Wangan & Jagalingou Family Council

7 March 2017

Submission to the Senate Constitutional and Legal Affairs Committee re the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

This submission is composed of –

1. The statement set out below, outlining the position of the Wangan & Jagalingou Traditional Owners Council, encompassing 5 members of the extant and 9 members of the interlocutory Applicant, and the objectors to the purported Adani ILUA ("the W&J council")
2. An attached copy of the submission prepared by Colin Hardie, Principal Solicitor, Just Us Lawyers, on behalf of the Bigambul Native Title Aboriginal Corporation (ICN 8479), the Wardingarri Aboriginal Corporation RNTBC (ICN 8305) of the Iman People, and the Wangan and Jagalingou Traditional Owners Council of the Wangan and Jagalingou people and the Objectors to the Registration of the Adani ILUA
3. An attached copy of advice to the Wangan & Jagalingou Traditional Owners Council, from Martin Wagner, Managing Attorney, International Program, Earth Justice, regarding an international law and Indigenous rights perspective on the process the Bill

Statement by the W&J council

In *McGlade v Native Title Tribunal*, the Full Federal Court overruled the decision in *Bygraves* and confirmed that the Native Title Act requires that all signatures of the Registered Native Title Claimants (RNTCs) are required for an area ILUA to be properly authorised.

The decision was specific to the Noongar native title settlement and the ILUA documents before the National Native Title Tribunal ("the NNTT") for a decision on registration.

The *McGlade* decision may have implications for the registration of ILUAs currently in the registration or notification stage *if* they do not have all the signatures of the RNTCs.

To our knowledge, based on expert legal advice, it is not the case that many existing ILUAs will be affected by the *McGlade* decision, or that there is now some type of systemic crisis that requires the urgent amendment of the Native Title Act.

The W&J council is profoundly concerned about the rushed introduction of the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* ("the bill") and –

- the sense of crisis that has been politically generated as a justification for the urgent introduction and passage of the Bill[1]
- the extremely limited time in which we and other Traditional Owners are given to consider and respond to its proposed measures

[1] Native title call a risk to projects, The Australian, February 8, 2017. http://www.theaustralian.com.au/national-affairs/indigenous/native-title-call-a-risk-to-projects/news-story/70e29506ce805d373497f75cb3518608

- how the measures contained in the bill would impact our rights directly as Traditional Owners of our lands and waters, and our cultural rights and heritage
- the consequential uncertainties and injustices for Aboriginal people in similar circumstances across the country, that could flow from this bill being adopted into law

We are deeply concerned about the speed with which these amendments have been pushed forward and passed by the Government through the House of Representatives, with only very limited opportunity to assess them before they are submitted to the Senate for a vote.

We have obtained two pieces of legal advice which are contained herein and form the basis of our submission to the Senate Constitutional and Legal Affairs Committee regarding the bill. Further to these, we note the following –

A false urgency

As reported, the Attorney-General George Brandis introduced amendments into Federal Parliament to remove the "commercial uncertainty'' created by the *McGlade* decision. Senator Brandis said the Prime Minister had given him approval to "proceed urgently'' with the changes. [2]

The Queensland Resources Council[3] and other supporters of the bill, claim it must be passed through the Senate as a matter of urgency. This proposed amendment bill appears to be a knee-jerk reaction to concerns expressed by the mining industry and its associates; and without a comprehensive assessment of the impacts of the proposed reforms on Aboriginal peoples' rights and interests.

No substantive evidence has been made publicly available by the Government, or to us, with respect to any supposed urgency or crisis arising because of the *McGlade* decision.

We are also very concerned with how quickly the Government can act to protect and promote commercial interests, while sensible reforms, thoroughly canvassed in the Australian Law Reform Commission report[4], have not received any attention by the Parliament, and are not yet in a bill. The ALRC report was submitted to the Attorney General, Senator Brandis on April 30, 2015.

Consideration by the Parliament of changes to the Native Title Act is a rare opportunity and we believe that Aboriginal rights should be prioritised, and a comprehensive package of reform introduced to advance Aboriginal peoples' realization of the benefits of native title, as well as providing certainty to proponents of projects and land uses in respect of Future Acts.

The wholesale validation of area agreements proposed by the Bill is unnecessary. The *Native Title Act* already provides that an act is valid while an area agreement is on the register and prevents its removal except in limited circumstances.

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[2] Land rights Native Title Act faces urgent changes after Adani move, The Australian, February 13, 2017. http://www.theaustralian.com.au/national-affairs/indigenous/land-rights-native-title-act-faces-urgent-changes-after-adani-move/news-story/5d9b6712af07fe253e98338606536a3b

[3] Statement by QRC Chief Executive Ian Macfarlane on Native Title Amendment, QRC media release, February 16, 2017. https://www.qrc.org.au/media-releases/statement-qrc-chief-executive-ian-macfarlane-native-title-amendment/

[4] Connection to Country: Review of the Native Title Act 1993 (Cth) (ALRC Report 126), Australian Law Reform Commission. https://www.alrc.gov.au/publications/alrc126

A thorough investigation of the impact of the *McGlade* decision on registered area agreements should be undertaken before any legislative response is made. It would be valuable if a Parliamentary committee were to also look at what other reform to the Native Title Act may be achieved as this investigation proceeds.

The 'Adani Amendment'

A key driver for the proposed bill and the sense of urgency appears to be a concerted effort to protect the Adani Carmichael mine project from any failure regarding its purported ILUA with the Wangan and Jagalingou people.[5]

Adani Mining, The Queensland Government, the Queensland Resources Council (QRC) and various and sundry other promoters of the project have all argued that the *McGlade* decision should not be allowed to 'interfere' with the progress of the project.

