THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

UNFINISHED BUSINESS:
ADANI, THE STATE, AND THE INDIGENOUS RIGHTS STRUGGLE OF THE WANGAN AND JAGALINGOU TRADITIONAL OWNERS COUNCIL

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Cover photo: Self-determined authorisation meeting of the Wangan and Jagalingou People on the 19th March 2016 in Brisbane. Photo W&J Council.

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List of Acronyms

ALHR	Australian Lawyers for Human Rights
CERD	Convention on the Elimination of All Forms of Racial Discrimination
ESD	Environmentally Sustainable Development
FPIC	Free, Prior and Informed Consent
ILUA	Indigenous Land Use Agreement
NTA	Native Title Act
NTRBs	Native Title Representative Bodies
NNTT	National Native Title Tribunal
QSNTS	Queensland South Native Title Services
RDA	Racial Discrimination Act
The W&J	The Wangan and Jagalingou Traditional Owners Family Council
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Foreword

This report by senior researchers from the University of Queensland raises issues that are crucial to the important and timely debate about native title and the rights of Indigenous peoples in Australia and around the world.

Across the globe, indigenous peoples are facing the destruction of their traditional lands and sacred sites by large-scale resource-extraction projects. Emblematic of this threat in Australia is the Carmichael mine, which threatens lands on which the Wangan and Jagalingou people have lived for millennia, lands that are central to their spirituality, culture, and their very identity as a people.

Unfortunately, the historic disempowerment of Indigenous peoples has meant that decisions concerning resource-extraction projects nearly always preference corporate business interests, with the affected Indigenous peoples having little to no voice in the permanent fate of their traditional lands and cultures. To attempt to remedy this imbalance, the international community has recognized the right of Indigenous peoples to "free, prior and informed consent" (FPIC) concerning any decision that will affect their interests.

FPIC is rooted in fundamental principles of international law, including the International Covenant on Civil and Political Rights and numerous other treaties to which Australia is a party.

Most recently, the principle was included in the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which Australia gave its support to in 2009 and the core principles of which reflects binding customary international law. The obligation to guarantee the right to free, prior and informed consent thus applies to all members of the international community, including Australia.

While there is debate concerning whether FPIC requires anything more than consultation with Indigenous peoples before approving projects affecting them, that debate is irrelevant in the context of the Carmichael Mine and the Wangan and Jagalingou people.

International jurists agree that international law requires the affirmative consent of an affected Indigenous people before a project may go forward that would implicate the survival of the people or significantly and directly harm their rights or their traditional or sacred lands.

It is widely recognized among human rights jurists that natural resource extraction projects on Indigenous lands fall into this category. The Wangan and Jagalingou therefore have an international legal right to veto the Carmichael Mine, a right that the Government of Australia is bound to respect.

In this context, it is particularly valuable that this report centers Indigenous rights and the perspective of those who exercise their right to free prior informed consent to say no to industrial development that would destroy their ancient inheritance, and furthers inquiry into the legacy of injustices, coercion, and systematic bias that are perpetuated in today's State-supported development regimes.

The report describes the collision of the Adani mining project with the unwavering resistance of the Wangan and Jagalingou Traditional Owners Council who have deployed a multifaceted strategy to fight against the destruction that would befall their country by the "opening up" of the Galilee Basin.

The story of their fight against governmental and corporate power is an important cautionary tale highlighting the implications for Australian society of the unfinished business between the state and Aboriginal and Torres Strait Islander Peoples.

Martin Wagner
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Introduction

A remarkable campaign is underway by the Wangan and Jagalingou Traditional Owners Family Council (W&J). This group of Traditional Owners has gained both national and international attention on the basis of their opposition to a large-scale coal mine proposed by Indian industrial conglomerate, the Adani Group, in Central Queensland's Galilee Basin.

We are witnessing an extraordinary moment as the W&J challenge Australia's native title system and the notion that compliance with industrial projects is the pathway to development for Indigenous people.

The W&J are Traditional Owners and Native Title Applicants over a large area of land in Central Western Queensland, including the land Adani needs to secure for its mine operations. The W&J contend that if this mine were to proceed, it would destroy Wangan and Jagalingou ancestral homelands, thereby irreversibly devastating culture, customs and heritage.

Opposition to the mine is palpable across the legal and other fights in which the W&J are engaged. As Murrawah Johnson, elected W&J Youth Spokesperson, says of her involvement in the campaign: "*This is our future, and our world. And it's our duty. I am part of a 60,000 year old legacy, of the greatest sustainability that this world has ever known. I refuse to be the broken link in the chain*".

