ADANI'S CARMICHAEL MINE, INTERNATIONAL LAW AND THE DEFINITION OF CONSENT

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This month, the India-based multinational conglomerate Adani received approval from the Queensland and Federal Governments for a rail line from its proposed Carmichael mine to the Abbott Point coal export terminal. This decision now means the project has obtained all necessary state and federal approvals.[1] The legal saga which has surrounded the mine in recent years has reignited debate over whether traditional owners can withhold consent for future acts, and how this aligns with Australia's international obligations.

Adani hopes to create one of the world's largest coal mines in Queensland's Galilee Basin, over an area of land subject to a native title claim by the Wangan and Jagalingou people. Adani and the Wangan and Jagalingou native title claimants began negotiations for an Indigenous Land Use Agreement (ILUA) in 2011, but little progress was made; Adani and the claim group were unable to reach an agreement.[2, 3]

This prompted the company to apply to the National Native Title Tribunal for a future act determination for the grant of two mining leases. The Tribunal's decision, handed down in April 2015, was that the mining leases could be granted because it was accepted that the mine would have a positive economic impact and be in the public interest.[4]

This decision was based on the contentions presented by Adani and the Queensland Government, including the fact that the Minister for State Development had recently designated the mine and associated rail and port projects as a 'prescribed project' – one of social or economic significance to the state.[5]

In November 2015, the claim group lodged an appeal to the Federal Court against this determination, arguing that Adani had misled the Tribunal by overstating the economic benefits of the mine and associated infrastructure.[6]

Differing opinions within the claim group on the mine led to two separate claim group meetings, convened by two separate groups of applicants, in less than a month. The first rejected a proposed ILUA,[7] and the second agreed to it 'unanimously'.[8] The legitimacy of the vote at the second meeting has been challenged by applicants who attended the first, and vice versa.[9]

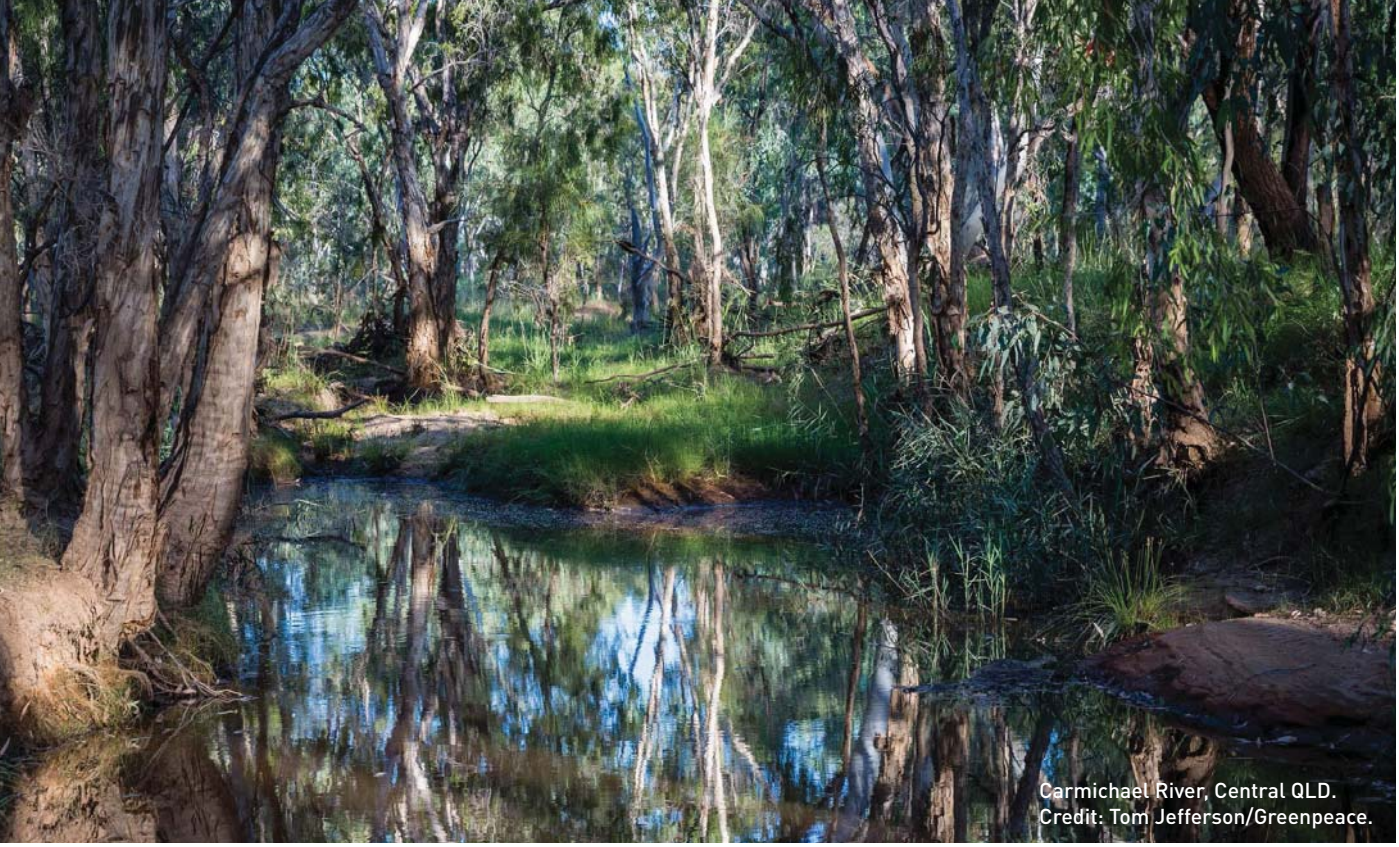
In April 2016, the Queensland Minister for Natural Resources and Mines granted the two mining leases to Adani,[10] and in August 2016 the Federal Court dismissed the appeal against the Tribunal's decision to allow the grant of the mining leases.[11] In September, an appeal against this decision was made to the full Federal Court.[12]

