THE MATERIAL COSTS OF CLAIMING INTERNATIONAL HUMAN RIGHTS: AUSTRALIA, ADANI AND THE WANGAN AND JAGALINGOU

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This article presents a materialist account of Indigenous peoples' international legal human rights claims. It argues that appeals to the global legal system as well as pluralistic approaches to Indigenous peoples' rights depend on international law to make a convincing case and yet fail to account for the material construction of human rights claimants as subjects of international law. To explain this intervention, this article theorises that when international human rights law and national laws clash, human rights claimants constitute and transform themselves into international legal subjects and become identifiable Indigenous peoples. In support of this international legal constructivist approach to Indigenous peoples' human rights claims, this article re-articulates the development of Indigenous peoples as subjects that emerged from international law and then examines the development of Australia's native title regime. An exposition of international and then state laws reveals that the codification of different standards for participation enables those who subject themselves to international law as Indigenous peoples to claim human rights. It then provides a case study on the Wangan and Jagalingou Family Council, which constructed itself as Indigenous peoples to assert human rights, as they engage with Australia's native title regime in the case against Adani Mining Pty Ltd's Carmichael Coal Mine and Rail Project. A central aspect of this argument is that becoming identifiable Indigenous peoples through claiming human rights provides benefits as well as potentially deleterious political, economic and legal costs.

CONTENTS

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I INTRODUCTION

This article examines the materiality involved in claiming international human rights in Australia. From a theoretical perspective, it examines the material construction and self-enactment of the subjectivity of Indigenous peoples through interactions of international human rights claims with national legal regimes. It is material in the sense that becoming a subject generates economic and political benefits but also shapes how those who claim human rights must express themselves.[1] Becoming a subject is *agentic* and expressive, but also requires the subject to objectify themselves (or become an object) in that discourse. Importantly, the material construction or production of the subjectivity is not based in global law. Nor is it based in local laws, cultures, customs or habits that pre-exist the claimants' interactions with international law. As such, this article is an attempt to rethink, problematise and theorise the promise and potential of international human rights law. The case study examined here reveals how an Aboriginal community enacts and materially produces themselves as Indigenous peoples through their invocation of international human rights law within and in opposition to the Australian legal regime.

The subject of the case study is the Wangan and Jagalingou ('W&J')[2] Family Council ('Family Council'), which claimed international human rights in opposition to the Carmichael Mine and Rail Project ('Carmichael mine') by Adani Mining Pty Ltd ('Adani') in central Queensland, Australia.[3] Planning for the Carmichael mine began in 2010 and, if developed, would be located on W&J ancestral territories.[4] The Australian legal regime is worth studying because it recognises and regulates the rights of Aboriginal and Torres Strait Islander peoples but has not formally adopted many of the rights recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[5] Australia does have some human rights protections, such as a state-level Human Rights

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1 Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) *Verfassung und Recht in Übersee* [Law and Politics in Africa, Asia and Latin America] 195, 199–202.

2 I employ the abbreviation 'W&J' to signify the Wangan and Jagalingou because the Family Council and media outlets have used it. See, eg, 'Stop Adani Destroying Our Land and Culture', *Wangan & Jagalingou Family Council* (Web Page) <https://wanganjagalingou.com.au/our-fight/>, archived at <https://perma.cc/B8SY-XB6E>; Josh Robertson, 'Traditional Owners Driven Apart by Adani Issue Unite to Fight Queensland Government', *ABC News* (online, 6 December 2019) <https://www.abc.net.au/news/2019-12-06/adani-native-title-claim-wangan-jagalingou-galilee-basin-court/11770936>, archived at <https://perma.cc/JNX6-KZX2>.

3 See below Part IV.

4 'Carmichael Coal ("Adani") Mine Cases in Queensland Courts', *Environmental Law Australia* (Web Page) <http://envlaw.com.au/carmichael-coal-mine-case>, archived at <https://perma.cc/DRL5-T2LX>.

5 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*'); Zsofia Korosy, 'Native Title, Sovereignty and the Fragmented Recognition of Indigenous Law and Custom' (2008) 12(1) *Australian Indigenous Law Review* 81, 82–7; Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (2019) 23(1–2) *International Journal of Human Rights* 174, 175.

Commission, which reports to Parliament to promote and protect human rights.[6] It has also ratified and legislatively implemented several human rights treaties.[7] However, the Commonwealth has not adopted comprehensive human rights legislation or, for that matter, a bill of rights.[8] Therefore, the Australian national legal context was poised to clash with the international human rights of Indigenous peoples that provide broader protections. That clash materialised when the Family Council asserted free, prior and informed consent ('FPIC') and self-determination as international human rights in opposition to the Carmichael mine in 2015.[9] Their invocation of human rights demonstrates how the Family Council positions itself as a subject of international law and materially produces itself as Indigenous peoples by objectifying itself as the true and essential peoples to become identifiable bearers of human rights alongside its engagement with Australian legal processes.

Every state and all Indigenous communities are different. But this article theorises how Indigenous peoples claim human rights in former-British-colony settler-states, such as Canada, New Zealand and the United States. These unique legal regimes have not adopted a number of central Indigenous peoples' human rights, such as FPIC or self-determination.[10] As such, this case study aids in understanding how Indigenous peoples' rights are claimed in those settler-states, even though there are differences among and within those states. When individuals and communities claim international human rights, they materially and politically bring themselves into subjection of international legal discourse as Indigenous peoples to highlight the clash between international and national legal regimes.

Part II begins with a description of the methodology and theoretical framework deployed in this article. As a materialist approach to international law, it shares similarities with Benedict Kingsbury's constructivist approach,[11] but maintains that individuals and communities are not Indigenous peoples for the purpose of claiming human rights before they are materially constructed as such within

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6 See, eg, 'Questions and Answers on the UN Declaration on the Rights of Indigenous Peoples', *Australian Human Rights Commission* (Web Page, April 2009) <https://www.humanrights.gov.au/publications/questions-and-answers-un-declaration-rights-indigenous-peoples-2009>, archived at <https://perma.cc/BDT2-TFDD> ('Questions and Answers'); 'Reports to the Minister under the AHRC Act', *Australian Human Rights Commission* (Web Page, 12 September 2019) <https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>, archived at <https://perma.cc/K8TW-4A7R>.

7 See, eg, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 1 (entered into force 4 January 1969).

8 Michael Kirby, 'Arguments for an Australian Charter of Rights' (September 2009) *Constitutional Education Fund of Australia Blog* 1, 1 <https://www.michaelkirby.com.au/images/stories/speeches/2000s/2009%2B/2398.Cefa_-_Blog_-_Arguments_For_Aust.Charter_Of_Rights.pdf>, archived at <https://perma.cc/KA2Z-8VDP>.

9 See below Part IV.

10 For example, in Canada, Bill C-262, *United Nations Declaration on the Rights of Indigenous Peoples Act*, 1st sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), an Act to ensure that Canadian laws are in harmony with *UNDRIP*, has been proposed and read in the House of Commons and now faces the Senate. See also *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257, 294 [76], which maintains that to legally use the land of 'Aboriginal title holders', the government must obtain their consent or justify its incursion under *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*') s 35.

11 See generally Benedict Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92(3) *American Journal of International Law* 414.

international legal discourse. Borrowing from Chris Thornhill et al's approach, it affirms that 'the legal subjectivity of Indigenous rights claimants is profoundly transfigured' through claiming rights.[12] However, this article departs from their orientation of Indigenous peoples' rights in the global legal system, arguing instead that the legal subjectivity of Indigenous rights claimants, Indigenous peoples, is inextricably entangled with international law. Although the primary focus of this article is on international human rights, it also maintains that the interaction and clash between the international and national laws have not been thoroughly investigated. Accordingly, Part III provides background information on the national legal regime, which is required to demonstrate how Indigenous peoples' international human rights conflict with Australia's recognition of native title rights for Aboriginal and Torres Strait Islander peoples. As explored through Part IV, the clash between national and international legal regimes also materialises as a clash between national and international subject-statuses. It focuses on the Family Council's opposition to the Carmichael mine by materially constructing itself as Indigenous peoples. That case study reveals how dual narratives about those people arise, which also demonstrates how becoming Indigenous peoples for purposes of claiming human rights can be as *agentic* and affirming, as it is costly.

II THEORY, METHOD AND FRAMEWORK

This Part describes what is meant by a materialist approach to international law. It then argues that the subject-status of Indigenous peoples is located in international law, rather than in global law or a 'distinct and comprehensive Indigenous value system and as founding a "distinct legal code, different from positive law and ordinary justice"'.[13]

A *Materialist Approach*

Luis Eslava and Sundhya Pahuja note that international law is an 'ideological project that has material consequences' that is also 'a material project in itself'.[14] For them, international law shapes 'modes of being'.[15] International legal discourses, like all discourses, are 'practices that systematically form the objects' — as well as subjects — 'of which they speak'.[16] International legal discourse can influence individuals and communities, including how they live in the world, present themselves, use language, and relate to themselves and others.[17] Following these insights, this article maintains that Indigenous peoples are those who become identifiable subjects of international legal discourse by constructing material facts about themselves and the world. Those individuals and communities who engage

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12 Chris Thornhill et al, 'Legal Pluralism? Indigenous Rights as Legal Constructs' (2018) 68(3) *University of Toronto Law Journal* 440, 446.

13 Ibid 442–3, citing Simón Yampara Huarachi, 'Cosmo-convivencia, Derecho y Justicia de los Pueblos Qullana' (Speech, Appnoi-Tari Community Pachakuti, 2005) <http://www.katari.org/pdf/justicia%20Qullana.pdf>, archived at <https://perma.cc/Q7SJ-YRXB>.

14 Eslava and Pahuja (n 1) 202.

15 Ibid 200.

16 Michel Foucault, *Archaeology of Knowledge*, tr AM Sheridan Smith (Tavistock Publications, 1972) 54 [trans of: *L'Archéologie du savoir* (1969)].

17 See Eslava and Pahuja (n 1) 196–7.

with international legal discourse are engaging with a legal discourse, a discourse — like most discourse — that has the productive ability to construct true facts in the world.[18] Individuals or communities become identifiable international legal subjects — as Indigenous peoples — through their act of claiming and asserting international legal objects — human rights. Although human rights claimants might be known according to more localised, sub-national identifiers for other purposes, the subjectivity that matters, that is, the subject that materialises for the purpose of claiming human rights,[19] is the international legal subjectivity of Indigenous peoples.

The materialist approach proposed here differs from Kingsbury's well-known constructivist approach to Indigenous peoples.[20] Kingsbury identifies '[t]wo broad approaches to relatively underspecified concepts such as "indigenous peoples"'.[21] The first 'treats "indigenous peoples" as a legal category requiring precise definition', while the second approach, the one Kingsbury prefers,

> takes the international concept of 'indigenous peoples' not as one sharply defined by universally applicable criteria, but as embodying a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal and social processes of particular cases and societies.[22]

This materialist approach is, admittedly, like Kingsbury's constructivism. However, in some ways, it bridges the two approaches Kingsbury identifies. It maintains '"indigenous peoples" as a legal category', albeit, one that involves continuous processes that cannot be 'not sharply defined'.[23] The main difference derives from the following. Kingsbury attempts to generate an incomplete series of flexible and non-essential pre-legal factors that help us define those who are Indigenous peoples in Asia.[24] A materialist approach maintains that individuals and communities are not Indigenous peoples before they are materially constructed as such in international legal discourse. Kingsbury's factors could help pre-select those who might become Indigenous peoples, even if there are no a priori definitional elements of Indigenous peoples. Indigenous peoples cannot be defined as an a priori subject because Indigenous peoples are those who materially produce, construct or manifest themselves — and hence become identifiable to others — as Indigenous peoples in international law. Other non-Indigenous and

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18 See Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009) 15.

19 The approach to materiality presented here borrows significantly from Michel Foucault and Judith Butler's theorisations of power and discourse. A full theorisation is not provided here because there is not enough space to do so. Furthermore, Foucault and Butler's theorisations are not easily digestible or well-known to international lawyers. While Butler's discussion of the creation of an 'abject' domain seems particularly warranted in this context, it is not a topic that fits here. See Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge, 1993) 1–3; Foucault, *Archaeology of Knowledge* (n 16). For a more robust discussion of this method, see Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Routledge, 2019) ch 1.

20 Kingsbury (n 11) 415.

21 Ibid 414. Kingsbury employs a lower case 'i' instead of the upper case 'I' that is employed in Australia. I preserve authorial uses within citations.

22 Ibid 415.

23 Ibid 414–15.

24 Ibid 419–20, 453–5.

Indigenous peoples can identify human rights claimants as true Indigenous peoples, because they are expressing themselves in international legal discourse that has, among other effects, a truth-producing function.[25] It is not the expression of something previously true about the world: it is the construction of truth in the world.[26]

To engage with international human rights and for others to recognise those claimants as bearers of human rights is to materially constitute oneself in a particular way. Doing so is not fake or false, nor does it 'distract attention from real local issues'.[27] Those who become Indigenous peoples by claiming human rights are truly Indigenous peoples and it becomes a true fact of those people and the world because it is true according to international legal discourse. To become, be seen, and construct oneself as a human rights bearer is not simply the mobilisation of rights language.[28] It is a process of acting, altering or transforming one's 'modes of being' and how they relate to themselves and others through discourse. We will see this in Part IV.

Materially constituting oneself in such a way can be costly, because constituting oneself as a subject of legal discourse is also to produce oneself as an object of that discourse.[29] That is to say, one cannot be a subject of discourse without also being an object of discourse. We will see that those who construct themselves as Indigenous peoples do so by objectifying themselves within international legal discourse as being the 'true' or 'essential' representatives of their communities.[30] They do so with the support of non-government organisations ('NGOs') and others to attract support, which aids in expressing their agency. It is 'costly' in several ways.

First, it is costly in the sense that it produces difficulties for the mine developers, as the human rights claimants and their supporters intend. Secondly, by becoming subjects of legal discourse, the rights claimants might have to bear

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25 See Michel Foucault, 'Politics and the Study of Discourse' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) 61; Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Routledge, 1970) xi–xiv ('*The Order of Things*'). See also Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 13–14.

26 Foucault, *Archaeology of Knowledge* (n 16) 48–9.

27 Adam Kuper, 'The Return of the Native' (2003) 44(3) *Current Anthropology* 389, 395.

28 Cf Paul O'Connell, 'Human Rights: Contesting the Displacement Thesis' (2018) 69(1) *Northern Ireland Legal Quarterly* 19.

29 Mark Kelly cautions, *agentic* 'constitution is not possible in practice without also being constituted as a passive subject': Mark GE Kelly, *The Political Philosophy of Michel Foucault* (Routledge, 2009) 88. Essentially, if one is a subject of a discourse, then others can view them as an object of that discourse.

30 According to Alan Milchman and Alan Rosenberg, a subject's ability to objectify itself in a true discourse is different from the subject's ability to subjectify itself in a true discourse arising 'from the subject's own practices of freedom, from a choice': Alan Milchman and Alan Rosenberg, 'The Aesthetic and Ascetic Dimensions of an Ethics of Self-Fashioning: Nietzsche and Foucault' (2007) 2 *Parrhesia* 44, 55. See also Michel Foucault, 'About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth' (1993) 21(2) *Political Theory* 198, 203 ('About the Beginning of the Hermeneutics of the Self'). The first is called subjectification and the second is called subjectivation: Milchman and Rosenberg (n 30) 55–6. Whether it is subjectification or subjectivation is not discussed here. For an application of a similar notion to Indigenous peoples in international law: see Marjo Lindroth, 'Indigenous Rights as Tactics of Neoliberal Governance: Practices of Expertise in the United Nations' (2014) 23(3) *Social and Legal Studies* 341, 347–8.

financial costs or legal penalties.[31] Thirdly, by becoming subjects of legal discourse they also become publicly open to others, like academics, media outlets and others who may treat those claimants as objects of their discourses.[32] Fourthly, and most problematically, constituting oneself as a subject of international legal discourse may reproduce a colonial form. Jennifer Beard writes that 'colonised subjects are required both materially and politically to bring themselves into subjection to Empire, "not to make themselves equal" … but rather to maintain recognition by an international audience that promises salvation'.[33]

Those who produce themselves as Indigenous peoples for the purpose of claiming human rights are both 'materially and politically' bringing themselves into subjection of international law.[34] They may believe that the discourse provides some form of equality, but agency arises from becoming subjects of power.[35] It is colonial, in Beard's sense, in that they materially constitute themselves as Indigenous peoples and politically associate themselves with democratic processes for the purposes of generating a clash between international and national legal discourses. The case study in Part IV will show that. To the extent that scholars, NGOs and others are identifying or defining individuals and communities as Indigenous peoples to support them and their human rights claims, they might also help reproduce a material and political colonial form of international law.

Two potential ways that some have avoided this consequence is to either: (1) treat the subjectivity of Indigenous peoples as pre-existing international law or (2) orient it within a 'global legal system'.[36] As described in the following sections, the ways of avoiding this consequence are problematic.

