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## Resources, race and rights: A case study of Native Title and the Adani Carmichael coal mine

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# **Resources, race and rights:**

**A case study of Native Title and the Adani Carmichael coal mine**

This thesis is presented in partial fulfilment of the degree of  
**Bachelor of Arts Honours**

**Kate Arnautovic**

School of Arts and Humanities  
Edith Cowan University  
2017



## USE OF THESIS

The Use of Thesis statement is not included in this version of the thesis.

## **Abstract**

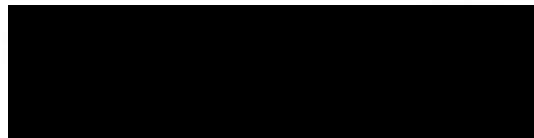
This thesis examines the extent to which state institutions and government have taken into account Indigenous rights and interests during the approval process for a large mining development. This case study focuses on the various phases of approval for the proposed Adani Carmichael Coal Mine, a significant development that has challenged the native title system in Australia. It assesses the extent to which the rights and interests of the Wangan and Jagalingou people, the traditional owners that possess a native title claim over the region, have been upheld by the National Native Title Tribunal and the State and Federal Government. This thesis employs multiple theoretical perspectives to explain the outcomes of the approval process. While this study aims to critically review the existing literature, the application of two liberal culturalist perspectives and the broader framework of critical race theory contribute added insights in the area of native title and resource developments.

## Declaration

I certify that this thesis does not, to the best of my knowledge and belief:

- (i) incorporate without acknowledgement any material previously submitted for a degree or diploma in any institution of higher education;
- (ii) contain any material previously published or written by another person except where due reference is made in the text;  
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Date: 29/5/2017

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## Table of Contents

<b>Abstract .....</b>	<b>ii</b>
<b>Declaration.....</b>	<b>iii</b>
<b>Acknowledgements .....</b>	<b>iv</b>
<b>List of Figures .....</b>	<b>vii</b>
<b>Introduction.....</b>	<b>1</b>
Mining Companies, the State and Indigenous Groups.....	1
International Law and Australia .....	4
Australian Domestic Law .....	7
Theoretical Perspective: A Multifaceted Approach.....	9
Will Kymlicka: Liberal Culturalism.....	9
Allen Buchanan: Collective Land Rights .....	11
Critical Race Theory .....	12
Research Questions and Thesis Structure .....	14
Methodology.....	16
Problem and Significance.....	17
<b>Chapter 2 .....</b>	<b>19</b>
Resource Politics.....	19
Adani and Australian politics .....	25
<b>Chapter 3 .....</b>	<b>30</b>
The First Phase of Negotiations .....	30
Negotiation Breakdown.....	34
An Emerging Pattern.....	39
<b>Chapter 4 .....</b>	<b>42</b>
The First Determination.....	42
The Split in the Community .....	44
A Change of Representation.....	45
A Rift Between the Applicants .....	48
A Sense of Practicality or Obligation.....	49

<b>Chapter 5 .....</b>	<b>52</b>
Back to the Tribunal .....	52
Response to the Media .....	53
Parliamentary Oversight .....	56
A Disputed Agreement .....	58
The <i>McGlade</i> decision: A new hope or more uncertainty? .....	59
<b>Conclusion .....</b>	<b>62</b>
Added Insights: Multiple Modes of Analysis .....	64
<b>References .....</b>	<b>66</b>

## List of Figures

<b>Figure 1.1</b> Adani's contributions to political parties .....	25
<b>Figure 2.2</b> Adani Carmichael Coal Mine development timeline .....	33



## **Introduction**

### **Mining Companies, the State and Indigenous Groups**

This study will examine the extent to which state institutions and government have taken into account Indigenous rights and interests during the approval process for large mining developments. It will focus on the various phases of approval for the Adani Carmichael Coal Mine and assess the extent to which Indigenous rights and interests have been upheld. The Adani Carmichael Project is a significant development proposal that has greatly challenged and exposed limitations within Australia's native title system (Borschmann, 2015; Milman, 2015a, 2015b; Palese, 2015).

The Carmichael Coal Mine development is located in the Galilee Basin in central Queensland. It will be the second largest coal mine in the world with a proposed scale that includes six open-cut pits and a lifetime of up to 60 years (Horn, 2016). The Wangan and Jagalingou people possess a registered native title claim over the proposed mine site and while some community members have sought to negotiate a land use agreement with Adani, others have remained relentlessly opposed to the project (Milman, 2015a; Taylor, 2015; Robertson, 2015; West, 2015).

This thesis examines the responses of state institutions and government to Indigenous rights and interests. The terms 'state' and 'government' refer to separate mechanisms of the modern society. The term 'state' refers to the set of institutions that enforce the rules of a society, such as the administrative bureaucracy, the judicial system and the military (Best, 2002; McAuley, 2003). State institutions are independent of government, however, the state is tasked with interpreting and implementing the decisions of past and present political leadership. The term 'government' refers to the elected representatives of parliament. While the government can change with every election, institutions of the state remain constant (Best, 2002). This study will examine the responses of state judicial bodies such as the National Native Title Tribunal (NNTT), the elected government of the State of Queensland and the Federal Government.

Australia is a resource-driven nation and resource companies exercise a high degree of power in the political sphere. The carbon lobby has influenced government decision-making and public opinion (Baer, 2014; Esteban & Ray, 2006; Hodder, 2009; McKnight & Hobbs, 2013). It is widely known that resource companies make significant contributions to political parties. The heads of multinational corporations often enjoy a close relationship with members of the public office and influence policy that relates to resource interests (Baer, 2014; Hodder, 2009). State institutions and government have a tendency to prioritise demands in the energy and mining sector.

International law supports the rights of Indigenous groups and encourages nations to implement domestic laws that adhere to international standards (Australian Law Reform Commission [ALRC], 2015). The Australian Government faces a conflict between advancing what is considered to be the national interest or endorsing international standards and the rights and interests of Indigenous communities. The prevailing national interest in resource development may compromise the interests of traditional owners (Altman, 2009; Howlett, 2010; Marsh, 2013; Scambary, 2013).

The Wangan and Jagalingou people have a history of spiritual connection to the lands surrounding the town of Clermont in Central Queensland (NNTT, 2014). The names 'Wangan' and 'Jagalingou' refer to different Indigenous tribal groups that have historically inhabited the region. European settlement on Wangan and Jagalingou land became sustained in the 1860s and several families were forcibly removed to other areas (NNTT, 2014). However, many of these families remained living in the traditional area and maintained a strong physical connection to the land.

Some descendants of the Wangan and Jagalingou people have been the victims of massacres, such as the Mistake Creek massacre of 1857 (NNTT, 2014). The group shares a common knowledge of spiritual and religious beliefs and continues many traditional ways of life, such as a landholding system based on inheritance through cognatic descent. The Wangan and Jagalingou people have demonstrated a clear connection to the traditional land that surrounds Clermont, and the factual evidence provided to the NNTT has deemed their native title claim as valid before the Federal Court (NNTT, 2014).

The Wangan and Jagalingou people have had a native title claim application registered with the NNTT since July 2004 (NNTT, 2004; Queensland South Native Title Services [QSNTS], 2015). The application covers 30,200 square kilometres in central Queensland. The Federal Court determined that the group had a continuing connection to the land that pre-dated European settlement in the region (NNTT, 2014). As there are several overlapping native title claims involving other Indigenous groups, the final determination of the Wangan and Jagalingou claim has been delayed. While the status of their claim remains unresolved, the group still possesses a number of procedural rights as registered claimants (NNTT, 2014; QSNTS, 2015). It is mandated that the claim group are given notification of future acts and that negotiations are conducted to reach a legally binding agreement (QSNTS, 2015).

Adani obtained the consent of the Wangan and Jagalingou people in an Indigenous Land Use Agreement (ILUA) signed in April 2016 (“Adani mine,” 2016). However, the authorisation of this agreement was highly contentious and problematic as a significant section of the Wangan and Jagalingou community deemed the vote unrepresentative and illegitimate (Robertson, 2016d, 2017; Wangan and Jagalingou Family Council [WJ Family Council], 2016). The Wangan and Jagalingou people became divided in the course of negotiations, as some community members shared different opinions about the development on their land (Milman, 2015a; Taylor, 2015; Robertson, 2015, 2016a, 2017; West, 2015).

While one faction supported the Carmichael Project, provided the ILUA included satisfactory terms of agreement, the other was unwilling to support the development on any terms (Van Vonderen, 2016; Milman, 2015a; Robertson, 2015, 2016c, West, 2015). The latter camp contended that the project will lead to the destruction of Wangan and Jagalingou ancestral lands and insisted that ‘no means no’ regardless of the compensation offered (Robertson, 2016b, 2016c; WJ Family Council, 2016a). Examining the process of division, whereby these two groups within the community developed such opposing stances during the phases of approval, is a key focus of this thesis.

## **International Law and Australia**

There have been important developments over the past 20 years towards the recognition and protection of Indigenous peoples around the globe (Tauli-Corpuz, 2008). Indigenous issues have been placed on the international human rights agenda and a number of significant treaties have established the rights of Indigenous peoples. The United Nations (UN) Permanent Forum on Indigenous Issues was established in 2002 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) entered into force in 2007 (Palese, 2015; Tauli-Corpuz, 2008). These two Indigenous rights developments mark significant modern advancements for Indigenous groups worldwide. The UNDRIP has established an international framework that can inform domestic laws dealing with the collective rights of Indigenous peoples (ALRC, 2015; Davis, 2007). The Declaration sets the minimum standards that every country should abide by to fully recognise and protect the rights of Indigenous groups. While the document is not legally binding, it is recommended that countries implement its provisions in domestic law to remain consistent with international standards (ALRC, 2015; Davis, 2007; Tauli-Corpuz, 2008).

In 2007, 143 state parties voted in support of the UNDRIP and four voted in opposition. The state parties that voted against the Declaration were Australia, Canada, New Zealand and the United States (United Nations, 2007). Among other concerns raised, these nations were opposed to language in the Declaration suggesting Indigenous groups had the right to veto national legislation if it was likely to impact their rights and interests. Australia's UN delegate contended that the references to self-determination would encourage the secession of Australia's Indigenous peoples and, in turn, undermine or completely eradicate the democratic system of governance for those populations (Davis, 2007; United Nations, 2007). In 2009, Australia reversed its position and chose to adopt the Declaration (ALRC, 2015; Douglas, 2013; Rodgers, 2009). Since the Declaration is non-binding, Australia's support of its principles places no obligation on the government to make changes to domestic law. However, countries are encouraged to introduce or amend laws so they fulfill the principles of the Declaration (Macklin, 2009).

While Australia has given domestic effect to a number of international treaties, the principles of the UNDRIP have been seldom referenced in the High Court



(ALRC, 2015). Many years before the UNDRIP entered into force, the Australian Government passed legislation for its first national system of collective Indigenous land rights known as native title. While the Native Title Act (NTA) was legislated with reference to international law at the time, universal human rights standards prior to the UNDRIP did not address collective rights for Indigenous peoples (ALRC, 2015). The right to Free, Prior and Informed Consent (FPIC) set out in the UNDRIP applies to Indigenous land rights with respect to development (Hanna & Vanclay, 2013; Tauli-Corpuz, 2008; Rumler, 2011). While FPIC is cited numerous times in the Declaration, it is Article 32 that addresses development:

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* [emphasis added] 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. (United Nations, 2008, p. 12)

FPIC mandates the State's responsibility to withhold development until the consent of Indigenous communities is obtained (Hill, Lillywhite & Simon, 2010). The term 'consent' refers to the Indigenous group's collective decision to accept or reject a development. Some argue that the notion of consent implies the right to veto development (Rumler, 2011). While the NTA ensures the right to consultation and consent for some native title holders and claimants, the choice to withhold consent does not veto development (O'Faircheallaigh, 2006). If consent fails to be obtained, the Australian Government can extinguish Indigenous rights to land through compulsory acquisition (Australian Human Rights Commission [AHRC], 2014; NNTT, 2008a).

In many cases, native title has been overridden when the State has deemed a development to be in the public interest. Cariño and Colchester (2010) argue that the recognition of FPIC does not permit states to disregard consent on the basis of national interest. However, the Minerals Council of Australia (MCA) contends that "mineral ownership is vested in the Crown and accordingly the process of seeking consent does not confer a right of veto to Indigenous

people” (MCA, 2014, p. 1). Thus, the State has the overarching right to grant tenement regardless of consent.

While it remains unclear whether FPIC implies the right to veto development, it can be reasonably accepted that Indigenous peoples have the right to withhold consent if a state is aligned with the principles of FPIC (Cariño & Colchester, 2010; Collins, Ali, Lawson & Young, 2016; Portalewska, 2012; Smyth, 2016). As Cariño and Colchester (2010) assert, “international law is explicit that indigenous and tribal peoples enjoy the right to give or to withhold their FPIC to activities or policies which may affect them” (p. 430). Therefore, when consent is withheld, the State is responsible for the decision to protect or negate the rights and interests of its Indigenous peoples.

While the Australian Government may wield the power to extinguish Indigenous land rights in order to pave the way for development, traditional owners can still refuse to sign an agreement and thereby withhold their consent. The notion that consent is free of coercion means it cannot be forced or mandated under any procedural conditions (Portalewska, 2012; Office of the United Nations High Commissioner for Human Rights [OHCHR], 2013). Governments must therefore make a decision to respect the interests of traditional owners or grant mining tenement without consent. The latter decision may cause governments to be criticised as indifferent or insensitive to Indigenous interests and may affect the grantee’s social license to operate (O’Faircheallaigh, 2011; Scambary, 2013).

The native title system in Australia is largely based on the assumption that consent will be obtained, as negotiations between the government, the mining interest and Indigenous group must be conducted in ‘good faith’ of reaching an agreement. The scenario where a native title holder or claimant refuses to consent to any agreement appears to be a non-option in Australian law (Marsh, 2013).

The AHRC published a review measuring the rights afforded to Indigenous peoples in the NTA against the principles of the UNDRIP. The review concluded:

While the Native Title Act provides a process to recognise native title rights and interests in the traditional lands, territories and resources

for Aboriginal and Torres Strait Islander peoples, a gap exists between the realisation of these rights and interests and those rights affirmed in the Declaration. (AHRC, 2014, p. 9)

When compared with the principles of the UNDRIP, Indigenous land rights in Australia fail to satisfy international standards. The protection of human rights in Australia was assessed in the 2012 Universal Periodic Review. The review criticised Australia for its slow domestic implementation of the UNDRIP (AHRC, 2012). It can be concluded that native title, as the domestic equivalent of Indigenous land rights and FPIC, does not satisfy the most recent requirements of Indigenous rights in international law.