That the interests of Adani are front of mind for the Government were alluded to by Queensland Resources Council chief executive Ian Macfarlane, on a visit to Rockhampton on the 13th February 2017, during which he outlined the options available in relation to the Adani project.

He said: "If we don't get the legislative reform that I'm currently negotiating with the Federal Government and with the Labor Opposition through the parliament as quickly as possible, then quite frankly, it's impossible to predict when that project [the Carmichael mine] might proceed".

He said: "The best solution is for the Federal Government to amend the Native Title Act to uphold the decision the Federal Court made in 2010" in *Bygraves.* [6]

The risk to Adani's purported ILUA arising from *McGlade* has assumed disproportionate significance. The purported ILUA is the subject of an objection before the NNTT, and is now proceeding to the Federal Court on grounds including but not limited to the failure to acquire the signatures of all RNTCs.

The problem for the Adani ILUA objectors

The claim group for the W&J Native Title claim has on three occasions voted against authorising the Adani ILUA (December 2012, October 2014 and March 2016). After the claim group meeting of March 2016, Adani organised a further meeting for April 2016 seeking to have an ILUA authorised ("the April Meeting").

This was not a meeting of the claim group for the W&J Native Title claim alone. The meeting was open to any aboriginal person who asserted that they held Native Title rights and interests in the Adani ILUA claim area, whether they were members of the claim group for the W&J Native Title claim or not.

The meeting was called, organised and paid for by Adani. Adani paid for travelling and accommodation costs for people to attend and in many instances these costs exceeded the actual costs involved in attending the meeting. Significantly, for past meetings of the claim group for the W&J Native Title claim, travel costs and expenses were not paid.

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[5] Adani coalmine project frozen by shock land rights ruling, The Australian, February 11, 2017. http://www.theaustralian.com.au/business/mining-energy/adani-coalmine-project-frozen-by-shock-land-rights-ruling/news-story/7f6d1e581fe8d5ba8b690253b44e9938

[6] "Native Title changes on Parliament's table today". The Morning Bulletin, 14th February 2017. https://www.themorningbulletin.com.au/news/native-title-changes-on-parliaments-table-tomorrow/3143522/

An analysis of the attendance register for the April Meeting shows that 60.64% of those who attended were not recorded as attending any prior meeting of the Wangan and Jagalingou claim group. Allegations have been made that the April Meeting was composed of a "rent-a-crowd" of persons who had never previously identified as Wangan and Jagalingou people; and evidence and submissions have been made on this point to the Registrar of the NNTT by objectors to the application by Adani to register the purported ILUA.

On the day of the April Meeting seven of the twelve RNTCs signed the Adani ILUA. The remaining five RNTCs did not attend the April Meeting and did not sign the Adani ILUA.

Adani lodged the application to register the Adani ILUA on 27 April 2016. The agreement accompanying the Application was signed by only seven of the twelve registered RNTCs.

The risks associated with the signing of the ILUA without the participation of large parts of the claim group, and the signatures of 5 of the RNTCs, were known. The Future Act lawyer (Mr Philip Hunter) advising the seven signatories in a meeting held on February 1, 2016, is recorded to have said this in response to a question as to whether all signatures of the RNTCs would be required:

> "Phillip outlined possible changes in the law regarding signing requirements, and quoted a test case in WA. Currently the law states that if the agreement is validly authorised by claim group as a majority vote, it doesn't need to be signed by all claimants before it can be lodged for registration. A pending court decision in the WA case will determine whether or not all signatures will be required for registration. That decision is still some time off, but if the challenge is successful, it may impact on the W&J/Adani ILUA. Phillip advised that in terms of timing, W&J should just proceed as normal and not allow the WA test case to cause concern."

The proponents of the Adani ILUA cannot claim they are unsuspecting victims of the change in law brought about by *McGlade*. They decided to proceed with the authorisation meeting even though they knew in advance, because of the authorisation meeting of the claim group held just one month earlier, that they could not achieve the consent of all the RNTC's owing to the level of opposition to the proposal within the claim group. Further, there was no disclosure of this caveat at the April meeting to those of the W&J claim group in attendance. This is despite the fact the seven applicants, and the Future Act lawyer appointed by them and paid for by Adani, knew the ILUA may not be valid and was not supported by at least 5 of the RNTC's.

The failure by Adani to secure an ILUA is in its failure to achieve the consent of the claim group over several years. The ILUA is not vulnerable merely because of the *McGlade* decision. The NNTT records the status of the Adani ILUA application as "subject to objection (not withdrawn) and / or adverse material".

The risks to Wangan and Jagalingou rights from the bill

The lack of signatures on the Adani's purported ILUA reflects a bigger problem. There are multiple grounds on which it will be argued that the Adani ILUA is invalid.

The principle dispute with Adani – and the one that goes to our main concerns with the bill – is that their refusal to accept a no decision has undermined our decision process. The integrity of our decision making, especially regarding our laws and customs, and our rights to self-determination and to give and withhold our free prior informed consent to the destruction of our country and heritage, are central to our issues with the bill.

McGlade raises issues that need the proper attention of the Parliament; but the Federal Court also upheld the provisions of the Native Title Act that we believe could be seriously compromised by the bill.

It is a dangerous and unreasonable precedent to formalise a system where area ILUAs may be registered (and therefore bind all claimants) based on the signatures of only a minority of members of the RNTC.

There are already documented cases of mining companies interfering in the deliberations of native title claim groups to "divide and conquer" the claim group as a whole. There is a real risk that the unprincipled and possibly unlawful "divide and conquer" tactics deployed by some unscrupulous mining companies may become standard operating procedure if partial execution by the RNTC is allowed to stand.