B *A Pre-Legal Subject or a Subject of a Global Law?*

This Section recounts and then problematises Thornhill et al's attempt to orient the subject-status of Indigenous peoples in global law.[37] It does so because Thornhill et al argue against pre-legal subject status and in favour of a global legal subject-status, or what they call a 'pluralist view', which is a 'distinct and comprehensive Indigenous value system and as founding a "distinct legal code, different from positive law and ordinary justice"'.[38] To that extent, they are right: the subject-status of Indigenous peoples is not independent, comprehensive and based on a distinct legal code that is different from positive law or ordinary forms of justice. However, their orientation of Indigenous peoples' subject-status in a global legal system is more accurately based in international law.

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31 *Burragubba v Queensland (No 2)* [2018] FCAFC 65, 3–4 [8]–[12] ('*Burragubba (No 2)*').

32 See Mark Goodale, 'What Are Human Rights Good For?', *Boston Review* (Blog Post, 19 July 2018) <http://bostonreview.net/global-justice/mark-goodale-what-are-human-rights-good>, archived at <https://perma.cc/86D6-BW4V>.

33 Jennifer L Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Routledge-Cavendish, 2007) 27.

34 This draws on Jennifer Beard's discussion of the suggestion that 'colonised subjects are required both materially and politically to bring themselves into subjection to Empire, "not to make themselves equal" to use the words of Augustine, but rather to maintain recognition by an international audience that promises salvation': ibid.

35 See Michel Foucault, 'The Subject and Power' (1982) 8(4) *Critical Inquiry* 777, 789–90.

36 Thornhill et al (n 12) 446.

37 Thornhill et al (n 12).

38 Ibid 442–3, quoting Simón Yampara Huarachi (n 13).

According to Thornhill et al, there are three reasons against a pluralist approach to Indigenous rights. First, a pluralist approach to Indigenous rights would 'struggle to produce a comprehensive understanding of the subjects that claim Indigenous rights and of the grounds on which such rights can be established'.[39] Secondly, 'the theory of legal pluralism has not adequately identified the social foundations of Indigenous law'.[40] And thirdly, a pluralist account fails to appropriately theorise how 'Indigenous rights reflects a process in which new rights are created within the legal system as the institutions in a national legal system interact with, and extract norms from, the global legal system'.[41] It would appear that they agree with anthropologist Alan Barnard that '[t]o reject "indigenous people" as an anthropological concept is not the same thing as rejecting it as a legal concept, or rejecting it as a useful tool for political persuasion'.[42] Those are compelling reasons to believe that the subjectivity of Indigenous peoples is not pre-legal or discoverable to anthropological disciplines.[43]

Instead, they argue for a constructivist notion that 'Indigenous rights are generated through certain types of legal cases in which Indigenous communities are characteristically involved'.[44] According to them,

> [t]he legal subjectivity of indigeneity, consequently, is not to be confused with indigeneity *as a material fact*. Instead, it is one part of a broad mass of claims, linking a range of interconnected subjects, which are articulated as global legal norms that penetrate into national society.[45]

From their constructivist position, Thornhill et al locate the legal subject-status of Indigenous peoples in 'the deepening extension, of the global legal system'.[46] There are benefits that arise from orienting Indigenous peoples' rights in global law. For instance, if Indigenous peoples' rights are evidence of a global legal system, then perhaps '[t]he implementation of Indigenous rights requires a rethinking and reordering of sovereignty, territoriality, decolonization, liberalism, and human rights'.[47] Such a position may support the view that 'international law, although once an instrument of colonialism, has developed and continues to develop, however grudgingly or imperfectly, to support indigenous peoples' demands'.[48] That appears promising.

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39 Thornhill et al (n 12) 445.

40 Ibid.

41 Ibid 446.

42 Alan Barnard, 'Kalahari Revisionism, Vienna and the "Indigenous Peoples" Debate' (2006) 14(1) *Social Anthropology* 1, 7.

43 See generally Dorothy L Hodgson, *Being Maasai, Becoming Indigenous: Postcolonial Politics in a Neoliberal World* (Indiana University Press, 2011). See also Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010) 112; Courtney Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (Cambridge University Press, 2008) 147.

44 Thornhill et al (n 12) 448–9.

45 Ibid 480 (emphasis added).

46 Ibid 493.

47 Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Routledge, 2016) 4.

48 S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 4, 291.

While Thornhill et al's arguments against a pluralist conception of Indigenous peoples and their constructivist leanings are justifiable, their appeals to the 'global legal system' are fuzzy.[49] At various times they write of 'global international law', 'global legal norms', 'global law', 'the global legal system' or 'global modes of legal production'.[50] Furthermore, they are not clear how or why appealing to a global legal system can conceptually separate the 'legal subjectivity of indigeneity' from 'indigeneity as a material fact'.[51] While there are good reasons to make distinctions between legal and anthropologic disciplines, relying upon global law or the global legal system as a foundation for the subjectivity of Indigenous peoples creates a paradox, particularly surrounding their anti-materialist approach. On the one hand, one could maintain that global legal subjectivities are not material facts. In that scenario, it would not be clear where the origin or foundation for Indigenous rights or subjects resides. And, if so, then their reliance on a global legal system falls prey to two arguments they level against pluralist approaches. If those 'social foundations' cannot be found (or are not material facts), then, secondly, they would struggle to 'produce a comprehensive understanding of the subjects that claim Indigenous rights'.[52] So even if Thornhill et al provide a means for theorising how 'Indigenous rights reflects a process in which new rights are created within the legal system as the institutions in a national legal system interact with, and extract norms from, the global legal system',[53] it is not clear where or what constitutes 'the global legal system' or 'global law'.

On the other hand, they face a problem if global legal subjectivities are material or have some element of materiality. In that scenario, it is not clear what basis there is for invoking a 'global law' (or an associated fuzzy concept) that is comprised of international, regional and state legal levels while simultaneously denying that Indigenous peoples' rights have some foundation or relation to pre-existing legal codes that may, in fact, be distinct from those other levels. In either scenario, if one argues against a pluralistic legal system to avoid discussing the sub-national legality, it is increasingly difficult to convincingly appeal to a global legal system as real.

In fairness to Thornhill et al, the main thrust of their argument is that Indigenous peoples are legal subjects, which would mean that Indigenous peoples cannot be understood as a pre-existing subject discoverable by anthropology. Anthropologists will not be able to find Indigenous peoples' rights as pre-existing material facts because it is individuals and communities' engagement with international human rights law that produces Indigenous peoples who possess those rights as subjects of international law.[54] Under this approach, anthropologists may find, like Dorothy Hodgson, that individuals and communities, 'organized themselves by positioning themselves as "indigenous people," in order, in part, to engage with the increasingly powerful international

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49 Thornhill et al (n 12) 446.
50 Ibid 447–50.
51 Ibid 480.
52 Ibid 445.
53 Ibid 446.
54 Barnard (n 42) 7.

indigenous rights movement'.[55] Furthermore, it seems as though Thornhill et al have identified some material effects of international law when they argue that international human rights holding communities 'are stripped away from the factual societal sub-national collectives to which they are attached and integrated into a higher-order, increasingly global legal system'.[56] But even if those who become Indigenous peoples are 'stripped away from the factual societal sub-national collectives to which they are attached', that stripping is not total, nor necessarily an integration into a 'higher', a-factual, non-material order.

Accordingly, Thornhill et al's invocation of global law is an attempt at locating the subjectivity of Indigenous peoples in international law, but in a way that avoids 1) the problems that could arise from either acknowledging that the subjectivity of Indigenous peoples in international law is a colonial manifestation; or 2) criticism that could arise from doctrinal approaches to international law where the cardinal subjects of international law are states and all other actors, including humans, are objects.[57] Despite, perhaps, attempts to avoid those problematic consequences, the situations they invoke to support the global legal system can be re-read to reflect the dispersal of international legal discourse, perhaps, as a result of globalisation.[58] We turn to that now.

C *From International Legal Objects to Subjects, Who Remain Objects*

This Section re-reads Thornhill et al's narrative about the subjectivity of Indigenous peoples. Instead of invoking global law or a global legal system, this Section argues that a widespread or even 'global' uptake of Indigenous peoples' rights is the result of how international legal discourse has been dispersed.

Despite their overtures to the global legal system, an international legal subjectivity is evidenced in Thornhill et al's articulation of Indigenous subjects and rights, which is fundamentally predicated on international legal discourse. In their sections that explain the construction of Indigenous rights, they begin, as many scholars do,[59] by reinvesting the post-World War II, International Labour

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55 See Hodgson (n 43) x.

56 Thornhill et al (n 12) 446.

57 See Jessie Hohmann, 'The Lives of Objects' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press, 2018) 1, 35.

58 It might also be that Chris Thornhill et al mean exactly the same thing that I do, that there are ongoing processes that some people call 'globalisation' dispersing international law. Others, I believe, would call it neoliberalism. The point here is to clarify that international law is centrally important and has been dispersed, perhaps, as a result of globalisation.

59 See, eg, Derek Inman, Stefaan Smis and Dorothée Cambou, '"We Will Remain Idle No More": The Shortcomings of Canada's "Duty to Consult" Indigenous Peoples' (2013) 5(1) *Goettingen Journal of International Law* 251, 268–72; Stefaan Smis, Dorothée Cambou and Genny Ngende, 'The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources' (2013) 35(3) *Loyola of Los Angeles International and Comparative Law Review* 493, 498; Odette Mazel, 'The Evolution of Rights: Indigenous Peoples and International Law' (2009) 13(1) *Australian Indigenous Law Review* 140, 143; Rebecca Tsosie, 'Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized within the US Constitutional Structure?' (2011) 15(4) *Lewis and Clark Law Review* 923, 926–7; Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54, 59; Claire Charters, 'Indigenous Peoples and International Law and Policy' (2007) 18(1) *Public Law Review* 22, 28–31; Cathal Doyle and Jérémie Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"' (2009) 8 *European Yearbook of Minority Issues* 219, 239.

Organization ('ILO') with the authority as a 'pioneer in promoting international standards to address the claims of Indigenous and tribal peoples'.[60] But even if the 1957 *Convention (No 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* ('*Convention No 107*') promoted international standards, it did not address the claims of Indigenous and tribal peoples.[61] The ILO was an international legal pioneer for the regulation, assimilation and integration of Indigenous, other tribal and semi-tribal populations into the body politic of the 'nation to which they belong'.[62] It is easy, however, to rewrite it so that it pertains to Indigenous peoples, even though it never mentions Indigenous peoples and does not indicate that they have self-determination or self-government. However, the international legal codification of 'Indigenous populations' allowed individuals and communities of those populations to later assert themselves as peoples who act with collective will.

In response to assimilationist and integrationist international and national laws and politics like *Convention No 107*, Indian tribal communities and members throughout the Americas — those who were otherwise regulated in international law as 'Indigenous populations' — began organising and mobilising as pan-national, and then international organisations.[63] In the mid-1970s, organisations such as the National Indian Brotherhood of Canada reformulated themselves as the World Council on Indigenous Peoples.[64] The International Indian Treaty Council also began targeting international legal forums to protect them from state assimilationist policies.[65] In their engagements with international law, the term 'Indigenous peoples' emerged. When the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* entered into force in 1976, the ties between peoples and the right to self-determination was made explicit.[66] When portions of José Martínez Cobo's *Study of the Problem of Discrimination against Indigenous Populations* was released in 1982 and 1983, portions of that text reformulated Indigenous populations as 'Indigenous peoples', a formal shift that signified those 'peoples' have self-

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60 Thornhill et al (n 12) 451.

61 See, eg, Anaya, *Indigenous Peoples in International Law* (n 48) 55; *Convention (No 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, signed 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) ('*Convention No 107*').

62 *Convention No 107* (n 61) art 1(b).

63 See Douglas E Sanders, *The Formation of the World Council of Indigenous Peoples* (IWGIA Document, No 29, 1977) 14–18.

64 Roxanne Dunbar Ortiz, 'The First Ten Years: From Study to Working Group, 1972–1982' in Dunbar-Ortiz et al (eds), *Indigenous People's Rights in International Law: Emergence and Application* (Gáldu & IWGIA, 2015) 42, 44; Ward Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as "Self-Determination" in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20(3) *Griffith Law Review* 526, 536–7 n 54.

65 Ortiz (n 64) 44; Churchill (n 64) 536–7 n 53.

66 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

determination.[67] The UN Working Group on Indigenous Populations ('WGIP') formed in 1982.[68] In 1985, it began drafting a declaration on Indigenous rights.[69] If appeals to a global legal system involve something more than globalisation or the dispersal of international legal discourse, it ignores that Indigenous peoples and rights emerged from international law. As evidence of this emergence, in 1986 Russel Barsh published an article titled 'Indigenous Peoples: An Emerging Object of International Law'.[70]

As the WGIP continued negotiating and drafting a declaration, the ILO adopted *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries* ('*Convention No 169*').[71] It was the first binding international legal codification of Indigenous peoples as separate, distinct peoples, and of rights that states should recognise to protect them.[72] Bartolomé Clavero and others appropriately criticise the ILO for having not consulted any self-identifying Indigenous peoples and failing to recognise Indigenous peoples' right of self-determination.[73] And yet *Convention No 169* has been ratified, mostly by Latin American states, which Thornhill et al use to support their view that there is a global legal system.[74] While some, like César Rodríguez-Garavito, argue that Latin American states embraced it because it establishes and then exploits a dynamic tension between development and Indigenous peoples that facilitates the

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67 José R Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations*, 36th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983); José R Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations*, 35th sess, Agenda Item 12, UN Doc E/CN.4/Sub.2/1982/2 (10 August 1982).

68 *Study of the Problem of Discrimination against Indigenous Populations*, 28th plen mtg, UN Doc E/RES/1982/34 (7 May 1982).

69 Augusto Willemsen-Diaz, 'How Indigenous Peoples' Rights Reached the UN' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009) 16, 25–8.

70 Russel Lawrence Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80(2) *American Journal of International Law* 369.

71 International Labour Organization, *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

72 See Catherine J Iorns, 'Australian Ratification of International Labour Organisation Convention No 169' (1993) 1(1) *Murdoch University Electronic Journal of Law*; Kristen A Carpenter and Angela R Riley, 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights' (2014) 102(1) *California Law Review* 173, 190.

73 Bartolomé Clavero, 'The Indigenous Rights of Participation and International Development Policies' (2005) 22(1) *Arizona Journal of International and Comparative Law* 41, 45–6. In relation to such criticism regarding *Convention No 107*, see Howard R Berman, 'The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No 107 at the 75th Session of the International Labour Conference, 1988' (1988) 41 *Review: International Commission of Jurists* 48, 48–50; Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989)* (Oxford University Press, 2005) 256, 274.

74 Thornhill et al (n 12) 452–3.

subordination of their rights, like FPIC, to economic development,[75] others read it as promoting and protecting Indigenous peoples' rights.[76]

In 1991, two years after the ILO's codification of 'Indigenous peoples', S James Anaya wrote:

> Within the last several years, concern for groups identified as indigenous has assumed a prominent place on the international human rights agenda. *The conceptual category of indigenous peoples or populations has emerged within the human rights organs of international organizations and other venues of international discourse*. The category is generally understood to include not only the native tribes of the American continents but also other culturally distinctive non-state groupings, such as Australian aboriginal communities and tribal peoples of southern Asia, that similarly are threatened by the legacies of colonialism.[77]

It is salient to acknowledge, as Anaya did, that '[t]he conceptual category of indigenous peoples or populations has emerged within the human rights organs of international organizations and other venues of international discourse'.[78] Subsequently, in 1994 Barsh reassessed his stance on Indigenous peoples in an article titled, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law'.[79]

As explained above, there is a problem. Even after one becomes recognised as an active and *agentic* subject — as a 'peoples' — 'this constitution is not possible in practice without also being constituted as a passive subject',[80] as an object. To become a subject is not to break from or undermine that discourse. Instead, by becoming Indigenous peoples, they demonstrated that they were free and willing subjects of international legal discourse that had previously regulated them as Indigenous populations. To be a people or peoples, as opposed to a population, however, is no guarantee of freedom from domination or oppression. To become peoples is to also admit one is a population. It is a transformation of the self and how it relates to itself and legal discourse.[81] As we will see, individuals and communities objectify themselves — become objects — as 'true' and 'essential' representatives of a collective will so that others can identify them as Indigenous peoples for the purposes of claiming FPIC. They constitute themselves as both subjects and objects of international legal discourse.

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75 César Rodríguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18(1) *Indiana Journal of Global Legal Studies* 263, 284.

76 See, eg, Cathal M Doyle and Andrew Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement* (Tebtebba Foundation, 2014) 53–4; Andrew Erueti, 'The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 93, 94–5. See also Anaya, *Indigenous Peoples in International Law* (n 48) 52–6; Carpenter and Riley (n 72) 187; Charters (n 59) 28.

77 S James Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8(2) *Arizona Journal of International and Comparative Law* 1, 4 (emphasis added).

78 Ibid.

79 Russel Lawrence Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law?' (1994) 7 *Harvard Human Rights Journal* 33.

80 Mark GE Kelly (n 29) 88.

81 See Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press, 2015); Foucault, 'About the Beginning of the Hermeneutics of the Self' (n 30) 203.