### **Australian Domestic Law**

Australia's native title system enables Indigenous groups to be granted land rights through an application process. The recognition of Indigenous land rights overturned the notion of terra nullius and aimed to restore a degree of self-determination and sovereign ownership to the nation's first peoples. Colonialists deemed native land as terra nullius, a Latin phrase meaning 'nobody's land' (Poynton, 1994; Short, 2007). The High Court's controversial *Mabo* decision in 1992 abolished the myth of terra nullius and the existence of Indigenous customary land was nationally recognised (Finn, 2012; Moreton-Robinson, 1998; Poynton, 1994; Short, 2007).

The *Mabo* case began with a Torres Strait Islander man who challenged the laws governing land ownership. During the 1980s, Eddie Koliko Mabo took the State of Queensland to court in an attempt to claim traditional ownership of Murray Island (Hill, 1995). When the High Court ruled in favour of Mabo, the former Prime Minister Paul Keating introduced legislation to establish a national system for Indigenous land rights (Poynton, 1994). The *Native Title Act 1993* was the first piece of legislation that aimed to rectify the dispossession of Indigenous land. In the years that followed its enactment, subsequent amendments to the NTA diminished the rights attributed to native title groups (Behrendt & Strelein, 2001; O'Faircheallaigh, 2006; Ritter, 2009).

In 1996, the High Court made a second landmark decision for Indigenous land rights. The *Wik* decision ruled that pastoral leases did not necessarily

extinguish native title (Short, 2007; Strelein, 2009). The Wik people, a collective of different Indigenous groups, took the State of Queensland to court in order to have their native title claim recognised despite two overlapping pastoral leases. The determination handed down in favour of the Wik people created uncertainty for pastoralists across the nation, as pastoral leases comprised 42 per cent of Crown land (Stevenson, 1997; Strelein, 2009). In response, the Howard Government legislated the *Native Title Amendment Act 1998*. The amendments to the NTA diminished the rights of Indigenous claimants, ruling out the coexistence of native title and pastoral leases and increasing the requirements to prove connection (Finn, 2012; Smith & Morphy, 2007; Strelein, 2009; Tehan, 2003).

In comparison to the NTA legislated under the Keating Government, the 1998 amendments considerably weakened Indigenous land rights (Behrendt & Strelein, 2001; Ritter, 2009). The Aboriginal and Torres Strait Islander Social Justice Commissioner's 2008 annual review of the native title system found that the NTA had failed to deliver justice for most native title groups (Marsh, 2013).

Native title claims are required to pass a number of stages to become fully recognised. The Federal Court makes the final determination based on the proof of connection. However, it can take a number of years for a native title application to reach this stage (NNTT, 2009a). Before the application reaches the Federal Court, the NNTT assesses whether the application meets the requirements to become registered. Registered native title applicants possess a number of procedural rights. The procedural rights given to the applicants depend on the conditions of the proposed development. If a development is deemed unlikely to affect the claim area, the applicants may only possess the right to be notified or to lodge an objection (QSNTS, 2017; NTSCORP, 2017). However, if a development is likely to infringe native title rights, the right to negotiate (RTN) may ensue. This procedural right requires the grantee party to conduct negotiations with the native title applicants to establish a legally binding agreement (NNTT, 2016, 2017c; NTSCORP, 2017).

The negotiation phases examined in this thesis involve the RTN. The Carmichael Coal Mine has been deemed a significant development that will impact the area of the Wangan and Jagalingou claim. As this claim is registered

with the NNTT, negotiations between Adani and the claim group are mandated under the provisions of the NTA.

### **Theoretical Perspective: A Multifaceted Approach**

A number of theoretical perspectives will be employed to explain the outcomes of this thesis. The complexity of this specific case warrants multiple modes to provide insight into the outcomes of this study.

The following theories will be summarised in this section:

- Will Kymlicka's liberal culturalist theory of minority rights
- Allen Buchanan's essay on collective land rights
- Critical Race Theory (CRT)

#### **Will Kymlicka: Liberal Culturalism**

Will Kymlicka's theoretical perspective in his book *Multicultural Citizenship* (1995), situates multiculturalism within a liberal framework. He argues that collective rights for minorities are justified in liberal-democratic societies to preserve and protect cultural traditions and practices (Kymlicka, 1995). Kymlicka's theory of minority rights postulates that liberal principles inherently justify collective rights for these groups (Kymlicka, 1995). There is now a consensus among liberal theorists that collective rights for minorities are consistent with liberal principles. Liberals who support this argument are classified as 'liberal culturalists'. It is the moral grounds, or justification, for minority rights that remains contested among liberal culturalists (Kymlicka, 2001).

Kymlicka justifies collective rights on the basis of cultural membership and its capacity to deliver the basic liberal principles of individual freedom and autonomy. He argues that individual freedom, which is central to liberalism, is intrinsically linked to culture (Kymlicka, 1995, 2001). To explain this connection, Kymlicka describes the existence of societal cultures. 'Societal cultures' describes a society that is territorially concentrated, has common economic, political and educational institutions, a shared history and a

standardised language (Kymlicka, 1995, 2001). Gaining membership to a societal culture allows an individual to have access to “meaningful ways of life across the full range of human activities” (Kymlicka, 1995, p. 76). If an individual leaves its societal culture and joins a new societal culture, they will be confronted with a different set of common institutions, a different common language and different ‘culturally significant’ ways of life.

The link between liberalism and cultural membership in Kymlicka’s theory emerges from the freedom of choice, which is fundamental to liberal theory. In liberal societies, the individual is free to choose and revise their own conception of the good life (Kymlicka, 1995). ‘The good life’ represents an individual’s own perception of a fulfilling life, as shaped by the options made available to them. As societal cultures provide meaningful options for their members, in terms of the various ways they can lead their lives, it becomes an inherent right for individuals to be granted membership in a societal culture to obtain the freedom of choice (Kymlicka, 1995). Members of a societal culture attach value to the options available to them and from within this context decide on their current conception of the good life. Thus, without access to a societal culture, individuals are deprived of their right to the freedom of choice. The ability to choose their conception of the good life becomes significantly diminished when cultural membership fails to be obtained (Kymlicka, 1995).

Individuals who do not obtain cultural membership to a societal culture are more likely to become marginalised within that society. As Kymlicka argues, “if a culture is decaying or discriminated against, ‘the options and opportunities open to its members will shrink, become less attractive, and their pursuit [of the good life] less likely to be successful’.” (Margaret & Raz cited in Kymlicka, 1995, p. 89). Cultural membership is therefore fundamental to individual freedom. This connection frames Kymlicka’s initial argument for collective rights in liberal societies.

Kymlicka’s second justification for collective rights is based on the liberal principle of equality. Kymlicka perceives minority groups as the bearers of an inherent and unchosen inequality due to the majoritarian nature of societies (Kymlicka, 1995). Liberal theory supports the notion that all citizens deserve to have equal rights. In traditional liberal theory, this means individual rights

should be equally disseminated among all members of a society, regardless of ethnicity or race (Kymlicka, 1995, 2001). However, Kymlicka highlights that individual rights alone do not ensure equality but rather perpetuate inequality. What maintains this inequality is the tendency for liberal democracies to make decisions that appeal to the needs and desires of the majority (Kymlicka, 1995).

For Indigenous groups living within a larger societal culture, decisions that favour the majority can threaten the survival of their own pre-existing societal culture (Kymlicka, 1995, 2001). In absence of collective rights to protect Indigenous traditions, members of this group risk losing their cultural membership. As cultural membership is required to ensure individual freedom and autonomy, Indigenous people suffer a deep inequality due to majoritarian decisions (Kymlicka, 1995, 2001). Kymlicka's theory creates a mandate for liberal democracies to accommodate collective rights in order to satisfy the liberal principles of individual freedom and equality.

### **Allen Buchanan: Collective Land Rights**

Allen Buchanan's theory on collective land rights for Indigenous groups relies less on the principles of liberalism to advocate for these rights. Buchanan in his essay, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights* (1993), distinguishes two types of collective land rights that limit the power of the state and government to varying degrees. The first is collective property rights, which provide the same function as individual title but with collective ownership. The second is collective land regulatory rights, which embody a greater capacity to control resources and development. The latter threatens the authority of the state and government, as the right-holder has the power to regulate the use of the land (Buchanan, 1993). The Australian native title system resembles the former, as the government has the authority to proceed with development without the consent of Indigenous groups on the grounds of public interest.

Buchanan contends that there is a need to adopt collective rights for Indigenous groups, as the rights attributed solely to individuals in the United Nations Declaration of Human Rights fail to recognise people of a distinctly

different history and culture (Buchanan, 1993). The Declaration treats all individuals as equal rights-holders. However, Buchanan argues that the history and culture of distinct groups such as Indigenous peoples warrants collective rights to protect pre-existing ways of life.

Buchanan predominately justifies collective land rights for Indigenous groups on three grounds. Collective land rights can be justified as the initial step to reconcile historical injustice; a restoration of the collective property system that existed prior to colonialism; and a means to ensure the survival of an Indigenous culture (Buchanan, 1993). These justifications have a strong focus on reconciliation with Indigenous groups that have experienced dispossession of land. His essay explores some of the motivations behind Indigenous demands for collective land rights. A major factor is the desire to have pre-existing methods of land ownership prior to the advent of colonialism returned into practice.

Buchanan does make an additional justification based on the importance of cultural membership. As culture provides meaningful options to individuals, the preservation of culture ensures that cultural membership is maintained (Buchanan, 1993). This final premise overlaps with Kymlicka's justification for collective rights within the liberal principles of freedom and autonomy, for which cultural membership is a central component.

While Kymlicka and Buchanan's theories do provide some similar moral grounds for collective rights, the predominant justifications in both theories largely differ. Kymlicka seeks justification within the principles of liberalism whereas Buchanan bases his reasoning on the rectification of past injustice and reconciliation. However, both theories can be attributed to the broader framework of liberal culturalism.

### **Critical Race Theory**

Critical race theory (CRT) is a subset of critical theory that examines the role of race, racism and power in society. CRT views race as an influential factor in the outcome of legal cases (Bell, 1995; Darity, 2007). In its initial years, the movement criticised the legal system in the United States for reinforcing racism and inequality. However, this perspective has expanded to examine the



role of race in other disciplines such as political science and education. Critical race theorists view racism as a construct that is engrained in the social fabric of Western capitalist societies (Delgado & Stefancic, 2012).

Despite the presence of laws that aim to counter discrimination and inequality such as affirmative action regimes, subtle forms of racism remain embedded in state institutions (Delgado & Stefancic, 2012; Hutchinson, 2004). Critical race theorists share the belief that race is a common and ordinary occurrence. It is a phenomenon that is normalised and embedded into everyday life, which often makes it difficult to detect for those living in the majority (Delgado & Stefancic, 2012; Gillborn, 2005). While explicit forms of racism such as denying the right to vote have been curtailed with modern anti-discrimination laws, CRT contends that business-as-usual racism remains deeply prevalent in society. This form of racism is institutionalised and ensures that power remains in the hands of the dominant white class (Bracey, 2015; Delgado & Stefancic, 2012; Gillborn, 2005).

CRT contends that state institutions and government consciously and unconsciously ensure that white people continue to dominate positions of power and maintain control over material resources (Delgado & Stefancic, 2012; Gillborn, 2005). Bell (1980) establishes the concept of interest convergence, whereby racial remedies for blacks are accommodated on the basis that the rights afforded to them are compatible with the interests of whites. At the very least, black rights must not jeopardise white interests. Harris (1993) builds on this idea, arguing that over time the legal system has legitimised white privilege and a set of power-based presumptions are inherently attached to all whites. Thus, racial remedies will be amended or reversed if they disrupt the white expectation of power and control (Bell, 1980; Bracey, 2015; Delgado & Stefancic, 2012). Bracey (2015) cites Bell (2004) in his analysis on the white class and its dominance over state affairs, "Whites' control of the state is permanent and absolute, as evinced by their collective power to abrogate racial justice policies 'at the point that policymakers fear the remedial policy is threatening the superior social status of whites.'" (p. 558).

CRT can be applied to the Australian context to understand the winding back of Indigenous land rights afforded under the NTA. The native title system

essentially represents a bundle of rights granted to blacks. However, these rights are carried out in white institutions and are subject to the decisions of white-dominated political leaderships. When native title rights have been found to challenge the power and control that government exerts over land, the legislation is amended and 'watered down'. As critical race theorists Delgado and Stefancic (2012) purport, "rights are almost always cut back when they conflict with the interests of the powerful" (p. 29).

This is illustrated in the Howard Government's amendments to weaken the NTA following the *Wik* decision. The Federal Government's scramble to amend the Act in response to the recent *McGlade* decision also demonstrates the reluctance of political leaders to situate black interests ahead of large mining developments on traditional land. The decision of former Prime Minister Paul Keating to legislate native title rather than allow *Mabo* to determine the outcome of similar court challenges by way of common law further supports the arguments of CRT. As reflected in these examples, CRT would contend that whites accommodate racial remedies on the basis that it does not harm the interests of white institutions and government.

It can also be observed that the rights included in the NTA, particularly in the future act process this thesis examines, can be overridden if the interests of traditional owners obstruct the interests of those in power. Thus, while black rights have been accommodated to remedy past wrongdoings and set the nation on a path towards reconciliation, these rights have been crafted to remain subordinate to the powers of the white dominant class.

## **Research Questions and Thesis Structure**

Research question:

- To what extent have state institutions and government taken into account Indigenous rights and interests during the phases of approval for the Adani Carmichael Coal Mine?

Research sub-questions:

- What degree of power and influence do resource companies like Adani exercise in Australian politics? (Chapter 2)
- What factors contributed to the collapse of negotiations? (Chapter 3 and 4)
- Why did the Wangan and Jagalingou community become divided in the course of negotiations? (Chapter 4)
- How did the NNTT, the State Government and Adani respond to Indigenous rights and interests during the phases of approval? (Chapter 4 and 5)
- To what extent have Members of Parliament taken into consideration Indigenous rights and interests during the phases of approval? (Chapter 5)

Chapter Two will examine the degree of power resource companies exert in Australian politics and determine whether Adani reflects a similar level of influence.

Chapter Three will examine how the first phase of negotiations operated under the NTA and determine what factors contributed to the unresolved outcome.

Chapter Four will examine the next phase of approval, whereby the failure to produce an agreement leads to the involvement of the State. This chapter will investigate the process of arbitration and the community division that emerged thereafter.

