

²⁹ See Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5821.

³⁰ See The Hon. Malcolm Turnbull MP, quoted in, M. Safi and G. Chan, *The Guardian*, *Malcolm Turnbull tells Indian billionaire native title will not stop Adani coalmine* (Apr. 11, 2017), <https://www.theguardian.com/environment/2017/apr/11/malcolm-turnbull-tells-indian-billionaire-native-title-will-not-stop-adani-coalmine>.

³¹ See The Hon. G. Christensen MP, quoted in, J. Sferruzzi, *Chinchilla News*, *Decision that stalled Adani deal could be overturned* (Feb. 14, 2017), <https://www.chinchillanews.com.au/news/decision-that-stalled-adani-deal-could-be-overturn/3143012/> ("I spoke to the Attorney-General ... to urge immediate action be taken on changing the Native Title Act, so that Adani will not be impacted as they work towards developing" the Carmichael mine); D. Cameron, *Townsville Bulletin*, *'Critical infrastructure' status could bulldoze through native title challenge* (Feb. 12, 2017), <http://www.townsvillebulletin.com.au/news/critical-infrastructure-status-could-bulldoze-through-native-title-challenge/news-story/86d2a4ee963e50fdc3144d2daf49cd26> (Mr. Ian Macfarlane, a former federal minister and now chief executive of the Queensland Resources Council, reported as stating that he had spoken to his "good mates" in Canberra about amending native title laws). See also Wangan & Jagalingou Family Council, *W&J resist mining industry push to amend Native Title Act to secure Carmichael mine proposal* (Feb. 12, 2017), <http://wanganjagalingou.com.au/wj-resist-industry-push-for-amended-native-title-act-to-secure-carmichael-mine-proposal/>; Queensland Resources Council, *Statement by QRC Chief Executive Ian Macfarlane on Native Title Act* (Feb. 13, 2017), <https://www.qrc.org.au/submissions/statement-qrc-chief-executive-ian-macfarlane-native-title-act/> ("I call on all politicians from all sides of politics to raise up above politics and work to solve this problem....").

³² *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth), <https://www.legislation.gov.au/Details/C2017A00053>.

³³ See Earthjustice, *Australia's ongoing violation of the rights of the Wangan & Jagalingou People to be adequately consulted in good faith about the development of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) and its impact on the Wangan & Jagalingou* (Mar. 1, 2017), pages 29-39, http://wanganjagalingou.com.au/wp-content/uploads/2017/03/WJ-TO-Council--Submission-to-the-Senate-Constitutional-and-Legal-Affairs-Committee-re-the-Native-Title-Amendment-Indigenous-Land-Use-Agreements-Bill-2017_complete.pdf.



facilitate the kind of specific and engaged consultation that is required when legislative changes directly and explicitly threaten our fundamental interests in the health and survival of our traditional lands and culture.

D. The public campaign to undermine our opposition to the Carmichael mine

Adani and members of the government have engaged in a public campaign of misinformation intended to legitimise the invalid Adani ILUA and create the false impression that our people support the mine. Despite our clear and consistent refusal to consent to the mine, Adani has made repeated public statements suggesting that our people have consented to the mine³⁴ and that we “voted overwhelmingly” to authorise the Adani ILUA.³⁵ Adani has also said that, in negotiating with us, it was “dealing with all duty authorised representatives”³⁶ of our people when in fact it was only dealing with certain individuals who did not represent our people’s wishes, and that our authorised spokesperson “suggests” he is acting on our behalf but is actually acting contrary to our people’s wishes and at the behest of outside activists.³⁷ In addition, Senator Matt Canavan, who is the Minister for Resources and Northern Australia and is a vocal supporter of Adani, has incorrectly stated that our people support the mine.³⁸ The Honourable George Christensen, a federal member of parliament, has stated that only a “minority” of our people oppose the mine, and that that minority is “funded by the extreme green movement.”³⁹

The Queensland Resources Council, a powerful mining industry lobby group, has also attempted to portray our people’s opposition to the mine as illegitimate, through false public statements questioning our independence and integrity. For example, the Council has accused our opposition to the mine as being the tool of “foreign-funded radical activists”:⁴⁰ “Millionaires in the United States are funding activities in Australia, including the likes of [Wangan & Jagalingou senior spokesperson] Mr. Burragubba