After the emergence of Indigenous peoples in international legal discourse, subsequent developments of Indigenous peoples' rights in regional and state jurisdictions followed and borrowed from international legal discourse as individuals and communities began self-identifying as Indigenous peoples.[82] Thornhill et al contend that a global legal system is evidenced by the uptake of international legal discourse in the Inter-American Commission on Human Rights ('Inter-American Commission'), Inter-American Court of Human Rights ('Inter-American Court') and the African Commission on Human and Peoples' Rights ('African Commission'), as well as a range of state level adoptions of Indigenous peoples' rights in Latin American and African states.[83] Technically, each of the regional and state levels are distinct, independent and non-international legal jurisdictions. But where institutions at those levels adopt the terms of international legal discourse, and, indeed, invoke international law in their jurisprudences, legal institutions are involved in processes of dispersing and giving material effect to international legal discourse. As the next Section reveals, each of those levels or jurisdictions adopts the language and terminology of Indigenous peoples after the emergence of Indigenous peoples in international law.

D *The Dispersal of International Discourse throughout Regional and State Jurisdictions*

A brief examination of the jurisprudential trajectory of the Inter-American Commission, Inter-American Court, African Commission and several state regimes demonstrates how those jurisdictions borrowed and dispersed the terminology on Indigenous peoples and their rights, which had emerged from international legal discourse.

In the 1970s, before the emergence of Indigenous peoples in international law, the Inter-American Commission began considering issues involving Indian and Indigenous populations.[84] Between the early 1980s and 2000 the Commission issued special reports on human rights, which reflected its adoption of the terminological changes of international legal discourse from 'populations' to

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82 See Engle (n 43) 112; Jung (n 43) 147; Hodgson (n 43) 4–7.

83 Thornhill et al (n 12) 451–88.

84 See, eg, *Indians of Planas Region v Colombia (Judgment)* (Inter-American Commission of Human Rights, Case No 1690, 16–27 October 1972).

'Indigenous peoples'.[85] Neither the *American Convention on Human Rights*[86] nor the *American Declaration on the Rights and Duties of Man*[87] — the constitutive documents for the Inter-American Court and Inter-American Commission — mention Indigenous peoples or their rights.[88] However, since 2000, the Commission and the Court 'have both been prepared to interpret the basic rights of these two instruments in a manner that is sensitive to the special circumstances of indigenous peoples'.[89] According to Lucas Lixinski, the Court's willingness to draw on international legal instruments to read Indigenous peoples' rights into its jurisprudence supports the unity of the international legal system rather than the 'feared fragmentation'.[90]

Following the UN General Assembly's endorsement of *UNDRIP* in 2007,[91] the Organization of American States ('OAS') adopted its *American Declaration on the Rights of Indigenous Rights* ('*OASDRIP*') in 2016.[92] As Thornhill et al acknowledge, in the same year the ILO adopted *Convention No 169*, bodies within the OAS 'began to prepare a legal instrument concerning the rights of Indigenous populations'.[93] In a publication from 2000 on the history of Indigenous issues in the Inter-American system, the Commission wrote that '[t]hose efforts began in 1971, when the Commission found that *indigenous peoples* had a right to special

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85 See, eg, Organization of American States, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, Doc No OEA/Ser.L/V/II.62, Doc. 10 Rev. 3, 29 November 1983; Organization of American States, Inter-American Commission on Human Rights, *Fourth Report on the Situation of Human Rights in Guatemala*, Doc No OEA/Ser.L/V/II.83, Doc. 16 Rev, 1 June 1993, ch III ('*The Guatamalan Maya-Quiche Population and Their Human Rights*'); Organization of American States, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Colombia*, Doc No OEA/Ser.L/V/II.84, Doc. 39 Rev, 14 October 1993, ch XI ('*The Rights of Indigenous People in Colombia*'); Organization of American States, Inter-American Commission on Human Rights, *Special Report on the Human Rights Situation in the So-Called 'Communities of Peoples in Resistance' in Guatemala*, Doc No OEA/Ser/L/V/II.86, Doc. 5 Rev. 1, 16 June 1994; Organization of American States, Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, Doc No OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999, ch X ('*The Rights of Indigenous Peoples*'); Organization of American States, Inter-American Commission on Human Rights, *The Human Rights Situation of the Indigenous People in the Americas*, Doc No OEA/Ser.L/V/II.108, Doc. 62, 20 October 2000.

86 *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

87 Organization of American States, Inter-American Commission on Human Rights, *American Declaration on the Rights and Duties of Man*, Doc No AG/Res.XXX, 2 May 1948.

88 Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002) 266–8.

89 Nigel Bankes, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples' (2010) 47(2) *Alberta Law Review* 457, 479.

90 Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21(3) *European Journal of International Law* 585, 586.

91 *UNDRIP*, UN Doc A/RES/61/295 (n 5).

92 Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, Doc No AG/RES.2888, 15 June 2016.

93 Thornhill et al (n 12) 455; Organization of American States, Inter-American Commission on Human Rights, *Chapter II Preparatory Documents for the Draft American Declaration of the Indigenous Peoples*, GA Res 1022/89, OEA/Ser.L/V/II.108, Doc. 62, 20 Oct 2000.

legal protection because they had endured severe discrimination'.[94] Contrary to this assertion, the Commission at that time did not find that 'Indigenous peoples' had a right to special legal protection. Consistent with international legal discourse that existed in 1971,[95] the Commission at that time used the term 'Indians' rather than 'Indigenous'.[96] The Commission adopted the term 'Indigenous peoples' amidst the widespread dispersal of international legal discourse on Indigenous peoples in the early 1990s.[97] The OAS is a distinct regional human rights regime, but it also borrows, interprets, employs, disperses and gives material effect to international law.

The African Commission reflects a similar terminological adoption and material construction. It considered issues involving 'ethnic' groups as peoples in 1995.[98] It did not make any favourable findings for Indigenous peoples until its 2009 *Endorois* case.[99] Hence, scholars view the African Commission as having borrowed from and supporting the jurisprudence of the Inter-American Court.[100] Again, even if it is a distinct and separate regional jurisdiction, the African Commission gave material form to Indigenous peoples and their rights through its contribution to the dispersal of international legal discourse. This view is supported by Hodgson's superlative study on the Maasai of Tanzania.[101] Some

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94 *The Human Rights Situation of the Indigenous People in the Americas*, Doc No OEA/Ser.L/V/II.108 (n 85) ch I pt 1 (emphasis added).

95 See above Part II(C).

96 See, eg, Inter-American Commission on Human Rights, *Informe Annual de la Comisión Interamerica de Derechos Humanos 1971* [Annual Report of the Inter-American Commission on Human Rights 1971], Doc No OAS/Ser. L/V/II/.27, Doc. 11 Rev, 6 March 1972. In the early 1940s the Organization of American States ('OAS') 'officially translated "Instituto indigenista interamericano", "Congresos indigenistas interamericanos" and "politica indigenista" into English as "Inter-American Indian Institute", "Inter-American Indian Conferences" and "Indianist policy", respectively': José R Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations: Final Report (Supplementary Part) Submitted by the Special Rapporteur*, 35th sess, Agenda Item 12, UN Doc E/CN.4/Sub.2/1982/2/Add.2 (5 May 1982) 2. In the 1980s, Spanish speaking activists used the terms 'indianista', 'indianismo' and 'indio' rather than 'indigenista', 'indigenismo' and 'indigena' due to their association with indiscriminate assimilationist policies: at 2. See also Rodolfo Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate' in Rachel Sieder (ed), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan, 2002) 24, 27.

97 *The Human Rights Situation of the Indigenous People in the Americas*, Doc No OEA/Ser.L/V/II.108 (n 85) pt 2; Kingsbury (n 11) 114.

98 See, eg, *Congrès du Peuple Katangais v Democratic Republic of the Congo (Judgment)* (African Commission on Human and Peoples' Rights, Case No 75/92, 22 March 1995).

99 *Centre for Minority Rights Development (Kenya) v Kenya (Judgment)* (African Commission on Human and Peoples' Rights, Case No 276/03, 25 November 2009). This decision by the Commission was formally approved by the African Union at its January 2010 meeting. See Minority Rights Group International, 'Landmark Decision Rules Kenya's Removal of Indigenous People from Ancestral Land Illegal' (Press Release, 4 February 2010) <https://minorityrights.org/2010/02/04/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal/>, archived at <https://perma.cc/4TFP-FQKM>.

100 See Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16(1) *International Journal of Human Rights* 1, 15–16; Doyle and Whitmore (n 76) 97; Jérémie Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) *International and Comparative Law Quarterly* 245, 253.

101 Hodgson (n 43).

Maasai began identifying themselves as Indigenous peoples after members of the community started

> attending the annual meetings of the UN Working Group and UN Permanent Forum … [and] built strong ties with several international organizations that advocated on behalf of indigenous peoples … [which] sponsored local, national, and international workshops and meetings to educate Maasai and other African groups about indigenous rights and to provide opportunities for activists to meet one another to share their experiences, learn new strategies, and build an international coalition.[102]

The dispersal of international legal discourse is also demonstrable in Latin American states. Latin American states began deploying international legal discourse about Indigenous peoples' rights after some became signatories of *Convention No 169*.[103] The *Colombian Constitution of 1991* acknowledges 'indigenous [Indian] peoples'.[104] Thornhill et al correctly note that 'provisions of ILO *Convention 169* appear directly in Article 246 of the [Colombian] *Constitution*'.[105] Whether in Bolivia, Ecuador or elsewhere, as Thornhill et al note, 'Indigenous groups were able to claim rights because of the openings and opportunities provided by international law'.[106] Likewise, Courtney Jung has argued that those involved in the Mexican Zapatista movement reformulated themselves as Indigenous peoples after the decrease in political salience of leftist international movements, which coincided with the dispersal of international legal discourse on Indigenous peoples.[107]

This Part has described this article's main theory, method and framework. It maintains that Indigenous peoples are subjects of international legal discourse that materially produce themselves by acting in certain ways, which also produces them as objects of discourse. The case study provided in Part IV shows how members of the W&J community materially constitute themselves as Indigenous peoples through their invocation of international legal discourse that clashes with state legal discourse. In limited contexts, the Australian State has adopted the terminology of Indigenous peoples and their rights — particularly by rewriting unofficial, non-legal documents as though they always pertained to Indigenous peoples,[108] which is somewhat like the rewriting of *Convention No 107* or the

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102 Ibid 105.

103 See Rodríguez-Garavito (n 75); Thornhill et al (n 12) 452–3.

104 *Constitución Política de Colombia 1991* (Colombia) arts 246, 329 [tr Marcia W Coward et al, *Colombia's Constitution of 1991 with Amendments through 2005* (Oxford University Press, 2019)] (square brackets in original).

105 Thornhill et al (n 12) 469.

106 Ibid 470.

107 Jung (n 43) 147–9.

108 Angela Pratt and Scott Bennett, 'The End of ATSIC and the Future Administration of Indigenous Affairs' (Current Issues Brief No 4 2004-05, Parliamentary Library, Parliament of Australia, 9 August 2004).

OAS's rewriting of its study on discrimination against 'Indians' and 'Natives'.[109] Instead of evidence of a deepening 'global law' as Thornhill et al have argued, the Australian legal system's limited receptivity to Indigenous peoples' rights reveals how international legal discourse spreads, but materialises when human rights claimants produce and present themselves in ways that matter. They materially constitute themselves as Indigenous peoples and politically associate themselves with democratic processes for the purposes of generating a clash between international and national legal discourses. The next Part begins with a brief history on the formation of Australia's native title regime which aids in contextualising the W&J Family Council's opposition to the Carmichael mine and why it is significant, important and costly.

III AUSTRALIA'S STATE REGIME

This article primarily focuses on the international human rights law of Indigenous peoples. But because the material constitution of Aboriginal individuals and communities as Indigenous peoples arises from the clash between international and national legal regimes, it is necessary to provide some background about the formation and construction of the Australian legal regime. The following Sections discuss Australia's native title regime and how it is poised to clash with international law's human rights. It begins with a discussion of Australia's native title regime, the native title future acts processes and Australia's approach to *UNDRIP*.

A *Australia's Native Title Regime*

Native title rights were established through the *Mabo* cases.[110] The 1992 case, *Mabo v Queensland (No 2)* ('*Mabo No 2*'), recognised the legal claim of Aboriginal and Torres Strait Islander peoples to ancestral territories within

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109 See above 10–11, 15. For example, the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) established the Aboriginal and Torres Strait Islander Commission ('ATSIC'), which sought to ensure maximum participation of Aboriginal and Torres Strait Islander peoples 'in the formulation and implementation of government policies that affect them'; promote their self-management and self-sufficiency; further their economic, social and cultural development; and ensure coordination of the implementation of policies affecting them: at s 3. That Act mentions 'Indigenous inhabitants' but not 'Indigenous peoples': at ss 4, 224. Today, publications stored on the Parliament website explain ATSIC's objectives through the language of international legal discourse, specifically about Indigenous peoples — even though the Act did not mention 'Indigenous peoples'. The publications say that ATSIC's objectives were 'to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation; to promote Indigenous self-management and self-sufficiency; to further Indigenous economic, social and cultural development; and to ensure co-ordination of Commonwealth, state, territory and local government policy affecting Indigenous people': see Angela Pratt, 'Make or Break? A Background to the ATSIC Changes and the ATSIC Review' (Current Issues Brief No 29 2002-03, Parliamentary Library, Parliament of Australia, 26 May 2003); Senate Select Committee on the Administration of Indigenous Affairs, Parliament of Australia, *After ATSIC: Life in the Mainstream?* (Final Report, March 2005) 13 [2.2].

110 *Mabo v Queensland (No 1)* (1988) 166 CLR 186 ('*Mabo No 1*'); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo No 2*').

Australia's territory that predate settler-state sovereignty claims.[111] In this case, the High Court of Australia undermined terra nullius — the doctrinal justificatory basis for colonisation that legitimated the acquisition of sovereignty over land that was unsettled or uncultivated — but did not unsettle Crown sovereignty.[112] Accordingly, *Mabo No 2* found that native title and Crown sovereignty coexisted, but only to the extent that the Crown had not exhibited a 'clear and plain intention' to extinguish native title.[113] In *Mabo No 2*, those whom the state recognises as 'Aboriginal and Torres Strait Islanders' were granted rights called 'native title'.[114]

Mabo No 2 generated confusion because it was not clear what constituted a 'clear and plain intention' to extinguish or what processes were required to prove native title.[115] Accordingly, the Commonwealth Parliament adopted the *Native Title Act 1993* (Cth) ('*NTA*'), to codify procedural mechanisms to recognise, protect and determine native title while establishing legal mechanisms for validly extinguishing native title — a future acts regime.[116] The *NTA* established the National Native Title Tribunal ('NNTT') to recognise native title claims and to mediate disputes where proposed acts, called future acts, might extinguish native title.[117] Originally, the *NTA* created a procedural framework for regulating future acts that impact native title lands, called the right to negotiate ('RTN'),[118] which is detailed below.[119]

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111 *Mabo No 2* (n 110) 2, 15 (Mason CJ and McHugh J), 51, 75–6 (Brennan J), 115–16 (Deane and Gaudron JJ), 192 (Toohey J). See George K Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights' (2012) 33(4) *Michigan Journal of International Law* 627, 645.

112 *Mabo No 2* (n 110) 29–30, 33–4 (Brennan J).

113 Ibid 64 (Brennan J).

114 Ibid 64–6 (Brennan J). Clearly, given the date of this case, the Court occasionally uses the international legal term 'Indigenous people' and 'Indigenous peoples'. For example, Brennan J wrote of 'indigenous people': at 26, 35–6, 39, 50–1, 52–3, 59–61, 66–7, 70. Deane and Gaudron JJ also wrote of 'indigenous peoples', citing *In re Southern Rhodesia* (1919) AC 234: *Mabo No 2* (n 110) 83. This might appear to militate against the argument presented here, that Indigenous peoples are international legal subjects. Admittedly and undeniably, there are earlier uses of 'indigenous peoples'. The salient point is that the term 'Indigenous peoples' means something different today when asserting human rights claims because members of Indigenous populations engaged with and became subjects of international law in the 1970s and 1980s: see above Parts II(C)–(D). For human rights purposes, those terms are no longer adjectives even if they can be used and often masquerade as mere adjectives. Accordingly, the identifiers 'Aboriginal and Torres Strait Islanders' and 'indigenous peoples' can be used interchangeably without seeming problematic. But, for legal purposes, national and international subjectivities are not identical and not equated.

115 See Sean Brennan, 'Native Title in the High Court of Australia a Decade after Mabo' (2003) 14 *Public Law Review* 209, 211. See also *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422 ('*Yorta Yorta*').

116 *Native Title Act 1993* (Cth) s 3 ('*NTA*').

117 See ibid ss 107–8. Because *Mabo No 1* (n 110) held that the *Racial Discrimination Act 1975* (Cth) made it unlawful for the government to extinguish native title, any governmental acts that extinguished native title after 1975 but before *Mabo No 1* were called into question. See *Western Australia v Commonwealth* (1995) 183 CLR 373, 453.

118 *NTA* (n 116) s 3(b), pt 2 div 3 sub-div P. See MA Stephenson, 'Resource Development on Aboriginal Lands in Canada and Australia' (2002–03) 9 (Special Issue) *James Cook University Law Review* 21, 31.