The bill would alter the fundamentals of our traditional decision processes. The integrity of Traditional Owner decision making and rights to speak for country must be protected. Corralling claimants (and non-claimants alike) into a collective decision at the behest of a resources company or other proponent, can interfere with the role of families, elders and respected decision-makers amongst our people.

Checks and balances are required, as is respect for property rights associated with customary tenure and the right to speak for country. The inalienability of our rights in land must be respected. It is the ground on which we seek to protect our country and heritage from the mass destruction that would ensue from the Carmichael mine.

The requirement that the signature of only one RNTC is necessary has the potential to paper over serious disagreements within the claim group and legitimise unfair practices by proponents.

By giving primacy to the role of the claim group in approving area agreements the bill highlights the need for measures to be introduced that ensure free and informed consent. A court should be empowered to supervise and control the way authorisation meetings are conducted.

A minimum level of support amongst claim group members should be mandated, especially where an area agreement provides for surrender of Native Title.

This is especially important where the large scale of projects, their destructive effects, their complexity, and their extinguishing impact on our native title is involved, and cannot possible be comprehended, assessed and decided upon in the extremely limited 'right to negotiate' (RTN) period and without impartial, expert and independent advice.

It is essential that parliament get rid of the laissez faire system where proponents can take control of the ILUA process and minimise the chances of dissent and opposition. Our rights to free prior and informed consent under international law and embodied in the UN Declaration on the Rights of Indigenous Peoples require bolstering, not diminishing, in the NTA ILUA provisions.

Problems with ILUAs

What distinguishes an area ILUA from an ordinary agreement or contract is that, once registered as an ILUA by the National Native Title Tribunal's (NNTT), the ILUA has the force of contract on every native title claimant for the relevant area, so that every native title claimant is bound by the terms of the ILUA as though they had signed it themselves. This has profound implications for not just our claim group, but our future generations, especially where agreements involve the surrender of native title.

Whilst convenient for mining companies, governments and others who wish to do business with a native title claim group, the ILUA represents a radical departure from the common law concept of contract: 'A contract is an agreement between two or more parties in which an offer is made and accepted; there is *intention* to enter into a contract; and there is consideration (benefit) flowing to each party' [Black's law Dictionary]. The law sanctions sometimes severe penalties for breach of contract, because a contract is presumed to have been freely entered into.

In contrast, an ILUA once registered binds in contract all native title claimants for the area, including those who are not even aware of its existence, who do not wish to be a party to the ILUA or who vehemently object to the terms of the ILUA.

For this reason, before registering an ILUA the greatest of care must be taken to ensure that it is truly the intention of the claim group to enter into the ILUA and to be bound by it.

International law considerations

Australia is a signatory to the UN Declaration of the rights of Indigenous Peoples but to date has paid scant regard to its clauses, the international law underpinnings of the declaration, and the moral standards that it provides. The Native Title Act is one area in which such considerations are and should be paramount, given the primacy of land, and of law and custom, to our rights and interests.

Consequently, we wish to make clear that our submission is not just out of concern for W&J people, but for all Aboriginal people that have connection to country threatened by extractive industry and other deals that would impact on their cultural heritage and ancestral lands.

The bill is no small matter. If passed, the Law would likely be in place for a long time and bind future generations, as it already has over the last 24 years.

Significant values, heritage and sites are at great risk. Our identity as traditional owners and the basis of our law and custom can be destroyed with the land.

We are very concerned about many issues arising from Parliament's consideration of this Bill, not the least being the requirements of "free, prior and informed consent" under the UN Declaration on the Rights of Indigenous People – particularly in the case of this Bill, where the effect of registration of an ILUA is to bind in contract all members of a native title group, including those who may not consent.

Where the interests of Indigenous people are affected by a legislative or administrative decision, special consultation procedures are required because normal democratic and representative processes usually do not adequately address Indigenous peoples' particular concerns.

Despite the W&J being particularly affected by the Bill, the government did not consult with the W&J before the Bill was introduced into parliament. Indeed, the speed at which the government introduced the Bill following the Federal Court's decision demonstrates the absence of good faith consultation with the objective of achieving consent, and reflects the criticisms of the Australian Human Rights Commission that governments have interpreted their obligation to consult with Indigenous peoples as simply a duty to tell them what has been developed on their behalf.

Simply making this submission to a Senate committee inquiry does not facilitate the kind of specific and engaged consultation that is required when the legislation directly and explicitly threatens the fundamental interests of a particular indigenous group, like us, in the health of our traditional lands and the survival of our culture.

To comply with its duties under international law, Australia must not seek to progress the passage of the Bill through parliament until it has adequately consulted with the W&J in good faith with the objective of obtaining their free, prior and informed consent to the Bill.

Extended consultations – a further and proper inquiry

We are of the view that we, along with all Aboriginal people affected by this bill, can't make informed judgements about something that may impact upon our rights and interests profoundly, or hold our representatives to account, if we do not have clear information and sufficient time to consider this Bill; or if the debate is driven by sectional interests seeking to codify and limit our rights and interests.

These matters need a further, full and proper inquiry arising out of the Senate sitting commencing 20th March.

Considerations and recommendations

We rely on the attached submission prepared by Colin Hardie, Principal Solicitor, Just Us Lawyers, and the attached advice from Martin Wagner, Managing Attorney, International Program, Earth Justice, in making this submission.

Those documents along with this statement are to be taken as forming our submission for the purposes of this Senate Constitutional and Legal Affairs Committee Inquiry.