³⁴ See, for example, Adani, *Adani welcomes appeal court ruling* (Aug. 22, 2017) (under the links “Media” – “Latest News”), <http://www.adaniaustralia.com/>; The Guardian, *Adani says it is negotiating with Indigenous people over coalmine* (Mar. 26, 2015), <https://www.theguardian.com/australia-news/2015/mar/26/adani-says-it-is-negotiating-with-indigenous-people-over-coalmine>; Facebook – *Adani Australia* (Apr. 16, 2016), <https://www.facebook.com/adaniaustralia/posts/1064138620309377>; J. Robertson, The Guardian, *Indigenous owners threaten legal action unless Adani abandons land access deal* (Feb. 6, 2017), <https://www.theguardian.com/australia-news/2017/feb/07/indigenous-owners-threaten-legal-action-unless-adani-abandons-land-access-deal>; ABC News, *Carmichael coal mine: Wangan and Jagalingou people plan further legal action* (Apr. 13, 2016), <http://www.abc.net.au/news/2016-04-13/wangan-and-jagalingou-plan-legal-action-carmichael-mine/7323728>.

³⁵ Facebook – *Adani Australia*, above n 34. See also, Adani, *Adani welcomes appeal court ruling*, above n 34.

³⁶ The Guardian, *Adani says it is negotiating with Indigenous people over coalmine*, above n 34.

³⁷ Adani, *Adani welcomes appeal court ruling*, above n 34.

³⁸ *Minister for Resources and Northern Australia – Transcript – Press Conference*, <http://www.mattcanavan.com.au/subjects-westpac-s-decision-not-to-invest-in-new-coal-basins-australian-domestic-gas-security-developing-northern-australia-northern-australia-infrastructure-facility>.

³⁹ Facebook – *George Christensen* (Apr. 16, 2016), <https://www.facebook.com/gchristensenmp/posts/969058593149069>.

⁴⁰ Queensland Resources Council, *Supreme Court dismisses Adani activist claims* (Nov. 25, 2016), <https://www.qrc.org.au/media-releases/supreme-court-dismisses-adani-activist-claims/>.

to disrupt and delay resource projects.”⁴¹ The Council has also attempted to undermine our opposition by suggesting we are “anti-coal,”⁴² when our concerns are about the violations of our fundamental human rights and the protection of our country and heritage from destruction: the Council described one of the court cases we have been forced to fight to protect our basic human rights as “merely a tactic of the anti-coal brigade and ... straight out of the activists’ playbook.”⁴³

II. Australia’s obligations under the Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination, which Australia ratified in 1975, defines racial discrimination as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁴⁴

Racial discrimination may be indirect or *de facto*, where an “apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons.”⁴⁵

A. General obligations under the Convention

The Convention imposes a wide range of obligations upon State Parties to eliminate racial discrimination. For example, under Article 2, “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”⁴⁶ To this end, under Articles 2(1)(b) and (c), State Parties undertake “not to sponsor, defend or support racial discrimination by any persons or organizations” and “to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”⁴⁷ State Parties also agree not to “permit public authorities or public institutions, national or local, to promote or incite racial discrimination” (Article 4(c)).⁴⁸

⁴¹ *Id.* (quotations omitted).

⁴² Queensland Resources Council, *A double blow for anti-coal green activism* (Aug. 25, 2017), <https://www.qrc.org.au/media-releases/double-blow-anti-coal-green-activism/>. See also, Queensland Resources Council, *Court of Appeal dismisses activist’s claim* (Aug. 22, 2017), <https://www.qrc.org.au/media-releases/court-appeal-dismisses-activists-claim/>.

⁴³ Queensland Resources Council, *Court of Appeal dismisses activist’s claim*, above n 42.

⁴⁴ *International Convention on the Elimination of All Forms of Racial Discrimination* (“Convention”), Article 1(1).

⁴⁵ Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – United States of America* (CERD/C/USA/CO/6) (May 8, 2008), para. 10.

⁴⁶ *Convention*, Article 2(1).

⁴⁷ *Id.*, Articles 2(1)(b) and (c).

⁴⁸ *Id.*, Article 4(c).