119 See below Part III(B)(2).

In response to a 1996 case,[120] Parliament passed the *Native Title Amendment Act 1998* (Cth) ('*1998 Amendments*').[121] Among other changes, the *1998 Amendments* streamlined the future acts regime by adding a second process, the Indigenous Land Use Agreement ('ILUA') process, also described below.[122] Some commentators were highly critical of the *1998 Amendments*.[123] Most importantly, for our purposes, the UN Committee on the Elimination of Racial Discrimination ('CERD') criticised the *1998 Amendments* as inconsistent with its General Recommendation XXIII.[124] That recommendation called on ratifying states to recognise, protect and ensure 'that no decisions directly relating to [Indigenous] rights and interests are taken without their informed consent'.[125] As the earliest UN treaty body to argue that states should recognise the rights of Indigenous peoples,[126] CERD's criticism of the *1998 Amendments* was an early legalistic pronouncement of Indigenous peoples' human rights. Under the material approach proposed here, CERD sought to protect — and materially constitute — all Aboriginal and Torres Strait Islander peoples as Indigenous peoples who are subjects of international law. To be sure, some Aboriginal and Torres Strait Islander peoples involved in the UN,[127] and elsewhere,[128] were actively cultivating

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120 *Wik Peoples v Queensland* (1996) 187 CLR 1. The practical implication of this case was that pastoral leases did not provide leaseholders with a right to exclusive possession, and that lands subject to such leases could contain native title rights: at 37.

121 *Native Title Amendment Act 1998* (Cth). See Richard Bartlett, 'A Return to Dispossession and Discrimination: The Ten Point Plan' (1997) 27(1) *Western Australia Law Review* 44, 50 ('A Return to Dispossession and Discrimination').

122 *NTA* (n 116) s 3(b), pt 2 div 3 sub-divs A–E. See below Part III(B)(1).

123 Tony McAvoy, 'Native Title Litigation Reform' (2009) 93 *Reform* 30, 30, quoting Interview with Tim Fisher (John Highfield, ABC TV World at Noon, 4 September 1997) regarding the Ten-Point Plan. See also Dan Meagher (ed), 'Comments' (2008) 19(3) *Public Law Review* 179, 184, citing *NTA* (n 116) s 26(2)(f); Bartlett, 'A Return to Dispossession and Discrimination' (n 121).

124 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 54th sess, 1331st mtg, Supp No 18, UN Doc A/54/18 (18 March 1999) ch II(A) ('*Decision 2 (54) on Australia*') 7 [9], [11]; *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (26 September 1997) annex V ('*General Recommendation on the Rights of Indigenous Peoples, Adopted by the Committee, at Its 1235th Meeting, on 18 August 1997*') ('*General Recommendation XXIII*'). See Katharine Gelber, 'Human Rights Treaties in Australia: Empty Words?' (12 April 2001) *Australian Review of Public Affairs*. See also Greg Marks, 'Australia, the Committee on the Elimination of All Forms of Racial Discrimination and Indigenous Rights' (2004) 6(7) *Indigenous Law Bulletin* 11, 11–12; McAvoy (n 123) 30.

125 *General Recommendation XXIII*, UN Doc A/52/18 (n 124) 122 [4(d)]. Paragraph 4(d) is directly related to Adrian Burragubba's claims: see below Part IV.

126 See Jérémie Gilbert, 'CERD's Contribution to the Development of the Rights of Indigenous Peoples under International Law' in David Keane and Annapurna Waughray (eds), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press, 2017) 92.

127 See Erica-Irene Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 11, 13–15.

128 See above n 109. Lois (Lowitjia) O'Donoghue was the first Chairperson of ATSIC. In that role, she actively communicated with members of the UN Working Group on Indigenous Populations ('WGIP'). See Erica-Irene A Daes, 'The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009) 48, 70. ATSIC was abolished by the Howard Government in 2004: Pratt and Bennett (n 108).

international legal subject-status. However, CERD's critique of Australia's native title regime begins to reveal a clash between Australian laws on Aboriginal and Torres Strait Islander peoples and international laws on Indigenous peoples.

There are several material consequences of these cases and legislative amendments. First, Australia's native title jurisprudence does not recognise Aboriginal law as such.[129] Stewart Motha argues that it legally determined what is or is not 'a "proper" "Aboriginality" adequate to retain a proprietary interest'.[130] Similarly, Jon Altman has criticised the *NTA* for trapping Aboriginal and Torres Strait Islander peoples in a contrived Western legal definition that is designed to gain title to ancestral lands and that perpetuates a form of legalised colonialism.[131] Furthermore, Australian law defines and constructs what matters as 'Aboriginal and Torres Strait Islander' (the legal subjects), as well as what laws and practices matter for purposes of native title (the legal objects).[132] As a more obvious example about the materiality of the rights, a subsequent case formed traditional practices into a native title right as a stick in a 'bundle of rights',[133] a trope utilised to conceive of property law in material terms.[134]

Secondly, it might mean that those people who lose native title claims — or refuse to be subjected to the state[135] — continue to exhibit laws, practices, cultures and ways of living that are perfectly identifiable to them,[136] but are not recognisable to the state as 'Aboriginal and Torres Strait Islander' peoples for the

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129 See *Western Australia v Ward* (2002) 213 CLR 1, 397 [969] ('*Ward*'); *Yorta Yorta* (n 115) 462 [110], 489 [176]–[177], 490 [179]. See Lisa Strelein, 'From *Mabo* to *Yorta Yorta*: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225, 270; Brennan (n 115); Ben Golder, 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law' (2004) 9(1) *Deakin Law Review* 41; Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *University of Western Australia Law Review* 35.

130 Stewart Motha, 'The Sovereign Event in a Nation's Law' (2002) 13(3) *Law and Critique* 311, 338, citing *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (Olney J); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244.

131 Jon Altman, 'Indigenous Rights, Mining Corporations, and the Australian State' in Suzana Sawyer and Edmund Terence Gomez (eds), *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State* (Palgrave Macmillan, 2012) 46, 52; Tom Calma, *Native Title Report 2009* (Report, Australian Human Rights Commission, 2009) 80–8.

132 *Mabo No 2* (n 110).

133 *Western Australia v Ward* (2000) 99 FCR 316, 345 [90]. See Ann Genovese and Alexander Reilly, 'Turning the Tide of History' (2003–04) 2 *Griffith Review* 158.

134 Katy Barnett, 'Western Australian v Ward: One Step Forward and Two Steps Back' (2002) 24(2) *Melbourne University Law Review* 462, 466. See also Marcia Langton, Odette Mazel and Lisa Palmer, 'The "Spirit" of the Thing: The Boundaries of Aboriginal Economic Relations at Australian Common Law' (2006) 17(3) *Australian Journal of Anthropology* 307, 310–11.

135 See Irene Watson, 'First Nations Stories, Grandmother's Law: Too Many Stories to Tell' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 46.

136 See, eg, Irene Watson, 'First Nations, Indigenous Peoples: Our Laws Have Always Been Here' in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge, 2018) 96. See also Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

purposes of native title.[137] Another consequence is that if a developer can access resources on or under native title lands, they may extinguish native title rights where those rights are lesser sticks in the bundle.[138] Problematically, when native title claimants cannot stop others from exploiting those resources, they have no means of preventing the extinguishment of their rights if resource exploitation conflicts with their native title rights. To ostensibly mitigate extinguishment as a legal fait accompli, the *NTA*'s future acts regime creates processes and procedures that balance conflicting uses with extinguishment. The following Sections describe the future acts regime and how it does not allow native title claimants to withhold their consent, which the human rights regime does, as described in the subsequent Section.

B *Future Acts Procedural Processes for Conflict Resolution*

This Section briefly describes the Australian future acts regimes. A 'future act' is an act that would extinguish native title rights.[139] The *NTA* establishes two processes, the RTN and the ILUA, for validating future acts.[140] Those processes demonstrate how native title is not Aboriginal and Torres Strait Islander peoples' own law, and, furthermore, how Aboriginal and Torres Strait Islander peoples must materially produce and constitute themselves according to Australian native title law to be subjects of the *NTA*. To be so subjected is an alteration to their 'modes of beings', although it is an alteration at the state legal level. Whilst compliance with the *NTA* is compulsory,[141] the grantee — not the native title party — decides which process to pursue (by triggering the future act process), and neither process allows those who have native title rights to withhold their consent.[142] As explored below, a consequence is that those who can constitute themselves as Indigenous peoples in the processes of claiming international human rights, can then claim that Australia does not recognise their human rights. To be so subjected is another alteration to their 'modes of beings', although it is an alteration according to international legal discourse. Consider first ILUAs and RTNs.

1 *Indigenous Land Use Agreements*

Created by the *1998 Amendments*, ILUAs allow grantees, such as miners, to enter into an agreement with native title holders — those who comprise and constitute themselves as the registered native title claimant ('RNTC') or native

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137 Australian law vested mineral ownership with the Crown, as the High Court of Australia confirmed in *Ward* (n 129), despite the majority finding to the contrary in *Yanner v Eaton* (1999) 201 CLR 351 ('*Yanner*'). See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 ('*Yarmirr*'). Langton, Mazel and Palmer (n 134) argue that *Yarmirr* represents the extinguishment of economic rights by narrowly defining what counts as commerce and trade, finding that mere 'exchanges' do not amount to market-economy type actions: at 310–11. For a general account, see Korosy (n 5) 82–7; Brenna Bhandar and Jonathan Goldberg-Hiller, 'Law, Sovereignty, and Recognition' in Brenna Bhandar and Jonathan Goldberg-Hiller (eds), *Plastic Materialities: Politics, Legality, and Metamorphosis in the Work of Catherine Malabou* (Duke University Press, 2015) 209, 214–21.

138 See Stephenson (n 118) 25–30.

139 *NTA* (n 116) pt 2 div 3, pt 15 div 2 s 233.

140 Ibid ss 24AA, 24BA–24EB, 25–44.

141 Ibid s 28.

142 Ibid s 29(2)(c).

title holders.[143] ILUAs are legally enforceable contracts between RNTCs or native title holders and the development proponents.[144] They enable the parties to enter into a process that is more flexible than the RTN, which might be considered a 'win–win' situation.[145] ILUAs allow the parties to negotiate how they will work together regarding disputes, monetary compensation, employment, training, or other areas of mutual concern, such as how lands and waters are managed.[146] ILUAs also allow native title claimants to seek greater private acknowledgement of rights than is allowable by the *NTA*: the *NTA* does not specifically grant native title claimants mineral rights, but an ILUA may cover 'royalty' payments, partnerships in the enterprise, or any feature to which both parties agree.[147] As such, an ILUA can benefit native title holders in ways that the RTN would not allow, and also provides the developer with the ability to access or extinguish native title rights.[148] Even if ILUAs allow for more flexible negotiations, grantees retain the ability to initiate an RTN process before, during or after an ILUA process, which looms over any ILUA negotiation.[149]

2 *Right to Negotiate*

The RTN provides native title holders and registered claimants with the right to negotiate with the government and the grantee prior to some future land-use grants that may affect or extinguish native title.[150] The *NTA* allows for an RTN without having native title previously determined and without granting a right of ownership in the minerals, which is held by the Crown.[151] Because the *NTA* does not guarantee that native title rights will be recognised or will not be impacted, the RTN process provides native title claimants with the ability to negotiate how their

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143 There are three forms of Indigenous Land Use Agreements ('ILUA'): Body Corporate Agreements, Areas Agreements and Alternative Procedure Agreements: ibid pt 2 div 3 sub-divs B–D. Body Corporate Agreements are used when there has been a native title determination, while Area Agreements and Alternative Procedure Agreements are used when there has not been a determination. Area Agreements can extinguish or suspend native title, whereas Alternative Procedure Agreements cannot extinguish or suspend native title since all registered claimants do not have to be parties: ss 24CB(e), 24 CD(1), 24DB, 24DC, 24DE(1).

144 Ibid ss 24BD, 24CD, 24DE, 24EA.

145 See, eg, ibid ss 24BI(2), 24CI, 24DJ.

146 Ibid ss 24BB, 24CB. For example, the Argyle Diamonds Indigenous Land Use Agreement (National Native Title Tribunal File No WI2002/003, 8 April 2005) between Rio Tinto and the traditional owners of the mine, the Gija and Mirriuwung people, created income streams for future generations of local Aboriginal people, as well as training, employment and business opportunities and a voice for Aboriginal people in mining decisions affecting their interests: 'Indigenous Land Use Agreements', *Australian Government, Australian Trade and Investment Commission* (Web Page) <https://www.austrade.gov.au/land-tenure/native-title/indigenous-land-use-agreements>, archived at <https://perma.cc/E4QN-PVCE>.

147 Ciaran O'Faircheallaigh and Tony Corbett, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14(5) *Environmental Politics* 629, 635 ('Indigenous Participation').

148 Other motivating ideas behind the *NTA* amendments that legalised the ILUA processes were discriminatory in nature. See Bartlett, 'A Return to Dispossession and Discrimination' (n 121) 50.

149 *NTA* (n 116) ss 24EB(1)(c), 26(2).

150 Ibid pt 2 div 3 sub-div P, s 25.

151 Australian states have vested mineral ownership with the Crown, as the High Court of Australia confirmed in *Ward* (n 129), despite the majority finding to the contrary in *Yanner* (n 137). See above n 137.

rights are impacted but not whether they are impacted.[152] It is a structured negotiation 'designed to encourage the reaching of an agreement'.[153] Negotiations commence when the government provides notice of the proposed land-use act, with the date of notification triggering a timeline for negotiation.[154] From the notice date, potentially affected Aboriginal and Torres Strait Islander peoples have several months to register with the NNTT as either a body corporate or a registered claimant.[155] As such, the law requires them to constitute themselves in a particular way to be identifiable to the grantee and the state. When Aboriginal or Torres Strait Islander peoples are properly self-constructed according to native title law, the parties must engage in good faith negotiations for six months before the NNTT or the Minister can make a determination as to whether the future act may be done.[156]

The RTN also limits the substance of any negotiation in two ways. First, negotiations 'must necessarily be about the terms and conditions upon which the native title parties would be prepared to agree'.[157] Secondly, the negotiation is only substantively constrained by the requirement of good faith.[158] Negotiations cannot be about the temporality of the negotiation or whether the act may not be done because the *NTA* does not provide a right to question the doing of the act.[159] If an agreement is reached, then a copy is provided to the NNTT or arbitral body.[160] So long as six months have elapsed and the grantee can demonstrate good faith on its part, if the parties do not reach agreement, the NNTT or the Minister is required to make a determination regarding the 'doing of the act'.[161] If the NNTT finds that an act may be done, it is limited to granting compensation for

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152 See *NTA* (n 116) ss 25–6, 28. The right to negotiate process applies to any future act that passes the freehold test or prior to the government granting an interest in the tenement, such as a mining interest: at ss 24MA, 24MD, 26. Similarly, a renewal, re-grant or extension of a mining lease that is a permissible lease is not exempt: at s 26D(1).

153 Stephenson (n 118) 57. See *NTA* (n 116) s 25.

154 *NTA* (n 116) ss 28–9. Notice is provided to the native title holders, the registered native title claimants, the representative body, the public, the grantee party, or the registrar of the arbitral body: at ss 29(2)–(3), 30A.

155 Ibid ss 29(4), 30(1)(a)–(b).

156 Ibid ss 35(1), 36. The Native Title Amendment Bill 2012 (Cth) sought to extend the time before a party seeks a determination from the arbitral body from six to eight months: at cl 74.

157 *Northern Territory v Risk* [1998] NNTTA 1, 80 ('*Northern Territory v Risk*').

158 *NTA* (n 116) s 31; *Western Australia v Taylor* (1996) 134 FLR 211, 223–5; *Adani Mining Pty Ltd v Driver* [2013] NNTTA 30; *FMG Pilbara Pty Ltd v Cox* [2009] 175 FCR 141, 146 [27].

159 *Northern Territory v Risk* (n 157) 80.

160 *NTA* (n 116) s 41A(1).

161 Ibid ss 25(3), 28(f), 29, 35, 38.

access over native title land and, unlike ILUAs, cannot make a determination that entitles the claimant to receive royalties, income or profit sharing.[162]

The *NTA*'s future acts regime does not allow native title claimants to withhold consent or question the 'doing of the act'.[163] It does require Aboriginal and Torres Strait Islander peoples to constitute and produce themselves as an RNTC, a body corporate or a native title holder for native title purposes.[164] Those who want to question the 'doing of the act' or withhold their consent must, then, constitute themselves according to discourses that putatively enables subjects to withhold consent.[165] The international legal discourse is such a discourse: it recognises Indigenous peoples' right to FPIC.