Chapter Five will examine the response of Adani and the State Government when negotiations fail to produce an agreement and arbitration is sought for a second time. This chapter will then investigate the degree of recognition and oversight of Indigenous issues by government in the approval process and discuss the effect of the recent *McGlade* decision.

The concluding chapter will compare the findings of this study to the existing literature and assess the capacity for each theory to explain the research outcomes.

## **Methodology**

### **Document Analysis**

Document analysis is a common methodology employed in qualitative studies. It involves the systematic analysis of organisational and institutional documents to build understanding and contextualise events and phenomena. The process requires the selection of multiple documents relevant to the research problem and the evaluation and synthesis of the data found in those documents (Bowen, 2009).

This thesis will use document analysis to investigate a single case study. This type of methodology is often used in case study research to develop an understanding of a specific phenomenon or event. In this case, a range of documents will be reviewed and evaluated to detail each phase of approval. Comparing the data in each document will aim to verify and confirm important information about the approval process and, in turn, determine the extent to which state institutions and government have taken into account Indigenous rights and interests, and if this is a sufficient protection of these rights and interests.

### **Case Study**

Case study research involves the in-depth analysis of a single sample. This methodology requires detailed and descriptive content about one specific phenomenon or event (Pierce, 2008). This thesis will examine a single instance where state institutions and government have had to consider the rights and interests of an Indigenous group in the approval process of a significant mining development project.

The Carmichael Coal Mine is a highly exposed and polarising example of a recent large mining development that has placed the Australian native title system under the lens and tested the existing legislation. This thesis aims to develop broad conclusions that may be applied to other instances where a large mining development has challenged the State and government's consideration of Indigenous rights and interests.

### **Employment of Theory**

This thesis will employ multiple theories to interpret and understand the outcomes of a single case study. While each theoretical perspective will be applied to develop a critical understanding of the findings, the practical implementation of each framework will assess its applicability in a real life event. The application of multiple theories that are relevant to the research problem is intended to provide explanation and insight into the response of state institutions and government.

### **Problem and Significance**

This thesis will determine the extent to which state institutions and government have taken into account Indigenous rights and interests during the approval process of a large mining development. It will determine whether Indigenous land rights in Australia have fully mandated the consideration of Indigenous rights and interests in each phase of approval. A series of theoretical perspectives will be employed to explain the research outcomes.

This study will compare a recent case to the existing body of literature on Indigenous land rights and mining developments in Australia. The findings may confirm or counter the literature and may also support or challenge the criticisms of the NTA as a weak apparatus for Indigenous groups seeking to protect their rights to land.

The use of multiple theories to explain the outcomes of the approval process offers an additional contribution to the literature. There are a number of studies that examine cases where the interests of Indigenous groups and the rights afforded to them under the NTA and the UNDRIP have been affected by mining developments (Altman, 2009; Corbett & O’Faircheallaigh, 2006; O’Faircheallaigh, 2006, 2008; Scambary, 2013). However, theoretical perspectives have been scarcely employed to explain the inadequacies of Indigenous land rights in Australia’s jurisdiction and the attitudes of state institutions and government.

While there appears to be a consensus in the literature that the NTA has failed to uphold Indigenous rights and interests, there are few studies that provide a

deeper source of explanation beyond the inherent weaknesses of the legislation. This thesis seeks to account for the failure of the native title system using the application of multiple social theories.

## Chapter 2

### Resource Politics

Australia is a resource-rich nation and the energy and mining industry has contributed significantly to the national economy. While it is a common misconception that Australia's economy is largely bound to expendable energy and mining production, the mining sector only contributes around 8 per cent to the nation's GDP (Frydenberg, 2015; Garnett, 2015; Roarty, 2010). However, the resources sector continues to occupy a prominent position on the national agenda as it delivers many benefits to the state, contributing to export earnings, employment, foreign and domestic investment, and to government revenue (Roarty, 2010).

The national reliance on energy and mining has enabled large resource companies to become highly influential in Australian politics (Baer, 2014; Hodder, 2009; Lyons, 2016). The carbon lobby has exercised significant power to influence key policymakers and public opinion. While the government ensures transparency for certain lobbying practices, many cases of lobbying are conducted off the record (Readfearn, 2015). The mining industry engages in a high level of government lobbying and enjoys a close relationship with the Australian Government. There is a revolving door whereby individuals move between positions in the resource industry and public office. This close exchange may compromise the independence of government decision-making and increase the influence of energy and mining interests (Aulby & Ogge, 2016; Hodder, 2009; Readfearn, 2015).

The conduct of Adani mirrors the approach of many large resource companies that have aimed to influence Australian politics. Adani has employed multiple lobbying strategies, including monetary donations, personal gifts, private meetings and the strategic hiring of several former government executives of Queensland (Aulby & Ogge, 2016; Cox, 2015b; Readfearn, 2015). Adani has received widespread criticism by countless interest groups locally and Australia-wide. Despite sustained opposition to the Carmichael Project and the refusal of Australian-owned banks to finance the project, the Queensland Government has continued to tender approvals (Bell-James, 2015; Haxton, 2015; Milman, 2015; Tlozek, 2015). This raises the question as to whether the

decision to issue controversial grants and approvals are made independently and with equal consideration of other interest groups that do not enjoy the same access to government as the energy and mining industry.

Australia produces a wide range of energy sources, including oil, coal, aluminum and iron ore. The nation strongly relies on coal as a source of electricity and export (Baer, 2014; Healey, 2012). Australia's domestic use of coal to generate electricity ranks it fifth in the world. Coal generates 85 per cent of grid-connected electricity across the nation, and prior to 2011 Australia was the world's largest coal exporter (Hodder, 2009; Baer, 2014; Crowley, 2013). Australia currently provides 30 per cent of coal exports around the globe. While Australia's global reputation as an energy and mining powerhouse situates it among the world's resource heavyweights such as China, the United States and India, mineral resources in Australia seldom belong to local mining industries and instead rest in the hands of a few majority foreign-owned transnational corporations (Goodman & Worth, 2008). These large energy and mining companies enjoy a close relationship with the Australian Government and have the economic power to devote millions towards lobbying for their interests.

Energy and mining companies lobby the government either directly or through lobbying firms. Lobbying can include contributions to political parties, gifts, private meetings or media engagement (Baer, 2014; Hodder, 2009). It is a legal requirement that certain lobbying practices are recorded on a formal public register. However, many operate outside this requirement and remain undisclosed to the public. Australian law does not require political donations under \$12,100 to be formally registered and this highlights a lack of transparency in the system (Readfearn, 2015). Lobbying conducted in secrecy is a common and concerning practice that increases the opportunity for misconduct and institutional corruption. Transparency of governance is reduced and accountability diminishes when lobbying activities are not formally recorded. There is an entrusted expectation that government officials will make decisions independent of influence and in the interests of the public.

Liberal democratic governance is based on transparency and accountability. Fukuyama (2015) states that democratic accountability "seeks to ensure that government acts in the interests of the whole community, rather than simply



in the self-interest of the rulers” (p. 12). When the government’s actions seek to benefit the whole community, the public interest is prioritised and the moral legitimacy of the democratic system is upheld (Beresford, 2010). However, when the government makes decisions in favour of other interest groups rather than the public interest, its moral legitimacy becomes compromised. Institutional corruption can manifest when the government is less accountable to the public. Government accountability is maintained through transparency and when a democracy lacks transparency, it becomes vulnerable to institutional corruption. A high level of public disclosure ensures that government officials remain accountable and decisions are made with the public interest at heart (Beresford, 2010). Australia’s weak lobbying laws reduce transparency and increase the risk of institutional corruption. The power of the carbon lobby unveils, to some extent, the uneven influence energy and mining companies have over government decisions and party policies.

Perhaps the most straightforward form of lobbying is monetary donations to political parties. Political donations on the surface appear to be a one-way flow of funds from a donor to a recipient, in good faith and impartial of vested interests. However, political donations are more realistically viewed as single or multiple transactions by which the donor gives and then gains something in return. Political donations are often made to gain some degree of political advantage (Hodder, 2009). Energy and mining companies donate with the expectation that political parties will favour their developments and expedite approvals. Large and sustained political donations are a concerning practice, as it introduces bias into the decision-making process (Aulby & Ogge, 2016). In some cases, it can be observed that political donations correspond with favourable decisions for the donors.

Political donations in Australia are legal and commonplace (Hodder, 2009). Mining and energy companies have made sizable donations to both sides of politics. Since the 1980s, the Liberal and Labor parties have received millions in corporate donations (Baer, 2014; McKnight & Hobbs, 2013). Mining companies have made donations directly and indirectly through industry lobby groups and associations. The Australian Coal Association (ACA) represents coal mining interests in Queensland and New South Wales and has made large donations to both major political parties since the 1990s (Baer,

2014; Hodder, 2009). Other industry lobby groups such as the Australian Industry Greenhouse Network (AIGN), a cross-industry group representing several major energy and mining corporations, has donated millions to the Liberal Party and Australian Labor Party (ALP) since 1998 (Baer, 2014; Hodder, 2009). The mining industry is a wealthy conglomerate of transnational corporations and lobbyists that can afford to donate millions to increase the likelihood that policy leans in their favour.

There have been two reports released that examine the Queensland Government's lack of transparency and disclosure of lobbying activities. Readfearn's (2015) report on the political influence of coal and gas lobbyists in Queensland uncovered a string of generous donations to the Liberal National Party (LNP). In 2007, when the government rejected the Australian energy company New Hope's proposal to expand its Darling Downs coal mine, the company donated \$950,000 to the Federal Liberal Party between 2008 and 2011. In 2014, New Hope's expansion was approved under the LNP Newman Government (Aulby & Ogge, 2016; Readfearn, 2015). This example illustrates how large donations to political parties can influence key decision-makers in government and, in turn, effectuate corporate objectives.

Aulby and Ogge's (2016) report examines the legislative outcomes in specific cases where the Queensland Government has been exposed to multiple lobbying tactics. The findings of the report observe a significant disparity between mining related donations to the Federal ALP and the Federal Liberal Party. Between 2011 and 2015, the Labor Party accepted approximately \$1.2 million whereas the Liberal Party accepted nearly \$3 million. During this time, there were six controversial mining developments pending approval in Newman-led Queensland. The LNP Newman Government received over \$1 million from the mining industry over the same period (Aulby & Ogge, 2016). Corresponding with their generous donations to the LNP and Federal Liberal Party, the mining companies seeking approvals in Queensland received desirable legislative outcomes under the LNP (Aulby & Ogge, 2016). It is clear that political parties routinely receive large donations from the mining sector and such contributions can compromise independent and unbiased decision-making.

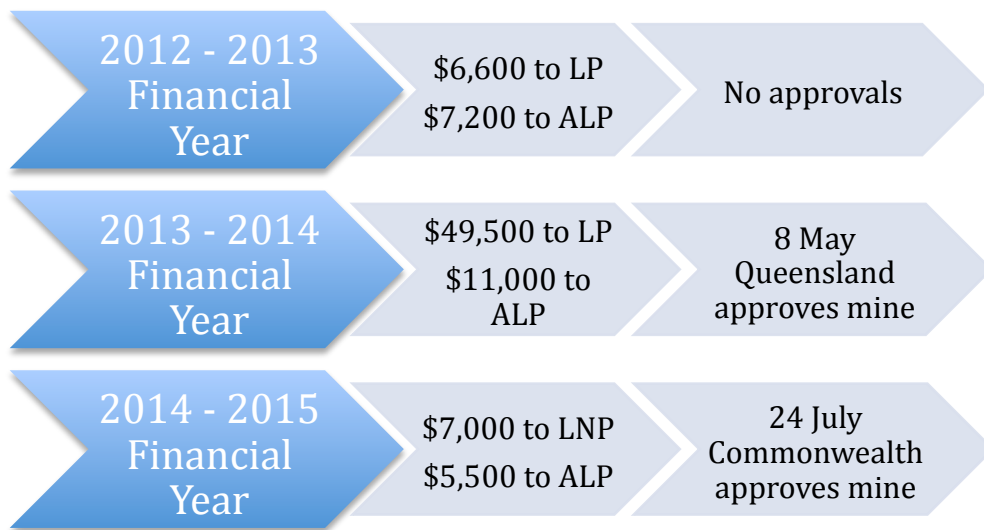
Evidence of the link between political donations and government decisions casts doubts upon the level of institutional corruption at work in Australian politics. While sizable donations from a multiplicity of corporations in the mining industry have flowed into the pockets of political parties for years, governments have acted favourably in return. The Australian Government has given energy and mining companies large subsidies for their developments and expansion (Baer, 2014). Government expenditure on subsidies for the mining sector is an expensive investment. The Queensland Government spent \$9 billion on mining projects between 2009 and 2014 (Aulby & Ogge, 2016).

Energy and mining companies enjoy a privileged level of access to government (Aulby & Ogge, 2016; Hodder, 2009; Readfearn, 2015). Industry leaders can pay for access to events where politicians are present (Readfearn, 2015). In Queensland, both the LNP and Labor have established subscription-based schemes where corporations 'buy-in' to attend exclusive events with key politicians. Labor's Queensland Progressive Business Network (QPBN) scheme charged corporations \$10,000 a year for a subscription to events. The LNP's QForum scheme promised corporations such as Hancock Coal, Caltex and Peabody Energy one-on-one access to ministers (Aulby & Ogge, 2016; Readfearn, 2015).

These 'cash for access' schemes have been kept highly secretive and are not inclusive of other interest groups such as those with environmental or agricultural concerns (Readfearn, 2015). The establishment of QPBN and QForum encourages a direct engagement with government that can go unrecorded. These fundraising forums allow the lobbying of key policymakers to be conducted behind closed doors, without disclosure to the public. As Hodder (2009) asserts, "Although legal, these activities are generally hidden because broad exposure would reveal the disproportionate access and influence that certain powerful actors within the system enjoy" (p. 58). Judging the independence of government decision-making becomes problematic when direct access is attainable for some wealthy interest groups and not others. While the red carpet is rolled out for the heads of energy and mining companies to 'rub shoulders' with key decision-makers, many other groups do not enjoy the same level of access to government (Hodder, 2009).

There is a revolving door between the resource sector and the public office of government (Aulby & Ogge, 2016; Readfearn, 2015). In many cases, former Queensland politicians and their staff have left government to work as lobbyists for energy and mining firms and then returned to politics months or years later. The opposite has also occurred where lobbyists for the resource sector have obtained influential positions in public office and then returned to the lobby world. The unrestrained movement of staff between the public office and the resource sector raises a considerable conflict of interest (Aulby & Ogge, 2016; Readfearn, 2015). It is concerning when politicians tasked with regulating development are found to have held prominent positions in the energy and mining industry. This conflict of interest may lead to the preferential treatment and prioritisation of certain development projects and less consideration given to other stakeholders in the community.