Since Adani secured the coal tenements for this mine site in 2010, the project has become the focus of intense debate as Indigenous rights, as well as environmental, economic, social and other impacts and issues have come under national and international scrutiny.

However, it is the W&J who currently hold the last line of legal defence against this mine proceeding. Without a legally recognised land use agreement with the Traditional Owners who hold or claim native title, and with related court proceedings pending until at least March 2018, the efforts of Adani and government backers of the project continue to be frustrated by the W&J.

Murrawah Johnson delivering an address at the Sydney Peace Prize Ceremony

Members of the W&J Traditional Owners Council outside the Federal Court

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This report is the first of a series to be prepared by The University of Queensland researchers collaborating in a research project with the W&J and Australian Lawyers for Human Rights (ALHR) (see Appendix One for Research Approach and Methods).

As part of this project, the W&J have provided access to their files, and we have undertaken preliminary analysis of key political, social and economic contexts for, and dynamics of, the W&J's campaign. Our scoping, summarised in this report, reveals the strength of the W&J's resolve, the highly inequitable environment in which they are working, and the depth and breadth of institutional forces arrayed against them in their pursuit of their rights as Indigenous people.

International Indigenous Human Rights: Consent versus Consultation

The relatively recent emergence of an international Indigenous human rights agenda has its origins in a centuries-long process of colonisation that began with Christopher Columbus' arrival in the Americas in 1492. Columbus day (12th October) continues to be celebrated as a holiday in some jurisdictions, but for many Indigenous peoples in the Americas and beyond, 1492 stands for the beginning of highly destructive and immoral colonial exchanges characterised by the expropriation of Indigenous lands and the concentration of wealth in European hands.

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These dynamics are particularly prevalent in settler-colonies, including Australia, where the incredible damage inflicted on Indigenous peoples frequently pushed them to the brink of extinction.

The political architecture and institutions of European colonisers have prevailed in settler-colonies, but in recent decades Indigenous peoples from Australia and around the world have mobilised in local, national and international fora. Although Indigenous peoples have advocated for their rights since the beginning of colonial incursions, the second half of the 20th century saw the emergence of a coherent transnational movement as part of the ongoing development of international human rights laws and norms.

The mobilisation of transnational Indigenous activism through human rights institutions has resulted in an accumulating body of international law that applies to Indigenous peoples' rights. The most well-known marker of these developments is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly (GA) in 2007.

Initially, Australia voted against the UNDRIP in 2007, but subsequently joined in 2009. Despite the earlier resistance of Australia and three

Despite UNDRIP's undeniable importance, there are real questions about whether it is able to facilitate tangible change in the political circumstances of Indigenous peoples

other countries, and the fact that such a GA Declaration is not legally binding, the UNDRIP is a remarkable achievement borne of the determination of indigenous scholars, activists and representatives in the face of a state-based order that is underpinned by European approaches to politics. Despite UNDRIP's undeniable importance, there are real questions about whether it is able to facilitate tangible change in the political circumstances of Indigenous peoples, and these will not be able to be answered in the near term.

A key touchstone of the UNDRIP for Indigenous people – and one frequently referenced by the W&J – is the notion of "free, prior and informed consent" (FPIC).

FPIC is used in a variety of ways within the UNDRIP, and has been taken up by many Indigenous people as a marker that states should not be able to override the rights and wishes of Indigenous people.

To date, the UNDRIP has not been substantially deployed in Australia, and FPIC has not been extensively mobilised. In contrast, Latin American countries, including Bolivia, Colombia and Peru have each made extensive use of FPIC in relation to extractive and other industries.

These countries are also among those that have granted relatively extensive recognition to the rights of indigenous peoples. In addition, Bolivia, along with other states in the region, is at the forefront of granting rights to nature or Mother Earth.

Despite the relatively extensive deployment of FPIC in Latin American countries, FPIC has become a site of contestation, rather than an avenue for resolving past tensions, or seriously progressing Indigenous rights.

Problems abound, from constraints on participation to controversies about who should be consulted, and whether outcomes of consultation should be binding. The latter issue signals a fundamental problem about whether FPIC implies, or should involve, the right of veto through "consent", or whether the "C" should refer, more minimally, to the right to be consulted.

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The risk of empowering Indigenous people with a veto right was one of Australia's original objections to the UNDRIP. Among Latin American states, too, early outcomes associated with the deployment of FPIC thus far seem to indicate, despite stated support for Indigenous rights, that they will not allow the pursuit of FPIC to put limits on extractive industries and other developmental and nation-building enterprises.

Consent's poor cousin, consultation, allows that Indigenous rights and wishes can be vetoed by the state.