C *Australia and UNDRIP*

Amid widespread member state endorsement of *UNDRIP* in 2007, Australia was one of four countries to vote 'no'.[166] On 3 April 2009, Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, announced that Australia would reverse its position and endorse *UNDRIP*.[167] The Minister couched Australia's endorsement in language highlighting the aspirational nature of the instrument. Macklin stated:

> Today, Australia joins the international community to affirm the aspirations of all Indigenous peoples. … While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to.[168]

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162 *NTA* (n 116) s 38(2). The grant of compensation is consistent with a limited interpretation of the *Australian Constitution* s 51(xxxi), which requires that just terms must be paid for the extinguishment of any property right. In 2009, the National Native Title Tribunal ('NNTT') made native title determinations in favour of the native title claimants: *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) v Western Australia* [2009] NNTTA 49; *Weld Range Metals Ltd v Western Australia* [2011] NNTTA 172. A third case, *Seven Star Investments Group Pty Ltd v Western Australia* [2011] NNTTA 53, also found that the future act must not be done: at 39 [119]–[120]. The NNTT's reasoning was that the grantee party's proposed astrological and mystical exploration methods were non-scientific: at 21 [61], 24 [72], 39 [119]. The NNTT also considered evidence of the grantee's conduct, which included intimidating and disrespectful remarks and threats of violence directed towards the native title party and Central Desert Native Title Services Ltd: at 24–28 [73]–[79], 36–39 [110]–[119]. See Ciaran O'Faircheallaigh and Tony Corbett, 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions' (2006) 33(1) *University of Western Australian Law Review* 153. Cf Christopher J Sumner and Lisa Wright, 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries' (2009) 34(2) *University of Western Australia Law Review* 191. See also David Wells, 'The Native Title System as a Market: Fortescue Metals Group and the Yindjibarndi' (2013) 8(4) *Indigenous Law Bulletin* 20; O'Faircheallaigh and Corbett, 'Indigenous Participation' (n 147).

163 O'Faircheallaigh and Corbett, 'Indigenous Participation' (n 147) 156; *Northern Territory v Risk* (n 157) 80.

164 See above nn 143, 155.

165 It is possible that, in some jurisdictions, non-federal laws require obtaining consent such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or the *Mineral Resources Act 1989* (Qld) ('*Mineral Resources Act*').

166 UN GAOR, 3rd Comm, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007) 10–19.

167 Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech, Parliament House, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>, archived at <https://perma.cc/KD6F-7JZA>.

168 Ibid.

The Australian Human Rights Commission commented that Australia's endorsement was a 'positive, aspirational document that sets out ambitions for a new partnership'.[169] It rhetorically asked: 'Does [*UNDRIP*] elevate customary law over Australian law or individual rights?'[170] And it responded: 'No. There is no legal force to the Declaration and so it cannot elevate customary law over Australian law'.[171]

Australia's position towards *UNDRIP* is consistent with its dualist approach to international law.[172] Even if *UNDRIP* had the legal force of a treaty or customary international law, domestic legislation is required for it to have state-wide effect.[173] There is the possibility that *UNDRIP* influences legislation, as well as judicial interpretation of Australian law, in terms of triggering presumptions of statutory and common law interpretation.[174] And even if *UNDRIP* or other international human rights instruments should underpin non-Indigenous and Indigenous peoples' legislative efforts, there is little authority for claiming that *UNDRIP* is binding on Australian legal actors.[175] This dualism assists in staging the clash between national and international legal discourse and associated subject-statuses.

Despite *UNDRIP*'s status,[176] there is mounting pressure on industry actors to obtain Indigenous peoples' FPIC.[177] Although *UNDRIP* defines FPIC in multiple articles,[178] art 32(2) declares that

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169 'Questions and Answers' (n 6).

170 Ibid.

171 Ibid. The Australian Human Rights Commission is not clear whether its use of 'customary law' means the laws of those constituted under Australian law as Aboriginal and Torres Strait Islander peoples or customary international law.

172 See Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5(2) *Australian Journal of Human Rights* 109, 109.

173 See, eg, Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law and Policy Journal* 247, 249. Some case law suggests that ratifying a Covenant (not a Declaration), but not yet passing domestic legislation, could be binding: see, eg, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

174 Catherine J Iorns Magallanes, 'International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada, and New Zealand' in Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (Oxford University Press, 1999) 235, 245–53; Kristen Walker, 'Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights' (1995) 25(2) *University of Western Australian Law Review* 238, 239–43.

175 Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*' (2008) 9(2) *Melbourne Journal of International Law* 439, 465–6.

176 Ibid.

177 George K Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights' (2012) 33(4) *Michigan Journal of International Law* 627, 646, citing Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy and Natural Resources Law* 31, 40, 42. See also David Brereton and Joni Parmenter, 'Indigenous Employment in the Australian Mining Industry' (2008) 26(1) *Journal of Energy and Natural Resources Law* 66, 68; Fergus MacKay, 'Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review' (2004) 4(2) *Sustainable Development Law and Policy* 43; Stephen M Young, 'The Sioux's Suits: Global Law and the Dakota Access Pipeline' (2017) 6(1) *American Indian Law Journal* 173 ('The Sioux's Suits').

178 *UNDRIP*, UN Doc A/RES/61/295 (n 5) arts 10, 19, 28–9, 32.

> States shall consult and cooperate in good faith with the indigenous peoples concerned … in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[179]

When connected with Indigenous peoples' self-determination to 'freely pursue their economic, social and cultural development',[180] Australia's RTN and ILUA processes do not appear to comply with that article. The following case study demonstrates a clash between international and Australian laws — namely, that international human rights law recognises Indigenous peoples' right of FPIC whilst the Australian legal regime does not allow Aboriginal and Torres Strait Islander peoples to withhold consent to the extinguishment of their native title rights — when industry actors seek to comply with Australian law and some Aboriginal-qua-Indigenous peoples claim international human rights in an attempt to prevent that development.

IV THE CARMICHAEL MINE AND THE FAMILY COUNCIL

This Part presents a case study on the W&J Family Council's opposition to the Carmichael mine. As argued here, the Family Council opposes the Carmichael mine by constituting themselves as international legal subjects — as Indigenous peoples — through their act of claiming and asserting international legal objects — human rights. They do not simply mobilise rights-based language or discourse.[181] They engage in a process of acting, altering or transforming their 'modes of being'.[182] They become identifiable Indigenous peoples by materially constituting themselves as subjects by objectifying themselves within international legal discourse as the 'traditional', 'true' or 'essential' representatives of their communities.[183] In becoming subjects and objects of discourse, dual narratives arise. As discussed below, those that support international legal discourse, like NGOs, aid in expressing their *agentic* actions as subjects. This increases the costs for the developers. In contrast, those that support the mine development uphold the state-based legal discourse as more important than the international legal discourse. They might also question whether the Family Council or its members are 'traditional', 'essential' or 'true' by arguing that they are being used, as objects, by NGOs. As subjects of state-based legal discourse, Family Council members might have to bear financial costs or legal penalties.[184] More problematically, constituting oneself as a subject of international legal discourse may reproduce a form of colonialism by 'materially and politically' bringing 'themselves into subjection to Empire'.[185] Although the Family Council materially constitutes itself as Indigenous peoples, it also

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179 Ibid art 32(2).

180 Ibid art 3.

181 On the mobilisation of rights-based language and discourse by social movements, see Paul O'Connell, 'Human Rights: Contesting the Displacement Thesis' (2018) 69(1) *Northern Ireland Legal Quarterly* 19, 33–5.

182 On human rights as transmitters of particular modes of being, see Eslava and Pahuja (n 1) 200.

183 See above n 30.

184 See *Burragubba (No 2)* (n 31) 4 [11]–[12].

185 Beard (n 33) 27.

politically constitutes itself as democratic actors.[186] While that is not necessarily a bad thing, we will see how state actors use that to their benefit. To the extent that scholars, NGOs and others are identifying or defining individuals and communities as Indigenous peoples to support them and their human rights claims, they might also materialise a colonial form of international law.

A *Background*

In July 2014, an energy company from India, Adani, received environmental approval from the Australian Minister for the Environment to develop the Carmichael coal deposit in central Queensland.[187] As proposed, the mine would extract thermal coal from some native title land claimed by the W&J.[188] After Adani failed to obtain an ILUA with the W&J, it sought approval from Australia to construct the mine over the traditional indigenous territories via the RTN.[189] In response — and because the Australian regime does not enable them to withhold consent — Adrian Burragubba, a member of the W&J, began invoking the international human rights regime against the industry and the state.[190]

Burragubba submitted a letter to the NNTT reviewing Adani's application.[191] In that letter, Burragubba asserted that the Traditional Owner's Family Representative Council (which was later shortened to 'Family Council') had not consented to Adani's mining actions.[192] In an exchange with the NNTT, Burragubba explained that the Family Council was a central governing body of an 'indivisible whole' that broadly represented the

> heart of our rights as an Indigenous People, and the issue of obtaining our free, prior and informed consent for matters affecting our traditional territories, upon which

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186 Foucault, 'The Subject and Power' (n 35) 790; 'Explainer: Representation of W&J', *Wangan & Jagalingou Family Council* (Blog Post, 21 August 2015) <https://wanganjagalingou.com.au/representation/>, archived at <https://perma.cc/A2A7-DX7L> ('Representation of W&J').

187 Department of the Environment, *Approval: Carmichael Coal Mine and Rail Infrastructure Project, Queensland* (EPBC 2010/5736, 24 July 2014).

188 'Statement by the Wangan and Jagalingou Peoples about the Carmichael Mine', *Wangan & Jagalingou Family Council* (Blog Post, 26 March 2015) <http://wanganjagalingou.com.au/stories-two/>, archived at <https://perma.cc/YT7U-39NW> ('W&J Statement'); 'Carmichael Coal ("Adani") Mine Cases in Queensland Courts', *Environmental Law Australia* (Web Page) <http://envlaw.com.au/carmichael-coal-mine-case/>, archived at <https://perma.cc/J59M-ZG7Q>.

189 Email from Mr Burragubba to Kate and Leilehus, 12 February 2015, reproduced in *Adani Mining Pty Ltd v Burragubba* (2015) NNTTA 16 ('*Adani Mining v Burragubba*') 16–17 [29]. See also Adrian Burragubba and Murrawah Johnson, 'Australia's Periodic Review: Australia's Ongoing Violation of Its Obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and Its Failure to Protect the Indigenous Wangan and Jagalingou People from Human Rights Violations Arising from the Development of the Carmichael Coal Mine on Our Ancestral Homelands', Submission to the Committee on the Elimination of Racial Discrimination in *Wangan and Jagalingou People v Australia*, 31 October 2017, 5–8, 15 <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_29370_E.pdf>, archived at <https://perma.cc/8HND-2RTX>.

190 'W&J Statement' (n 188).

191 Email from Mr Burragubba to Kate and Leilehus, 12 February 2015, reproduced in *Adani Mining v Burragubba* (n 189) 16–17 [29].

192 Email from Mr Burragubba to Kate and Leilehus (n 191), reproduced in *Adani Mining v Burragubba* (n 189) 16–17 [29].

> we uphold all of our spiritual, cultural, family and social, environmental and economic values, rights and interests.[193]

That exchange reveals how Burragubba essentialised the W&J as an indivisible whole that acts with a collective will as traditional custodians of the land to demonstrate the Family Council's material constitution as Indigenous peoples for the purposes of claiming human rights. Burragubba sought to form the W&J into Indigenous peoples as subjects of international legal discourse. Simultaneously, his reliance on essentialism and traditionalism objectified them as Indigenous peoples to become objects of public discourse.

While the NNTT deliberated, Burragubba commenced a public media campaign against the mine. The campaign opened with a public letter to the Queensland Premier asking her to uphold the W&J's internationally recognised rights of FPIC and self-determination.[194] Burragubba's invocation of human rights in public letters and the media campaign cultivated the Family Council's public status as subjects and objects of international legal discourse.[195] Repeatedly and publicly invoking international human rights appeared to challenge the native title regime, under which the state could approve the mine without the consent of the Family Council as Indigenous peoples. By materially constructing the Family Council as an identifiable subject of international human rights, the W&J also became an object of public inquiry, scrutiny and discourse.[196] As the W&J became opened to public scrutiny — a costly process — Burragubba emphasised their democratic decision-making to constitute themselves politically.

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193 Email from Mr Burragubba to Kate and Leilehus (n 191), reproduced in *Adani Mining v Burragubba* (n 189) 16–17 [29]. In August 2015, the Family Council clarified that it, as the Family Council, had voted to object to Adani's application for a 'Future Acts Determination': 'Representation of W&J' (n 186).

194 'Letter to Queensland Premier Annastacia Palaszczuk', *Wangan & Jagalingou Family Council* (Blog Post, 26 March 2015) <http://wanganjagalingou.com.au/stories-one/>, archived at <https://perma.cc/3PF7-9Y5E> ('Letter to Queensland Premier'). Inter alia, the Wangan and Jagalingou Family Council asked the Queensland Government to agree to a consent determination of its native title claim. A consent determination is a decision by a recognised body, reached through negotiated settlements, that reflects an agreement about some native title issue: see 'Native Title Claims', Queensland Government (Web Page, 7 March 2017) <https://www.qld.gov.au/atsi/environment-land-use-native-title/native-title/native-title-claims>, archived at <https://perma.cc/M3LA-MT5L>. Queensland has the authority to issue mining leases if it complies with the *Environmental Protection Act 1994* (Qld), the *State Development and Public Works Organisation Act 1971* (Qld), the *Mineral Resources Act* (n 165) and the *NTA* (n 116).

195 See, eg, Wangan & Jagalingou Family Council, 'Qld Mines Minister Lynham's Adani Mine Approval Shows Gutless and Morally Bankrupt Approach of Government to Traditional Owners' Rights' (Media Release, 3 April 2016) <https://wanganjagalingou.com.au/gutless/>, archived at <https://perma.cc/ZJY3-PWG9>. This has also been reported favourably in the left-wing activist press: see Carl Jackson, 'Wangan and Jagalingou People Take on Coal Giant Adani', *Redflag* (online, 12 April 2015) <http://redflag.org.au/article/wangan-and-jagalingou-people-take-coal-giant-adani>, archived at <https://perma.cc/HJ9J-FJLE>; 'Traditional Owners Reject Adani's Huge Carmichael Coalmine in Queensland's Galilee Basin', *Green Left Weekly* (online, 27 March 2015) <https://www.greenleft.org.au/node/58640>, archived at <https://perma.cc/BNP6-9H9K>; 'Traditional Owners vs Carmichael Mine', *Lateline* (ABC News, 26 March 2015) <http://www.abc.net.au/lateline/content/2015/s4205747.htm>, archived at <https://perma.cc/2MYP-2MG2>.

196 See above n 195.

Ultimately, the NNTT found that the mining could proceed as the mine would likely have a positive economic impact that would be in the public interest.[197] Burragubba then appealed that decision to the Federal Court of Australia ('Federal Court'), claiming that Adani had overinflated the economic benefits of the project.[198] He sought to challenge the mine's putative benefits.[199] The appeal was denied in August 2016,[200] but was then appealed to the Full Federal Court in September 2016.[201] As explained below, the failed appeal would have direct financial costs for Burragubba.[202] But while those appeals worked through the court system, Adani sought to cultivate agreement and have an ILUA approved. The Family Council's opposition to ILUA formation are described in detail because it further reveals how they enacted their status as subjects with the help from NGOs and became objects of public scrutiny.

B *Forming Indigenous and Environmental Partnerships*

When Burragubba began making public media appearances, Adani responded by attacking Burragubba's legitimacy to speak on behalf of the W&J.[203] As a subject, they questioned his objectivity and objectives.[204] Public questions arose about the composition of the W&J as 'unified' when it was reported that the Family Council, convened by Burragubba, was financially supported by the Sunrise Project ('Sunrise'), an environmental NGO that receives foreign funding.[205] Media outlets reported that the Family Council had been offered 'a $325,000 payment over one year to the Wangan and Jagalingou group' and '[a]ccess to a scholarships program … to the value of $600,000 over five years'.[206] Burragubba initially claimed that money had not been exchanged.[207] However, Sunrise's executive director, John Hepburn, wrote that it was happy to have entered into an agreement with the Family Council, a 'duly authorised decision making body' to support environmental conservation.[208] Hepburn also responded to criticisms that the arrangement was an 'inducement' or a 'cash for comment'

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197 *Adani Mining v Burragubba* (n 189) 43 [112], 46 [121].

198 *Burragubba v Queensland* [2016] FCA 984, 1–2 [6], 10–13 [29]–[30].

199 Ibid.

200 Ibid 132 [321].

201 *Burragubba (No 2)* (n 31). As of January 2019, the various challenges have not been fully resolved. The ILUA has been registered due to a legislative amendment of the *NTA*. See below Part IV(D).

202 *Burragubba (No 2)* (n 31) 4 [11]–[12].

203 'Traditional Owners vs Carmichael Mine' (n 195); 'Traditional Owners Reject Adani Mine', *The Australian* (online, 27 March 2015) <https://www.theaustralian.com.au/business/business-spectator/traditional-owners-reject-adani-mine-/news-story/b79556c76b7d20e3d7853e0e21ba3cf4>, archived at <https://perma.cc/6LH7-HPCD>.

204 'Traditional Owners vs Carmichael Mine' (n 195).

205 Anna Krien, 'The Long Goodbye: Coal, Coral and Australia's Climate Deadlock' (2017) 66(1) *Quarterly Essays* 1, 37–8.

206 Sid Maher, 'Anti-Coal Activists' $1m Bid to Campaign', *The Australian* (online, 19 May 2015) <http://www.theaustralian.com.au/national-affairs/indigenous/anticoal-activists-1m-bid-to-campaign/news-story/3f746620c24147ca253852321a4ccf9c>, archived at <https://perma.cc/4DCJ-4YMD>.