**Adani and Australian politics**



LP: Liberal Party, ALP: Australian Labor Party, LNP: Liberal National Party

**Figure 1.1 Adani's contributions to political parties**

Consistent with the experiences of numerous energy and mining companies, Adani has enjoyed direct access to Australian politicians, ministers and bureaucrats. Adani has actively lobbied the Commonwealth and Queensland Government through political contributions, gifts to ministers, private meetings and the strategic hiring of influential former government executives (Aulby & Ogge, 2016; Cox, 2015b; Readfearn, 2015). When compared with the lobbying activities of other multinational corporations that have a vested interest, Adani ticks all the boxes. The Carmichael Coal Mine has made its way through Australia’s approval process, whereby the State and Federal Government has approved and re-approved mining leases for the project (Bell-James, 2015). While it is difficult to determine whether a link exists between the lobbying activities of Adani and the tender of approvals, it is evident that the company wields a disproportionate influence and access to government compared to many other interest groups.

The Electoral Commission of Queensland (ECQ) revealed Adani’s contributions to both sides of politics over the past five years. Contributions on the ECQ’s record are listed for each financial year. In the 2012-2013 financial year Adani paid \$7,200 to the ALP for attendance at the 2013 Budget Dinner and Post-Budget Lunch (ECQ, 2013). In the same period, the Federal Liberal Party received \$6,600 for attendance at a business advisory lunch (Australian Electoral Commission [AEC], 2013). Contributions increase

significantly in the following financial year. Between 2013-2014 Adani paid \$49,500 to the Federal Liberal Party and \$11,000 to the ALP (AEC, 2014). In the financial year 2014-2015, Adani contributed \$7,000 to the LNP and \$5,500 to the ALP. The ECQ did not specify a reason for the contributions made by Adani from July 2013 to June 2015 (ECQ, 2015).

Adani operates its lobbying through Queensland-based firm Next Level Strategic Services (NLSS). NLSS has made contributions to the LNP in excess of \$52,000 since 2013 (ECQ, 2013a, 2014, 2015a, 2015b, 2016, 2016a). While Adani is one of 10 clients managed by NLSS (Australian Government, 2017), the contributions these firms make to political parties promote the interests of the companies they represent.

Based on the premise that political contributions are made to encourage desirable outcomes for the donor, the approvals issued by the Commonwealth and Queensland Government for the Carmichael Coal Mine in May and July of 2014 coincide with Adani's contributions of over \$60,000 to the Federal Liberal Party and ALP. These two approvals were tendered under the Newman and Abbott governments. In comparison to the contributions made to the ALP, the Liberal Party received considerably larger contributions prior to its endorsement of the Carmichael Project. In August 2013, the Deputy Premier Jeff Seeney and his chief of staff both received gifts from Adani jointly valued at over \$1,000 (Aulby & Ogge, 2016; Queensland Government, 2013). While Adani's contributions to both federal and state divisions of political parties significantly diminished following the 2013-2014 financial year, company executives continued to meet regularly with ministers.

Adani has sustained countless private meetings with the heads of government in Queensland. Between 2013 and 2014 Adani had 12 private meetings with ministers of the Newman Government, including six meetings with the Deputy Premier (Aulby & Ogge, 2016). Since the defeat of the Newman Government in 2015, Adani has obtained 21 private meetings with the Palaszczuk Ministry and the Opposition (Queensland Integrity Commissioner [QIC], 2016). Adani has met with policy advisors to the Queensland Premier Anastasia Palaszczuk on eight occasions and twice with the Premier. Policy advisors and the chief of staff to the Minister for State Development, Natural Resources and Mines, Anthony Lynham, have had five meetings with Adani, one meeting including

the Minister. Other private meetings involved the Deputy Premier Jackie Trad, the Leader of the Opposition Tim Nicholls, several Members of Parliament and the Mayor of Townsville (Aulby & Ogge, 2016; QIC, 2016). Adani has sustained direct access to both sides of politics in Queensland.

Adani has pursued a range of internal lobbying tactics, strategically employing former government executives with knowledge relevant to the oversight of developments. There are a number of staffers working for Adani that have strong connections to the major political parties in Queensland (Cox, 2015b). The former Deputy Premier's chief of staff David Moore and former Leader of the Opposition's chief of staff Cameron Milner jointly own the lobbying firm NLSS (Cox, 2015b; Rose, 2015; Readfearn, 2015). NLSS has facilitated private meetings between Adani and the government (QIC, 2016).

Lobbyists David Moore and Cameron Milner have held a number of influential roles in public office. Moore has left and returned to government several times. After serving as John Howard's chief of staff for 10 years, Moore left public office to start a lobbying firm. He then left the private sector for a 12-month period to work as Campbell Newman's chief of staff in 2011 (NLSS, 2013). Milner entered the private sector after working as the ALP state secretary in Queensland. He left his position as co-director at NLSS in 2015 to serve as Bill Shorten's chief of staff. After 10 months, Milner returned to the lobby world (Maiden, 2016; NLSS, 2013). Moore and Milner's movements between private enterprise and public office reflect the revolving door between government and the resource sector.

Adani has a long track record of non-compliance with environmental laws overseas. This has failed to deter or delay the Australian Government's approvals for the Carmichael Coal Mine (Earth Justice & Environmental Justice Australia, 2015; Reside, Mappin, Watson, Chapman & Kearney, 2016). The potential environmental impacts of the development will put at risk 69,000 full-time jobs dependent on the Great Barrier Reef (Blain, 2016; Moore, 2015; Robertson, 2015a). When compared to an estimated 1,500 full-time jobs generated to operate the Carmichael Coal Mine (Branco, 2015a; Campbell, 2015), the prospect of endangering a world heritage listed site and major tourism hub for Australia seems an unnecessary and high-risk endeavour. Moreover, the construction of the world's second largest coal mine is at odds

with the global awareness of climate change and the consequences of high carbon emission developments (Bell-James, 2015; Blain, 2016; Reside, Mappin, Watson, Chapman & Kearney, 2016).

Despite a number of serious allegations against Adani's mining operations overseas, the Australian Government has continued to support the project and advance its approval. Adani currently faces numerous allegations of financial crime and corruption involving fraud, money laundering, and bribery (Aulby & Ogge, 2016; Long, 2016; Robertson, 2016a). The company has struggled to secure investment, as Australian and international banks have been reluctant to provide funding. There have already been 11 international banks that have refused to invest in the Carmichael Project (Haxton, 2015; Milman, 2015; Tlozek, 2015).

In August 2015, the Australian Commonwealth Bank suspended its role as Adani's financial advisor. This is a significant move that suggests the Commonwealth Bank views the development as commercially unviable (Tlozek, 2015). The Queensland Treasury has raised similar concerns and has deemed the project 'unbankable'. The Treasury has highlighted the company's large debts and this has cast doubts on its financial capacity to deliver the proposed project (Cox, 2015).

Energy and financial analysts have labelled the Carmichael Coal Mine development a risky investment due to Adani's record of debt, the accusations of financial crime and India's plan to discontinue coal imports (Briggs, 2016; Robertson & Safi, 2016). The Indian Government has declared it intends to phase out coal imports. This is a significant policy shift that the Australian Government must take into consideration. Analysts have predicted that the Carmichael Project will become a 'stranded asset' if India continues to turn to alternatives sources of energy (Milman, 2015; Long, 2016). The success of the proposed development in the Galilee Basin is dependent on India's coal reliance. The prominence of coal as a key energy source for electricity in India is becoming an increasingly unlikely prospect.

Adani's history of non-compliance with environmental laws doubled with numerous allegations of financial crime greatly challenges its suitability to operate in Australia. However, at every stage the Australian Government has continued to issue approvals for the Carmichael Coal Mine. It appears the only



setback to the project is the actions of concerned interest groups that have held the government and Adani to account (Wellington, 2016). The Federal and State Government's undue support for Adani at each phase of the approval process, despite evidence that suggests the project is both a financially and environmentally risky investment for Australia, raises the concern that the actions of government are not independent of influence.

The Australian Government appears to have ignored all the warning signs and has unequivocally handed Adani its approvals. In consideration of the consistent lobbying efforts of the mining giant and its direct access to key policymakers, it is possible that Adani and the coal lobby have exercised a disproportionate level of influence in Australian politics. The result has conceived a series of decision outcomes in favour of the second largest coal development in the world.

## Chapter 3

### The First Phase of Negotiations

Since the Wangan and Jagalingou people received the first notification of the Carmichael Project in late 2011, negotiations took a prolonged and controversial course. The task of reaching an agreement involved significant state intervention. Within a five-year period, between 2012 and 2016, the Wangan and Jagalingou people rejected three Indigenous Land Use Agreements (ILUA) put forward by Adani (Borschmann, 2015; Davidson, 2017; Robertson, 2016b). Adani approached the National Native Title Tribunal (NNTT) on two occasions and both times the NNTT delivered a ruling in favour of the mining leases.

Before the ILUA was signed in April 2016, there were two periods of negotiations that failed to produce an agreement. The first between May 2011 and December 2012 concerned the mining lease (ML) 70441 (*Adani Mining v. Jessie Diver & Others*, 2013). The second between October 2013 and October 2014 concerned two additional mining leases, ML 70505 and ML 70506 (*Adani Mining v. Adrian Burragubba & Others*, 2015). Negotiations on both counts were unable to secure an ILUA between Adani and the Wangan and Jagalingou people. The collapse of negotiations prompted Adani to pass the matter to the NNTT twice, a move that delivered desirable outcomes for the mining giant and effectively sidelined the concerns of the Indigenous group.

The Native Title Act (NTA) has established a two-pronged system that consists of claims and future acts. Indigenous groups make claims that are either determined, pending determination (as registered or unregistered claims), or rejected. The Wangan and Jagalingou people have a registered claim that is pending determination (NNTT, 2004). The future act system operates separately from claims and concerns any proposed activity that may infringe native title rights and interests (NNTT, 2017a). Future acts include activities such as infrastructure, mineral exploration, pastoral leases or mining projects (QSNTS, 2017; NNTT, 2009; NTSCORP, 2017).

Registered claimants are entitled to a number of procedural rights in relation to future acts. Procedural rights range from the right to lodge an objection to the right to negotiate compensation or conditions attached to a future act

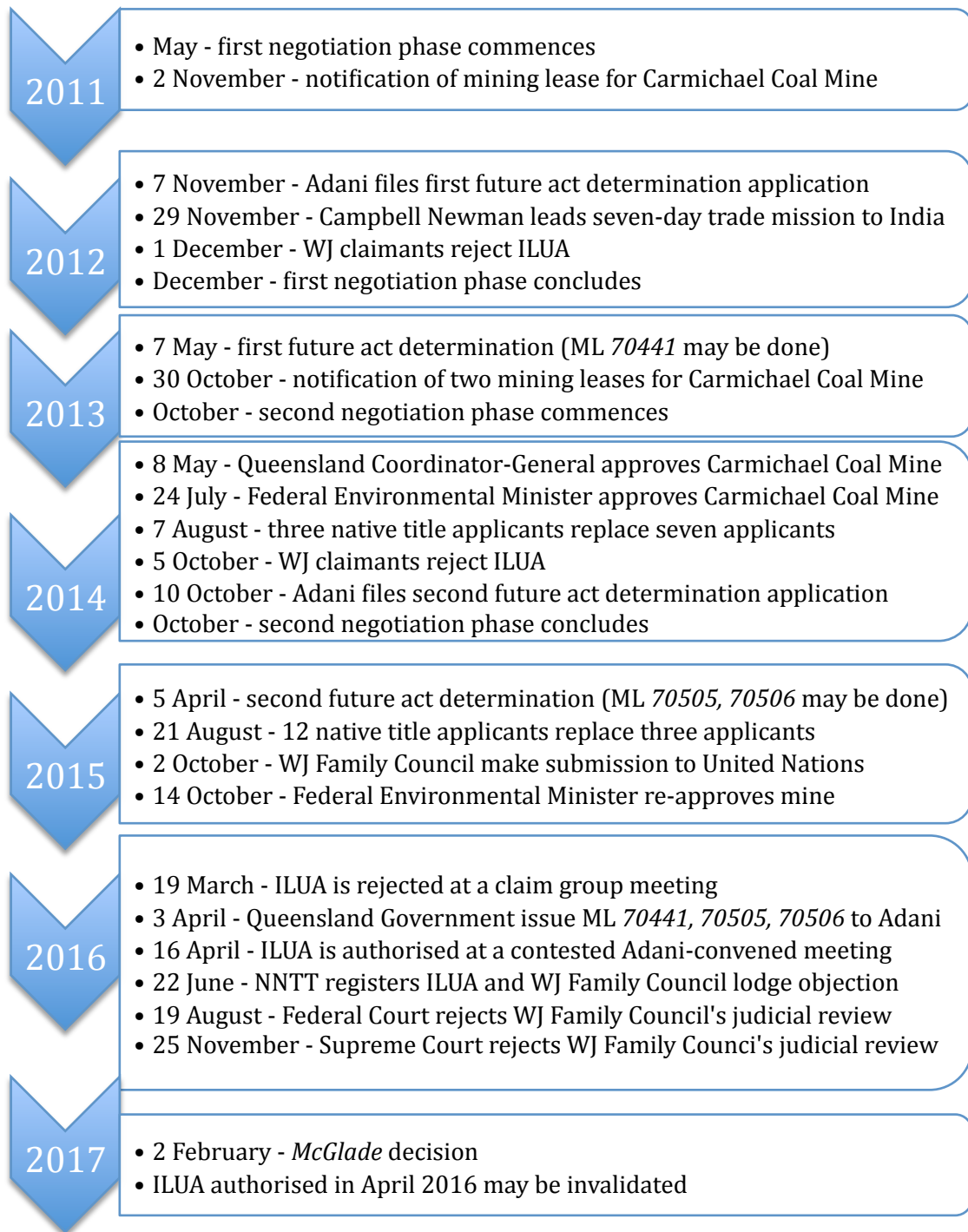
(QSNTS, 2017; NNTT, 2009; NTSCORP, 2017). The level of procedural rights granted depends on the size and impact of the future act and its proximity to the claim area. As mining developments can lead to the extinguishment of native title, the NTA mandates that the mining interest negotiates a land use agreement with the registered claimants. Where resource companies seek to have mining leases granted for new projects near or within a registered claim area, the right to negotiate (RTN) ensues (NNTT, 2016, 2017c; NTSCORP, 2017).