In addition, Article 5 provides that “[i]n compliance with the fundamental obligations laid down in article 2..., States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone ... to equality before the law, notably in the enjoyment of” the rights to freedom of religion and equal participation in cultural activities.⁴⁹

B. Specific obligations under the Convention in relation to Indigenous peoples

The Committee has long recognised that “discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.”⁵⁰ As the Committee said in General Recommendation No. 23, Indigenous peoples “have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular ... they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their cultural and their historical identity has been and still is jeopardized.”⁵¹

The Committee has recognised that a State Party’s failure to conduct good faith negotiations and obtain the free, prior and informed consent of Indigenous peoples with respect to development projects – particularly resource extraction – on their traditional homelands, and the consequent destruction of Indigenous peoples’ sacred sites and cultural resources, is inconsistent with the Convention’s mandate to eliminate racial discrimination. For example, in New Zealand’s periodic review earlier this year, the Committee noted that “the requirement that any decision affecting the rights and interests of indigenous peoples must be subject to their free, prior and informed consent” is “unequivocal,”⁵² and the Committee has previously recommended that Australia seek the informed consent of Indigenous peoples before making decisions relating to their rights and interests.⁵³ In concluding observations in other periodic reviews, the Committee has expressed concern about:

- mining activities in “areas of spiritual and cultural significance to Native Americans, and the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention.” The Committee recommended that the State Party “take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedure, - to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention;”⁵⁴
- “insufficient measures [being] taken to protect the sacred sites of indigenous peoples that are essential for the preservation of their religious, cultural and spiritual practices against polluting and

⁴⁹ *Id.*, Articles 5(d)(vii) and (e)(vi).

⁵⁰ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII on the rights of indigenous peoples* (1997) (“*General Recommendation No. 23*”), para. 1.

⁵¹ *Id.*, para. 3.

⁵² Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – New Zealand* (CERD/C/NZL/CO/21-22) (Sep. 22, 2017), para. 14.

⁵³ Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia* (CERD/C/AUS/CO/14) (Apr. 14, 2005), paras. 11, 16.

⁵⁴ *Concluding observations of the Committee on the Elimination of Racial Discrimination – United States of America* (2008), above n 45, para. 29.

disruptive activities, resulting from ... resource extraction.” The Committee called upon the State Party to “[g]uarantee, in law and in practice, the right of indigenous peoples to effective participation in public life and in decisions that affect them, based on their free, prior and informed consent” and to “[a]dopt concrete measures to effectively protect the sacred sites of indigenous peoples in the context of the State party’s ... exploitation of natural resources;”⁵⁵

- the destruction of sacred sites and cultural resources by development projects, in respect to which the Committee recommended that the State Party ensure the free, prior and informed consent of Indigenous peoples on all matters concerning their land rights;⁵⁶ and
- the lack of effective implementation of the fundamental right to consultation. Here, the Committee recommended that the State Party fulfill “its obligation to ensure consultation, with a view to obtaining the free, prior and informed consent” of Indigenous peoples in any activities that could affect their rights, “particularly their right to the land and natural resources that they own or have traditionally used.”⁵⁷

In recognising that, in order to fulfill its obligations under the Convention, a State Party should seek the free, prior and informed consent of Indigenous peoples with respect to development projects on their traditional lands, the Committee has reiterated that State Parties should act in accordance with General Recommendation No.23.⁵⁸ In that recommendation, the Committee called upon State Parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”⁵⁹ Also, in paragraph 4 of the recommendation, the Committee called upon State Parties to:

⁵⁵ Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – United States of America* (CERD/C/USA/CO/7-9) (Sep. 25, 2014), para. 24.

⁵⁶ Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Canada* (CERD/C/CAN/CO/21-23) (Sep. 13, 2017), paras. 19-20.

⁵⁷ Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Ecuador* (CERD/C/ECU/CO/23-24) (Sep. 15, 2017), para. 19.