Respect for the Noongar

On a final note, we wish to acknowledge that the *McGlade* appellants, who took their concerns to a Full Bench of the Federal Court, have achieved a decision which is their right and due. The courts are there for us all to seek justice and the Government should not override that because it causes concern or inconvenience to others.

Notwithstanding that the Parliament is entitled to respond to such decisions with a legislative response where it deems fit, it is a matter of fairness that this only occur where a case has been properly made for such dramatic (and in this case supposedly urgent) measures. The judgement in McGlade should be honoured. The Noongar people should be allowed to resolve the matter within their own nations, and with respect to the relevant parties to any agreements.

Yours faithfully

Adrian Burragubba
Senior spokesperson

Murrawah Johnson
Youth Spokesperson

Wangan and Jagalingou Traditional Owners Family Council

Attachments –

1. Submission prepared by Colin Hardie, Principal Solicitor, Just Us Lawyers, on behalf of the Bigambul Native Title Aboriginal Corporation (ICN 8479), the Wardingarri Aboriginal Corporation RNTBC (ICN 8305) of the Iman People, and the Wangan and Jagalingou Traditional Owners Council of the Wangan and Jagalingou people and the Objectors to the Registration of the Adani ILUA
2. Advice to the Wangan & Jagalingou Traditional Owners Council, from Martin Wagner, Managing Attorney, International Program, Earth Justice, regarding an international law and Indigenous rights perspective on the process the Bill

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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

Summary

The Wangan & Jagalingou People ("W&J") are the traditional owners on land on which Adani Mining Pty Ltd proposes to build the Carmichael Coal Mine and Rail Project ("Carmichael Mine"). The mine will destroy the W&J's ancestral lands and waters, threatening their culture for the current and all future generations. The W&J have not consented to the development of this mine; to the contrary, they have actively opposed it, and are currently involved in four legal cases challenging the development of the mine on their traditional lands.[1] In particular, the W&J oppose the registration of a purported area indigenous land use agreement ("ILUA") signed by some, but not all, of the Registered Native Title Claimants of the W&J with Adani Mining Pty Ltd.

On 15 February 2017, the Australian government introduced the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) to amend the *Native Title Act 1993* (Cth) ("Bill"). Among other things, this Bill is intended to retrospectively validate registered area ILUAs and applications for ILUA registration which might otherwise be invalid due to a decision of the Full Court of the Federal Court less than two weeks earlier. The court held that area ILUAs could not be registered unless they had been signed by all members of the applicant, the Registered Native Title Claimant. We understand that the Bill would, in this respect only, overcome the invalidity, created by the court's decision, of Adani Mining's purported ILUA with the W&J.

Under international law, Australia has a duty to consult in good faith with Indigenous peoples about matters that affect them, with the objective of obtaining the consent of the Indigenous peoples concerned. This duty is grounded in core human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination. Australia is party to each of these agreements, and recognizes that they provide "international standards for the protection of universal human rights and fundamental freedoms."[2] It is also affirmed as an overarching principle in the United Nations Declaration on the Rights of Indigenous Peoples, which reflects international law and to which Australia has given its support.

[1] The W&J have also requested assistance from the United Nations Special Rapporteur on the Rights of Indigenous Peoples, because the development of the mine will violate their internationally-protected rights to culture, and to free, prior and informed consent, including their rights to be adequately consulted in good faith about, and to give or withhold their consent to, the development of significant extractive industries on their land. *See* Wangan & Jagalingou Family Council, *Submission regarding Australia's failure to protect the Wangan and Jagalingou People's rights to culture and to be consulted in good faith about, and give or withhold consent to, the development of the destructive Carmichael Coal Mine on our traditional lands* ("*UN Submission*") (Oct. 2, 2015), 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.

[2] *Native Title Act 1993* (Cth), Preamble.

Where the particular interests of Indigenous people are affected by a legislative or administrative decision, special consultation procedures are required because normal democratic and representative processes usually do not adequately address Indigenous peoples' particular concerns. For example, effective consultation must ensure Indigenous peoples have sufficient time and resources to consider and respond to matters that affect them.

Despite the W&J being particularly affected by the Bill, the government did not consult with the W&J, or any group representing their interests in this matter, before the Bill was introduced into parliament. Indeed, the speed at which the government introduced the Bill following the Federal Court's decision demonstrates the absence of good faith consultation with the objective of achieving consent, and reflects the criticisms of the Australian Human Rights Commission that governments have interpreted their obligation to consult with Indigenous peoples as simply a duty to tell them what has been developed on their behalf. In addition, although the W&J are now able to make submissions to the Senate Committee's inquiry, this inquiry is only open for a short two-week period, during which time the W&J must themselves obtain the resources necessary to seek legal assistance to understand the impacts of the Bill and prepare a response. Finally, simply making a submission to a Senate committee inquiry does not facilitate the kind of specific and engaged consultation that is required when the legislation directly and explicitly threatens the fundamental interests of a particular indigenous group like the W&J in the health of their traditional lands and the survival of their culture.

To comply with its duties under international law, Australia must not seek to progress the passage of the Bill through parliament until it has adequately consulted with the W&J in good faith with the objective of obtaining their free, prior and informed consent to the Bill.

Our full analysis is set out below.

Analysis

I. Factual background

If developed as proposed, the Carmichael Mine would be among the largest coal mines in the world. The total area of disturbance would be around 30,000 hectares, including six open-cut pits, five underground longwall mines, a coal handling and processing plant, and waste stockpiles.[3] The mine is a well-publicized and highly controversial project in Australia.