The Wangan and Jagalingou people have been granted the RTN as the proposed Carmichael Coal Mine resides entirely inside their registered claim area. Negotiations are conducted independently between the native title applicant and the mining interest (QSNTS, 2017). When a native title application is made, the claimants appoint one or more persons, referred to as the 'applicant', to represent the interests of the group as a whole. The claim group appoint applicants through a traditional decision-making process or an appropriate alternative method of their choice. The applicants speak on behalf of the claim group and make decisions in relation to the claim (Duff, 2017; NNTT, 2008, 2009; NTSCORP, 2012).

The Wangan and Jagalingou claimants, who constitute 400 to 500 people, have appointed applicants on three occasions (Burragubba & Johnson, 2015; de Tarczyński, 2016; Jishnu, 2015). These applicants have dealt directly with Adani in the course of negotiations. The NTA requires negotiations to be conducted for a minimum of six months before parties can request the State to arbitrate the matter. However, negotiations can extend for any length of time provided that all parties continue in good faith of reaching an agreement (NNTT, 2008a, 2016; NTSCORP, 2017). Negotiations in both cases have exceeded the six-month minimum and Adani has requested that the State intervene.

This chapter will involve extensive analysis of the NNTT's future act determination *Adani Mining v. Jessie Diver & Others* (2013) to examine the first phase of negotiations. This primary source contains a detailed chronology of correspondence between Adani and the Wangan and Jagalingou applicants from May 2011 to December 2012. It is a significant legal document that exceeds 100 pages and recounts the series of disputes that led to the collapse

of negotiations. While this document provides excerpts of correspondence, such as emails, letters and affidavits, full submissions made to the NNTT are not publicly available. The author contacted the NNTT and requested the full release of submissions to strengthen this analysis. However, none were made available. While the document is still critical for this study, as it provides a comprehensive account of negotiations, the denial of access limits the transparency of the process. During the first phase of negotiations there was minimal media coverage or commentary to support the findings of the NNTT's determination. The conclusions made in this chapter have been formed through in depth analysis of the available evidence in *Adani Mining v. Jessie Diver & Others* (2013).



**Figure 2.2 Adani Carmichael Coal Mine development timeline**

## Negotiation Breakdown

The first phase of negotiations between Adani and the Wangan and Jagalingou people failed to produce an agreement. Based on the available evidence, it appears that the native title applicants had negotiated in good faith of reaching an agreement (*Adani Mining v. Jessie Diver & Others*, 2013). The applicants did not abandon or disengage from negotiations at any stage, but continued to work towards an ILUA that would create long-term benefits for the Wangan and Jagalingou community. The failure to settle a deal with Adani can be attributed to a variety of factors. The Wangan and Jagalingou applicants and Adani had misaligned expectations in relation to the status and schedule of negotiations. As a result, Adani sought authorisation from a third party to meet its deadline and this was perceived as an attempt to undermine the authority of the applicants. The applicants were ultimately dissatisfied with the deal on offer, as the terms of agreement were not sensitive to key Indigenous interests (*Adani Mining v. Jessie Diver & Others*, 2013).

## Unaligned Expectations

The first phase of negotiations began in May 2011, prior to the official notification date for the Carmichael Coal Mine in November 2011. Negotiations were conducted between Adani and the Wangan and Jagalingou applicants for 24 months, ending in December 2012. While it appears that negotiations remained on-track for the majority of this period, the applicants submitted a number of contentions to the NNTT in relation to their engagement with Adani (*Adani Mining v. Jessie Diver & Others*, 2013).

Adani's delayed response to the applicants' initial position paper was raised as a concern. The response letter received after a seven-month delay included an increased geographical scope of consent, an expansion the applicants would have to consider at length (*Adani Mining v. Jessie Diver & Others*, 2013). While the applicants' position paper had been based on the surrender of 2,700 hectares of native title, this area had expanded to 5,060 hectares in Adani's response letter. The company had also set the deadline to conclude negotiations in early October 2012, expecting the applicants to revise their position in less than three months and consent to the deal on offer. While the

applicants accepted the expanded surrender of their native title rights in the revised proposal, they felt under pressure to consent to the agreement within Adani's devised timeframe (*Adani Mining v. Jessie Diver & Others*, 2013).

While the applicants had aimed to meet the agreement schedule, "they did not agree to be committed to the grantee party's timeframes" (*Adani Mining v. Jessie Diver & Others*, 2013, p. 30), nor did they "give an unqualified assurance that they would [meet the grantee party's requirements]" (p. 37). At a meeting in late September 2012, the applicants' felt that the close deadline was 'forcing their hand' and Adani had 'pushed hard' to have the ILUA signed (*Adani Mining v. Jessie Diver & Others*, 2013).

Earlier in September 2012, a month before Adani expected the agreement to be authorised, the applicants changed legal representation (*Adani Mining v. Jessie Diver & Others*, 2013). This decision highlighted the applicants' concern for their interests, as the change occurred when Adani had expanded the scope of consents. Some of the applicants expressed dissatisfaction with the direction that negotiations were travelling in under the guidance of the former legal advisors (*Adani Mining v. Jessie Diver & Others*, 2013). The change also demonstrated the applicants' intention to continue negotiations and develop a stronger agreement. However, it was unlikely that a better deal could be negotiated in time to meet Adani's deadline.

Adani's realisation that the applicants wished to prolong negotiations in order to settle an improved ILUA created a rift between the two parties. Adani's conduct became rigid and unwilling to consider additional terms of agreement. In a letter and teleconference, the applicants' legal representative Chalk & Fitzgerald proposed a life of mine services contract be included in the agreement (*Adani Mining v. Jessie Diver & Others*, 2013). A life of mine services contract would involve the partnership of Transfield Services and the Wangan and Jagalingou community to provide the service and maintenance of the Carmichael Project camps. The contract would provide long-term benefits for the community, generating employment opportunities and business ownership. If the services contract were included, the Wangan and Jagalingou people were willing to accept the settlement deal. However, Adani contended that it would not include a life of mine services contract in the ILUA and

viewed the proposal as an attempt to reset the path of negotiations (*Adani Mining v. Jessie Diver & Others*, 2013).

While Adani was adamant that the applicants were committed to the agreement schedule and would sign the ILUA in October 2012, it appears both parties' perception of the stage reached in negotiations had become increasingly unaligned. The applicants were unwilling to give their consent to the existing terms of agreement in Adani's best settlement offer (*Adani Mining v. Jessie Diver & Others*, 2013). As they were dissatisfied with the direction of negotiations, the applicants changed legal representatives with the hope that it would assist them to negotiate a stronger agreement. When Adani's agreement schedule started to elapse, the applicants attempted to negotiate a better deal for the Wangan and Jagalingou community through the inclusion of a life of mine services contract (*Adani Mining v. Jessie Diver & Others*, 2013). However, their efforts were unsuccessful as Adani was unwilling to accommodate the contract or extend negotiations. The solution for Adani was simple, to approach the State for its mining grants and avoid further delay.

### **Undermining Authority**

When the likelihood of having an agreement signed in October 2012 began to diminish, Adani sought authorisation from a Wangan and Jagalingou affiliate that had no previous involvement in negotiations. This occurred at the end of 2012, after Adani had filed a future act determination for its mining lease but the case was still awaiting submissions by all parties.

In December 2012, Adani attempted to sideline the authority of the applicants and seek authorisation from the Wangan and Jagalingou Traditional Owners Aboriginal Corporation (WJ Corporation). The WJ Corporation is a representative body with a board of Wangan and Jagalingou family representatives (*Adani Mining v. Jessie Diver & Others*, 2013). While its membership is comprised of many Wangan and Jagalingou claimants, it also represents people who are not claimants. Patrick Malone told the NNTT that the membership of the WJ Corporation included 'large numbers' of people who were not descendants of the 12 families that constitute the claim group (*Adani Mining v. Jessie Diver & Others*, 2013).



The function of the WJ Corporation is seldom mentioned in the available evidence, so it is difficult to distinguish the difference between the WJ Corporation and the Wangan and Jagalingou Family Council (WJ Family Council). The role of the WJ Family Council will be discussed in the following chapter. According to the affidavits of the native title applicants in *Adani Mining v. Jessie Diver & Others* (2013), the WJ Corporation shared different views to the applicants and cannot be considered fully representative of the claim group.

Following Chalk & Fitzgerald's proposal for a life of mine services contract, Adani made a final effort to have its proposed ILUA signed. In November 2012, Adani effectively sidestepped the applicants and began correspondence with the WJ Corporation and their legal representatives Just Us Lawyers (*Adani Mining v. Jessie Diver & Others*, 2013). Adani convened a meeting in collaboration with the WJ Corporation on 1 December 2012 in an attempt to have the agreement authorised by the Wangan and Jagalingou people. While the NNTT deemed this approach as 'opportunistic', the applicants felt Adani's conduct undermined their authority and exacerbated divisions within the Wangan and Jagalingou community (*Adani Mining v. Jessie Diver & Others*, 2013). It was also stated that the WJ Corporation represented people who were not registered claimants and some members were seeking to unseat the applicants. These concerns were expressed in several letters to Adani sent in mid-November 2012. Despite this, the authorisation meeting was not cancelled and a resolution was passed on the day. However, the resolution rejected the ILUA on offer and recommended additional terms to be included in the agreement (*Adani Mining v. Jessie Diver & Others*, 2013).

Adani continued to communicate directly with the WJ Corporation while it was aware of a dispute between the applicants and the WJ Corporation board members. The applicants are entrusted with the responsibility to represent the interests of the claim group during negotiations (Duff, 2017; NNTT, 2017). While Adani's actions were not considered illegal, its decision to suspend negotiations with the applicants and seek authorisation from a group it deemed as equally representative of the claim group undermined the role of the applicants (*Adani Mining v. Jessie Diver & Others*, 2013).

While some registered claimants would have attended the 1 December 2012 meeting, and the applicant Patrick Malone moved the motion to adopt the resolution on the day, the conduct of Adani highlights its unwillingness to compromise on its final settlement deal (*Adani Mining v. Jessie Diver & Others*, 2013). Adani placed the applicants in a challenging position, whereby an unauthorised representative body was delegated influence during a pivotal stage of negotiations. This occurred without the support of the applicants. It appears that Adani's decision to give power to a third party was done with the intention that the meeting attendees would settle for the ILUA on offer.

### **An Unsatisfactory Agreement**

Both Adani and the Wangan and Jagalingou applicants present a number of conflicting claims about the circumstances that led to the collapse of negotiations. It is unclear whether disagreements can be ascribed to miscommunication or deliberate misinformation. However, what becomes clear is that the applicants were not satisfied with the terms of agreement. The applicants stated in a letter to Adani that without a life of mine services contract the compensation aspect of the ILUA would be "wholly deficient" (*Adani Mining v. Jessie Diver & Others*, 2013, p. 89). In a letter sent in mid-October to Adani, the applicants contended that, "the compensation put forward in Adani's offer of 24 September 2012 for a mine of this scale and impact would otherwise be seriously inadequate" (*Adani Mining v. Jessie Diver & Others*, 2013, p. 73). The life of mine services contract was proposed in the letter and indicated that with the contract ensured, the ILUA would be acceptable. However, Adani was unwilling to negotiate a services contract with the applicants and sought authorisation elsewhere before turning to the State for approval.

In the process of negotiating agreements with government and developers, Indigenous communities wish to attain a 'better life' in both an economic and cultural sense (O'Faircheallaigh, 2006). Some future acts can produce short- and long-term opportunities for locals and some Indigenous people strongly support mining developments (Behrendt & Strelein, 2001; O'Faircheallaigh, 2006). However, the cumulative effects caused by mining can be damaging to land and culture. Many native title groups attempt to strike a balance between

the material and cultural benefits of development projects. While financial gain may be beneficial for under-resourced communities, it may not be the goal that agreements are signed at the detriment of connection to country and culture (O’Faircheallaigh, 2006). The terms of agreement must therefore contain adequate benefits to justify the impact of developments on traditional land.

In this case, the applicants were dissatisfied with the ILUA put forward and required more time to negotiate a stronger agreement. However, they were unable to strike a deal they felt compensated for the surrender of native title. Adani, unwilling to extend their timeframe, opted to have the State grant their mining lease without Indigenous consent.

### **An Emerging Pattern**

The first phase of negotiations reflect the complexities observed in similar case studies. The Carmichael Coal Mine is a large-scale development that has placed Australia’s native title system under scrutiny and tested its capacity to protect Indigenous rights and interests. Large resource projects often become problematic when they encounter native title for a number of reasons.

When the Wangan and Jagalingou people refused to sign a deal with Adani, the company ensured that the failure to obtain consent did not cause further delay and approached the NNTT. The involvement of the State had desirable outcomes for Adani. As its schedule began to elapse, Adani threatened to arbitrate the matter if the agreement was not signed. In a letter to the applicants a few days before the deadline, Adani indicated it would file a future act determination application with the NNTT if the applicants’ change of lawyers were to delay its schedule. The letter exchanged between the legal representatives of Adani and the Wangan and Jagalingou applicants stated, “If the ILUA were to be authorised on 1 December 2012, the grantee party would consider discontinuing its future act determination application” (*Adani Mining v. Jessie Diver & Others*, 2013, p. 22). This communication put the applicants under pressure to accept the agreement or have the State Government compulsorily acquire their land. The literature has observed that the State consistently rules in favour of mining interests (O’Faircheallaigh, 2006; Ritter,

2009; Scambary, 2013). This is reflected in the NNTT's decision to approve the Carmichael Coal Mine when Adani sought a future act determination.

The Federal Government has increasingly tasked developers with the role of funding negotiations (Burnside, 2008; O'Faircheallaigh, 2006; Scambary, 2013; Ritter, 2009). This presents a conflict of interest for resource companies, as it reduces the impartiality of the future act process and can undermine the bargaining position of Indigenous groups (Scambary, 2013; Ritter, 2009). The heads of development projects control the funds distributed in the course of negotiations and can refuse to provide certain advisors or even choose to suspend funding. The role can be used strategically to pressure Indigenous groups into accepting weak agreements (O'Faircheallaigh, 2006; Scambary, 2013).