⁵⁸ See, for example, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Mexico* (CERD/C/MEX/CO/16-17) (Apr. 4, 2012), para. 17 (“The Committee reiterates its concern ... at the failure, in practice, to fully respect [Indigenous peoples’] right to be consulted before work starts on exploiting the natural resources in their territories. ... In light of its general recommendation No. 23, 1997, the Committee recommends that the State party should ... [e]nsure that effective consultations are carried out at each stage of the process with communities likely to be affected by projects to develop and exploit natural resources, with the aim of obtaining their free, prior and informed consent, particularly in the case of mining projects.”); *Concluding observations of the Committee on the Elimination of Racial Discrimination – Guatemala* (CERD/C/GTM/CO/12-13) (May 19, 2010), para. 11 (“In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources.”); *Concluding observations of the Committee on the Elimination of Racial Discrimination – Canada*, above n 56, para. 20 (“Recalling its general recommendation No. 23 (1997) on the rights of indigenous peoples..., the Committee recommends that the State party ... [e]nsure the full implementation of general recommendation No. 23 in a transparent manner with the full involvement of the ... indigenous peoples and with their free, prior and informed consent on all matters concerning their land rights.”).

⁵⁹ *General Recommendation No. 23*, above n 50, para. 5.

- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that [are] based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.⁶⁰

The Committee has also stated that UNDRIP should “be used as a guide to interpret the State Party's obligations under the Convention relating to indigenous peoples,”⁶¹ and that State Parties should act in accordance with UNDRIP and international law generally when fulfilling their obligations under the Convention.⁶² As the UN Special Rapporteur on the Rights of Indigenous Peoples stated, “the duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in [UNDRIP], and is firmly rooted in international human rights law.”⁶³ Furthermore, “where the rights

⁶⁰ *Id.*, para. 4.

⁶¹ *Concluding observations of the Committee on the Elimination of Racial Discrimination – United States of America* (2008), above n 45, para. 29.

⁶² See, for example, Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Fiji* (CERD/C/FJI/CO/18-20) (Oct. 23, 2012), para. 14 (“The Committee reaffirms the importance of securing the free, prior and informed consent of indigenous groups regarding their permanent rights as a group, including issues affecting them and their ways of living. It urges the State party to enhance appropriate mechanisms for effective consultation with indigenous people around all policies affecting their identity, ways of living and resources, in line with the Convention [and] the United Nations Declaration on the Rights of Indigenous Peoples.”); *Concluding observations of the Committee on the Elimination of Racial Discrimination – Guatemala*, above n 58, para. 11 (“The Committee recommends that the State party ... [e]stablish suitable procedures, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples ... to effectively consult the communities that may be affected by development projects or the exploitation of natural resources with a view to obtaining their free, prior and informed consent.”); *Concluding observations of the Committee on the Elimination of Racial Discrimination – New Zealand*, above n 52, para. 19 (“The Committee recommends that the State party review, in consultation with all affected Maori, the designation of Special Housing Area 62 to evaluate its conformity with ... the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international standards, and that the State party obtain the free and informed consent of Maori before approving any project affecting the use and development of their traditional land and resources.”); Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Canada* (CERD/C/CAN/CO/19-20) (Apr. 4, 2012), para. 20 (“[T]he Committee recommends that the State Party ... [i]mplement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards.”).

⁶³ Special Rapporteur James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (“2009 Annual Report”), A/HRC/12/34 (Jul. 15, 2009), para. 38, http://unsr.jamesanaya.org/docs/annual/2009_hrc_annual_report_en.pdf. See also para. 40 (“The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights

implicated by [extractive industries] are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations.”⁶⁴

In addition, like General Recommendation No. 23, both UNDRIP and international law⁶⁵ assure the cultural rights of Indigenous peoples – an “integral part of human rights”⁶⁶ – including the right to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or other occupied and used lands, territories, waters ... and other resources and to uphold their responsibilities to future generations in this regard,”⁶⁷ to not be subject to destruction of their culture,⁶⁸ and to practise and revitalise their cultural traditions and customs.⁶⁹

III. Australia is violating its obligations under the Convention on the Elimination of All Forms of Racial Discrimination

A. Australia’s failure to obtain our free, prior and informed consent to the Carmichael mine, and to take adequate measures to protect our cultural resources, is inconsistent with its obligations under the Convention

As described above, the Committee has made clear that, to fulfill its obligations to eliminate racial discrimination under the Convention, a State Party must conduct good faith negotiations and obtain the

treaties of the United Nations.”). Article 32(2) of UNDRIP requires States to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