This structural inequality continues grossly asymmetrical power relations and, as some Indigenous people bluntly suggest, colonialism. In addition, while the UNDRIP states that Indigenous peoples have a right to just and fair compensation, the calculus for compensation defers to the logics of colonisers and, typically, to monetary compensation.

Within coloniser logics it is very difficult, and perhaps impossible, to draw equivalences between introduced and Indigenous values, and this leads to the disavowal of Indigenous worldviews and accompanying ethical and political commitments.

The confluence of transnational Indigenous activism and human rights institutions in the UNDRIP does not, in short, provide an immediately hospitable vehicle for the pursuit of Indigenous rights, and this would appear to be particularly so in the local case given Australia's tepid endorsement of the UNDRIP and FPIC.

Certainly the native title regime (discussed below) does not allow Indigenous veto, instead tending to manufacture consent through consultation (backed up with the option of compulsory state acquisition of land over which native title rights are claimed, should that be deemed necessary).

The W&J appear to be well-aware of these limitations, but also willing to invoke the UNDRIP and to enter into the contestations that accompany the notion of FPIC, including to challenge Queensland Government dealings in relation to the proposed Adani Carmichael mine.

The native title regime does not allow Indigenous veto, instead tending to manufacture consent through consultation, backed up with the option of compulsory state acquisition of land over which native title rights are claimed.

The Developmentalist State

For most of the 20th century, Australian policy regarding land use was dominated by the ideology of developmentalism. The starting point of developmentalism was the doctrine of *terra nullius*, which stated that Europeans arriving in Australia found a land whose inhabitants were making no use of it, and could therefore be justly dispossessed of any rights they might claim.

The immediate corollary of *terra nullius* was the obligation to develop the land and make use of its natural resources for the production of agricultural and mineral commodities. If this was not done, it was feared, the European occupiers might themselves be dispossessed in turn by others - a fear that was reinforced by the experience of World War II.

A particular feature of Australian developmentalism was the priority given to mining over agriculture and other land uses. This reflected the circumstances of the 19th century, where wealthy pastoralists had acquired large landholdings at little cost through “squatting”, while mining was largely undertaken by individual prospectors.

The political outcome was one in which, unlike in most other common law jurisdictions, mineral rights were not held by landowners but by the state, which in turn assigned them to any miner who could make out an appropriate claim. The preferential treatment of miners has continued to the present, even though most mining production is undertaken by large multinational corporations, while the majority of agricultural enterprises are owned and operated by farm families, using predominantly family labour.

Queensland Premier Annastacia Palaszczuk with Gautum Adani, Chairman of the Adani Group

A central theme of Australian developmentalism was the apparently unlimited nature of our resources and a corresponding lack of concern about sustainable management of those resources. The claim “we’ve boundless plains to share” in the national anthem reflects this assumption.

But by the end of the 20th century, it had become apparent that every aspect of the developmentalist ideology was wrong or obsolete. The shift to an information-based service economy rendered the industrial model of primary, secondary and tertiary sectors irrelevant.

Increasing recognition of the degradation of the environment associated with untrammelled industrial production and resource exploitation was reflected in the rise of environmentally sustainable development (ESD) as a guiding principle for policy. ESD principles imply a range of constraints on mining activity in general, such as the need to properly fund mine site rehabilitation.

In the case of coal, however, the constraints implied by ESD are far more stringent. If carbon dioxide emissions are to be reduced in a way consistent with stabilising the global climate, production and combustion of coal

A poster on show at the W&J Traditional Owners Council campaign launch

needs to be stabilised and then reduced in the very near future. The development of the coal resources of the Galilee Basin is inconsistent with this requirement.

Despite its obsolescence, the developmentalist ideology maintains a powerful presence in Australian politics, almost invariably combined with hostility to indigenous rights and environmental protection, alongside a nostalgic view of the 20th century industrial economy.

The clearest expression of this is found in Pauline Hanson's One Nation party (though the Indian ownership of the Adani project has led her to oppose it).

Developmentalism also inspired the Newman LNP government's "four pillars" (agriculture, construction, mining and tourism) economic policy, which sought to base the entire economy of Queensland on sectors responsible for employing less than 25 per cent of the workforce.

Developmentalism remains influential under Labor, particularly when faced with the spurious potential benefits of large projects like the Adani mine.

Nevertheless, there is no future for exploitative developmentalism. The economy of the future will depend on sustainable management of resources, a task in which indigenous communities must play a central role.

This follows the general (though not universal) recognition of the principle, following the Mabo decision, that Indigenous people have the right to play a role in determining the appropriate use of their land.

The Native Title Regime

As part of the colonisation of the Australian continent, expropriation of Indigenous lands, and the enabling of state-led development, Wangan and Jagalingou people were dispossessed of their lands in Central Queensland, often violently, beginning in the 1860s, and stretching into the 1920s.