207 Ibid.

208 John Hepburn, 'Our Support for the Wangan and Jagalingou Traditional Owners' (Media Release, Sunrise Project, 21 May 2015).

by saying that these were 'deeply troubling' accusations, although he acknowledged that Sunrise's support could only continue for so long as their interests were aligned.[209]

In materially constituting itself as Indigenous peoples, the Family Council was able to cultivate relationships and support from NGOs to assist in expressing the Family Council's agency. The Family Council maintained distance from the larger environmental 'Stop Adani' campaign through assertions that its fight is to protect its territories, cultural practices, sovereignty and self-determination.[210] Despite that distance, NGO support was also costly — as Hepburn noted, funding was contingent on the Family Council continuing to act in material and political alignment with Sunrise's objectives. Materiality is revealed in the economic benefit as well as in the heightened scrutiny about the Family Council's and, indeed, all W&J members' financial ties to foreign NGOs.[211] That is to say, as the Family Council strove to be viewed as subjects of international human rights, the W&J members who supported and opposed the mine became objects of public inquiry. Given that relationships which support agency are also costly, duelling narratives arose about the Family Council. Some commentators highlight how relationships express *agentic* action by seeking to uphold the Family Council's independence, autonomy and self-determination.[212] On the other hand, some attempt to support Australia's *NTA* or the mine project by highlighting the costs that arise from those relationships, claiming that the Family Council is being 'used' by foreign interests or environmentalists.[213] Some suggested that the Family Council was being used by foreign NGOs as an object.[214] The dual narratives intensified.

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209 Ibid.

210 'W&J Statement' (n 188).

211 See Geoff Egan, 'Adani Questions Where Opponents Get Their Money', *Sunshine Coast Daily* (online, 31 January 2018) <https://www.sunshinecoastdaily.com.au/news/adani-questions-where-opponents-get-their-money/3322719/>, archived at <https://perma.cc/NE66-3T59>.

212 See Joshua Robertson, 'Leading Indigenous Lawyer Hits Back at Marcia Langton over Adani', *The Guardian* (online, 9 June 2017) <https://www.theguardian.com/environment/2017/jun/09/leading-indigenous-lawyer-hits-back-at-marcia-langton-over-adani>, archived at <https://perma.cc/62JL-CKHX> ('Leading Indigenous Lawyer Hits Back').

213 See Katharine Murphy, 'Indigenous People Victims of "Green" Fight against Adani Mine, Says Marcia Langton', *The Guardian* (online, 7 June 2017) <https://www.theguardian.com/australia-news/2017/jun/07/indigenous-people-victims-of-green-fight-against-adani-mine-says-marcia-langton>, archived at <https://perma.cc/62DV-GJFM>.

214 See Michael McKenna, 'Green Activist Still Working to Block Adani Project', *The Australian* (online, 25 October 2016) <https://www.theaustralian.com.au/search-results?q=Michael+McKenna%2C+%E2%80%98Green+Activist+Still+Working+to+Block+Adani+Project%E2%80%99>, archived at <https://perma.cc/DY7L-LRP2> ('Green Activist'); Nyunggai Warren Mundine, 'Activists Are the New Colonial Oppressors', *The Australian* (online, 17 April 2017) <https://www.theaustralian.com.au/commentary/opinion/activists-are-like-colonial-oppressors-in-opposing-native-rights/news-story/014d08232c41f3fc3ea39d9bf0b30f10>, archived at <https://perma.cc/EM2T-N7WW>.

In July 2015, it was reported that Adani had bussed 150 members of the W&J to a meeting, so that they could vote on and approve an ILUA.[215] The ILUA was not approved at that time.[216] Burragubba claimed that Adani was 'engaging in tactical skulduggery' and 'has been conniving with these other two [native title representatives] to try to get an agreement and undermine the Native Title process and our right to free prior informed consent'.[217] There are two conceptual problems with Burragubba's assertions, the first is material and the second is political. First, by admitting that some W&J support the ILUA, it appears that the W&J were not acting as one people with a collective will, which then raises questions about who the Family Council is. Secondly, Burragubba was now claiming human rights alongside state legal processes and that Adani's interests were against both.[218] Even though he had previously asserted that the state was against their human rights, because human rights are meant to 'underpin' the relationship between Indigenous peoples and the state,[219] the human rights claims had to establish and support a better form of democratic state behaviour.[220] The Family Council's website responded to these issues.

First, in order to quash concerns that Burrabugga was the essence (or sole member) of the Family Council and claims of disunity among the W&J, the Family Council stated that '[i]t is not true to say that the group is *divided* in its opposition to [the] Carmichael mine'.[221] Although that statement contrasts with Burragubba's admission that Adani was working with two W&J members,[222] the statement identifies the 'group' that matters as the Family Council. The Family Council further claimed that W&J decisions were made by 'majority', and clarified that the 'Traditional Owners' Council *authorised* Adrian Burragubba as its spokesperson and cultural leader'.[223] It ended by invoking the recognition in *UNDRIP* art 18 of Indigenous peoples' traditional decision-making authority.[224] That publication, again, reveals how the Family Council materially constructs itself as Indigenous peoples by objectifying itself in international legal discourse through invoking human rights.[225]

Secondly, in order to clarify whether its claims were 'against' the state or Adani, a subsequent letter published on the Family Council's website rhetorically asked: 'What part of our "democracy" do they not understand? Adani is

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215 Michael West, 'Adani Shown the Door by Traditional Owners', *The Sydney Morning Herald* (online, 4 July 2015) <http://www.smh.com.au/business/comment-and-analysis/adani-shown-the-door-by-traditional-owners-20150702-gi3y2h?stb=twt>, archived at <https://perma.cc/73XC-CZKS>.

216 Ibid.

217 Ibid.

218 Ibid.

219 Davis (n 175) 465. See also 'Letter to Queensland Premier' (n 194).

220 Duane Champagne, 'UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights' (2013) 28(1) *Wicazo Sa Review* 9, 15.

221 'Representation of W&J' (n 186) (emphasis in original).

222 Burragubba stated that 'Adani has been conniving with these other two people [other Indigenous applicants] to try to get an agreement and undermine the Native Title process and our right to free prior informed consent': see West (n 215).

223 'Representation of W&J' (n 186) (emphasis in original).

224 Ibid.

225 Thornhill et al (n 12) 470.

dishonestly seeking to divide and conquer'.[226] The Family Council also responded to allegations it was being 'used' by environmentalists: 'Nor will we stand by while the media mouthpieces of Adani and the government insult us, representing us in story after story as simple, gullible patsies bought off by greenies'.[227] This statement seeks to construe the Family Council as democratic actors and subjects to emphasise that they speak for themselves and contradict assertions that they are being used as objects. Burragubba materially constituted the Family Council as Indigenous peoples and politically constituted it as democratic actors 'to maintain recognition by an international audience'.[228] To the extent that the Family Council is materially and politically altering themselves for the purpose of opposing the mine they are, to borrow from Beard, bringing 'themselves into subjection to Empire'.[229]

With support from environmental and human rights NGOs, the Family Council's opposition gained traction, internet presence, national and international media attention and the ability to meet with major banks and demand that they respect Indigenous peoples' international human rights.[230] Environmental NGOs had been waging a campaign to ensure public acknowledgement and legal approval of all potential environmental despoliation.[231] In April 2015, NGOs successfully brought environmental concerns to the attention of several fossil fuel financers, which then announced that they would not fund the Carmichael mine.[232] By materially constituting itself as Indigenous peoples through its international human rights claims, the Family Council took its concerns directly to financers. In late 2015, several additional banks withdrew funding support for Adani.[233] The banks did not attribute their decisions to concerns for Indigenous peoples' self-determination or FPIC, but their announcements came after Family Council representatives appealed to board members and stockholder conferences.[234]

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226 Wangan & Jagalingou Family Council, 'Next, Federal Court: Wangan & Jagalingou Stand Stronger Than Ever to Stop Adani Carmichael' (Media Release, 21 August 2015) <https://wanganjagalingou.com.au/stronger-than-ever/>, archived at <https://perma.cc/2HWU-VN4D>.

227 Ibid.

228 Beard (n 33) 27.

229 Ibid.

230 Krien (n 205) 36–7.

231 Stephanie March, 'French Banks Rule Out Funding Galilee Basin Coal Project', *AM, Australian Broadcasting Corporation* (online, 9 April 2015) <http://www.abc.net.au/am/content/2015/s4213055.htm>, archived at <https://perma.cc/3DV9-X79A>.

232 Ibid.

233 Krien (n 205) 36–7; PR Sanjai, 'National Australia Bank Rules Out Funding for Adani's Carmichael Project', *LiveMint* (online, 3 September 2015) <http://www.livemint.com/Industry/JlVwOVCxvxvIF1XuLZ51CM/National-Australia-Bank-rules-out-funding-for-Adanis-Carmic.html>, archived at <https://perma.cc/9R8Q-JQWR>.

234 Krien (n 205) 36–7; Wangan and Jagalingou Traditional Owners Council, (Facebook, 16 December 2015) <https://www.facebook.com/WanganandJagalingou/photos/a.106894431312074 5.1073741828.106877616647089 3/1223549934326848/?type=3&theater>, archived at <https://perma.cc/3Q77-2QNM>.

In October 2015, the Commonwealth Minister for the Environment, the Hon Greg Hunt, reapproved the Adani project.[235] In response to the reapproval, the Family Council, with the support of Earthjustice, a US-based environmental justice law firm, sent letters to UN bodies to request 'urgent intervention' under *UNDRIP*.[236] It sent a request to the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, to comment on Australia's support and facilitation of the Carmichael mine as against their 'fundamental, universally recognized human rights' to FPIC and self-determination.[237] The Family Council sent a similar request to the UN Special Rapporteur in the Field of Cultural Rights.[238] UN special rapporteurs are limited to exercising recommendatory jurisdiction and do not have the ability to intervene legally. However, a request to intervene functions as a request that UN actors appraise the controversy and legitimate the Family Council's material constitution as Indigenous peoples who bear human rights as international legal subjects, which helps cultivate pressures against the mine development.[239] Tauli-Corpuz validated the Family Council as Indigenous peoples by writing to the Australian Government and requesting additional information, while reminding it of its international human rights obligations — specifically, referencing *UNDRIP* art 32 on FPIC and resource development.[240]

The Commonwealth representative responded by describing the *NTA* processes and reasserting that

> Australia encourages all Australians to participate fully and freely in our democratic processes and specifically recognises how important it is for Aboriginal and Torres Strait Islander peoples to have a voice and a means to express it. Australia recognises the importance of engaging in good faith consultation with Indigenous peoples … Australia's statement on the [*UNDRIP*] clarified that Australia's laws concerning land rights and native title are not altered by its support of the [*UNDRIP*]. However, Australia supports Indigenous peoples' aspiration to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity.[241]

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235 Greg Hunt, 'Carmichael Coal Mine and Rail Infrastructure Project' (Media Release, Minister for the Environment, 15 October 2015). The approval was granted 'subject to 36 of the strictest conditions in Australian history'.

236 Letter from Adrian Burragubba and Murrawah Johnson to Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, 2 October 2015. The letter included the following as the subject: 'Submission regarding Australia's failure to protect the Wangan and Jagalingou People's rights to culture and to be consulted in good faith about, and give or withhold consent to, the development of the destructive Carmichael Coal Mine on our traditional lands'.

237 Ibid.

238 Letter from Adrian Burragubba and Murrawah Johnson to Farida Shaheed, UN Special Rapporteur in the Field of Cultural Rights, 2 October 2015. The letter included the following as the subject: 'Submission regarding Australia's failure to protect the Wangan and Jagalingou People's rights to culture from the proposed Carmichael Coal Mine'.

239 See, eg, Young, 'The Sioux's Suits' (n 177) 209–38.

240 Letter from Victoria Lucia Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, 29 February 2016, 4–5.

241 Letter from Tanya Bennett, Chargé d'affaires, to Karim Ghezraoui, Chief Officer, Office of the High Commissioner for Human Rights, 1 April 2016, 5 ('Letter from Tanya Bennett to Karim Ghezraoui').

This response preserves the distinction between international and national legal discourse as it simultaneously reduces self-determination to the management of self by or within democratic processes of extant state laws. It upholds Indigenous peoples' aspirations to 'manage their own affairs' and 'a level of economic independence', as it includes them as 'all Australians' and orients the dispute within the state democratic processes.[242] After the Family Council has materially produced itself as Indigenous peoples and politically produced itself as democratic actors, Australia's response demonstrates how state representatives confirm and include them as subjects of the state (empire), which negates and excludes them from being able to make their own decisions.[243] Where international legal discourse promises self-governance and self-determination, it seems that it requires those who wish to be identifiable to an international audience to materially and politically subject themselves to that discourse.[244]

However, the Family Council continued to 'manage [its] own affairs' and 'economic independence'.[245] It pressured financial actors to not lend to Adani, developed methods of publicising its opposition and would pursue an alternative and sustainable development model for the W&J, which are, if anything, material developments. It would also face considerable opposition.

C *The Miners Fight Back*

The Family Council was able to cultivate relationships and support from NGOs to assist in expressing the Family Council's agency. This Section shows how that raised costs for the Carmichael mine. It also shows how others, including some W&J members, continued to challenge the Family Council's subjection as Indigenous peoples. As discussed above, some commentators who support Australia's *NTA* or the mine project highlighted the costs arising from those relationships, claiming that the Family Council was being used by foreign interests or environmentalists, as though they are objects.[246] As Adani moved closer to developing the mine, the Family Council and its supporters would then subject those who support the mine to greater public scrutiny as though they were being used, as mere objects.[247] The international and national legal discourses continued.

While the Family Council materially constituted itself as Indigenous peoples and politically constituted itself as democratic actors through claiming

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242 Ibid. Cf the Australian Government's comments to WGIP discussed in Gudmundur Alfredsson, 'The Right of Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993) 41, 51.

243 This is a reformulation of Chris Sibley's model of post-colonial ideology called the 'dark duo' — historical negation and symbolic exclusion — which enables post-colonial nations to dismiss calls for reparations and representation for disadvantaged groups. See Chris G Sibley, 'The Dark Duo of Post-Colonial Ideology: A Model of Symbolic Exclusion and Historical Negation' (2010) 4(1) *International Journal of Conflict and Violence* 106; Helena J Newton, Chris G Sibley and Danny Osborne, 'The Predictive Power of Post-Colonial Ideologies: Historical Negation and Symbolic Exclusion Undermine Support for Resource-Based Bicultural Policies' (2018) 62 *International Journal of Intercultural Relations* 23.

244 Beard (n 33) 27.

245 Letter from Tanya Bennett to Karim Ghezraoui (n 241). See below Part IV(C).

246 McKenna, 'Green Activist' (n 214); Mundine (n 214).

247 See Joshua Robertson, 'Revealed: Traditional Owners Accepted Payments to Attend Adani Meetings', *The Guardian* (online, 16 April 2016) <https://www.theguardian.com/australia-news/2016/apr/16/revealed-traditional-owners-accepted-payments-to-attend-adani-meetings>, archived at <https://perma.cc/Q7HG-9K3F> ('Revealed').

international human rights law, Adani and state actors advanced their interests in developing the mine through state laws.[248] To approve the mine, the Queensland Coordinator-General, the actor responsible for state land-use planning, proposed the compulsory acquisition of the land to convert the pastoral lease to freehold lease, which would have extinguished any native title claim and allowed the state to transfer title to Adani.[249] Queensland did not use its compulsory acquisition powers. At the Commonwealth level, when asked 'how the Government is acting to protect jobs against extreme green law-fare', Prime Minister Tony Abbott publicly committed the Commonwealth to repealing sections of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[250] Commonwealth Attorney-General George Brandis also asserted that 'radical activists' who 'disrupt and sabotage important projects' are engaged in 'vigilante litigation' and 'lawfare'.[251] The Prime Minister's and the Attorney-General's invocations of 'vigilantism' and 'lawfare' attempted to identify and subjectify those who oppose the mine — primarily environmental organisations that use environmental legal protections — as undemocratic actors, subjects that do not matter, objects to dismiss. The Family Council shortly thereafter became associated with these environmental activists.[252]

Adani's Chief Executive Officer said that it was 'absolutely committed to proceeding with its investments in Queensland', although an economic brief asserted that Adani would 'not put any capital expenditure into the Carmichael project in the next financial year and would not make any further investments'.[253]

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248 *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48. The Court held that the mining project could proceed against environmental concerns provided that several conditions were followed.

249 Wangan & Jagalingou Family Council, 'Qld Government Plans to Extinguish Native Title for Adani's Coal Mine a New Low in Violating Traditional Owners' Rights' (Media Release, 28 November 2015) <http://wanganjagalingou.com.au/qld-government-plans-to-extinguish-native-title-for-adanis-coal-mine-a-new-low-in-violating-traditional-owners-rights/>, archived at <https://perma.cc/ATL5-JX7C>; Mark Willacy and Angela Lavoipierre, 'Carmichael Coal Mine: Coordinator-General Proposes Existing Native Title over Key Mine Property', *ABC News* (online, 28 November 2015) <https://www.abc.net.au/news/2015-11-27/proposal-to-extinguish-native-title-over-key-adani-mine-property/6979998>, archived at <https://perma.cc/4L2X-CEAC>.

250 'Warfare on Lawfare', *Insiders* (Australian Broadcasting Corporation, 23 August 2015) <http://www.abc.net.au/insiders/content/2015/s4298437.htm>, archived at <https://perma.cc/2FCR-9ET9>.