⁶⁴ Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, Report to the Human Rights Council, 21st session, A/HRC/21/47 (Jul. 6, 2012), para. 65, http://www.unsr.jamesanaya.org/docs/annual/2012_hrc_annual_report_en.pdf. See also Anaya, *2009 Annual Report*, above n 63, para. 47 (“A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.”); Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples*, Report to the Human Rights Council, 24th Session, A/HRC/24/41 (Jul.1, 2013), para. 28, <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf> (“It can readily be seen that, given the invasive nature of industrial-scale extraction of natural resources, the enjoyment of [rights including the right to culture] is invariably affected in one way or another when extractive activities occur within indigenous territories – thus the general rule that indigenous consent is required for extractive activities within indigenous territories.”).

⁶⁵ The right to culture is recognised in many international instruments, including Article 27(1) of the *Universal Declaration on Human Rights*, Article 27(1) of the *International Covenant on Civil and Political Rights*, and Article 15(1)(a) of the *International Covenant on Economic, Social and Cultural Rights*.

⁶⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21 – Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/21 (Dec. 21, 2009), para. 1.

⁶⁷ UNDRIP, Article 25.

⁶⁸ *Id.*, Article 8.

⁶⁹ *Id.*, Article 11.



free, prior and informed consent of Indigenous peoples with respect to development projects on our traditional homelands, as well as take adequate measures to protect the sacred sites and cultural resources that are essential for the preservation of our culture. This is consistent with the Committee's General Recommendation No. 23, as well as the obligations in UNDRIP and international law generally.

Australia has failed to act consistently with these obligations. We have not been consulted in good faith about the development of the Carmichael mine, nor has our free, prior and informed consent to its development been obtained. Instead, our people have consistently opposed the mine over many years and have on three occasions formally rejected an ILUA with Adani. As described in section I.C above, Adani has acted in bad faith throughout the statutory negotiation process, variously providing us with short periods of time to agree to an ILUA that it proposed, pressuring us to agree to an ILUA by telling us that the mine was inevitable whether or not we agreed, threatening us with compulsory acquisition of our native title rights in our ancestral homelands, undermining our institutions of representation and decision-making by stacking meetings in its favour with people who are not recorded as Wangan and Jagalingou, excluding our authorised senior spokesperson from meetings, and questioning our independence by asserting we are acting at the behest of outside activists. Despite this, both the Australian federal and Queensland state governments have approved and support the mine, and Adani has indicated that it will start developing the mine this month, including building a rail line (for which preliminary work is underway) from the Queensland coast up to the boundary of our ancestral homelands.

In addition, Australia has failed to develop adequate measures to protect our ancestral homelands, sacred sites, and cultural resources that are essential to the preservation of our culture. The Carmichael mine will destroy our lands and waters: there is simply no way to build a massive coal mine consisting of six open-cut pits, five underground mines, and associated infrastructure, on our ancestral homelands without destroying them. Our lands and waters – any everything on and in them – embody our culture, and their destruction by the Carmichael mine threatens the preservation of our culture and harms our ability to pass our culture onto our children and grandchildren. We will be unable to practise our cultural traditions and customs. As described in section I.B above, the mine would also likely devastate one of our most sacred sites, the Doongmabulla Springs, and the evidence demonstrates that the conditions that the Australian government has imposed on the mine are inadequate to assure its protection.

Australia's failure to fulfill its obligations to eliminate racial discrimination against Indigenous peoples is ongoing. In fact, in this Committee's review of Australia's compliance with the Convention in 2010, the Committee noted its concern about "the absence of a legal framework regulating the obligation of Australian corporations ... whose activities, notably in the extractive sector, when carried out on the traditional territories of indigenous peoples, have a negative impact on indigenous peoples' rights to land, health, living environment and livelihoods."⁷⁰ The Committee continued, "In light of [General Recommendation No. 23], the Committee encourages [Australia] to take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the

⁷⁰ *Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia* (CERD/C/AUS/CO/15-17) (Sep. 13, 2010), para. 13.

enjoyment of rights of indigenous peoples.”⁷¹ As our situation demonstrates, Australia has not taken the steps recommended by the Committee.