From the 1970s, Aboriginal peoples began to make progress in their campaigns to regain access and rights to land and sea.

As a result, a patchwork of legislative and administrative schemes has emerged in recent decades, but the key national framework, and the regime with which the W&J are currently engaged, relates to native title.

Native title in Australia was recognised following the 1992 Mabo v Queensland (No 2) High Court case (Mabo), leading to the passing of the 1993 Native Title Act.

Along with other forms of Aboriginal title, native title has its origins in British colonial law.

It involves the recognition of customary tenure framed in the terms of the coloniser, and does not substantially disrupt settler interests or sovereignty.

The term “native” is thus somewhat of a misnomer: native title has its basis in a recognition of Aboriginal laws and customs, but this recognition occurs in and on the terms of the settler-state, rather than on Aboriginal terms.

Prime Minister Paul Keating at the commencement of the NTA negotiations

Native title is also a highly contingent, thin, and weak form of title.

It does not apply where events subsequent to colonisation have seen Indigenous observance of custom disrupted. This pattern is widespread due to frontier violence, and key policy approaches such as assimilation which sought, by design, to directly eliminate custom.

Native title can be extinguished, can only be claimed in certain areas where other legal title (such as freehold) does not exist, and native title rights are typically non-exclusive, giving little opportunity to control access to land or its use.

While the limitations of native title were recognised through accompanying policy instruments – the land fund and social justice package - when the Native Title Act (NTA) was legislated, these measures are generally considered to have been inadequately implemented, or to not have had the effect of achieving a comprehensive and just response to the Mabo decision.

It is clear, conversely, that native title has achieved the very direct political effect of domesticating what could have otherwise been, in the wake of Mabo, myriad and unruly Indigenous claims, both within and beyond the courts.

The 1993 NTA created a stable and predictable environment for government and business, something that was particularly important for the pastoral and resources industries given the land in play in these cases was open to native title claims.

The National Native Title Tribunal (NNTT) established a one-stop-shop that clarified the legal situation and enabled industry to negotiate over lands that could otherwise be subject to complicated and competing claims. Native Title Representative Bodies (NTRBs), appointed under the NTA, were established to assist Indigenous people with their claims. NTRBs are ostensibly facilitators of Indigenous access to native title rights, and indeed they do serve that function.

But the extent to which native title facilitates industry access to Indigenous lands also arguably positions NTRBs as facilitators and enablers of a settler-state regime that is ill-disposed to substantive recognition of Indigenous rights on Indigenous terms.

The native title regime delivers further guarantees to the settler-state and industry because it can be modified to further erode the meagre provisions of native title should that be deemed necessary.

The 1996 High Court Wik Peoples v Queensland case (Wik) provided a trigger for such a move, with the decision that the granting of pastoral leases did not deliver exclusive possession to settlers. The resulting Native Title Amendment Act 1998 (Cth) – or the "10 Point Plan" – responded by granting greater powers to the NNTT, as well as further restricting the scope of native title claims.

These amendments embodied elements that are racially discriminatory, including requiring the substantial suspending of the Racial Discrimination Act 1975 (RDA).

Because the RDA provides for equality before the law for people of all races, enacting legislation to limit or extinguish the property rights of one group through a distinction based on race is inconsistent with the RDA and, arguably, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The 1998 amendments heavily promoted the co-existence of native title with other uses, including through the establishment of Indigenous Land Use Agreements (ILUAs). ILUAs are a crucial mechanism for facilitating the mining industry where native title claims and determinations apply.

ILUAs provide native title claimants with limited rights to negotiate with miners and others about the use of land and waters.

However, ILUA negotiations are severely stacked against Aboriginal people such that they often end up being forced to take the poor deal on offer rather than risk ending up with nothing in arbitration at the NNTT.

It seems, then, overly sanguine to consider these engagements as in any way free contractual negotiations.

Rather, the making of ILUAs occurs under difficult conditions which also generate fraught and sometimes highly conflictual exchanges among Aboriginal people, and with the stakes especially high in mining matters.

Tensions among Aboriginal groups can be exacerbated by the action of development proponents and others who see an opportunity to exploit divisions.

Families are sometimes torn apart, and the resulting acrimonies can be deep and long-lasting.

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Contesting an attempted Land Deal

While the predominance of state-led development, supported and enabled through the native title regime, has led to a widespread implicit understanding that mining will prevail, the W&J are challenging this assumption, including by contesting Adani's efforts to secure an ILUA.

As it stands, Adani has been granted three mining leases by the Queensland Government, all of which are authorised by the NNTT, and without the consent of the W&J. The third of these, however, is currently being contested by the W&J in both the Federal Court and the Queensland Court of Appeal.

