

May 15, 2017



To: Committee on Economic, Social and Cultural Rights

Re: Australia's Fifth Periodic Review: Australia's ongoing violation of its obligations under the International Covenant on Economic, Social and Cultural Rights and its failure to protect the Wangan and Jagalingou People from violations arising out of the development of the destructive Carmichael Coal Mine on our traditional lands

We are Wangan and Jagalingou.¹ Our ancestral homelands in the central-western part of the state of Queensland, Australia, are threatened with destruction by the imminent development by Adani Mining Pty Ltd ("Adani") of the massive Carmichael Coal Mine and Rail Project – which would be among the largest coal mines in the world. If developed as proposed, the Carmichael mine would harm approximately 30,000 hectares of land, the bulk of which are our traditional lands, and permanently destroy vast swathes of our traditional lands and waters. 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 from where our dreaming totem, the *Mundunjudra* (also known as the Rainbow Serpent), travelled to shape the earth.

We have not been consulted in good faith about, or given our consent to, the development of the Carmichael mine, or any other proposed mine, on our traditional lands. Despite this, both the Australian federal and Queensland state governments have approved the Carmichael mine and support its development.

In this submission, we respectfully request that, during Australia's fifth periodic review in May 2017, the Committee on Economic, Social and Cultural Rights ("Committee") investigate and express concern about Australia's failure to respect and protect the human rights of our people due to the federal and state governments' support for the Carmichael mine.

Mining on our ancestral lands would violate our human right to take part in cultural life

Under Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), we have a right to take part in cultural life, which includes our customs and traditions² and our way of life associated with our lands and waters.³ The ICESCR imposes a corresponding obligation on Australia to respect, protect, and fulfil that right⁴ and to ensure

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.

² Committee on Economic, Social and Cultural Rights ("CESCR"), *General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights) ("General Comment 21")*, E/C.12/GC/21 (Dec. 21, 2009), paras. 10-13, 16.

³ *Id.*, paras. 10-16.

⁴ *Id.*, paras. 44 and 48. See also, *id.*, paras. 45-47, 49-55.

that the activities of third parties do not violate it.⁵ As the Committee has said, “States parties 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.”⁶

Our lands and waters embody our culture, and our special relationship with them tells us who we are. They are the origins and the living source of our stories, laws, and spiritual beliefs. Indeed, our culture is inseparable from the condition of our traditional lands and waters.

Our lands and waters are located in a coal-rich area called the Galilee Basin. If developed as proposed, the Carmichael mine would be the largest proposed coal mine in the southern hemisphere, and would consist of six open-cut pits, five underground mines, a coal handling and processing plant, rail infrastructure, and other associated infrastructure.⁷ This mine would be the first of six, and possibly more, mines proposed to extract Galilee Basin coal.⁸ It 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. Our children and grandchildren would never know their culture or who they are, and would suffer significant social, cultural, economic, environmental, and spiritual damage and loss if the mine is allowed to proceed.

Among the most damaging aspects of the Carmichael mine would be its devastation of one of the most sacred places to our culture and religion: the Doongmabulla Springs – *the source of our dreaming, our culture, and ourselves*. The mine would draw down billions of litres of water each year from aquifers in the area.⁹ Although experts – including Adani’s own experts – agree that the springs would dry up if the mine were to deplete the aquifers that feed the springs,¹⁰ there has been no study to determine whether the mine would affect those aquifers.¹¹ Once dry, even temporarily, the springs cannot be restored. The harm would be irreparable.

⁵ *Id.*, para. 62.

⁶ *Id.*, para. 49(d).

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 (“Carmichael EIS Report”)* (May 2014), pages 5-6, <http://www.statedevelopment.qld.gov.au/resources/project/carmichael/carmichael-coal-mine-and-rail-cg-report-may2014.pdf>.

⁸ 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.

⁹ *Carmichael EIS Report*, above n. 7, pages 5-6.