Accordingly, by approving and supporting the Carmichael mine in circumstances where it has failed to obtain our free, prior, and informed consent, and by failing to ensure adequate measures to preserve our culture, Australia is failing to act consistently with its obligations under the Convention to eliminate racial discrimination.

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

Australia is violating its obligation under Article 5 “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone ... to equality before the law, notably in the enjoyment of” the rights to freedom of religion and equal participation in cultural activities. This is because Australia is failing to protect our rights to practise our culture and religion by permitting the destruction of our sacred sites and ancestral homelands – which embody our culture and religion – without our free, prior, and informed consent. Non-Indigenous Australians are not subject to a similar derogation of their rights to culture and religion, because that culture and religion does not arise from a connection to ancestral homelands and waters as our does. Our rights are not on an equal footing with those of non-Indigenous Australians, and Australia’s failure to secure our free, prior, and informed consent puts us as Indigenous peoples at a disadvantage in the exercise of our cultural and religious rights compared with non-Indigenous Australians.

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

Article 2(1)(c) of the Convention requires Australia to “amend, rescind or nullify” legislation that has the effect of creating or perpetuating racial discrimination. Australia is violating this obligation because it has failed to amend, rescind, or nullify the Native Title Act which, as our experience demonstrates, creates and perpetuates racial discrimination.

The Native Title Act permits resource extraction projects like the Carmichael mine to proceed even in the absence of good faith negotiation and the free, prior, and informed consent of the affected Indigenous peoples. Indeed, a good faith negotiation process to obtain free, prior, and informed consent is almost impossible under the legislation: as the UN Special Rapporteur on the Situation of Human Rights Defenders has recently recognised, “the right to free, prior and informed consent is not protected under Australian law, and government officials frequently fail to meaningfully consult and cooperate with indigenous and community leaders.”⁷² For example, the Native Title Act establishes a negotiation process that coerces Indigenous peoples into unfavourable agreements that they do not want because, as described in section I.C above, if Indigenous peoples do not agree to the project’s development, the matter is transferred to the National Native Title Tribunal which almost always allows

⁷¹ *Id.*

⁷² Special Rapporteur Michel Forst, *End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders – Visit to Australia* (Oct. 18, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>.

the project to proceed but cannot order royalty-type payments. As such, Indigenous peoples often feel they have no choice but to agree to the project during the negotiation process so that they can obtain some financial benefit from a project they feel is inevitable. During Adani's engagements with us, it undermined the negotiation process by telling us that the mine is inevitable whether or not we agree to an ILUA, threatening us with compulsory acquisition of our native title interests in our homelands if we do not agree to an ILUA, and giving us very short time periods to consider its proposed ILUA in the context of all the environmental, financial, and legal requirements for such a massive industrial project, as well as the issue of the extinguishment of our native title and the adequacy of any compensation proposed. Accordingly, the Act permits decisions "directly relating to [our] rights and interests"⁷³ to be taken without our free, prior, and informed consent and, in so doing, creates and perpetuates racial discrimination.

Furthermore, Australia perpetuated the racially discriminatory operation of the Native Title Act this year when it passed the Native Title Amendment Act, which we understand from statements by members of parliament and others was specifically intended to retrospectively validate the invalid Adani ILUA, in circumstances where we have rejected an ILUA with Adani three times and the meeting at which the Adani ILUA was purportedly authorised was invalid.⁷⁴ This was also exacerbated by the process by which the Native Title Amendment Act was passed: despite the bill apparently being targeted at our people and it directly and explicitly threatening our fundamental interests in the health of our traditional lands and survival of our culture, we were not consulted about it. Instead, the government brought the bill on for debate only one day after it was introduced to parliament and, although a Senate committee conducted an inquiry into the bill, this was at initiative of non-government members of the Senate, and the inquiry was only open a short two-week period, during which time we had to obtain the resources necessary to seek legal assistance to fully understand the impacts of the bill and prepare a submission.⁷⁵ This process failed to facilitate the kind of specific and engaged consultation that is required under international law when legislation directly impacts our fundamental interests.