The area to which this disputed lease pertains includes a 2750 hectare area over which native title rights must be surrendered to provide access to land required for critical infrastructure for mine operations (eg an airstrip, workers village, washing plant, power etc).

Adani is seeking an ILUA to obtain control of this land unencumbered by native title rights. In the event an ILUA is not achieved, the Queensland Government can undertake compulsory acquisition to secure this land for Adani's project.

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While governments are typically wary of going down the compulsory acquisition path, the Queensland Government has toyed with doing so in this case, and has not ruled it out.

If compulsory acquisition were to proceed, it would be a first case of explicitly privileging private sector mining interests over those of Traditional Owners.

If there is to be any semblance of "consent", then, Adani needs to secure an ILUA with Wangan and Jagalingou Traditional Owners.

While some members of the extant native title applicant support a deal with Adani, the W&J describe the Wangan and Jagalingou people as firmly rejecting a land use agreement with Adani that would surrender their land to Adani's mining project.

They stress that on three separate occasions, ILUAs proposed by Adani were voted down through *bone fide* meetings of the claim group.

The first ILUA proposed to the Wangan and Jagalingou people was voted down in 2012. In 2014, Adani provided a revised document which was again rejected by the Traditional Owners claim group.

W&J describe a "self-determined" meeting held in March 2016 as also confirming, for a third time, they were resolute in rejecting

any offer from Adani in exchange for the extinguishment of their native title rights. In defence of their position, the W&J explain that Adani's proposed coal mine - which would be Australia's largest ever built - would destroy their ancestral homelands, threatening Wangan and Jagalingou connection to their lands, and their culture and identity.

They also argue that it would deliver massive destructive impacts on the environment and water resources, alongside producing huge carbon emissions. These impositions and costs are set against what the W&J contend is a lack of any meaningful benefits in return.

Despite the third Wangan and Jagalingou meeting that resolved to oppose the proposed mine, Adani continued to pursue an ILUA. At an April 2016 meeting facilitated by the local NTRB, Queensland South Native Title Services (QSNTS), attendees accepted a deal on offer from Adani, in a vote recorded at 294 in support, and 1 against.

The W&J stayed away from this meeting in order to avoid legitimising what they took to be an illegitimate process, and subsequently contested the result, including in a case still pending through the Federal Court.

A large part of the W&J's grievance and grounds for contestation relate to their claims about the way in which QSNTS oversaw and Adani ran the meeting. The W&J also contrast what they see as QSNTS facilitation of a meeting for Adani's benefit with QSNTS's refusal to assist with, and active opposition to, the W&J's efforts to hold the aforementioned "self-determined" meeting.

The W&J point out that the 294 Vs 1 meeting was wholly paid for by Adani, including in the form of generous travel and accommodation expenses for attendees.

Aside from other objections, the W&J question the legitimacy of those accorded entry and voting rights at this meeting. They state that the meeting was not exclusively attended by claim group members, and that many who attended - and voted - were first time attendees at meetings on Wangan and Jagalingou native title matters.

In evidence submitted to the court, the W&J state that the attendance record shows that over 60% of attendees were not recorded at a prior meeting, and W&J describe many as having no recorded apical ancestor, and as not being Wangan and Jagalingou claimants.

Adrian Burragubba, Murrawah Johnson and Benedict Coyne (ALHR) at the Federal Law Court announcement

As stated above, long established members of the claim group, who attended the March meeting, did not attend. On the basis of these (and other) claimed failings in the consultative process, senior spokesperson for the W&J, Adrian Burragubba has described the ILUA as "*illegitimate*" and built upon a "*sham process*".

While W&J reject any deal with Adani outright, they also point to the ILUA on offer as a parlous deal. In particular, they draw attention to the very limited job creation associated with the mine, including the conditional provision of some bus driving jobs to a Wangan and Jagalingou "certified" bus company.

On the basis of figures provided by Adani, W&J explain that workers would be paid just $35,000.00 per year, a figure that barely meets Australia's minimum wage.

Despite the extent of the W&J's sustained opposition to Adani's proposed mine, their efforts have arguably received relatively little national media coverage when compared to reporting on the broader Stop Adani campaign.

This seems curious, given that the W&J have carriage of the only current legal process that continues to block Adani from achieving an ILUA.

Adani announced internal financial approval to proceed on 6 June, 2017, and this was widely reported in Australian mainstream media as a "green light".

However, this announcement coincided with the Federal Court setting a hearing date for March 2018 to consider the current W&J legal case. The court process was not reported, and yet until this case is heard, Adani's ability to achieve all legal approvals remains out of reach.

