

# Grounds of objection: climate change, Country, and human rights in the Waratah Coal case

## CSRMR Occasional Paper



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## Cover image

Photo courtesy of Bimblebox Alliance Inc. Within the footprint of Waratah's Galilee Coal Mine and heavily cleared land, the Bimblebox Conservation Reserve retains a high level of biodiversity.

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<sup>1</sup> QS World University Rankings and Performance Ranking of Scientific Papers for World Universities, 2021.

<sup>2</sup> The University of Queensland ranks third in the world for mining and mineral engineering, 2021 QS World University Rankings by subject.

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*It is imperative that the perspective of First Nations people be heard in the approval process for fossil fuel projects in Queensland, where such projects have the potential to limit the cultural and human rights of First Nations people. Marawah Johnson Co-director Youth Verdict Ltd*

## 1. Introduction

This paper examines the landmark decision<sup>3</sup> of the Land Court of Queensland delivered on 25 November 2022 in Brisbane<sup>4</sup> to recommend the refusal of Waratah Coal Pty Ltd's applications to develop a new coal mine in the Galilee Basin.<sup>5</sup>

Lawyers reporting on the case say it has 'captivated environmental organisations and lawyers, mining companies and members of the general public, with many grappling to understand and prepare for the implications and consequences of this decision'.<sup>6</sup>

Headlining the interest in the case are several firsts:

- the first major coal mine refused in Queensland following a recommendation by the Land Court
- the first time a court in Queensland has factored-in the effect on the environment from burning the coal produced by a coal mine
- the first time in an Australian court decision that the deleterious effects of climate change have been accepted as impacting human rights, especially First Nations cultural rights
- the first time First Nations' evidence in a mining objection in Queensland was heard 'on Country'.

Although this paper reports on key aspects of the Land Court decision, it is not a legal take on proceedings. Rather, it is a social science-driven study concerned with how the Court has responded to Indigenous peoples' arguments for protecting their cultural interests in response to proposals for large-scale thermal coal mining in Queensland. The purpose is to expound on specific dimensions of the case and make the legal issues accessible to an interested non-legal audience. Of particular interest is how the reasons connect environmental protection with protection of the cultural rights of First Nations people.

To ensure relevance to readers unfamiliar with the Queensland setting, pertinent context is provided in the next section.<sup>7</sup> The sections that follow aim to:

1. Situate the case within the developing jurisprudence in environmental activism against fossil fuels projects in Queensland.
2. Outline the legislative regime for approving mines in Queensland.
3. Detail aspects of the proposed mine including ownership, location, size, infrastructure, and cost.
4. Describe the objections and objectors, being a unique coalition of youth and First Nations People coordinating with local non-Indigenous landowners.

<sup>3</sup> McGrath, C. (2023) 'Waratah Coal v Youth Verdict (Galilee Coal Project)'. Case study, Environmental Law Australia: Brisbane <http://envlaw.com.au/waratah/>. Human Rights Law Centre. 'Landmark recognition of human rights and environmental impacts ...' <https://www.hrlc.org.au/human-rights-case-summaries/2023/1/12/landmark-recognition-of-human-rights-and-environmental-impacts>.

<sup>4</sup> Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21 <https://www.queenslandjudgments.com.au/caselaw/qjc/2022/21>.

<sup>5</sup> The Land Court is a specialised judicial tribunal and court of record established under the *Land Court Act 2000* (Qld). Originally established to deal with Crown leasehold land rentals, valuations, compensation for resumption, in 2007 its jurisdiction was expanded to include mining and petroleum matters, cultural heritage and other Indigenous land issues. Its objection decisions are amenable to judicial review under the Act <https://www.courts.qld.gov.au/courts/land-court>.

<sup>6</sup> Carter Newell (2022) 'Queensland Land Court considers Scope 3 emissions and Human Rights impacts'. Publications <https://www.carternewell.com/page/Publications/2022/queensland-land-court-considers-scope-3-emissions-and-human-rights-impacts/>.

<sup>7</sup> This written paper follows a presentation by the author to Canada's Pacific Business and Law Institute educational and knowledge transfer event, *Nothing About Us Without Us: Indigenous Jurisdiction Over Mining and Marine Territories*, held in Vancouver, Canada, on 31 Oct & 1 Nov 2023.