Adani met the costs of negotiations with the Wangan and Jagalingou people. Funding primarily included travel costs for meetings and paid legal advice (*Adani Mining v. Jessie Diver & Others*, 2013; *Adani Mining v. Adrian Burragubba & Others*, 2015). In the first phase of negotiations, Adani threatened to deny the applicants funding for new legal advisors. Adani expressed discontent over the applicants' decision to change lawyers in September 2012 and stated that it was "unlikely to agree to extra costs of funding legal representation" (*Adani Mining v. Jessie Diver & Others*, 2013, p. 55). The company subsequently agreed to fund meetings between the applicants and their new lawyers on the condition that an agreement would be reached by the devised deadline. This reflects the conduct of developers observed in the literature, whereby control over funds leads to the tendency to set conditions and withhold funding if an Indigenous group seeks to extend or alter negotiations (O'Faircheallaigh, 2006; Scambary, 2013)

While Adani denied that it exacerbated divisions by involving the WJ Corporation in negotiations, the applicants remained adamant that it would perpetuate conflict within the Wangan and Jagalingou community (*Adani Mining v. Jessie Diver & Others*, 2013). Adani's collaboration with a separate representative body effectively took power and authority away from the individuals voted in to speak on behalf on the claim group. While the company acknowledged its awareness of division in the community, it still acted to further its own interests.

It is clear from the first phase of negotiations that while Indigenous rights exist, they can be undermined when required to compete with the power of mining interests. When collective rights, such as the right to negotiate (RTN), fail to produce desirable outcomes for mining interests, the overriding powers of government are sought to remedy obstacles to development. As outlined in the theories of Kymlicka and Buchanan, the rights afforded under the NTA have fulfilled the mandate of collective rights. However, examining the tangible outcomes of these rights exposes the severe limitations of the process. Critical race theory (CRT) would postulate that the dominance of 'white' interests, which prioritise mining interests in the Australian context, undermines Indigenous land rights.

## Chapter 4

### The First Determination

Adani has sought a future act determination on two occasions. The company approached the National Native Title Tribunal (NNTT) to have its three mining leases approved, but not to arbitrate an Indigenous Land Use Agreement (ILUA). Thus, negotiations continued between Adani and the Wangan and Jagalingou applicants despite two determination outcomes that ruled in favour of the Carmichael Coal Mine. The first future act determination in May 2013 concerned one initial mining lease, and the second determination in April 2015 concerned two further mining leases. This chapter will focus on the May 2013 determination and the division within the claim group that occurred thereafter.

When the first phase of negotiations had exceeded Adani's deadline with no agreement outcome, the company filed a future act determination application with the NNTT on 7 November 2012. Seven months later, on 7 May 2013, the NNTT delivered its determination in favour of the mining lease (ML) 70441. The decision gave the State Government a green flag to approve the tenement required to commence development for the Carmichael Coal Mine. Adani and the State Government sought a ruling that the future act may be done without conditions. It appears that both parties acted in tandem, routinely echoing the same perspectives in their submissions to the NNTT. The NNTT ruled that the mining lease could be granted on the basis of public interest.

The Native Title Act (NTA) permits any party to seek arbitration if negotiations exceed six months without a settlement reached. Any party may file a future act determination application at the NNTT (NNTT, 2008a, 2016; NTSCORP, 2017). In making a future act determination, the NNTT must interpret sections of the NTA to determine whether a future act may or may not be done (O'Faircheallaigh, 2006; Ritter, 2009). The process involves three parties: the native title applicants, the State Government, and the grantee party. All parties are asked to make submissions of any contentions or evidence to the NNTT to assist its determination. If the NNTT rules in favour of the proposed future act, the government has permission to grant tenement in

the absence of an agreement reached between the grantee and the traditional owners (NNTT, 2008a).

In its May 2013 determination, the NNTT concluded that the applicants did not submit sufficient evidence to demonstrate the exercise or enjoyment of their rights and interests in the claim area (*Adani Mining v. Jessie Diver & Others*, 2013). The NNTT ruled that the applicants' submissions provided broad assertions of an impact on their rights and interests but offered no specific evidence about how these rights and interests were exercised or enjoyed. The State Government and Adani both claimed that the Carmichael Coal Mine would be unlikely to affect the native title group's enjoyment of their rights and interests. The State Government and Adani repeatedly emphasised the economic benefits of the Carmichael Project for the local community, the State of Queensland and the wider national economy (*Adani Mining v. Jessie Diver & Others*, 2013).

The applicants requested that conditions be attached to the mining lease should the NNTT determine that the future act may be done. The NNTT dismissed the recommended conditions and handed down its determination on 7 May 2013, ruling that the State Government may grant ML 70441 without conditions (*Adani Mining v. Jessie Diver & Others*, 2013).

The State Government and Adani's response has been based on their views expressed in the NNTT's determination. However, it must be appreciated that the full submissions to the NNTT are not publicly available. The evidence relies on the NNTT's interpretation of those submissions. Nevertheless, the State Government and Adani reflected similar positions, emphasising the same benefits of the project and arguing that the rights and interests of the applicants would not be affected. These views persist despite the applicants' claim that there would be a significant impact on the enjoyment of their rights and interests as a consequence of the development (*Adani Mining v. Jessie Diver & Others*, 2013).

While there was no media commentary or parliamentary debate on the outcome of the May 2013 determination, a significant event occurred at the peak of negotiations. This event demonstrated the close relations of the State Government and Adani. In late November 2012, the then Queensland Premier, Campbell Newman, led a seven-day trade mission to India to discuss

investment and exporting prospects for Queensland's industries (Hodge, 2012; Queensland Government, 2012; Readfearn, 2015). Newman highlighted that the overseas mission would, "include meetings with companies such as Adani Group, GVK and Tata Group – companies with diversified interests and investments across a range of key industry sectors" (Queensland Parliament. Record of Proceedings, November 9, 2012, p. 2955).

Newman, former Minister for Resources and Energy Martin Ferguson and a 76-person cohort of Queensland businessmen flew to the Adani-owned Mundra Port on a private Adani jet. In the evening, they attended a reception at the private estate of Gautam Adani in Ahmedabad (Hodge, 2012; Readfearn, 2015). In a report on the trade mission tabled to the Queensland Parliament, Newman reiterated his support for Adani: "I acknowledge the large investment made by the Adani Group into Queensland's resources sectors and indicated commitment to working with the Adani Group to ensure their investment in Queensland is supported" (Newman, 2013, p. 29).

During the trade mission the Queensland Government made a clear commitment to support Adani, while in the same month the company had acted to sidestep the traditional owners of the Galilee Basin. The response of the State Government and Adani before the NNTT reflect a cohesive and shared ambition to ensure the Carmichael Project proceeded. The State Government appeared unaware or unsupportive of the concerns raised by the native title group.

### **The Split in the Community**

The second phase of negotiations commenced in October 2013 and ended in October 2014. As negotiations failed to produce an agreement between Adani and the Wangan and Jagalingou people after 12 months, Adani approached the State to arbitrate the matter for a second time. In this respect, the second phase of negotiations had similar results to the first. However, during this period the Wangan and Jagalingou community became deeply divided and split into two factions. One supported the Carmichael Coal Mine if the agreement was sensitive to Indigenous interests, whereas the other was opposed to the project and any deal offered. While the native title system



disenfranchised the interests of the latter group, the former still had the capacity to strike a strong bargaining position and negotiate a mutually beneficial agreement. There is evidence to indicate that internal division contributed to the unresolved outcome of the second phase of negotiations.

This analysis largely relies on the determinations of the NNTT and its account of events and correspondence relevant to its decisions. The second half of this chapter analyses the evidence provided in *Adani Mining v. Adrian Burragubba & Others* (2015), a 46-page legal document. When the second phase of negotiations ended in October 2014, Adani filed a future act determination application with the NNTT. In this determination, the applicants chose not to make a submission. In the absence of any materials or contentions submitted to the NNTT on behalf of the native title group, it is difficult to determine the factors that led to the collapse of negotiations in this second phase. In contrast to the previous future act determination wherein the applicants detailed their experience during the first phase of negotiations, the second phase lacks the evidence to form a chronological account of what occurred. As the NNTT asserted in relation to the second phase: “Within the evidence there is minimal information about ILUA negotiations” (*Adani Mining v. Adrian Burragubba & Others*, 2015, p. 45).

While there is less evidence available to detail the second phase of negotiations, it is clear that the Wangan and Jagalingou people were dissatisfied with the terms of agreement. At a claim group meeting in October 2014, the proposed ILUA was rejected by majority vote. This marked the second agreement to be refused and Adani immediately sought arbitration to have ML 70505 and ML 70506 approved without Indigenous consent (*Adani Mining v. Adrian Burragubba & Others*, 2015).

### **A Change of Representation**

While the Wangan and Jagalingou people appeared to resemble a united bloc during the first phase negotiations, a clear division emerged in the course of the second phase. On 7 August 2014, the seven persons registered as the native title applicants for the claim group were replaced with three applicants, two of whom were existing applicants. Five applicants were not re-appointed

(*Adani Mining v. Adrian Burragubba & Others*, 2015). While Patrick Malone and Irene White had been representatives for the group since the beginning of negotiations, Adrian Burragubba was appointed as a new applicant. It appears a distinct division of opinion within the Wangan and Jagalingou people coincided with the change of representatives.

The dominant perspective of the claim group in the first phase of negotiations was a willingness to accept the Carmichael Project and surrender native title if a satisfactory agreement could be reached. However, a separate faction emerged with the appointment of Adrian Burragubba in August 2014. This 'breakaway' group was unwilling to give consent to the project regardless of the conditions, compensation or benefits included in the ILUA. Adrian Burragubba, as a new applicant and founder of the Wangan and Jagalingou Family Council (WJ Family Council), represented the views of the latter faction.

The WJ Family Council is a community group that claims to represent the interests of the Wangan and Jagalingou people (Hunjan, 2015; Yoon, 2015). It has been described as an anti-mine group that seeks to conserve and protect the land of the traditional owners in central Queensland (Ker, 2016). The WJ Family Council remains adamant that the Wangan and Jagalingou people do not want the Carmichael Coal Mine to proceed on any terms. In a media release, Adrian Burragubba stated the position of the WJ Family Council:

A pittance from compensation agreements signed under duress, and a few minimum-wage jobs in a dying industry, are not what our people, especially our young people, deserve. The crumbs thrown by Adani are not worth sacrificing our dignity, our freedom and our ancient legacy for. Nothing Adani offers up will ever be worth the damage this mine will inflict on laws and customs. (WJ Family Council, 2016d, para. 14)

In contrast to the anti-mine rhetoric of Adrian Burragubba and his cohort, the views of the other applicants, Patrick Malone and Irene White, remained consistent with the stance adopted during the first phase of negotiations. This position accepted the establishment of the mine on Wangan and Jagalingou land but aimed to negotiate terms of agreement that would return long-term intergenerational benefits to the community. Aligned with the perspective that

they were working towards an agreement with Adani, these applicants chose to withhold consent until the ILUA offered satisfactory benefits.

Patrick Malone and Irene White do not appear to be associated with any Wangan and Jagalingou organisation in particular, but instead represent the interests of the claim group independently. They are not board members of the WJ Council nor is there any evidence of their involvement at the WJ Corporation. In consideration of the dispute between the applicants and the WJ Corporation in the first phase of negotiations, it can be assumed that the applicants continue to operate independently of the WJ Corporation and any other WJ-affiliated organisations.

It is common for members of Indigenous groups to share different views on commercial development and cultural heritage. While some may consider the opportunity for local jobs and business ownership as paramount, others may consider the conservation of traditional lands and sacred sites to be more important (O’Faircheallaigh, 2007). The divide that emerged in the second phase of negotiations may reflect the different values each individual claimant has attached to economic growth and culture heritage. The faction that accepted the development of the mine was willing to surrender part of their ancestral lands in exchange for long-term economic benefits for the community. The anti-mine faction, however, considered the protection of traditional land and culture more important than any compensation offered.

The discourse of the anti-mine faction emphasised the imminent threat of the development to the culture of the Wangan and Jagalingou people. In October 2015, WJ Family Council members Adrian Burragubba and Murrawah Johnson made a submission to the United Nations Special Rapporteur on the Rights of Indigenous Peoples in a plea to have their concerns recognised. The submission described the intrinsic link between land and culture for the Wangan and Jagalingou people:

Our land and waters are our culture, and our special relationship with them tells us who we are. Our culture is inseparable from the condition of our traditional lands... The development of the Carmichael Mine would tear the heart out of our country, rendering our land unrecognisable, and devastating the places, animals, plants

and water-bodies that are so essential to us and our culture.  
(Burragebba & Johnson, 2015, p. 2)

### **A Rift Between the Applicants**

The divided opinion between the applicants became evident in their conduct before the NNTT. This occurred after the second phase of negotiations had elapsed without an outcome. In January 2015, the NNTT was informed that the applicants would not be submitting any material or contentions to support their case (*Adani Mining v. Adrian Burragebba & Others*, 2015). However, several days following the deadline for submissions, Adrian Burragebba sent an unsigned statement written on behalf of the WJ Family Council. The statement addressed concerns in relation to the impact of the Carmichael Coal Mine on the traditional land and cultural heritage of the Wangan and Jagalingou people (*Adani Mining v. Adrian Burragebba & Others*, 2015). Adrian Burragebba alleged that the applicants' views were not unanimous and that Patrick Malone and Irene White had taken a 'contrary direction' to the interests of the claim group. When the NNTT asked if his statement should be taken into account, the applicants, Adani, and the State Government all agreed that it should not be considered (*Adani Mining v. Adrian Burragebba & Others*, 2015; Kos, 2016).

Adrian Burragebba's submission to the NNTT has not been made publicly available and has been broadly summarised in its determination. The summary noted that his submission detailed the reasons the applicants could not participate in the proceedings (*Adani Mining v. Adrian Burragebba & Others*, 2015). In its determination, the NNTT did provide the full version of a second statement made by Adrian Burragebba. This second statement clarified his argument and reinforced that the Wangan and Jagalingou people do not consent to the Carmichael Coal Mine (*Adani Mining v. Adrian Burragebba & Others*, 2015).

## **A Sense of Practicality or Obligation**

While Adrian Burragubba and his supporters were dedicated to opposing the Carmichael Coal Mine regardless of the deal offered, the applicants and claimants that reflected a willingness to accommodate the project may have formed their perspective with awareness to the limitations of native title. At best, when an Indigenous group refuses to give consent, the company's social license to operate may be blemished in the eyes of investors (O'Faircheallaigh, 2011; Robertson, 2016b; Scambary, 2013). The Wangan and Jagalingou claimants who do not support the Carmichael Project on any terms are left without a legislative foothold. The State had continued to issue approvals despite the failure to obtain consent up until that point.