Members of the legal team for the W&J at the Federal Court

Expediting Native Title Amendments and the interests of mining

Just as the Wik decision saw amendments to the NTA, another recent court decision has seen similar moves. This time the amendments relate to the making of ILUAs, and the W&J are at the centre of the debate.

The Federal Government is acting in response to a recent (February 2017) Federal Court decision in McGlade v Native Title Registrar & Ors (McGlade). The case and legislative amendments, which have been introduced and passed through the House of Representatives, relate to 'area' ILUAs, or cases wherein native title has not yet been determined.

In the McGlade case, several ILUAs were challenged by Noongar applicants who argued that the deals should not stand because they did not have the requisite signatures to the agreement.

The court broadly agreed because the NTA requires signed authorisation from all RNTCs (registered native title claimants - also called applicants), rather than just some of them. McGlade confirmed the provisions of the Native Title Act by overruling the 2010 QGC v Bygrave case (Bygrave) which had ruled that is was not necessary for all applicants

Adrian Burragubba and Murrawah Johnson at the Supreme Court announcement

constituting the registered native title claimant to sign an ILUA.

Because the McGlade decision applies to area agreements it can be expected to only affect a relatively small number of cases.

However, McGlade does potentially empower native title applicants who feel that they have been disenfranchised or subject to poor process as part of negotiating ILUAs in the aforementioned difficult and highly asymmetric conditions of ILUA agreement making.

The W&J assert that they are victims of exactly such poor process, including through Adani's efforts to strike an area ILUA with Wangan and Jagalingou people by incentivising meeting participants and attempting to exclude voices critical of the proposed mine (as detailed above).

The W&J therefore moved quickly to make use of the McGlade decision by seeking a court order to strike out what they call Adani's fake land use agreement.

The Federal Government responded very quickly to the McGlade decision, putting the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 before the parliament on 15th February 2017, less than 2 weeks after McGlade.

The pace of this response raised concerns for the United Nations Special Rapporteur on the Rights of Indigenous People, whose visit occurred around the time of the McGlade decision, warning that such important reform should not be rushed.

Such a rapid response from the Federal Government may have arisen because of

UN Special Rapporteur on the rights of Indigenous Peoples, Vicky Tauli-Corpuz, meets with Adrian Burragubba and Murrawah Johnson from the W&J

media commentary about the potentially widespread and disruptive impacts of McGlade.

However, this must be set against the fact that McGlade simply restores the status quo, and that very little evidence of disruption has emerged, including in a senate inquiry into the Amendment Bill.

The W&J lawyers assert that talk of disruption is manufactured, and the W&J claim that the urgency to pass the Amendment Bill is directly targeted at facilitating the Adani project and opening up the Galilee Basin.

It certainly appears clear that the Queensland Resources Council, through the figure of former Liberal politician and government minister Ian Macfarlane, was involved in lobbying for legislative change.

The link between the Amendment Bill and the Adani project also seems particularly clear in the mind of Senator Ian MacDonald who, in a recent senate debate, referred to the amendment as "the Adani bill".

The very strong likelihood of links between the proposed amendments and the Adani project are further illustrated by the actions of the Attorney General, who intervened on Federal Court proceedings between the W&J and Adani in May to request a court delay until the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 amendments could be considered for a third time in the Senate.

At the time of writing the Bill has not passed through the Senate. It has been opposed by The Greens and frustrated by a combination of apparent over-reach by the Attorney-General and Australian Labor Party misgivings about aspects of the Bill and associated process, despite their overall support for some form of legislative amendment and strong historical support for the mining industry.

The W&J describe their campaigning as playing a key role in stopping the passage of the proposed Amendments on two separate occasions, including by assisting the Opposition and cross-benchers to understand

The Queensland Resources Council, through the figure of former Liberal politician and government minister Ian Macfarlane, was involved in lobbying for legislative change. The link between the Amendment Bill and the Adani project also seems particularly clear in the mind of Senator Ian MacDonald who, in a recent senate debate, referred to the amendment as “the Adani bill”.

that, as one W&J representative stated, “if you do this now, you are enabling Adani”.

Although native title entrenches structural inequality through core legislative, legal and administrative mechanisms of the settler-state, as well as normalising Indigenous support for mining, the W&J continue to campaign actively on the Native Title Amendment Bill, and have a number of related legal cases pending.

It seems that they, along with their legal and other supporters, plan to continue to maximise the possibilities available to them to prosecute their struggle through native title.

At the same time, W&J also appear acutely aware of the limitations of native title, and are therefore also firmly focused on foregrounding and asserting Indigenous rights aside from the native title regime.