¹⁰ Queensland Land Court in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, para. 266, <http://archive.sclqld.org.au/qjudgment/2015/QLC15-048.pdf>.

¹¹ Doongmabulla Springs sits over two aquifers that are separated by an ancient layer of sandstone and mudstone called the Rewan Formation, and current research indicates that the springs are sourced by the aquifer above the Rewan Formation: see Australian Government Department of the Environment, *Statement of reasons for approval of a proposed action under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (“*Federal Approval – Reasons*”) (Oct. 14, 2015), <https://www.environment.gov.au/system/files/pages/cb8a9e41-eba5-47a4-8b72-154d0a5a6956/files/carmichael-statement-reasons.pdf>, para. 113. However, there are no studies about

Although the Australian government claims to have imposed strict conditions to protect the springs, those conditions are inadequate for several reasons. First, although Adani is required to submit for government approval prior to commencing mining a research plan to determine whether the aquifers feeding the springs would be harmed, it is not required to implement that plan prior to mining.¹² As such, it is unlikely the company would understand the impact on the aquifers when it begins mining, which is far too late to prevent harm to the springs. Second, although the mining operations may draw down no more than 20 centimetres of groundwater at the springs,¹³ 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,¹⁴ and another expert opined that a drawdown of about 20 centimetres would cause a number of the springs to go dry, although he could not say how many and which ones.¹⁵ A 20 centimetre drawdown thus would likely be devastating for Doongmabulla Springs.

Our lands and waters, and in particular Doongmabulla Springs, are so sacred to us, and so central to our customs and traditions and way of life, that harm to them threatens our culture and our identity as Wangan and Jagalingou. We need our traditional lands to remain intact and healthy so that our children and grandchildren can learn and experience their cultural identities. Without our culture, we are nothing. Australia's support for and approval of the Carmichael mine violates our right to take part in cultural life under the ICESCR.

Australia is violating our rights to be consulted in good faith about, and to give or withhold our free, prior and informed consent to, the development of the Carmichael mine

A core obligation under Article 15(1) of the ICESCR is that State Parties should obtain the free, prior and informed consent of affected Indigenous peoples when the preservation of their cultural resources, especially the resources associated with their way of life and cultural expressions, are at risk.¹⁶

whether there is faulting or fracturing in the Rewan Foundation that would allow water to seep between the two aquifers, an issue raised by an independent scientific agency established under federal legislation: *see id.*, paras. 108-113; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, para. 266. The mine will extract coal located below the Rewan Formation, and mining will draw down water in the lower aquifer: *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, para. 69. However, if the Rewan Formation is permeable, groundwater could flow between the two aquifers, and a drawdown of either aquifer would deplete the water that is the source of the springs, destroying them: *Federal Approval – Reasons*, para. 113.

¹² See Australian Government Department of the Environment, *Approval – Carmichael Coal Mine and Rail Infrastructure Project, Queensland (EPBC 2010/5736)* (Oct. 14, 2015), http://epbcnotices.environment.gov.au/_entity/annotation/0b3953c8-e472-e511-a947-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1491600590213, conditions 25-28.

¹³ *Id.*, condition 3(d).

¹⁴ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, para. 242.

¹⁵ See Australian Conservation Foundation and EDOs of Australia, *Licence to Kill: Commonwealth environmental approval for Adani's Carmichael coal mine project* (2016),

http://www.edong.org.au/documents/ACF_ANEDO_CarmichaelFederalConditionsReport_201609.pdf, page 9.

¹⁶ *General Comment 21*, above n. 2, paras. 36-37 and 55(e). This requirement is reflected in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Article 32(2) of UNDRIP requires good faith

These international human rights obligations require Australia to consult with us in good faith, and to *obtain our explicit consent to the Carmichael mine's development*, prior to allowing the mine to proceed. This is because the Carmichael mine will cause significant, direct, and foreseeable harm to our ancestral homelands and, consequently, to our culture. As former UN Special Rapporteur on the rights of indigenous peoples James Anaya has explained, “where the rights implicated [by extractive industries] are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations.”¹⁷

We have not given our consent to the development of the Carmichael mine on our ancestral homelands, and we have not been consulted in good faith. In fact, as our situation demonstrates, a free, prior and informed consent process that conforms to international law is nearly impossible under Australian law.