The W&J are the traditional owners of the land on which the Carmichael Mine is proposed to be built. The mine would devastate the ancestral lands and waters that are central to the W&J's culture, their physical and spiritual well-being, and their ability to pursue their own priorities for development.[4] These include sacred water-bodies and other sacred sites, such as Doongmabulla Springs and sites along the Carmichael River, where ceremonies are performed to obtain access to the Mundunjudra, the W&J's dreaming totem (also known as the Rainbow Serpent).[5] The continuation of the W&J's culture is inseparable from the condition of their traditional lands, and the development of this mine would threaten the survival of the W&J's culture and their ability to transmit that culture to their children and future generations.[6]

The W&J actively oppose the mine, and are currently involved in four legal cases challenging the mine's development.[7] They have also requested assistance from the United Nations Special Rapporteur on the Rights of Indigenous Peoples, because the development of the mine will violate their internationally protected rights to culture, and to free, prior and informed consent, including their rights to be adequately consulted in good faith about, and to give or withhold their consent to, the development of significant extractive industries on their land.[8]

Despite the W&J rejecting an indigenous land use agreement ("ILUA") with Adani Mining in March 2016 (the third time since 2012 they had rejected an ILUA with Adani Mining), in April 2016 Adani Mining purported to secure an ILUA with the W&J at a meeting the company organized.[9] This ILUA was signed by seven of the twelve registered native title claimants for the W&J.[10] In June 2016, Adani Mining gave

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[3] Queensland Government, Department of State Development, Infrastructure and Planning ("Qld Dept. of State Development"), *Carmichael Coal Mine and Rail project: Coordinator-General's evaluation report on the environmental impact statement* (May 2014), pages 2, 5-10, http://www.dsdip.qld.gov.au/resources/project/carmichael/carmichael-coal-mine-and-rail-cg-report-may2014.pdf.

[4] Wangan & Jagalingou Family Council, *UN Submission*, above n. 1.

[5] *Id*.

[6] *Id*.

[7] *See generally*, Wangan & Jagalingou Family Council, *Traditional Owners construct 'legal line of defence' against Adani and Qld Govt* (Dec. 7, 2016), http://wanganjagalingou.com.au/traditional-owners-construct-legal-line-of-defence-against-adani-and-qld-govt/.

[8] Wangan & Jagalingou Family Council, *UN Submission*, above n. 1.

[9] Wangan & Jagalingou Family Council, *Traditional Owners' rejection of Carmichael stands, despite Adani bank rolling bogus 'land use agreement'* (Apr. 16, 2016), http://wanganjagalingou.com.au/traditional-owners-rejection-of-carmichael-stands-despite-adani-bank-rolling-bogus-land-use-agreement/.

[10] The Guardian, *Acrimony and legal threat as Indigenous group approves Adani mine* (Apr. 16, 2016), https://www.theguardian.com/australia-news/2016/apr/17/wangan-and-jagalingou-indigenous-group-approves-adani-carmichael-mine.

notice of its application to register this ILUA with the National Native Title Tribunal ("NNTT").[11] The W&J oppose the validity of this ILUA, and have submitted an objection to the registration to the National Native Title Tribunal and are now proceeding to an application for a declaration in the Federal Court.[12] The reasons for the W&J's objection to this ILUA include that a large contingency of the people who attended Adani Mining's meeting in April 2016 and purported to authorize the ILUA had never previously identified as W&J, and that Adani Mining did not take steps to verify those voting were members of the W&J's native title claim group.[13]

On 2 February 2017, in *McGlade v Native Title Registrar* (a case unrelated to the W&J), the Full Court of the Federal Court held that certain types of ILUAs (known as "area agreements") could not be registered unless they had been signed by all members of the registered native title claimant.[14] We understand that this case would likely invalidate Adani Mining's purported ILUA with the W&J, which is an area ILUA, because that document was not signed by all members of the registered native title claimant.

Less than two weeks after the court's judgment, on 15 February 2017, the Australian government introduced the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) ("Bill"), and the Bill was brought on for debate only one day later. Among other things, the Bill would retrospectively validate registered ILUAs and applications for ILUA registration which would otherwise be invalid due to the fact that not all persons comprising the registered native title claimant signed the agreement. We understand that these amendments would serve to overcome the invalidity of Adani Mining's purported ILUA with the W&J that resulted from the *McGlade* decision.

The explanatory memorandum to the Bill, together with the haste with the government has sought to move the Bill through parliament, indicates that the government considers the Bill to contain urgent amendments. Despite this, the government was still able to consult with state and territory governments, the National Native Title Tribunal, and the National Native Title Council (an umbrella body of most Native Title Representative Bodies) before introducing the Bill to parliament.

However, the Australian government did not consult with the W&J, any group representing the W&J's interests in this matter, or, to our knowledge, other Traditional Owner groups before it introduced the Bill into parliament and brought the Bill on for debate one day after its introduction, even though some current and former members of parliament made clear that their advocacy for immediate amendments to the Native Title Act following the *McGlade* case was specifically related to the risk posed to Adani's purported ILUA. In particular, Mr. George Christensen MP said, "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,[15] and Mr. Ian Macfarlane (a former federal

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[11] National Native Title Tribunal, *Notice of an application to register an area agreement on the Register of Indigenous Land Use Agreements* (Jun. 22, 2016), http://www.nntt.gov.au/Public%20Notifications/ILUA-QI2016_015%20clean%20copy%2022062016.PDF.

[12] *See* Wangan & Jagalingou Family Council, *Traditional Owners construct 'legal line of defence' against Adani and Qld Govt*, above n. 7.

[13] *Id*.