Members of the W&J Council and Advisors meet with Pat Dodson, Federal Parliament, to discuss Native Title Amendments

Social Impacts and Costs

The W&J's campaign occurs within the context of substantial social costs, including those associated with contested native title processes and, in particular, Adani's attempts at securing a land use agreement.

Traditional Owners have been divided, including both within and across families. This has severed relationships, and at times sparked what is described by some W&J members as irreconcilable conflict. The W&J assert that Adani have courted individuals, including via direct payments and other inducements, and that this has fueled divisions among Wangan and Jagalingou people.

Such conduct has also eroded trust among Wangan and Jagalingou people, and pitted individuals against one another. Wangan and Jagalingou people carry the costs of these community conflicts and divisions (as do other Aboriginal people caught up in similar conflicts) in deeply personal ways, including in the form of stress, fatigue and a range of health problems. These impacts double down on people already living with the legacies of violent settler-colonialism.

UN Special Rapporteur on the situation of Human Rights Defenders, Michel Forst, meets with Adrian Burragubba and Murrawah Johnson from the W&J

Those opposing the mine are subject to yet a further set of impacts in the form of the active state disregard of their interests in favour of mining. On a visit to Australia in September 2016, the United Nations Special Rapporteur Human Rights Defender described the lack of protection for free prior and informed consent in Australia as directly constraining effective consultation with Indigenous people.

The case of the proposed Adani Carmichael coal mine was singled out as an exemplar in poor consultation. The Special Rapporteur also identified that Indigenous people face the marginalisation of their interests, including by government.

The W&J cite, as a key example of this, Minister Lynham's issuing of the Queensland Government leases to Adani in the absence of their consent. The W&J point out that the minister issued leases despite his repeated commitment to await resolution of the Judicial Review in the Federal Court. His actions leave the W&J with little recourse, underlining the disempowerment of Indigenous people vis-a-vis the settler-state.

Despite the social costs associated with the proposed mine for many Wangan and Jagalingou people, and for the W&J and particular, the W&J maintain their strong resolve against the Adani mine and aspire to an alternative pathway for development that centres their rights and interests, including those of generations to come. As one W&J representative states: "*Remember, we will never give up!*".

Unwavering Resistance

The W&J stress that they have said "no" to an ILUA deal with Adani at three separate *bone fide* meetings. But they also describe their stance as more than rejection of a mine on the lands to which they have a native title claim.

The "no" stance signifies, more fundamentally, their fight for recognition of their rights. At the core of these rights, for the W&J, is the right to reject a mine that would deliver devastating and irreversible impacts upon their ancestral homelands, creating a devastating legacy for their culture and people.

It also represents defence of their right, as Indigenous people, to free and prior informed consent, as recognised by the UNDRIP.
In defence of their rights, the W&J is running an increasingly internationally-recognised campaign built upon a strategy that is both legal and political.

This already sizeable and apparently effective campaign has attracted over 100,000 supporters on their lists, and 12,000 followers on Facebook – many of whom have personally donated to the W&J's campaign.

The W&J were also able to mobilise over 6,500 supporters in a letter writing campaign to politicians during the expedited Native Title Amendments process. In 2015, and as a direct

Murrawah Johnson and Adrian Burragubba at Wall St

Aunty Alexandra Gater at the March meeting

effect of the W&J's international visits to financial institutions, the Standard Chartered Bank ruled out future funding to Adani. Other banks and finance institutions have similarly followed suit, including Westpac, ANZ, NAB, Barclays and the Royal Bank of Scotland, amongst others.

The legal cases underway - and set to run until at least March 2018 - are the last current line of legal defence against the Adani mine proceeding (notwithstanding the state's capacity to pursue compulsory acquisition).

But the W&J explain that this legal strategy is about far more than stopping Adani. It is also a rejection of what they understand to be the constrained space of consultation - and contrived version of "consent" - afforded through the native title system and actively facilitated by Australian governments.

In this way, the W&J describe their campaign as exposing the limitations of the native title system, including by revealing the convergence of colonial settler-state and mining interests, while bearing witness to assaults upon their rights and incursions into their lives.

One W&J representative, describing her presence in the courtroom in these terms, stated "*I like to look the judge in the eye. He is making decisions on our lives, and I want to him to know that I am there*". The W&J describe the assertion of their right to say "no", then, as part of a process of taking their people's future into their own hands.

Conclusion

The long history of an expanding European colonial frontier has delivered devastating impacts for Indigenous peoples in Australia, and internationally. As a direct result of often-violent colonial histories, Indigenous peoples continue to face political, social and economic disadvantage.

In Australia, the forced removal of Indigenous people has in many cases disconnected Traditional Owners from their lands and sea, thereby disrupting or destroying cultural connections and ties.