Patrick Malone and Irene White may have acted out of practicality, as they understand the existing legislation does not enable them to prevent the mine but that the community could attain benefits if a strong agreement was reached. In a news article, Patrick Malone stated that, "even though some [Wangan and Jagalingou] people didn't like the idea of the mine, most knew it would probably go ahead and it was best to take the opportunities for our people, to get jobs for the next generations" (McKenna, 2015). This statement acknowledged the perspective shared among claimants who recognise the limitations of the native title system and the inevitability of mining expansion.

Patrick Malone and Irene White have spoken favourably about signing an agreement with Adani on the basis that it delivers long-term intergenerational opportunities that will flow back to the Wangan and Jagalingou community (Branco, 2015a; McKenna, 2015). However, there have been several occasions where the media has reported divergent views. While Irene White has remained a proponent of the Carmichael Coal Mine, Patrick Malone has expressed a reluctance to accept the mine. The three applicants appointed in the second phase of negotiations reflected far greater inconsistency in their sentiments towards the development compared to those in the first appointment. At one end of the spectrum, Irene White remained pro-mine while Patrick Malone was initially conflicted and then accepted the inevitability of the mine. At the other end, Adrian Burragubba was strongly anti-mine. Irene White expressed her views on the Carmichael Coal Mine to *The Australian* on 3 December 2015, arguing that "The decision is about

working with Adani to create jobs, create training so that we can build a platform for our younger generation” and that the agreement would “deliver genuine and lasting intergenerational benefits to our community“ (McKenna, 2015). Patrick Malone has spoken both for and against the mine. While he has admitted that he would “prefer the mine to not go ahead”, he has also told media he had accepted that the project would be approved and he was committed to achieving the best deal for his community (Branco, 2015, para. 8).

The corporate funding of negotiations may be a factor that has caused those applicants engaged in negotiations for a longer period to feel more obligated to match the expectations of Adani. Responsible for funding negotiations, Adani has paid the travel costs of the applicants for meetings and lobbied some of the applicants through the payment of generous ‘sitting fees’. Sitting fees have been paid to a number of the applicants. On 21 August 2015, nine new applicants were appointed and Patrick Malone, Irene White and Adrian Burragubba were re-appointed (*Adani Mining v. Adrian Burragubba & Others*, 2015).

According to *The Guardian*, Adani paid seven of the 12 applicants, including Patrick Malone and Irene White, over \$10,500 collectively in excess of travel expenses to attend meetings (Robertson, 2016, 2016b; WJ Family Council, 2016). The seven applicants that received sitting fees were proponents of the Carmichael Project. The five other applicants were opposed to the development and refused to accept payments (Robertson, 2016b). For some applicants who may have had more accommodating views towards the mine, receiving payments to attend meetings may have conjured a sense of obligation. The literature strongly supports the argument that the developer’s responsibility to fund negotiations creates an uneven power dynamic that can considerably influence agreement outcomes (Burnside, 2008; O’Faircheallaigh, 2006; Scambary, 2013; Ritter, 2009).

It appears that the rise of an anti-mine faction within the claim group thwarted the outcome of negotiations in the second phase. Patrick Malone and Irene White explained to the media that Adani had improved the terms of agreement and the revised ILUA had gained widespread support. However, there was a shift following the appointment of Adrian Burragubba and

support for the offer diminished. When the group met to consider the agreement in October 2014, the growing anti-mine sentiments caused it to be voted down (McKenna, 2015). It is likely that divided opinion during the second phase of negotiations contributed to the unresolved outcome. Following the second rejection of the ILUA, Adani ended negotiations and lodged a future act determination application with the NNTT on 10 October 2014 (*Adani Mining v. Adrian Burragubba & Others*, 2015).

It is clear that the process of negotiation and the limitations of the NTA left the Indigenous community vulnerable to fracturing and division, further undermining their interests. When the right to negotiate (RTN) fails to operate as intended and traditional owners refuse to consent to a development, these rights can effectively be nullified through the right of all parties to arbitrate the matter. This chapter has examined the avenue of arbitration, whereby Adani has sought the overarching powers of the State to advance approvals in the absence of Indigenous consent. The strength of the RTN is subject to the decisions of mining interests and the State who may seek to override the interests of traditional owners. If an agreement fails to actualise, the RTN becomes a redundant right.

The outcome of this process demonstrates that the NTA does not allow traditional owners to fully assert collective rights, as conceptualised in the theories of Kymlicka and Buchanan. The weaknesses of the rights afforded by native title reflect the arguments inherent in critical race theory (CRT). CRT would argue that the apparatus of native title law has ensured that it offers almost no legislative foothold for Indigenous groups who oppose 'white' interests in resource development. Thus, the dominant interests of 'whites' will always supersede the rights and interests of native title groups.

## Chapter 5

### Back to the Tribunal

When the second phase of negotiations failed to produce an Indigenous Land Use Agreement (ILUA), Adani sought arbitration for two further mining leases. If the National Native Title Tribunal (NNTT) ruled that the future act may be done, the government would be able to grant the mining leases in the absence of an ILUA signed with the Wangan and Jagalingou people. Adani filed its second future act determination for the additional mining leases (ML) 70505 and 70506 in October 2014. The NNTT delivered its determination in favour of the Carmichael Coal Mine on 8 April 2015 (*Adani Mining v. Adrian Burragubba & Others*, 2015).

As examined in the previous chapter, the native title applicants chose not to make a submission to the NNTT for this determination with the exception of Adrian Burragubba's two statements (*Adani Mining v. Adrian Burragubba & Others*, 2015). In consideration of his statements, the State Government and the NNTT both raised concerns about its 'authenticity' and 'authority'. A few days before the determination, the NNTT received a letter confirming Adrian Burragubba as an authorised representative of the WJ Family Council. However, his statements were still dismissed on the basis that they failed "in terms of authority" (*Adani Mining v. Adrian Burragubba & Others*, 2015). The NNTT reasoned that since his submission did not receive any support from the other applicants, it should not be taken into consideration as evidence.

Consistent with their submission in the May 2013 determination, the State Government and Adani both reflect similar views and sought a determination that would impose no conditions on the two mining leases (*Adani Mining v. Adrian Burragubba & Others*, 2015). Both parties contended that the grant of mining leases in the area was unlikely to have a significant effect on the native title group's enjoyment of their rights and interests. However, it was admitted that they were unaware of whether the claim group exercised their rights and interests in the proposed area. In response to the listed criterion of the NTA, the State Government and Adani claimed that they were unaware of any likely effect on the claim group's way of life, culture and traditions; development of social, cultural and economic structures; freedom of access and freedom to



carry out rites and ceremonies; or effect on the areas or sites of particular significance (*Adani Mining v. Adrian Burragubba & Others*, 2015).

The State Government attributed the failure of negotiations to the division between the applicants. In its submission to the NNTT, it argued, “the Native Title Party [the applicants] and Grantee Party were close to authorising an Indigenous Land Use Agreement (ILUA)... but that issues arose within the Native Title Party at the time of authorisation of the proposed ILUA” (*Adani Mining v. Adrian Burragubba & Others*, 2015, p. 38). Consistent with the views expressed in the May 2013 determination, the State Government and Adani highlighted the economic significance of the Carmichael Project for local communities, the State of Queensland and wider Australia.

The State Government and Adani both claimed that the Carmichael Coal Mine was in the public interest. The State Government emphasised the importance of the mining sector within the national economy, asserting that, “the grant of exploration permits is central to the maintenance of a healthy and feasible mining industry in Queensland... [and] the mining industry plays a pivotal role in maintaining Australia’s economic strength” (*Adani Mining v. Adrian Burragubba & Others*, 2015, p. 43). In the absence of any material submitted that challenged the views of the mine’s proponents, the NNTT delivered another ruling in favour of Adani and attached no conditions to its mining leases.

### **Response to the Media**

Following the April 2015 determination, Patrick Malone revealed to the media that the applicants’ decision not to make a submission to the NNTT was because it could compromise the pending recognition of the Wangan and Jagalingou native title claim (Branco, 2015a). While Patrick Malone remained aligned with the pro-mine cohort during negotiations, at times he has expressed criticisms of the native title system and the Carmichael Project in his statements to the media. He has spoken of the inherent bias in the future act process and contended that the NNTT is unfairly skewed towards the interests of mining companies and the government. Having an awareness of the NNTT’s tendency to rule in the favour of the proponents, he felt his people

were unlikely to have a successful outcome in the determination (Branco, 2015a). He contended, “We’re looking at an end game here and the end game is to make sure that we get our native title determination... If we'd have gone into this thing where we're going to lose they would have used that against us having our native title rights recognised” (Branco, 2015, para. 10). It appears that the applicants’ anticipation of an unsuccessful outcome before the NNTT has triggered concerns that it could stand in the way of their wider interests.

Adani’s response in the media following the NNTT’s second determination demonstrated its reluctance to acknowledge members of the claim group who were opposed to the Carmichael Project. The company remained adamant that the Wangan and Jagalingou people supported the mine and that it was negotiating with those ‘authorised’ to represent the group (Branco, 2015; Borschmann, 2015; “Qld: Traditional owners,” 2015). In statements to the media, Adani claimed that Adrian Burragubba was unauthorised to speak on behalf of the claim group (“Qld: Traditional owners,” 2015; Borschmann, 2015; Branco, 2015; Frost, 2015). In March 2015, an Adani spokesperson told *ABC News*, “Adani continues to negotiate with the W&J *authorised* [emphasis added] representatives... Adani does not believe that the W&J don’t want this mine” (Borschmann, 2015, para. 20-21). The allegations against Adrian Burragubba occurred when the NNTT was taking submissions and continued for months after the determination was handed down in April 2015.

Adani’s attempt to suppress the views of Adrian Burragubba through challenging his authority undermines the legitimacy of the native title system. While he had been formally appointed to represent the views of the Wangan and Jagalingou people, Adani continued to dismiss his authority to speak on their behalf and chose to liaise with the applicants who were more accommodating of its project (Burragubba & Johnson, 2015). In its submission to the UN Special Rapporteur on the Rights of Indigenous Peoples, the WJ Family Council alleged that, “[Adani’s] actions include undermining and challenging the right of our authorised senior spokesperson [Adrian Burragubba] to speak and be consulted” (Burragubba & Johnson, 2015, p. 2). The submission also addressed Adani’s efforts to use division to advance their interests:

the company attempted to use a divide-and-conquer tactic by excluding our senior authorised spokesperson, Adrian Burragubba, who was at the time one of the three people comprising the Applicant on the native title claim, from meetings at which Adani Mining attempted to secure agreements with the two other Applicant group members... the company has falsely stated that it was “dealing with all duly authorised representatives” of the Wangan and Jagalingou people when it was dealing only with the two members of the former Applicant group who did not represent the wishes of our people. (Burragubba & Johnson, 2015, p. 18)

While Adrian Burragubba had expressed views that stood in isolation to the views of Patrick Malone and Irene White, his opposition to the Carmichael Project was shared with a section of the Wangan and Jagalingou community. Patrick Malone responded to Adani’s allegations and told media that Adrian Burragubba “had as much right to speak as himself or Ms White” (Branco, 2015, para. 17). Thus, despite the divided opinion between the applicants in the months preceding and following the April 2015 determination, this statement confirms that at least one of the applicants supported Adrian Burragubba as an authorised representative and, unlike Adani, did not dispute his authority to speak on behalf of the claim group.

The literature revealed that mining companies and governments are quick to identify and capitalise on any disunity or division within native title groups (O’Faircheallaigh, 2007; Marsh, 2013). Internal conflict will often be exploited to benefit vested interests and where division has been identified, weaker agreement outcomes have followed for Indigenous groups (O’Faircheallaigh, 2007).

In the days following the NNTT’s April 2015 determination, Adani made statements to the media that highlighted the division it had identified between the native title applicants (Branco, 2015). An Adani spokesperson told *The Brisbane Times*, “Adani is aware of at least one instance where the authorised majority of the W&J applicant instructed that the NNTT should disregard an individual statement of one of its group” (Branco, 2015, para. 11). Along with identifying disunity, Adani made public statements to undermine the authority of the applicant who was least supportive of its project. This

response could be viewed as an attempt to stifle emerging views within the claim group that could delay or thwart negotiations.

### **Parliamentary Oversight**

The State Government's response to the two determinations of the NNTT is consistent with the discourse of representatives in State Parliament. During parliamentary debates in 2014 and 2015, members have expressed their support for the Carmichael Project and stressed the importance of the resources sector to Queensland.

In May 2014, the former Premier Campbell Newman declared, "we are particularly excited to see the Adani Carmichael project get going" (Queensland Parliament. Record of Proceedings, May 21, 2014, p. 1662). In May 2015, the Minister for State Development and Natural Resources and Mines, Anthony Lynham, stated, "There is no doubt that the resources sector drives the Queensland economy... A jobs focused government is a government that is pro the resources sector... We are working with Adani and have demonstrated our support for the project" (Queensland Parliament. Record of Proceedings, May 7, 2015, p. 560). This statement, reflective of the State Government's submissions to the NNTT, emphasises the prioritisation of mining as a key component of the State's economy.

The statements of ministers to the media reflect the State Government's support of Adani. In March 2015, Anthony Lynham described the Carmichael Coal Mine as a 'vital' project for Queensland ("Adani, GVK win Queensland," 2015). In June 2015, Queensland Labor Treasurer Curtis Pitt told *Fairfax Media*, "we welcome Adani's significant investment proposal in Queensland with the Carmichael Coal Project and enabling infrastructure" (Cox, 2015a, para. 4). The Queensland Premier Anastacia Palaszczuk told *ABC News* in October 2015, "my Government will continue to work with the company [Adani] about how we can deliver the projects that are needed here in this state" (Hatzakis, 2015, para. 10). The response of the State Government in parliament demonstrates its overwhelming support for mining developments. This view is consistent with the widespread perception of mining exploration as an integral national interest.

The rights and interests of the Wangan and Jagalingou people are seldom mentioned in parliamentary debate. Despite discussion of the Carmichael Project in State Parliament, the oversight of Indigenous concerns has been largely absent when the topic is raised. In May 2016, Anthony Lynham boasted the 'positive progress' made between Adani and the traditional owners with the settlement of an ILUA, declaring that this was a significant milestone for the advancement of the project (Queensland Parliament. Record of Proceedings, May 11, 2016, p. 1670). The State Parliament has made reference to the Wangan and Jagalingou people once more, again to praise desirable developments in negotiations.