5. Summarise how the Court adjudged key arguments heard on the climate change and human rights dimensions of the case, particularly as they relate to First Nations Peoples and the global impact of the Project's potential greenhouse gas emissions.

## 1.1 Précis of the case

Waratah Coal is a private wholly owned subsidiary of Mineralogy Pty Ltd,<sup>8</sup> which is owned by prominent Australian businessman and politician, Clive Palmer, the nation's fifth richest person.<sup>9</sup> Waratah Coal seeks to develop a large new thermal coal mine in Queensland's Galilee Basin and construct a dedicated railway to transport the coal to a coastal port (Abbot Point) for export (see map at Figure 1).

In order to conduct mining in Queensland, the miner must apply for and be granted:

- a mining lease under the *Mineral Resources Act 1989* (Qld) (MR Act), and
- an environmental authority under the *Environmental Protection Act 1994* (Qld) (EP Act).

The principal objectives of the MR Act (s.2) are: to encourage exploration and mining of minerals; ensure an appropriate financial return to the State; minimise land use conflict; and encourage environmental responsibility with respect to exploration and mining.

The EP Act recognises the benefits that appropriate development can bring. Its objective is to 'protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development)' (s.3).

The EP Act provides a process for an environmental impact statement (EIS) process 'to assess the potential adverse and beneficial environmental, economic and social impacts of the project; and management, monitoring, planning and other measures proposed to minimise any adverse environmental impacts of the project' (s.40).

The Waratah Coal project was declared a 'Coordinated Project' under the *State Development and Public Works Organisation Act 1971* (Qld) (s.26) (SDPWO Act), which triggered the EIS process under that act.<sup>10</sup> The SDPWO Act incorporates the Coordinator-General who is conferred wide-ranging powers to plan, deliver, and coordinate large-scale infrastructure projects across government, while ensuring their environmental impacts are properly managed.<sup>11</sup>

The legislative scheme for major mining projects provides for public notice of applications for mining leases and environmental authorities, and allows submissions to be received. Although the EIS process supported Waratah Coal's proposals (as explained in Section 3), the Project was met with hundreds of submissions objecting to it going ahead. The MR Act and the EP Act convey functions on the Land Court to hear objections to mining leases and environmental authorities and decide on the merits of the case whether to recommend the issuing authorities refuse or approve the applications.<sup>12</sup> In doing so, the Court acts in an administrative capacity and is not 'bound by any rule or practice as to evidence'.<sup>13</sup> Both acts prescribe matters that the Land Court must take into account and weigh in the balance.

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<sup>8</sup> Waratah Coal was approximately 50% Australian-owned public company, incorporated in British Columbia, Canada on 19 Jan 2006 and listed on the Toronto Stock Exchange's Venture Exchange in Dec 2006. In 2008, Waratah Coal listed on the Australian Stock Exchange, with Mineralogy Pty Ltd progressively taking a controlling stake and ultimately assuming 100% ownership and incorporating it into Australian billionaire Clive Palmer's Mineralogy Group by 2009.

<sup>9</sup> Australian Financial Review 'Rich List' <https://www.afr.com/rich-list>.

<sup>10</sup> A project with may be declared a 'coordinated project' under the SDPWO Act where there are complex approval requirements, involving local, state and federal governments; significant environmental effects; of strategic significance; or has significant infrastructure requirements (Coordinator-General) <https://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects>.

<sup>11</sup> Coordinator-General <https://www.statedevelopment.qld.gov.au/coordinator-general>.

<sup>12</sup> A recommendation to grant a mining lease may include a recommendation that the mining lease be granted subject to conditions the Land Court consider appropriate (s.269(4) EP Act) and similarly, a recommendation that an environmental authority be approved may be made subject to conditions determined by the Land Court (s.190 EP Act).

<sup>13</sup> The Land Court shall take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections and other matters and shall not be bound by any rule or practice as to evidence (s.268 MR Act).