For the Wangan and Jagalingou people, forced removals from Country (landscape imbued with sentience through ancestral figures and ongoing human practices) took place between the late 19th and early 20th centuries.

This Country is at the heart of the W&J's current Indigenous rights struggle. It also includes the land that Adani, enabled and apparently heartily-supported by the developmentalist state, appears tireless in seeking to secure for its mining interests.

The W&J are part of a growing international Indigenous rights movement that is firmly centring Indigenous peoples' rights and interests in struggles for restitution in relation to the past, and in charting a future for their people.

This movement draws upon international human rights law where it can, but also recognises that these instruments have limits because they have their origin in European approaches to politics and law, and continue colonial asymmetries by empowering states over Indigenous peoples.

The W&J call for Indigenous peoples' right to free, prior and informed consent, a desire that has been captured by UNDRIP. However, such consent is frequently set in tension with "consultation" - a collection of processes

Dancing on Country, Central Queensland

in which Indigenous people can have their say, but with little or no actual opportunity to leverage any substantive effect on decision making in terms of a veto right, including on issues with profound and direct impacts on their lives. In some forms, as the W&J assert, consultation serves as a legitimising tool for settler-state and industry agendas.

In Australia, several legal frameworks and policy mechanisms interact with international human rights law. Among these, the Native Title regime is of central importance to the W&J struggle.

A European construct with origins in British colonial law, native title favours the interests and priorities of the settler-colonial state and developmentalist state interests and industries. As a consequence, native title processes are tightly constrained, with the result that Indigenous peoples' agreement or acquiescence to mining is the norm.

The W&J argue that their engagements with the native title regime, including through organisations including the NNTT and the local NTRB, Queensland South Native Title Services, have seen the consistent prioritising of state and mining interests over their own interests in exercising meaningful consent in relation to Country.

The native title regime can also be modified by the state to secure settler interests, as happened with the 1998 Wik Amendments and as is currently underway through the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 that is before the Australian Senate.

In the face of this significant historical and institutional disadvantage, the W&J are staging a remarkable struggle. They are saying "no", as part of a highly contested ILUA-making process, to Adani's offers that would see the extinguishment of their native title rights.

Their efforts include a range of legal cases, and one of these - running until at least March 2018 - is the last current line of legal defence against the Adani Carmichael mine achieving full approvals. The only immediate way around this legal action is a state led compulsory acquisition. The W&J are also campaigning against the current Native Title Amendment Bill, which at least in part seems aimed at securing access to land for the Adani mine.

However, the W&J's campaign is about far more than saying "no" to Adani.

At the centre of their efforts is the assertion of Indigenous rights on Indigenous terms that are fundamentally grounded in their Country, and thus in Aboriginal law.

They aim, moreover, to strongly assert this approach in the Australian political-legal landscape as a means to advance and gain recognition for their rights, and those of other Traditional Owners in Australia.

While Adani, the state and the W&J have unfinished business such that the future of the proposed Carmichael mine remains uncertain, what does appear certain is the strength of the W&J's resolve to chart a future for their people that centres their rights and interests, and that protects and sustains their lands and waters.

APPENDIX

Research Approach and Methods

This report presents for a lay audience a summary of an early scoping study undertaken as part of a research project at The University of Queensland.

Research about Indigenous rights and extractive industries is invariably politically charged and thus "positioned" in some way.

Research that collaborates with mining companies or Indigenous people to improve Indigenous access to (or stake in) mining ventures, for instance, risks the charge of facilitating the interests of the resources industry.

This project is positioned in a different way through a collaboration with a group of Traditional Owners opposed to the Adani Carmichael mine. The project - and this first summary report – takes up its position in three ways.

First, the project takes no overall stance about the position that Indigenous peoples should hold in relation to mining. No doubt mining may be judged to be beneficial or detrimental, and be supported or opposed by Indigenous peoples on a case by case basis.

Second, the project takes seriously the global Indigenous rights agenda, and hence the right of Indigenous groups to say "yes" or "no" to mining.

Third, the project takes seriously the transition to a low carbon future as a necessary response to unequivocal scientific evidence of serious anthropogenic climate change.

This project has obtained Human Research Ethics approval through the University (#2017000084), and researchers follow all protocols and processes required by the terms of this approval.

Data relied upon for this scoping report includes selected court transcripts, Hansard records, Senate Inquiry submissions, media reporting, interviews with W&J members, as well as observations in court, and at W&J meetings. Widely accessible grey, academic and other literatures have informed this report.

Further detailed analysis, building upon in-depth engagement with relevant specialised academic literature and primary data collection, will feature in subsequent academic reporting, or other outputs.