251 Samantha Hepburn, 'Brandis' Changes to Environmental Laws Will Defang the Watchdogs', *The Conversation* (online, 19 August 2015) <http://theconversation.com/brandis-changes-to-environmental-laws-will-defang-the-watchdogs-46267>, archived at <https://perma.cc/9B4M-CDLN>; Lisa Cox and Jane Lee, 'Abbott Government to Change Environment Laws in Crackdown on "Vigilante" Green Groups', *The Sydney Morning Herald* (online, 18 August 2015) <http://www.smh.com.au/federal-politics/political-news/abbott-government-to-change-environment-laws-in-crackdown-on-vigilante-green-groups-20150818-gj1r4l.html>, archived at <https://perma.cc/T57A-VQA>; Thom Mitchell, 'Adani's Mega Coal Mine Hits Another Hurdle: A Second Round of "Vigilante Lawfare"', *New Matilda* (online, 9 November 2015) <https://newmatilda.com/2015/11/09/adanis-mega-coal-mine-hits-yet-another-hurdle-a-second-round-of-vigilante-lawfare/>, archived at <https://perma.cc/GUL2-MK97>.

252 See McKenna, 'Green Activist' (n 214); Mundine (n 214).

253 David Sparkes, 'Analysts Say Adani Won't Go Ahead with Carmichael Mine until Coal Prices Improve', *ABC News* (online, 6 February 2016) <https://www.abc.net.au/news/rural/2016-02-05/analysts-say-carmichael-mine-requires-higher-coal-prices/7144696>, archived at <https://perma.cc/3GLJ-XCJY>.

In an effort to expedite the mine development, Adani's owner, Gautam Adani, privately met with the new Prime Minister, Malcolm Turnbull, and asked him to introduce a law prohibiting activists from seeking further judicial review of the mine development.[254] Adani explained that he appealed because the multiple legal challenges were making the project uncertain and no 'lenders will be willing to finance it'.[255] Where the newly materialised Indigenous peoples and environmental 'greenies' increased the mine's financial risks and costs, the mine owner resorted to direct political pressure. In February 2016, amid ongoing legal challenges and financial difficulties, the Queensland Government provided environmental approval for the mine, subject to 140 conditions for environmental protection.[256] However, at the state legal level, the mine development could not proceed without resolving the native title issues.

In March 2016, a native title claim group rejected another ILUA.[257] In response, *The Australian*, a Murdoch-owned national broadsheet newspaper, published an article entitled, 'Greens Bankroll Indigenous Rebels Opposed to Carmichael Mine'.[258] It reported that the W&J were set to finalise a deal with Adani, but the deal fell through because 'anti-coal activists bankrolled Adani opponents within the indigenous group'.[259] It emphasised the notion expressed by Brandis that 'radical activists' who 'disrupt and sabotage important projects' are undemocratic actors or objects to dismiss.[260] It supported its position by quoting 'Elder Irene White', a W&J member who said:

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254 Lisa Cox, 'Gautam Adani Makes Special Request to Malcolm Turnbull over $15b Deal', *The Sydney Morning Herald* (online, 9 December 2015) <https://www.smh.com.au/business/companies/adani-demanded-certainty-from-turnbull-20151209-gliuk8.html>, archived at <https://perma.cc/54UA-HKZB>.

255 'Adani Group Seeks Uncontestable Nod from Australia for Its Mega Projects', *The Economic Times* (online, 8 December 2015) <https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/adani-group-seeks-uncontestable-nod-from-australia-for-its-mega-projects/articleshow/50078691.cms>, archived at <https://perma.cc/8AC9-X4GP>.

256 National Resources Review, 'Adani's Carmichael Coal Mine Environmental Authority Approved' (online, 4 February 2016) <https://www.nationalresourcesreview.com.au/projects/adanis-carmichael-coal-mine-environmental-authority-approved/>, archived at <https://perma.cc/8F95-JQBC>.

257 Joshua Robertson, 'Traditional Owners Vote to Sack Representatives Who Received Benefits from Adani', *The Guardian* (online, 21 March 2016) <https://www.theguardian.com/environment/2016/mar/21/adani-mine-traditional-owners-vote-to-sack-representatives-who-received-benefits-from-adani>, archived at <https://perma.cc/DP4B-38ZV>. It was later found to have not been a validly convened ILUA authorisation meeting. See *Burragubba v Queensland* [2017] FCA 373, 17–19 [33]–[35] ('*Burragubba*'). Reeves J found that the meeting was not valid and 'was to address concerns held by a minority of the members of the existing W & J Applicant and those members of the W & J claim group who held the same concerns, relating to the ILUA negotiations with Adani': at 19 [37].

258 Michael McKenna, 'Greens Bankroll Indigenous Rebels Opposed to Carmichael Mine', *The Australian* (online, 11 March 2016) <http://www.theaustralian.com.au/national-affairs/indigenous/greens-bankroll-indigenous-rebels-opposed-to-carmichael-mine/news-story/001f2f4514e07829a5318f88cc444587>, archived at <https://perma.cc/PQT8-WWFP> ('Greens Bankroll Indigenous Rebels').

259 Ibid.

260 Cox and Lee (n 251). See also Mitchell (n 251).

> Last year, there was majority support in a vote of the native title applicants to go ahead with the negotiations. … And then last month, this public notice appears from another greenie, an Aboriginal woman from Victoria, to stop the agreement.[261]

White continued: 'Why shouldn't our kids get the opportunity to get a job, earn a living, buy a car and save up for a house just like any other Australians?'[262] According to this quotation, White placed the onus of blame for the ILUA's failure on 'another greenie'. In seeking to support the mining, she downplayed the role of the Family Council, upheld the W&J 'majority' who she associates with 'any other Australians', an appeal to the state-level discourse. The Family Council responded by pointing out inconsistencies in this account, particularly that White was not an elder.[263] That is a significant distinction for the Family Council to make, because it materially produced itself as Indigenous peoples by objectifying itself as true, traditional and essential. In maintaining its subjection to international legal discourse, it had to distance itself from White and other pro-mining W&J individuals.

Soon afterwards, in April 2016, it was reported that the W&J had agreed to an ILUA ('April 2016 ILUA').[264] The Family Council objected to the ILUA and mounted a new, federal-level legal challenge against its registration by the NNTT.[265] Murrawah Johnson, a newer spokesperson for the Family Council, accused Adani of bussing 'large numbers of people, including non-members of our claim group who have no connection to the country' to vote on the ILUA.[266] From this point onward, the Family Council attempted to undermine the legal and public perceptions that the ILUA was valid by claiming that those who had voted for it were 'not the true people from that country'.[267] Again, there was a contrasting position within the W&J. A W&J member and mine supporter, Paul Malone, claimed that he and those who supported the mine lived in rural areas and

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261 McKenna, 'Greens Bankroll Indigenous Rebels' (n 258).

262 Ibid. Reports noted that those who consented to the ILUA did so out of fear that their rights would otherwise be extinguished: Paul Robinson, 'Traditional Owners Say They Were Forced to Negotiate with Adani for Fear of Losing Native Title Rights', *ABC News* (online, 11 December 2017) <https://www.abc.net.au/news/2017-12-11/traditional-owners-fear-losing-native-title-rights-adani-mine/9246474>, archived at <https://perma.cc/WL2S-DNBR>.

263 Wangan & Jagalingou Family Council, 'W&J People Authorisation Meeting: The Facts' (Media Release, 12 March 2016) <http://wanganjagalingou.com.au/thefacts/>, archived at <https://perma.cc/Q237-77PE>. Irene White's name appears on the Register of Native Title Claims: see *Adani Mining v Burragubba* (n 189) 2.

264 'Acrimony and Legal Threat as Indigenous Group Approves Adani Mine', *The Guardian* (online, 17 April 2016) <https://www.theguardian.com/australia-news/2016/apr/17/wangan-and-jagalingou-indigenous-group-approves-adani-carmichael-mine>, archived at <https://perma.cc/JNE3-9Y3Z>.

265 Wangan & Jagalingou Family Council, 'Traditional Owners' Rejection of Carmichael Stands, Despite Adani Bank Rolling Bogus "Land Use Agreement"' (Media Release, 16 April 2016) <http://wanganjagalingou.com.au/traditional-owners-rejection-of-carmichael-stands-despite-adani-bank-rolling-bogus-land-use-agreement/>, archived at <https://perma.cc/3PK2-XNND> ('Traditional Owners' Rejection'); Wangan & Jagalingou Family Council, 'Court Hearing: W&J Traditional Owners Fight Adani and Qld Govt' (Media Release, 12 March 2018) <http://wanganjagalingou.com.au/court-hearing-wj-traditional-owners-fight-adani-and-qld-govt/>, archived at <https://perma.cc/AR92-878K> ('Court Hearing').

266 Wangan & Jagalingou Family Council, 'Traditional Owners' Rejection' (n 265).

267 George Roberts, 'Indigenous Groups in Federal Court to Extend Injunction against Adani over Native Title', *ABC News* (online, 30 January 2018) <http://www.abc.net.au/news/2018–01–30/adani-in-court-over-carmichael-mine-native-title-claim/9373086>, archived at <https://perma.cc/SJ9U-MN2Q>.

were looking for jobs.[268] He accused mine opponents of living in capital cities and 'sitting in their homes in the luxury of air conditioning that's probably fuelled by coal fire power stations'.[269] In doing so, Malone asserted his authority as a W&J member who lived in the area and was looking for a job as he questioned the authority of the opponents as 'true people from that country' and undermined their subjection to international legal discourse as essential and traditional Indigenous peoples. In materially producing itself as international legal subjects, the Family Council invoked international law to challenge the state-level legal discourse. Burragubba responded:

> We are disadvantaged by the law and denied our international rights to self determination and free, prior informed consent. We are required to participate in the native title regime against a backdrop of financial disadvantage and discrimination.[270]

Those W&J members who support the mine would then also become objects of public scrutiny.

The Guardian Australia, the Australian-based online branch of the global British newspaper, reported that pro-mine W&J members had accepted undisclosed payments from Adani.[271] Essentially, it attacked the material benefits received by pro-mining W&J. Those in favour of the mine accepted money from Adani and aligned with current democratic practices of the state, which opponents sought to question. On the other hand, the Family Council accepted money and funding from environmental NGOs to establish a democratic, alternative development model,[272] which opponents sought to question. In furtherance of alternative development and democratic practices, the Family Council's partnership with environmental NGOs led to collaboration at The University of Queensland's Global Change Institute ('Institute').[273] As the Institute's first 'flagship project', that partnership 'will explore the international Indigenous movement that is re-imaging human rights and social and economic development'.[274] Johnson said that '[t]he project will help shape … understanding of how to sustain our lands and waters and enrich our culture, and build our futures

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268 Robinson (n 262).

269 Ibid.

270 Wangan & Jagalingou Family Council, 'Traditional Owners' Rejection' (n 265).

271 Robertson, 'Revealed' (n 247).

272 Krien (n 205) 36–9.

273 Wangan & Jagalingou Family Council, 'Naomi Klein Commends New UQ Traditional Owners Flagship Project' (Media Release, 9 November 2016) <http://wanganjagalingou.com.au/naomi-klein-commends-new-uq-traditional-owners-flagship-project/>, archived at <https://perma.cc/7668-WJKZ>. The Global Change Institute is supported by Graeme Wood, who is a financial supporter of the Sunrise Project and the founding investor of *The Guardian Australia*. Mark Sweney, 'Guardian Australia Launches with Promise of "Fresh and Independent View"', *The Guardian* (online, 26 May 2013) <www.guardian.co.uk/media/2013/may/26/guardian-australia-launch-julia-gillard>, archived at <https://perma.cc/K6TZ-K9VM>; Andrew Bolt, 'Greens Pay Aboriginal Objectors to Mine', *Herald Sun* (online, 21 August 2015) <https://www.heraldsun.com.au/blogs/andrew-bolt/greens-pay-aboriginal-objectors-to-mine/news-story/3183a2fcd5a88b6aedf7a0b4c233c3d8>, archived at <https://perma.cc/B9Z7-SSGW>.

274 'Global Change Flagship Projects', *The University of Queensland* (Web Page, 14 June 2017) <https://social-science.uq.edu.au/article/2017/06/global-change-flagship-projects>, archived at <https://perma.cc/4URM-94VD>.

on this'.[275] In addition to publishing on Indigenous peoples' international human rights and sustainable development to oppose the mine,[276] the Institute began publishing information on the economic non-viability of the mine.[277]

Whether a W&J member sought to benefit from the mine's development or associate with the Family Council and oppose the mine, in both instances they became subjects of legal discourse. The Family Council materialised itself as international legal subjects while the pro-mining W&J were subjects of national legal discourse, associated with 'any other Australians'. In either case, constituting themselves as subjects they were simultaneously open to public scrutiny as objects. Questions about who received money from which foreign backers reveals how the W&J were becoming objectified and scrutinised as they became identifiable subjects of international and state legal discourses.

The controversy surrounding the Family Council and environmental NGO partnerships came into sharp focus when Marcia Langton, who holds the Foundation Chair in Australian Indigenous Studies at The University of Melbourne,[278] was reported to have said that

> cashed-up green groups, some funded by wealthy overseas interests, oppose mining projects with often-flimsy evidence and misrepresent the evidence to the public, … [t]hey deliberately thwart the aspirations and native title achievements of the majority of Indigenous peoples by deception …[279]

According to Langton, the Family Council was used and deceived in ways that negated Indigenous peoples' aspirations for native title. In re-identifying all W&J and all Aboriginal and Torres Strait Islander individuals as Indigenous peoples, Langton's statement, as reported, upholds the native title regime and democratic practice of the state and downplays the subject-status of the Family Council as 'true' Indigenous peoples for international legal purposes. Such a view insufficiently credits the material and formative capacity of international legal discourse by slipping between the state and international legal discourses.

In response, Tony McAvoy SC, Australia's first Indigenous silk and a senior counsel assisting the Family Council, responded that the Family Council's campaign was driven by 'proud and independent people' and that Langton was 'very poorly informed'.[280] McAvoy highlighted the independence of the Family Council while questioning the accuracy of Langton's information. This brief example shows how those who hold differing interests can highlight the agency

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275 Ibid.

276 Kristen Lyons, Morgan Brigg and John Quiggin, 'Unfinished Business: Adani, the State, and the Indigenous Rights Struggle of the Wangan and Jagalingou Traditional Owners Council' (Research Report, School of Economics, The University of Queensland, 12 June 2017) <https://social-science.uq.edu.au/files/1292/unfinished-business-revised-with-captions.pdf>, archived at <https://perma.cc/9JA3-ZBWE>.

277 John Quiggin, 'The Economic (Non)Viability of the Adani Galilee Basin Project' (Research Paper, The University of Queensland, July 2017) <http://www.tai.org.au/sites/default/files/The%20economic%20non%20viability%20of%20the%20Adani%20Galilee%20Basin%20Project.pdf>, archived at <https://perma.cc/RX3W-N9QR>.

278 'Professor Marcia Langton', *The University of Melbourne* (Web Page) <https://research.unimelb.edu.au/cova/home/people/centre-fellows/professor-marcia-langton>, archived at <https://perma.cc/G565-EG5N>.

279 Murphy (n 213).

280 Robertson, 'Leading Indigenous Lawyer Hits Back' (n 212).

and subjectivity or oppressiveness and objectivity aspects of the relationship between the Family Council and NGOs to generate contrasting views as to whether the relationship has material contributions or costs.

The central and outstanding question was whether the April 2016 ILUA could be registered. If so, then Adani had satisfied the legal hurdles to the mine's development.

D *The 'Adani Amendment' and Material Alterations*

While the above was unfolding, repercussions from elsewhere impacted the Family Council's opposition to the ILUA. Those events enabled the NNTT to register the April 2016 ILUA against the Family Council's objections and without their consent. The following describes those developments.

In 2010, the Federal Court considered whether the RNTC was a 'collective entity' or was comprised of all individual members of the RNTC in *QGC Pty Ltd v Bygrave* ('*Bygrave*').[281] It found that the RNTC was one or more persons named in the RNTC acting in a representative capacity for the ILUA.[282] Accordingly, under *Bygrave* the April 2016 ILUA could have been registerable without Burragubba's agreement or signature even though he is a named member of the RNTC, as well as a Family Council member for international legal discourse purposes. Based on an *NTA* ILUA controversy in Western Australia,[283] in early 2017, the Court in *McGlade v Native Title Registrar* ('*McGlade*') 'decline[d] to follow *Bygrave*'.[284] In *McGlade*, the Full Federal Court found that all members of the RNTC would have to sign an ILUA for the NNTT to register it.[285] As such, under *McGlade*, in refusing to sign the April 2016 ILUA, Burragubba and other Family Council members who were also RNTC members made the ILUA unable to be registerable.

In response to *McGlade*, Attorney-General Brandis proposed an amendment to the *NTA* that would essentially reinstitute the *Bygrave* standard for ILUA registration.[286] The proposed amendment was designed to validate ILUAs registered between *Bygrave* and *McGlade* and those that had been made but not yet registered, including the April 2016 ILUA.[287] Brandis justified the amendment as consistent with Indigenous peoples' rights to self-determination as recognised

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281 *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412, 430 [56], 437 [85] ('*Bygrave*'). Reeves J also presided in *Burragubba* (n 257).

282 *Bygrave* (n 281) 437 [85].