Of particular relevance to understanding the significance of the Waratah Coal case is how the Court considered whether ‘there will be any adverse environmental impact caused by those operations ...’ (s.269(4)(j)) and whether ‘the public right and interest will be prejudiced’ (s.269(4)(k)) under the MR Act, as well as, the way it considered ‘the standard criteria’ under the EP Act (s.191(g)), which references international policy and national standards regarding environmental protection and ecologically sustainable development.<sup>14</sup>

On deciding on a case, the Land Court’s recommendations are non-binding. It is up to the Minister for Resources under the MR Act and the Chief Executive of the Department for the Environment and Science under the EP Act to make a final decision on the respective applications. They ‘must consider’ (s.271 MR Act) and ‘have regard to’ (s.194B EP Act) the objections made and the Land Court’s recommendations.

Additionally, the Land Court fits the definition of a ‘public entity’ under by the *Human Rights Act 2019* (Qld) (HR Act), which makes it unlawful ‘to act, or make a decision, in a way that is not compatible with human rights’, or ‘fail to give proper consideration to a human right relevant to the decision’ (s.58(1) HR Act).

The main objections ultimately tried in the Waratah case were made by Youth Verdict Ltd and the Bimblebox Alliance Inc. They objected largely on climate change grounds that emissions from burning the coal exported by the mine will cause unacceptable impacts to human rights, especially the cultural rights of First Nations peoples. The decision of the Land Court was the Project should not be approved and it recommended the mining lease application (MLA 70454) and the environmental authority (EPML 00571313) be refused.<sup>15</sup>

## 2. Coal mining and contestation in Australia

Australia is a mining nation with extractive resources contributing over 13% of gross national product. It is the world’s second largest thermal coal exporter, supplying mainly India, Japan, and South Korea.<sup>16</sup>

The economy of the State of Queensland is particularly dependent on coal exports, which represent over half the nation’s coal production and 70% of Queensland’s resources exports.<sup>17</sup> The State hosts 54 operating coal mines that produced 217.9 Mt of saleable coal in 2021-22 worth (in Australian dollars throughout this paper) \$71.8 B (135.4 Mt of metallurgical coal and 82.5 Mt of thermal coal).<sup>18</sup>

As at October 2022, there were 33 coal projects (both new mines and extensions to existing projects) at the feasibility stage in Australia (see Figure 1).<sup>19</sup> Many investment decisions have been delayed and the preference appears to be for expansions of existing sites over new mines.<sup>20</sup>

Australia is also signatory to the Paris Agreement.<sup>21</sup> The incoming federal Labor Government (elected May 2022) legislated the 2016 ‘Paris commitments’ to achieve net zero emissions by 2050 and committed to a 2030 national target to reduce emissions by 43% (from 2005 emissions levels). Although domestic electricity generation is incrementally transitioning away from thermal coal, exports remain lucrative in the immediate term as global demand persists.<sup>22</sup>

<sup>14</sup> The MR Act at s.269(4) lists 11 other matters additional to s.269(4)(j) and s.269(4)(k). The current EP Act (as at 2024) lists eight criteria at s.191, including ‘the standard criteria’ at s.191(g). NB. the relevant version at the time of the Waratah Case (current as at 14 March 2013) has ‘the standard criteria’ at s.223(c) in Division 7 Subdivision 1.

<sup>15</sup> These mining tenures incorporate Exploration Permit-Coal (EPC) 1040 and 1079, both held by Waratah Coal (EIS Vol2 Ch1 p.5).

<sup>16</sup> Australia’s mining sector contributes around 13.6% of Gross Domestic Product and makes up two thirds of the nation’s total merchandise export. Record commodity exports in 2022-2023 were worth AUD\$467B, with the value of Australia’s thermal coal exports AUD\$66B and metallurgical coal AUD\$62B.

<sup>17</sup> Queensland Treasury (2022) ‘Queensland’s Coal Industry and Long-Term Global Coal Demand, November 2022’ <https://www.treasury.qld.gov.au/resource/a-study-of-long-term-global-coal-demand/>.

<sup>18</sup> Thermal coal is used for generating electricity, metallurgical (coking) coal is for making steel.

<sup>19</sup> Office of the Chief Economist (2022). ‘Resources and Energy Major Projects, 2022 Report’. Australian Government <https://www.industry.gov.au/publications/resources-and-energy-major-projects-2022>.

<sup>20</sup> See for example, the Australia Institute, ‘Coal Mine Tracker’ <https://australiainstitute.org.au/initiative/coal-mine-tracker/>.