The interests of the claim group have been discussed briefly in Federal Parliament in the context of contentious environmental legislation. In response to the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill, introduced in August 2015, Labor Member Melissa Parke acknowledged that the impacts of the Carmichael Coal Mine were of concern to the traditional owners in the region. She made reference to Adrian Burragubba as a representative of the Wangan and Jagalingou cohort opposed to the mine, and highlighted that the proposed legislation would unfairly restrict the group's ability to challenge similar developments in the courts (Parliament of Australia. Record of Proceedings, September 9, 2015, p. 9595).

While the concerns of environmental groups have been debated at length in Federal Parliament, its members have failed to acknowledge the interests of the Wangan and Jagalingou people. While the media has captured the views of various representatives of the Wangan and Jagalingou community, there appears to be little parliamentary oversight to consider the interests of this group during the phases of approval. The Wangan and Jagalingou people have a significant stake in the outcome of this process, as they possess rights to the land. Despite this, parliamentary discussion has mainly focussed on environmental opponents to the Carmichael Project and ignored the concerns of Indigenous rights-holders that also stand in opposition to the development. As Wellington (2016) contends, "Indigenous opposition to the Carmichael mine has been largely whited out of the story... By ignoring them, government and media fail to acknowledge the Indigenous rights-based challenge to the Carmichael mine" (para. 17-18). In the process of granting multiple approvals

to Adani, almost no dialogue entered Federal or State Parliament in relation to Indigenous rights and interests.

Parliament has failed to give recognition to the anti-mine cohort. It is unclear whether this is due to the government's vested interest in coal mining and the investment of Adani in central Queensland, or whether members of parliament believe that the native title process is a fair and just system that produces legitimate results.

### **A Disputed Agreement**

While the second rejection of the ILUA in October 2014 was a clear and unanimous decision, the vote for Adani's third settlement deal has been disputed. The WJ Family Council convened an authorisation meeting in March 2016 with the Wangan and Jagalingou people where the ILUA was voted down for a third time (WJ Family Council, 2016a). However, Adani convened a meeting with the claim group the following month on 16 April 2016 where the attendees voted in favour of the agreement ("Adani mine," 2016). While the WJ Family Council have labelled this meeting a 'sham' and deemed the vote unauthorised and illegitimate, the State Government has openly supported the outcome of the Adani-convened meeting.

Representatives of the WJ Family Council have contended that many claimants present at the March 2016 meeting had chosen to boycott the meeting organised by Adani the following month (WJ Family Council, 2016c). As many members of the claim group did not attend the Adani-convened meeting in April, the vote to endorse the settlement deal was unrepresentative of the Wangan and Jagalingou people as a whole (WJ Family Council, 2016c). It has been alleged that over half the voters were not members of claim group (Robertson, 2017). This has raised issues of validation, as the WJ Family Council claimed that more than 200 of the 340 voters were not direct descendants of the 12 families who comprise the claim group. Adani engineered the meeting outcome and spent over half a million dollars to 'rent-a-crowd' (WJ Family Council, 2017). WJ Family Council representative Murrawah Johnson expressed in a statement that "Adani has bussed in large numbers of people, including non-members of our claim group who have no

connection to the country... Many members of the claim group who last met in March refused to attend Adani's meeting today" (WJ Family Council, 2016c, para. 8). Adani rejected these allegations and maintained that the meeting was consistent with the required statutory process ("Adani mine," 2016).

The ILUA authorised in April 2016 included an upfront payment of \$550,000 to the Wangan and Jagalingou people and an Indigenous Participation Plan that would distribute approximately \$5,000 annually to each person living in the region (Wellington, 2016). The anti-mine Wangan and Jagalingou faction have claimed that the ILUA endorsed in April 2016 was a weaker deal than the previous terms of agreement on offer. The windfall amount of half a million was considerably less than the figure included in the settlement deal offered in 2014, alleged to be \$1.5 million (McKenna, 2015a; Robertson, 2017). If these statements are accurate, it may be the case that the claimants willing to accommodate the mine have been unable to negotiate a satisfactory agreement and have settled for a weaker deal under pressure from Adani. However, if indeed the majority of the attendees at the April 2016 meeting were not part of the claim group as it has been alleged, then Adani has engineered a partial agreement. This was the second time Adani has acted to force an outcome. An unsuccessful attempt was made at the end of 2012 when it convened a meeting in concert with the WJ Corporation, sidelining the registered applicants.

Despite the WJ Family Council's condemnation of the authorisation meeting in April, the Australian Government has left the legitimacy of the standing ILUA unquestioned. Instead, the Federal and State Government have welcomed the decision and remained silent on the contentiousness of the matter.

### **The *McGlade* decision: A new hope or more uncertainty?**

The Commonwealth has scrambled to amend the NTA in response to a recent Federal Court determination that invalidated countless ILUAs (Borrello, 2017; Connors, 2017; McKenna, 2017; Sferruzzi, 2017). In February 2016, a landmark Western Australian court action known as the *McGlade* decision set a new precedent for the authorisation of ILUAs. Prior to the ruling, the requirements to authorise ILUAs had been based on the 2010 *Bygrave*

decision whereby authorisation was considered valid if a clear majority of the native title claimants voted for the agreement. However, the *McGlade* case has nullified these requirements and created uncertainty for 126 ILUAs across the nation (McKenna, 2017; Mesner, 2017; Sferruzzi, 2017).

*McGlade* affects native title groups that have a registered claim but have not received a determination in the Federal Court. This includes the Wangan and Jagalingou people and their contentious ILUA with Adani (McKenna, 2017). The *McGlade* decision requires a unanimous vote to authorise ILUAs. The Wangan and Jagalingou people who attended the authorisation meeting in April 2016 voted 294-1. The votes of the native title applicants were also split, as five of the 12 applicants voted against the ILUA (Mesner, 2017; Robertson, 2017; Rooney, 2017; Sferruzzi, 2017). The vote at the meeting was not unanimous and the ILUA has become invalidated as a result of *McGlade*.

In response to *McGlade*, the Federal Government has sought to amend the NTA in order to revalidate the affected ILUAs (McKenna, 2017a; Sferruzzi, 2017). The government has defended the move to amend the Act on the grounds that *McGlade* could freeze the operation of some developments and jeopardise the benefits delivered to Indigenous groups (McHugh, 2017). However, representatives of the WJ Family Council and a number of Australian Greens Members and Senators have claimed that the government has ‘fast-tracked’ amendments to remediate the effects on the Carmichael Coal Mine (Borello, 2017; Connors, 2017; “Senate inquiry,” 2017; WJ Family Council, 2017).

As the implications of *McGlade* presents a further obstacle to the Carmichael Project, the government has attempted to rush the amendments to secure certainty for Adani and the coal lobby. It has also been alleged that the motion to legislate the amendments has proceeded without proper Indigenous consultation. The Attorney General, George Brandis, has faced criticisms for his attempt to avoid consultation with stakeholders and pass the amendments through the Senate in one day (“Miners support,” 2017; “Senate inquiry,” 2017).

The response of the Federal Government in the aftermath of the *McGlade* decision can be interpreted through the lens of critical race theory (CRT). A major concept in CRT is that rights afforded to blacks will always be diminished when they conflict with white interests. Whites also seek to



maintain dominance and power over resources. Thus, in the wake of *McGlade*, proponents of the amendments to the NTA reflect the view that the rights afforded to blacks will always be modified or reversed if they are perceived to undermine the interests of whites. As the Australian Government has a vested interest in the energy and mining sector, it has prioritised the development of the Carmichael Coal Mine and ignored Indigenous rights and interests. The proposed amendments to the Act demonstrate the efforts of government to negate the requirements of native title and further undermine the rights of Indigenous opponents to the Carmichael Project.

## Conclusion

The findings of this thesis confirm a number of common observations in the literature. The decision-making of state institutions and government in relation to mining development projects commonly bends in favour of mining interests over Indigenous interests (Howlett, 2010; O’Faircheallaigh, 2006; Ritter, 2009). The National Native Title Tribunal (NNTT) as a state institution that deals with developments on areas of native title interprets the Native Title Act (NTA) to benefit mining interests and rarely rejects proposals (Howlett, 2010; Corbett & O’Faircheallaigh, 2006; O’Faircheallaigh, 2006). While the Australian Government has accommodated mining interests, it has been unwilling to support the interests of native title groups (O’Faircheallaigh, 2006; Ritter, 2009; Scambary, 2013). Several studies concluded that the NTA offers a weak foothold for Indigenous groups during the approval process. The NTA cannot be solely relied upon to uphold Indigenous interests and enable traditional owners to negotiate a desirable agreement with resource companies or otherwise refuse to accept developments on their land (O’Faircheallaigh, 2006, 2008; Short, 2007).

In both cases where Adani took the matter to the NNTT for determination, it ruled in favour of the mining leases and dismissed the applicants’ request for conditions to be attached to the first mining lease. The conduct of the NNTT examined in this case study is consistent with the literature, which demonstrates the State’s reluctance to reject or attach any conditions to mining developments grants. Adrian Burragubba highlights the resource-focus of state institutions like the NNTT that corrupt the impartiality of the native title system. He argues, “There’s an inherent bias in the system where companies know if they get a “no” they can go to the Tribunal and are virtually guaranteed to get their mining lease” (Milman, 2015a, para. 10). There is strong evidence to indicate that Adani remained confident that it had the unqualified support of the State Government during the phases of approval. In Patrick Malone’s affidavit to the NNTT, he recalled a conversation with a representative of Adani:

[who] said words to the effect that the grantee party was ‘flavour of the week’ with the Government party which wanted the project to go ahead, and that the grantee party did not need the native title group

because the grantee party could get all the approvals they need from the State. (*Adani Mining v. Jessie Diver & Others*, 2013, p. 51)

This is consistent with the findings in the literature that purport the State will prioritise mining exploration above Indigenous interests. When matters proceed to the State for determination, mining companies can rest assured that they will receive a positive outcome in favour of their interests (Howlett, 2010; O’Faircheallaigh, 2006).

While the literature acknowledges that divided opinion in Indigenous communities often results during the negotiation process (Altman, 2009; O’Faircheallaigh, 2006, 2008; Scambary, 2013), there are no studies that examine community division in depth. This thesis confirms the general view that the division of communities complicates the process, delays negotiations and can influence the outcome of agreements. However, this study provides greater insights into how the process can intensify and perpetuate division. The emergence of two distinct factions within the Wangan and Jagalingou claim group reveals the limitations of the native title system in terms of accommodating the interests of the anti-mine faction. This group has experienced greater barriers to achieving recognition of their interests. While Adani has actively attempted to silence the representatives of this cohort by contesting their authority, the government has failed to provide sufficient oversight and acknowledge their concerns during parliamentary debate.

These challenges have been compounded by the inadequacies of the rights afforded to native title claimants under the NTA. The current legislation does little to support those overtly opposed to developments on their land, as it lacks the option to veto future acts. These findings highlighting the weaknesses of the NTA, in terms of providing a platform to assert Indigenous rights and interests, remain consistent with criticisms in the literature that expose similar inadequacies (O’Faircheallaigh, 2006, 2008; Short, 2007). Indigenous land rights in Australia have continued to operate within a system that prioritises resource interests. This creates an impossible environment for native title claimants to have their interests recognised and to influence decision-makers when seeking to prevent the State’s imposition of large mining developments on their land.

In addition to the insights on division, this thesis offers a recent case study to update the existing body of literature. The studies that have previously examined the convergence of native title, the state and mining developments have focused on agreements negotiated and signed over 10 years ago (Altman, 2009; Corbett & O'Faircheallaigh, 2006; O'Faircheallaigh, 2006, 2008; Scambary, 2013). This thesis provides an updated case study, confirming and adding insights to the existing body of literature.

### **Added Insights: Multiple Modes of Analysis**

While this study confirms the literature in the area of native title and resource developments, it adds insights through its application of multiple modes of analysis. The liberal culturalist theories of Will Kymlicka and Allen Buchanan provide strong justifications for collective rights in liberal democracies. However, they fail to address the underlying discriminative nature of these societies that set such ideals on a path to inadequacy. Critical race theory (CRT) reasons that the failure of collective rights to achieve equality for Indigenous groups is the embedded racial prejudice that continues to dominate the status quo in these societies (Delgado & Stefancic, 2012; Hutchinson, 2004; Gillborn, 2005).

While a liberal culturalist perspective identifies the inherent requirement for collective rights to remediate inequality, CRT provides an explanation for the failure of these rights to reach these ideals. CRT exposes the innate racial imbalance that perseveres in liberal-democratic societies, despite the adoption of collective rights (Delgado & Stefancic, 2012; Hutchinson, 2004; Gillborn, 2005). Liberal culturalism conceptualises a set of ideals where the recognition of collective rights restores a sense of racial equilibrium. CRT unmasks why these ideals fail to actualize.

Native title represents an idealised system, whereby historical wrongdoings are rectified through the establishment of collective land rights for Indigenous groups. While it has conferred benefits to a number of Indigenous groups, it is also a flawed system. At every stage, the rights allocated under the NTA can be overridden by the State. CRT argues that while state institutions and government may support the adoption of collective rights for Indigenous

people, they ensure that these rights do not supersede the power of white institutions (Hutchinson, 2004; Delgado & Stefancic, 2012). Australia represents a significant illustration of CRT theory given the power wielded by the resource industry, as outlined in Chapter Two. In the Australian context, economic interests have led to the reversal of the rights afforded to Indigenous groups. While traditional owners have gained collective rights to protect their ancestral lands, rights under the NTA do not stand in the way of the State and government's power to acquire that land. The Australian Government has been willing to grant Indigenous rights to land. However, it has not been willing to sacrifice its power to determine how that land is used.

While the power and influence of energy and mining companies in Australia's political sphere are made explicit in this study, its findings reinforce the doctrine of CRT. State institutions and government have acted to nullify 'black' rights and interests in order to advance their own 'white' interests, which seek to expand and invest in the resource sector. While some studies have reasoned that the limitations of native title are linked to entrenched colonial structures (Altman, 2009; Short, 2007), this study is the first to examine Indigenous land rights through the lens of CRT. There remains an embedded bias towards Indigenous groups that attempt to defend their land when it faces the encroachment of resource interests. The State's interpretation of the NTA and the response of government to the Carmichael Coal Mine illustrate the deficiencies of a system underpinned by institutionalised racism that continues to constrain and limit the rights and interests of Indigenous Australians.

### **Postscript**

As of the time of writing, the final approval for the Carmichael Coal Mine has been suspended indefinitely due to uncertainty over a royalties deal with the Queensland Government. The Wangan and Jagalingou Family Council continue to challenge the development in the courts.

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