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

[15] 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/.

minister and now chief executive of the Queensland Resources Council) has been reported as stating that he had spoken to his "good mates" in Canberra about amending native title laws.[16]

Instead of being consulted concerning this bill that so obviously and directly affects their most fundamental interests, the W&J will have to provide information to the Australian government upon their own initiative. Fortunately, the Senate Standing Committee for Selection of Bills referred the Bill to the Senate Standing Committees on Legal and Constitutional and Constitutional Affairs, to which submissions may be made until 3 March 2017 (although Australian Greens Senators argued for an extension of time until 8 May 2017 due to the complexities of the issues involved).[17]

II. Under international law, Australia must consult in good faith with Indigenous peoples about matters that affect them

Under international law, states have a duty to consult with Indigenous peoples in good faith in order to obtain their free, prior and informed consent about matters that affect them. This duty derives from the overarching right of Indigenous peoples to self-determination, and is premised on the widespread acknowledgement of Indigenous peoples' distinctive characteristics, their relative marginalization in regard to normal democratic processes, and the need for special measures to address this.[18] Also, the participation of Indigenous peoples in all aspects of decisions affecting them is central to realizing and protecting the full spectrum of substantive Indigenous rights, including rights to cultural integrity, equality, and property.[19] Indeed, the consultation duty of a state is a "corollary of a myriad of

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[16] 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; 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… .).

[17] *See* Parliament of Australia, Senate Standing Committees on Legal and Constitutional and Constitutional Affairs, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NativeTitleILU2017.

[18] Special Rapporteur James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* ("*2009 Annual Report*"), A/HRC/12/34 (Jul. 15, 2009), paras. 41, 42, http://unsr.vtaulicorpuz.org/site/images/docs/annual/2009-annual-hrc-a-hrc-12-34-en.pdf. *See also* Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No. 3 – We have the right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith ("Declaration Dialogue")* (Jul. 2013), pages 5-6, https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_3_Consent.pdf.

[19] Anaya, *2009 Annual Report*, above n. 18, paras. 41, 42 and 62. *See also* Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples* ("*2012 Annual Report*"), A/HRC/21/47 (Jul. 6, 2012), para. 49, http://unsr.vtaulicorpuz.org/site/images/docs/annual/2012-annual-hrc-a-hrc-21-47-en.pdf ("[P]rinciples of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples' substantive rights. It is a standard that supplements and helps effectuate substantive rights.").

universally accepted human rights"[20] and is "indivisible from and interrelated with other rights of indigenous peoples, such as their right to self-determination and their rights to their lands, territories and resources."[21]

The international legal duty of a state to consult with Indigenous peoples about matters that affect them applies to Australia as to other states. The duty is "firmly rooted in international human rights law."[22] It is, for example, grounded in core human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.[23] Australia is party to each of these agreements,[24] and recognizes that they provide "international standards for the protection of universal human rights and fundamental freedoms."[25] The UN bodies established to monitor the implementation of each of these binding international legal treaties have, on numerous occasions, clarified that consultation with Indigenous peoples on matters that affect them is required in accordance with state obligations under the relevant treaties.[26] The duty is also recognized by International Labour Organization Convention 169[27] and, although Australia is not a party to this convention, the convention is "evidence of contemporary international opinion concerning matters relating to Indigenous peoples."[28] Furthermore, the duty "finds prominent expression" in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").[29] For example, Article 19 of that document provides:

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[20] Anaya, *2009 Annual Report*, above n. 18, para. 41.
[21] Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP"), *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries* ("*2012 Report*"), A/HRC/21/55 (Aug. 16, 2012), para. 8, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf.
[22] Anaya, *2009 Annual Report*, above n. 18, para. 38.
[23] *Id*., para. 40. *See also*, EMRIP, *2012 Report*, above n. 21, Annex, paras. 11 and 25; EMRIP, *Progress report on the study of indigenous peoples and the right to participate in decision-making* ("*Progress Report*"), A/HRC/15/35 (Aug. 23, 2010), para. 36, http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf ("International human rights treaty bodies, such as the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, have also clarified that the free, prior and informed consent of indigenous peoples is required in accordance with State obligations under their corresponding treaties.").
[24] For a list of human rights treaties to which Australia is party, *see* Office of the High Commissioner for Human Rights, *Status of ratification*, http://indicators.ohchr.org/.
[25] *Native Title Act 1993* (Cth), Preamble.
[26] *See, for example*, Anaya, *2009 Annual Report*, above n. 18, para. 40; EMRIP, *Progress Report*, above n. 23, para. 36; EMRIP, *2012 Report*, above n. 21, Annex, paras. 11 and 25; Special Rapporteur James Anaya, *Extractive industries and indigenous peoples*, A/HRC/24/41 (Jul. 1, 2013), para. 27, http://unsr.vtaulicorpuz.org/site/images/docs/annual/2013-annual-hrc-a-hrc-24-41-en.pdf.
[27] International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)* ("*ILO 169*") (1989), Article 6(1)(a), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 ("[G]overnments shall … consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.").
[28] Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* ("*IACHR Report*"), (Dec. 30, 2009), para. 14 (citations and quotations omitted), http://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf .
[29] Anaya, *2009 Annual Report*, above n. 18, para. 38.

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[30]

Where legislation concerns the development of Indigenous lands, Article 32 of UNDRIP reinforces the obligation to consult with the affected indigenous peoples:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[31]

Although UNDRIP is not a legally binding instrument, it reflects international law enshrined in binding international agreements of universal resonance – such as the ICESCR, ICERD and ICCPR described above.[32] As former UN Special Rapporteur James Anaya has explained:

> [E]ven though [UNDRIP] itself is not legally binding in the same way that a treaty is, [it] reflects legal commitments that are related to … treaty commitments and customary international law. [UNDRIP] … is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of [UNDRIP] can be seen to be generally accepted within international and State practice, and hence to that extent [UNDRIP] reflects customary international law.
>
> In sum, the significance of [UNDRIP] is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of [UNDRIP] should be regarded as political, moral and, *yes, legal imperative without qualification*.[33]

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[30] *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), Article 19, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[31] *Id*., Article 32.