D. Australia's support for the Carmichael mine violates its obligations to not sponsor, or permit public authorities to promote, racial discrimination

Under Articles 2(1)(b) and 4(c) of the Convention, Australia has agreed "not to sponsor, defend or support racial discrimination by any persons or organizations" and to "not permit public authorities or public institutions, national or local, to promote or incite racial discrimination." However, Australia is violating this obligation because both the Australian federal and Queensland state governments have approved and publicly support the mine, even though Australia has not fulfilled its obligations under the Convention to eliminate racial discrimination by obtaining our free, prior, and informed consent to the Carmichael mine and developing adequate measures to ensure the preservation of our culture in the face of destruction of our ancestral homelands by a massive mine.

In addition, despite Australia's failure to fulfill its obligation to obtain our free, prior, and informed consent, Australia is permitting members of the government, as well as Adani and the Queensland

⁷³ *General Recommendation No. 23*, above n 50, para. 4(d).

⁷⁴ See sections I.C and I.D above.

⁷⁵ See section I.C above.



Resources Council, to engage in a public campaign of misinformation intended to legitimise the invalid Adani ILUA and create the false impression that our people support the mine. For example, as described in section I.D above, our people’s opposition to the Carmichael mine has been consistently and incorrectly portrayed as merely a minority view, our independence and integrity have been questioned as we are accused of being tools of radical activists, and the seriousness of our concerns about violations of our fundamental human rights has been mocked and disrespected by constant accusations that we are simply “anti-coal.” The UN Special Rapporteur on the Situation of Human Rights Defenders has condemned these actions noting that “Indigenous rights defenders ... face lack of cooperation or severe pressure from the mining industry with regard to project activities, as has been exemplified in the case of the proposed Carmichael Coal Mine.”⁷⁶ By permitting this public campaign against our people, which disadvantages us in our fight to save our ancestral homelands and culture by undermining the absence of our free, prior, and informed consent, Australia is violating its obligations to not sponsor, or permit public authorities to promote, racial discrimination.

IV. Request for Committee’s intervention during Australia’s periodic review

Adani has indicated that it intends to commence construction of the Carmichael mine this month, including building a rail line to service the mine (for which preliminary work is underway) from the Queensland coast up to the boundary of our ancestral homelands, whilst our litigation against its purported agreement with our people is pending. By approving and supporting the development of this mine, which will destroy our ancestral homelands, sacred sites, and culture, and to which we have not given our free, prior and informed consent, and allowing the company to commence building a rail line up to the boundary of our homelands with indifference to the outcome of our litigation, Australia is violating its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination to eliminate racial discrimination.

In light of these violations, we respectfully encourage you to recommend that Australia fulfill its obligations under the Convention to eliminate racial discrimination against the Wangan and Jagalingou and all Indigenous peoples in Australia, including by:

- Prohibiting the development of the Carmichael mine on our ancestral homelands in the absence of good faith negotiation and our free, prior, and informed consent obtained through our own decision-making processes;
- Adopting and implementing adequate measures to effectively protect our ancestral homelands, sacred sites, and cultural resources;
- Taking steps to guarantee our equality before the law, notably in the enjoyment of our rights to equal participation in cultural activities and freedom of religion;
- Reforming the Native Title Act to require a good faith negotiation and free, prior, and informed consent process that conforms to international law and ensures that projects that jeopardise Indigenous peoples’ culture and religion are not permitted in the absence of their free, prior, and informed consent; and

⁷⁶ Special Rapporteur Michel Forst, *End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders – Visit to Australia*, above n 72.



- Not permitting or supporting actions and language by public authorities, private companies, and industry bodies that have the effect of perpetuating racial discrimination by engaging in a public campaign of misinformation intended to create the false impression that our people support the mine.

We have also made submissions about the violations of our human rights to the UN Special Rapporteur on the Rights of Indigenous Peoples, which include detailed information about our struggle against the Carmichael mine. These submissions are available at <http://wanganjagalingou.com.au/wp-content/uploads/2015/10/Submission-to-the-Special-Rapporteur-on-Indigenous-Peoples-by-the-Wangan-and-Jagalingou-People-2-Oct-2015.pdf> and <http://wanganjagalingou.com.au/wp-content/uploads/2017/03/Wangan-Jagalingou-reply-submission-to-SR-indigenous-peoples-17-03-10.pdf>.

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

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