The *Native Title Act 1993* (Cth) (“Native Title Act”), which is the law that governs the consultation process between Indigenous peoples whose interests in their traditional lands are likely to be affected by projects like the Carmichael mine and the project developer,¹⁸ coerces Indigenous peoples into entering unfavourable agreements that they do not want. Under the Native Title Act, after an Australian state indicates its intention to grant a mining lease, the affected Indigenous group and the project developer must negotiate with a view to reaching agreement by the Indigenous group to the grant of the mining lease and the project’s development.¹⁹ During these negotiations, the Indigenous group and the project developer may choose to enter a separate agreement called an indigenous land use agreement (“ILUA”), in which the Indigenous group agrees to the grant of the mining lease, and potentially other acts in the future that might affect their interests in their traditional lands, such as additional or different mining activities.²⁰

At least six months after the start of the negotiation process, if the affected Indigenous group does not agree to the project’s development, the law allows the matter to be transferred to the National Native Title Tribunal (“NNTT”) to determine whether the mining lease may be granted

consultation and free, prior and informed consent prior to approving extractive projects that affect Indigenous lands and resources, and Article 19 requires the same for legislative and administrative measures.

¹⁷ J. 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, J. 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 (“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.”).

¹⁸ *Native Title Act 1993* (Cth) (“Native Title Act”), Part 2, Division 3, Subdivision P (ss. 25-44),

<https://www.legislation.gov.au/Details/C2016C00748>.

¹⁹ *Id.*, especially ss. 25, 29, 31.

²⁰ *Id.*, ss. 24BA-24EC.

under the Native Title Act.²¹ In these proceedings, the NNTT almost inevitably determines that the state is authorised to grant the mining lease, even absent an agreement with the Indigenous group or despite their objections.²² However, the NNTT is prohibited from authorising any royalty-type payments to the Indigenous group.²³ Many Indigenous groups therefore feel they have no choice but to agree during the negotiating period to the project's development so that they can at least obtain some royalty-type payments from a project that appears inevitable.

In our case, even though we rejected agreements with Adani in December 2012 and October 2014, the NNTT determined the mining leases may be granted under the Native Title Act. We are now forced into time- and resource-intensive litigation to challenge the NNTT's decision.

In addition, for many years Adani has sought to enter into an ILUA with us, in which we would agree to the grant of approvals for the mine, as well as the permanent surrender of our interests in 2,750 hectares of our land that Adani needs for infrastructure associated with the mine. We have thrice rejected an ILUA, in December 2012, October 2014, and March 2016.

Throughout these negotiations, Adani has consulted with us in bad faith, attempted to undermined our institutions of representation and decision-making, challenged the right of our authorised senior spokesperson to speak, chosen whom to consult with rather than respecting our choices, and even presented false information to the public about our peoples' position on the Carmichael mine. This culminated in a meeting in April 2016, organised by Adani in yet another attempt to secure our people's support for an ILUA. Adani paid as much as AUD\$400 per person for transportation and provided accommodations for selected participants to attend that meeting. Although Adani claims that our people agreed to an ILUA (known as the "Adani ILUA") at that meeting, and has sought to register the ILUA (a step required under the law to give the ILUA contractual effect²⁴), over 80% of people who attended the meeting appear not

²¹ *Id.*, ss. 35, 38.

²² "The [NNTT] (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>.

²³ *Id.*, s 38(2).