[32] United Nations Permanent Forum on Indigenous Issues, *Declaration on the Rights of Indigenous Peoples – Frequently Asked Questions*, page 2, http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf ("UN Declarations are generally not legally binding; however, they represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions. The Declaration, however, is widely viewed as not creating new rights. Rather, it provides a detailing or interpretation of the human rights enshrined in other international human rights instruments of universal resonance – as these apply to indigenous peoples and indigenous individuals.") *See also*, Anaya, *2009 Annual Report*, above n. 18, para. 38 ("[T]he duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in [UNDRIP], and is firmly rooted in international human rights law.").

As such, the consultation duties in UNDRIP are consistent with existing obligations imposed upon Australia by other international agreements to which it is a party (and are also, as described above, a corollary of other universally accepted human rights, such as Indigenous peoples' rights to self-determination, cultural integrity, and property). Furthermore, in April 2009, the Australian government "gave its support" to the declaration, in "the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust."[34] In 2015, Australia told the United Nations that it "continues to support [UNDRIP] as a set of important guiding principles of the Government's engagement with Indigenous Australians."[35]

The right to be consulted with respect to legislative or administrative decisions of a state that affect Indigenous peoples raises unique considerations. Because almost all such decisions may affect Indigenous peoples along with the rest of the population in one way or another, former UN Special Rapporteur Anaya has suggested that

> [t]he duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests. … Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation. For example, land or resource use legislation may have a broad application but, at the same time, may affect indigenous peoples' interests in particular ways because of their traditional land tenure or related cultural patterns, thus giving rise to the duty to consult. … [L]egislative reform measures that concern or affect all the indigenous peoples of a country will require appropriate consultation and representative mechanisms that will in some way be open to, and reach, all of them. By contrast, measures that affect particular indigenous peoples or communities, such as initiatives for natural resource extraction activity in their territories, will require consultation procedures focused on the interests of, and engagement with, those particularly affected groups.[36]

Special consultation procedures are required when the particular interests of Indigenous peoples are affected partly because normal democratic and representative processes usually do not adequately address the concerns that are particular to Indigenous peoples.[37] The Australian Human Rights Commission has stated that effective consultation must allow Indigenous peoples "sufficient time to

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[33] Special Rapporteur James Anaya, *Situation of human rights and fundamental freedoms of indigenous people* ("*2010 General Assembly Report*"), A/65/264 (Aug. 9, 2010), paras. 62-63 (emphasis added), http://unsr.jamesanaya.org/docs/annual/2010_ga_annual_report_en.pdf .

[34] Australian Government, Attorney-General's Department, *Australia's Universal Periodic Review – National Report Part IV – Achievements, Best Practices, Challenges and Constraints* (Oct. 2010), para. 145, https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/UniversalPeriodicReview.PDF.

[35] Australian government, Attorney-General's Department, *National Report of Australia – Universal Periodic Review Second Cycle 2015* (Aug. 2015), para. 39, https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/UPR-National-Report-of-Australia-2015.pdf.

[36] Anaya, *2009 Annual Report*, above n. 18, paras. 43, 45, 63. *See also id.*, para. 42.

[37] *Id*., para. 42, 45.

engage in their own decision-making process, and participate in decisions taken in a matter consistent with their cultural and social practices."[38] The commission sees this as part of the duty of good faith, which should assist in addressing the power imbalance between governments and Indigenous peoples.[39] The commission states that Australian governments have interpreted their obligation to consult with Indigenous peoples as a duty to tell them "what has been developed on [their] behalf and what eventually will be imposed upon [them]."[40] The commission identifies factors that hinder Indigenous peoples' capacity to effectively engage in consultation, including inadequate resources to participate effectively, and unreasonably short timeframes for responding to matters that affect Indigenous peoples' rights.[41] Accordingly, the commission sets out features of meaningful and effective consultation:

> Governments need to do more than provide information about measures they have developed on behalf of [Indigenous] peoples and without their input. … Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on the rights of [Indigenous] peoples, and that the affected peoples do not agree to the measure. … [Indigenous] peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner. … Government consultation processes need to directly reach people "on the ground." Given the extreme resource constraints faced by many [Indigenous] peoples and their representative organisations, governments cannot simply expect communities to come to them. Governments need to be prepared to engage … in the location that is most convenient for, and is chosen by, the community that will be affected by a proposed measure. … [C]onsultation must be undertaken with the indigenous peoples concerned through their own representative organisations. … [F]ree, prior and informed consent must be sought from genuinely representative organisations or institutions charged with the responsibility of acting on their behalf. … [G]overnments must provide [Indigenous peoples] with full and accurate information about the proposed measure and its potential impact.[42]

The duty to consult requires that the *objective* of consultations be to obtain the agreement of the Indigenous peoples concerned by building a dialogue between states and Indigenous peoples to "reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples."[43] This is recognized in the Preamble to the *Native Title Act*, which provides that it is

> particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. … [A]cts that affect native title should only be able to be validly done if … every reasonably effort has been made to secure the agreement of the native title holders through a special right to negotiate.[44]

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[38] Australian Human Rights Commission, *Declaration Dialogue*, above n. 18, pages 12-13 (citations and quotations omitted).
[39] *Id*., page 13.
[40] *Id*.
[41] *Id*., page 14.
[42] *Id*., pages 16-18.
[43] Anaya, *2009 Annual Report*, above n. 18, para. 49; *see also id*., paras. 46-48.
[44] *Native Title Act 1993* (Cth), Preamble.