The Minister for State Development then upgraded the project's status to 'critical infrastructure' – considered 'essential to the state's economic and community wellbeing' – in October 2016.[13]

To be clear, the Tribunal's decision to allow the Queensland Government to grant the leases took place *before* the obvious division of opinion within the claim group, which led to the disputed vote approving the ILUA.

Adrian Burragubba, one of the native title applicants opposed to the mine, has claimed Adani and the Queensland Government are attempting to force the mine on traditional owners against their will:[14]

> Our international legal right to free, prior and informed consent is not protected under Australian law, and Adani has actively exploited this.[15]
>
> As First Nations people, Indigenous people, we have rights recognised under international law and the UN



Carmichael River, Central QLD.
Credit: Tom Jefferson/Greenpeace.

> Declaration on the Rights of Indigenous People – including to withhold our consent to mining on our land.[16]

Elements of this concept of free, prior and informed consent (FPIC) have existed in international agreements for decades. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), however, is the most influential of these.[17] The requirement for FPIC for projects affecting the 'lands or territories and other resources' of Indigenous peoples is found in Article 32 of the Declaration.

One interpretation of 'consent' has been that Indigenous peoples must have a right to withhold consent to any major act which affects them and their lands. This potential to interpret 'consent' as 'right to veto' was one of the reasons why Australia, along with Canada, New Zealand and the United States, were the only members of the United Nations to initially vote against the UNDRIP. All four have since endorsed UNDRIP, but with qualifications.[18]

Since its accession to the UNDRIP, court cases in Canada have determined that its First Nations, Inuit and Métis peoples have a common law right to FPIC in regards to projects on their land. If consent is withheld, however, the state can override this if it is 'justified in the broader public interest'. As interpreted in Canada, FPIC means a right to free, prior and informed consultation, but consent itself is not required if the public benefit is deemed to outweigh any associated infringements of Indigenous rights.[19]

The United States[20] and the International Council on Mining and Metals[21] have likewise interpreted FPIC to mean a right to free, prior and informed consultation, not a requirement for consent. How has 'consent' been reinterpreted as 'consultation' in these instances?

Looking at Article 32, the text in the original document drafted by the UN Working Group on Indigenous Populations appeared to confer a full right to FPIC. It reads (with emphasis added):

> Indigenous peoples *have the right to determine and develop priorities and strategies* for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources [...][22]

And in the final document it became:

> States shall *consult and cooperate in good faith* with the indigenous peoples concerned through their own representative institutions *in order to obtain* their free and informed consent prior to the approval of any project affecting their lands or territories and other resources [...][23]

The compromise made between representatives from governments and indigenous peoples during the drafting process appears to have been that there would be a right to free, prior and informed consultation with the aim of gaining consent, but at the cost of muddying the waters around whether consent itself is required.[24]

In the Adani case, approval to perform acts on land subject to a registered native title claim was granted despite a lack of consent, at the time, from the native title claim group, partially because it was determined that it was of economic significance and served the public interest. This aligns with the Canadian decision that the 'broader public interest' can outweigh the rights of Indigenous title holders.

The UNDRIP is a powerful document. It is a statement of intent, a worthy code of behaviour for states to abide by in dealing with indigenous peoples. But it is not a panacea. The apparent right to withhold consent ascribed to the UNDRIP is unfortunately, perhaps deliberately, vague.

Although the Carmichael mine has now received all necessary federal and state approvals some legal challenges are still ongoing; notably the appeal to the full Federal Court over the decision to allow the granting of the leases in the first place. Last-minute amendments to new groundwater licensing legislation in Queensland have ensured that while Adani will still need to apply for a licence, this process will not be subject to public scrutiny.[25] Adani has confirmed it plans to start construction of its coal and rail project in August or September next year.[26]

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