²⁴ *Id.*, s. 24EA.

to be members of the Wangan and Jagalingou native title claim group²⁵ (constituted under the Native Title Act), despite the law requiring an ILUA to be authorised by members of a registered native title claim group.²⁶ In fact, one-third of those people had not even previously identified themselves as Wangan and Jagalingou, but identified themselves as members of other Indigenous groups. As a result of this situation, we have been forced to file an objection to the Adani ILUA in the NNTT.

Because of the irregularities in the process underlying the Adani ILUA, it is clear that *we have not consented to the development of this mine*. Despite this, Adani continues to push forward with the mine's development, with governmental support. Accordingly, Australia has failed to meet its obligation under Article 15(1) of the ICESCR to respect and protect our right to be consulted in good faith about, and to give or withhold our consent to, the development of this mine where the preservation of our cultural resources and our very way of life are at risk.

The Australian government recently introduced a bill into Parliament that would validate the invalid Adani ILUA without consulting with us in good faith with the objective of obtaining our free, prior and informed consent

On 2 February 2017, in a 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 claim group.²⁷ This case would likely invalidate the Adani ILUA because five of the 12 members of our native title claim group refused to sign the ILUA.

Unfortunately, less than two weeks after the Full Court's judgment, on 15 February 2017, the Australian government introduced the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) ("the Bill"), and brought it on for debate only one day later. Among other things, we understand that the Bill would operate to retrospectively validate the *invalid* Adani ILUA, stripping us of our right to determine for ourselves whether we wish to enter into the proposed ILUA with Adani and of our right to say "no" to the Carmichael mine. Indeed, the Australian Prime Minister is reported as recently having assured the chairman of the Adani corporate group that this legislation will overcome the invalid Adani ILUA and allow the mine to proceed despite our objections.²⁸

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

²⁸ 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>.

Moreover, despite the direct impact of the Bill on our people and despite indications by current and former members of parliament that the Bill is specifically intended to validate the Adani ILUA,²⁹ the government has not consulted with us on this proposed legislation as required under international law. Although the Bill was referred for an inquiry by a federal senate committee, the submission process was only open for two weeks, hindering our capacity to effectively engage. This process does not 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.

The Australian's government attempts to push this Bill through parliament without consulting us (and other affected Indigenous groups) in good faith with the objective of obtaining our free, prior and informed consent is a violation of our internationally-protected rights.

Request for intervention during Australia's fifth periodic review

Adani has indicated that it will commence construction of the Carmichael mine in August this year.³⁰ By supporting and facilitating the mine, and by allowing Adani to proceed with the mine's development in violation of our rights to culture, to be adequately consulted in good faith, and to give or withhold our consent, Australia is violating its obligations under international law to protect and defend our human rights, including under the International Covenant on Economic, Social and Cultural Rights and the United Nations Declaration on the Rights of Indigenous Peoples.

In light of these violations, we respectfully encourage you to recommend that Australia:

²⁹ 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/>. See also, 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....").

³⁰ C. Chang, News.com.au, *Is this the worst mistake Australia could make?* (Apr. 3, 2017), <http://www.news.com.au/technology/environment/is-this-the-worst-mistake-australia-could-make/news-story/f461955f66050fb32f0c1717571399fa>; J. McCarthy, The Courier Mail, *Adani says Carmichael mine to be 'executed' this year despite not yet being approved by its board* (Mar. 31, 2017), <http://www.couriermail.com.au/news/queensland/adani-says-carmichael-mine-to-be-executed-this-year-despite-not-yet-being-approved-by-its-board/news-story/4f3136b1c8dd84901bb03adbff1204f5>.

- Ensure the protection of our rights to take part in cultural life, 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 mine on our ancestral homelands;
- Prohibit the development of the Carmichael mine on our ancestral homelands without our affirmative consent obtained through our own decision-making processes; and
- Not seek to progress the passage of the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) through parliament, until it has specifically and adequately consulted with us and other traditional owner groups who may be similarly affected, in good faith with the objective of obtaining our free, prior and informed consent.

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 this 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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