Depending on the circumstances, a range of actions may be necessary to demonstrate a "good faith" effort to achieve consent, and to ensure that a consultation has been structured and implemented to provide a genuine opportunity for the affected Indigenous peoples to influence the decision-making process along the path to reaching a mutually acceptable arrangement.[45] These include fully respecting Indigenous peoples' own institutions of representation and decision-making processes,[46] endeavoring to achieve consensus on the consultation procedures to be followed to ensure that the procedure is effective and to build confidence,[47] and ensuring Indigenous peoples have the financial, technical and other assistance they need, without using such assistance to leverage or influence Indigenous positions in the consultations.[48]

III. Australia's ongoing violation of the rights of the W&J to be adequately consulted in good faith about the development of the Bill and its impact on the W&J

As described above, when a legislative measure affects a particular indigenous community, special consultation procedures focused on the interests of, and engagement with, the community are required. The W&J are particularly affected by the Bill because, if passed, the Bill could overcome the invalidity, with respect to its signing, of Adani Mining's purported ILUA with the W&J, in circumstances where the W&J have rejected an ILUA with Adani Mining three times; the W&J claim that the meeting at which the ILUA was purportedly authorized was invalid; the W&J have four current legal cases challenging the development of the Carmichael Mine on their traditional lands, including an objection against the ILUA proceeding to the Federal Court; and the *McGlade* decision would unambiguously invalidate Adani Mining's purported ILUA with the W&J.

Despite this, the Australian government developed and introduced the Bill within a very short time following the *McGlade* decision. During this time, it did not consult with the W&J, although it did make time to consult with state and territory governments and the NNTT. The government also consulted with the National Native Title Council; however, neither this body nor any of its members represents the

[45] Anaya, *2009 Annual Report*, above n. 18, paras. 46 and 49; *see also id*., paras. 50-57. *See also* Australian Human Rights Commission, *Declaration Dialogue*, above n. 18, pages 8, 12-14, 16-18.

[46] UNDRIP, above n. 30, Article 18 ("Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."); Anaya, *2009 Annual Report*, above n. 18, para. 69 (A State "should make every effort to allow indigenous peoples to organize themselves and freely determine their representatives for consultation proceedings, and should provide a climate of respect and support for the authority of those representatives."); *see also id*., para. 52 ("The building of confidence and the possibility of genuine consensus also depends on a consultation procedure in which indigenous peoples' own institutions of representation and decision-making are fully respected."); Anaya, *Extractive industries and indigenous peoples,* above n. 26, paras. 70 and 71 ("[I]nternational standards require engagement with [indigenous peoples] through the representatives determined by them and with due regard for their own decision-making processes. …It may be that in some circumstances ambiguity exists about which indigenous representatives are to be engaged… . In such cases indigenous peoples should be given the opportunity and time … to organize themselves to define the representative institutions by which they will engage in consultations….").

[47] Anaya, *2009 Annual Report*, above n. 18, paras. 50, 51, 68.

[48] *Id*., para. 51. *See also*, Anaya, *2012 Annual Report*, above n. 19, para. 67 ("[C]onsultation procedures should tackle existing power imbalances by establishing mechanisms for sharing information and adequate negotiation capacity on the indigenous peoples' side.").

W&J's interests in this matter, and "free, prior and informed consent must be sought from genuinely representative organisations" charged with acting on behalf of the affected Indigenous peoples.[49] Media reports also indicate that the government was publicly lobbied by current and former members of parliament in favor of the Bill in the context of the development of the Carmichael Mine, and that the purpose of that lobbying was largely to overturn the invalidation of Adani Mining's purported ILUA with the W&J that resulted from the *McGlade* decision.

The government's determination to pass the Bill so rapidly is not conducive to consulting with the W&J or any other Traditional Owners groups with the objective of obtaining their free, prior and informed consent. Rather, the situation reflects the criticisms of the Australian Human Rights Commission that Australian governments have interpreted their obligation to consult with Indigenous peoples as a duty to tell them "what has been developed on [their] behalf and what eventually will be imposed upon [them]."[50]

Although the W&J are now able to make submissions to the Senate Committee's inquiry, they are only able to do so because the Senate Standing Committee for Selection of Bills referred the Bill to that committee, not because the government has sought to consult with the W&J. Furthermore, the Committee's inquiry is only open for a short two-week period. This hinders the W&J's capacity, and likely the capacity of many other Indigenous groups, to effectively engage in the Committee's inquiry because, among other things, "[Indigenous] peoples need to be given adequate time to consider the impact that a proposed law … may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner."[51] Furthermore, during the short period of inquiry, the W&J must themselves obtain the resources necessary to seek the legal assistance they need to fully understand the impacts of the Bill and prepare a submission. Moreover, simply making a submission to a Senate committee inquiry does not facilitate the kind of specific and engaged consultation that is required when the legislation directly and explicitly threatens the fundamental interests of a particular indigenous group like the W&J in the health of their traditional lands and the survival of their culture.

IV. Conclusion

To comply with its duties under international law, Australia must not seek to progress the passage of the Bill through parliament until it has specifically and adequately consulted with the W&J and other Traditional Owners groups who may be similarly affected, in good faith with the objective of obtaining their free, prior and informed consent.

Martin Wagner
Managing Attorney, International Program
March 1, 2017

[49] Australian Human Rights Commission, *Declaration Dialogue*, above n. 18, page 18.
[50] *Id*., page 13.
[51] *Id*., page 17.