283 See Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 29–30.

284 *McGlade v Native Title Registrar* (2017) 251 FCR 172, 219 [267].

285 Ibid 278 [517].

286 Explanatory Memorandum, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) 3 [11] ('NTA Explanatory Memorandum'). There are three types of ILUAs, one of which is Area ILUAs. See *NTA* (n 116) pt II div 3 sub-div C.

287 Section 1 of the amending act, *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) ('*Native Title Amendment Act*'), replaces s 24CD(2)(a) of the *NTA*. The new s 24CD(2)(a)(i) states that if a person has been nominated or determined under s 251A(2) to be a party to the agreement, they may sign an ILUA. If no persons have been nominated or determined under s 251A(2), then a majority of the registered native title claimants ('RNTC') is sufficient to register an ILUA as per s 24CD(2)(a)(ii). Section 251A(2) allows a native title claim group to nominate one person who comprises the RNTC to be a party to the agreement, or to specify a process for determining which person (or persons) who comprises the RNTC is to be a party (or parties).

in *UNDRIP* and elsewhere.[288] Under the amendment, the April 2016 ILUA could be registered so long as it was approved by a majority, which it may have been depending on who counted the votes.[289] Before Parliament passed the amendment, various Aboriginal communities, including the Family Council, and others, submitted comments to the Senate.[290] The Family Council testified and released a press statement. It claimed that the 'Adani Amendment' was 'a con on the public and part of a manufactured crisis'.[291] It also appealed to CERD[292] and Special Rapporteur Tauli-Corpuz, claiming:

> This system does not respect indigenous peoples' right to free, prior and informed consent, including our right to give or withhold our consent to a proposed destructive project, like a mine, on our traditional lands. If we reject a proposed project on our lands, our 'no' does not mean no.[293]

Other Aboriginal groups who feared that *McGlade* cast doubt on their ILUAs supported the amendments passage,[294] with some asserting that it was consistent with Indigenous peoples' rights as recognised in *UNDRIP*.[295] Parliament passed

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288 NTA Explanatory Memorandum (n 286) 6 [8], 8 [16]–[20]. For commentary, see Stephen Young, 'The Self Divided: The Problems of Contradictory Claims to Indigenous Peoples' Self-Determination in Australia' (2019) 23(1–2) *International Journal of Human Rights* 193 ('The Self Divided').

289 Young, 'The Self Divided' (n 288).

290 Ibid 8–11; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (Report, March 2017) app 1.

291 Wangan & Jagalingou Family Council, 'Traditional Owners Condemn Brandis' "Adani Amendment" to Native Title Act as a Con on the Public' (Media Release, 13 February 2017) <http://wanganjagalingou.com.au/traditional-owners-condemn-brandis-adani-amendment-to-native-title-act-as-a-con-on-the-public/>, archived at <https://perma.cc/4KAA-UA4P>.

292 Letter from Wangan and Jagalingou People to the United Nations Committee on the Elimination of Racial Discrimination, 31 July 2018 <http://wanganjagalingou.com.au/wp-content/uploads/2018/08/Request-for-Urgent-Action-by-Wangan-and-Jagalingou-People-to-CERD-31-July-2018.pdf>, archived at <https://perma.cc/8VDG-6C5H>. The subject of the letter was: 'Request to the United Nations Committee on the Elimination of Racial Discrimination for Urgent Action under the Early Warning and Urgent Action Procedure'.

293 Email from Martin Wagner to Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, 8 March 2017, 7 <http://wanganjagalingou.com.au/wp-content/uploads/2017/03/Wangan-Jagalingou-reply-submission-to-SR-indigenous-peoples-17-03-10.pdf>, archived at <https://perma.cc/4JHB-Y476>.

294 Rodney Carter, Submission No 13 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (2 March 2017) 2; Yawuru Native Title Holders Aboriginal Corporation, Submission No 42 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, 3; Glen Colbung, Submission No 7 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (2 March 2017) 3; David Collard, Submission No 11 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (2 March 2017) 2–3; Stuart Bradfield, Submission No 46 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (3 March 2017) 2–3. See generally Glen Kelly and Stuart Bradfield, 'Winning Native Title, or Winning out of Native Title? The Noongar Native Title Settlement' (2012) 8(2) *Indigenous Law Bulletin* 14, 15.

295 Glen Kelly, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (2 March 2017) 1–3.

the amendment to the *NTA* in June 2017.[296] Shortly afterwards, the NNTT registered the ILUA, which the Family Council then sought to challenge in the Federal Court.[297] That appeal was dismissed.[298]

As legal contests persist, financial costs accrue. Despite its inability to obtain funding from any of Australia's 'big four' banks or from international lending institutions,[299] and despite the Indian Energy Minister publicly stating that India would not accept new coal imports by at least 2020,[300] Adani announced that it would commence mine development in 2018.[301] However, because Adani 'had to find its own funding for the project after banks overseas and in Australia distanced themselves from coal export projects',[302] it has significantly reduced the size of its mine.[303]

The Family Council has not stopped fighting either. In September 2018, it made another appeal, as it continues to fight.[304] As Burragubba previously said, 'Adani

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296 *Native Title Amendment Act* (n 287). See Stephen M Young, 'Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth): Relying on Human Rights to Justify a Legalised Form of Colonial Dispossession?' (2017) 8(30) *Indigenous Law Bulletin* 24, 24–9.

297 Robinson (n 262); Wangan & Jagalingou Family Council, 'Court Hearing' (n 265).

298 *Kemppi v Adani Mining (No 4)* [2018] 360 ALR 697 ('*Kemppi*').

299 See above n 233; Joshua Robertson, 'Big Four Banks Distance Themselves from Adani Coalmine as Westpac Rules Out Loan', *The Guardian* (online, 27 April 2017) <https://www.theguardian.com/environment/2017/apr/28/big-four-banks-all-refuse-to-fund-adani-coalmine-after-westpac-rules-out-loan>, archived at <https://perma.cc/X4GM-F67E>; Michael Slezak, 'Future of Adani Coalmine Hanging by a Thread after Chinese Banks Back Out', *The Guardian* (online, 5 December 2017) <https://www.theguardian.com/environment/2017/dec/06/adani-coalmine-wont-be-funded-by-chinese-banks-embassy-says>, archived at <https://perma.cc/AWG6-FTYW>.

300 Giles Parkinson, 'Read My Lips: Indian Energy Minister Repeats "No Coal Imports within 3 Years"', *RenewEconomy* (online, 19 April 2016) <http://reneweconomy.com.au/2016/read-my-lips-indian-energy-minister-repeats-no-coal-imports-within-3-years-73239>, archived at <https://perma.cc/C97W-FS8L>.

301 'Adani's $16 Billion Queensland Mega Mine Gets the Go-Ahead', *SBS News* (online, 6 June 2017) <http://www.sbs.com.au/news/article/2017/06/06/adanis-16-billion-queensland-mega-mine-gets-go-ahead>, archived at <https://perma.cc/D9T9-CCRU>.

302 Charis Chang, 'Adani to Begin Construction on Scaled-Back Carmichael Mine', *News.com.au* (online, 29 November 2018) <https://www.news.com.au/finance/business/mining/adani-to-begin-construction-on-scaledback-carmichael-mine/news-story/9282ec26009dec03cbd7bc31e03b432a>, archived at <https://perma.cc/2T3J-4JAN>.

303 See Michael Slezak, 'Adani Says a Scaled-Down Version of Its Carmichael Coal Mine Will Go Ahead; Environmentalists Express Scepticism', *ABC News* (online, 29 November 2018) <https://www.abc.net.au/news/2018-11-29/adani-carmichael-coal-mine-go-ahead-plans-to-self-fund/10567848>, archived at <https://perma.cc/4TXJ-L4ZM>; Adani Mining, 'Adani: We Have Finance and We Are Ready to Start' (Media Release) <https://www.adaniaustralia.com/-/media/181129-MR-Adani%20ready%20to%20commence%20works-%20FINAL%20AUST>, archived at <https://perma.cc/UYV9-V2GQ>. Since the time of writing this article, Adani has expressed that it refuses to commit to a scaled-down version of the mine and is still pursuing final approvals based on the original plans: Ben Smee, 'Adani Refuses to Commit to Size of "Scaled-Down" Carmichael Coalmine', *The Guardian* (online, 7 May 2019) <https://www.theguardian.com/environment/2019/may/07/adani-refuses-to-commit-to-size-of-scaled-down-carmichael-coalmine>, archived at <https://perma.cc/MCG3-X6J2>.

304 Wangan & Jagalingou Family Council, 'Traditional Owners Announce Adani Court Appeal' (Media Release, 15 September 2018) <https://wanganjagalingou.com.au/traditional-owners-announce-adani-court-appeal/>, archived at <https://perma.cc/595N-GWAW>; Wangan & Jagalingou Family Council, 'Traditional Owners Mount Korea Tour to Block Adani Finance' (Media Release, 5 November 2018) <https://wanganjagalingou.com.au/traditional-owners-mount-korea-tour-to-block-adani-finance/>, archived at <https://perma.cc/AV2S-2G7M>.

is going nowhere fast — they don't have money to fund their mine of mass destruction and they don't have our consent'.[305] And yet Burragubba is now burdened with costs.[306] To stave off further appeals, Adani sought an order against W&J representatives for $161,000 in legal costs from failed bids.[307] The Court granted this order but reduced the quantum to $50,000.[308] Adani then announced it would ask the Court to enforce Burragubba to personally pay more than $600,000 in costs from its various rounds of litigation.[309] It noted that 'Burragubba has been urged' by the 'foreign-backed Sunrise Project' to 'oppos[e] the Adani Carmichael project' which has 'abandoned him'.[310] It apparently decided to sue Burragubba in his personal capacity because the April 2016 ILUA was approved by 'a vote of 294 to 1 and Mr Burragubba refuses to accept the voice of his own people'.[311]

This argument could be supported by the recent Federal Court decision which found that Burragubba was acting in a personal capacity when challenging Adani's claims about economic and employment benefits.[312] The Federal Court found that '[t]here is no evidence that the families generally agreed with his view'.[313] In so ruling, the Court reasserted itself and the state's legal discourse as the prevailing form of truth-finding and material constitution. It not only re-inscribes what is and is not 'a "proper" "Aboriginality" adequate to retain a proprietary interest' — as Motha criticised of Australia's native title cases[314] — but also levies costs against

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305 Wangan & Jagalingou Family Council, 'Native Title Bill Fails Us: Traditional Owners Say Adani Fight Continues' (Media Release, 13 June 2017) <http://wanganjagalingou.com.au/native-title-Bill-fails-us-traditional-owners-say-adani-fight-continues/>, archived at <https://perma.cc/S5NG-8W8S>.

306 Charis Chang, 'Adani Tries to Bankrupt Wangan and Jagalingou Man, Adrian Burragubba', *News.com.au* (online, 4 January 2019) <https://www.news.com.au/finance/business/mining/adani-tries-to-bankrupt-wangan-and-jagalingou-man-adrian-burragubba/news-story/46aefeeca5f02c61f73b3840cfdddad1>, archived at <https://perma.cc/SJ2H-PXN9>.

307 *Kemppi* (n 298) 5 [12].

308 Ibid 12–13 [57].

309 Adani Mining, 'Environmental Groups Leave Traditional Owner in Debt' (Media Statement, 29 December 2018) <https://www.adaniaustralia.com/-/media//181229%20MS%20activists%20ordered%20to%20pay%20court%20costs>, archived at <https://perma.cc/2997-K6ZY>.

310 Ibid.

311 Ibid.

312 *Burragubba (No 2)* (n 31) 3–4 [8]–[11]. Since this article was submitted and accepted, Adani was successful in its suit against Burragubba for $600,000: 'Adani Bankrupts Traditional Owner in Queensland', *SBS News* (online, 15 August 2019) <https://www.sbs.com.au/news/adani-bankrupts-traditional-owner-in-queensland>, archived at <https://perma.cc/Z8S8-5NX6>. Soon after that, the Queensland government issued freehold title to the mining company, effectively extinguishing any W&J native title: Wangan & Jagalingou Family Council, 'Qld Govt Wipes Out W&J Native Title for Adani' (Media Release, 31 August 2019) <https://wanganjagalingou.com.au/qld-govt-wipes-out-wj-native-title-for-adani/>, archived at <https://perma.cc/7BQD-JK8M>; Ben Doherty, 'Queensland Extinguishes Native Title over Indigenous Land to Make Way for Adani Coalmine', *The Guardian* (online, 31 August 2019) <https://www.theguardian.com/business/2019/aug/31/queensland-extinguishes-native-title-over-indigenous-land-to-make-way-for-adani-coalmine>, archived at <https://perma.cc/27YU-K638>.

313 *Burragubba (No 2)* (n 31) 3 [8].

314 Motha (n 130) 338.

those who question the evidence of economic and financial benefit that can arise from development projects.[315]

Although the Family Council materially constituted itself as Indigenous peoples, the clash between international and national legal discourses continues. The Chair of CERD, Noureddine Amir, recently wrote to Australia's Ambassador to the UN, Sally Mansfield, expressing concerns about the 2017 amendment to the *NTA* and that the Carmichael mine 'does not enjoy' the FPIC of the 'Wangan and Jagalingou indigenous people'.[316] It was reported that Federal Resources Minister Matt Canavan responded that CERD should 'respect the Australian legal system' on matters it 'clearly does not understand'.[317]

V TEMPORARY CONCLUSIONS: CONSIDERING THE COSTS OF SUBJECTION

To become and present oneself as Indigenous peoples is not to enact a pre-legal subject-status, nor is it a 'global legal' subject-status.[318] There are no a priori definitional elements of Indigenous peoples. To become, be seen and construct oneself as a human rights bearer is a process of acting, altering or transforming one's 'modes of being'. It requires materially altering how one relates to oneself and others through international legal discourse. That does not mean it is beyond contestation or cost.

The Family Council materially constituted itself as Indigenous peoples by claiming the internationally recognised human rights of self-determination and FPIC to oppose Adani's Carmichael mine. The Family Council became Indigenous peoples, subjects of international legal discourse, because Australia's native title regime does not provide Aboriginal and Torres Strait Islander people the right to withhold consent from development projects. Through claiming FPIC and self-determination, NGOs and other institutions — such as Earthjustice, Sunrise, *The Guardian* and The University of Queensland — assisted the Family Council. That assistance was material, economic, political and legal. Despite state-based legal discourses that suggest otherwise,[319] that does not mean NGOs 'used' Burragubba or the Family Council, at least not in the sense that their agency or intentionality was eclipsed. Even if the Family Council's strategies were shaped or influenced by NGOs, the assistance it received materially contributed to its opposition to the mining development. That was costly to Adani, which has reduced the size of the mine and repeatedly delayed opening it due to litigation and funding issues. That litigation was also costly to the Family Council and potentially Burragubba.

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315 See above n 198.

316 Letter from Noureddine Amir to Sally Mansfield, 14 December 2018, 1 <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_ALE_AUS_8816_E.pdf>, archived at <https://perma.cc/6ARW-KBLR>.

317 Josh Robertson, 'Adani Coal Mine Should Be Suspended, UN Says, Until All Traditional Owners Support the Project', *ABC News* (online, 25 January 2019) <https://www.abc.net.au/news/2019-01-25/adani-mine-should-be-suspended-un-traditional-owners/10686132>, archived at <https://perma.cc/ARK5-NUKU>.

318 Thornhill et al (n 12) 442–3.

319 Cf John Ferguson, 'City Greens Waging War on Work for Bush Starved of Jobs', *The Australian* (online, 7 January 2019) <https://www.theaustralian.com.au/news/nation/city-greens-versus-bush-mining-jobs-is-war-mundine/news-story/e38ac1513b24404d12b3ffef24f4a8ab>, archived at <https://perma.cc/RP4C-Z44W>.

It is costly because constituting oneself or one's community as a subject of legal discourse is also to produce oneself or the community as an object of that discourse.[320] As the Family Council materialised as subjects of international legal discourse to challenge the mine, they faced questions about who provided them with financing, how they govern themselves, who they represent and the internal-political dynamics of the W&J. They were publicly opened to others, like academics and media outlets, who may treat those claimants as objects of their discourses.[321] Likewise, pro-mining W&J members faced questions and asserted that they were just like any other Australians. Members of the Family Council strove to demonstrate that they were democratic actors. How the W&J members subject themselves to legal discourses matters. To be a subject of legal discourse can be as *agentic* and supportive just as it is oppressive and deleterious.

Furthermore, it is costly in a silent way, one reminiscent of colonisation.[322] The Family Council had to materially produce itself as Indigenous peoples and politically produce itself as democratic actors to be recognisable and verifiable to an international audience, like CERD, the UN Special Rapporteurs, NGOs and state actors. International human rights indicate that '[s]tates shall consult and cooperate … in order to obtain their free and informed consent' and that Indigenous peoples 'have the right to self-determination', including to 'freely pursue their economic, social and cultural development'.[323] It may then appear that human rights promise salvation, equality, self-determination or, even, self-government. To the extent that becoming an international legal subject fulfils those promises, it is costly. It is time to consider those costs.

320 Mark GE Kelly (n 29) 88.
321 See Goodale (n 32).
322 See Beard (n 33) 27.
323 *UNDRIP*, UN Doc A/RES/61/295 (n 5) arts 3, 32(2).