<sup>21</sup> Conference of Parties of the United Nations Framework Convention on Climate Change (UNFCCC) 21, sets a long-term global temperature goal of well below 2°C above the pre-industrial level at 2100, with the ambition of keeping that temperature to 1.5°C above that level <https://unfccc.int/process-and-meetings/the-paris-agreement>.

<sup>22</sup> Department of Industry, Science and Resources, Commonwealth of Australia (2022) ‘Resources and Energy Quarterly December’.

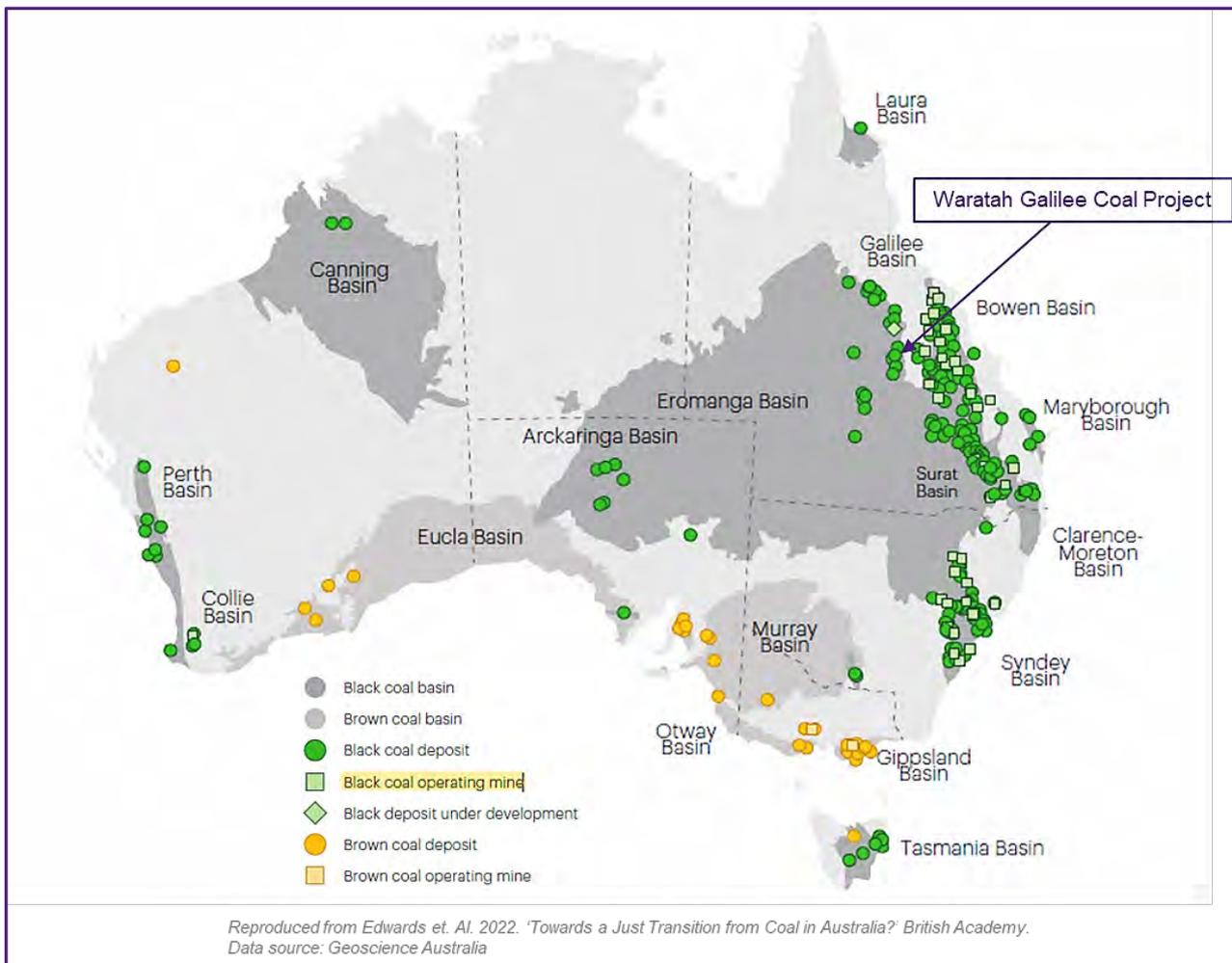


Figure 1 Location of Waratah's Galilee Coal Project amongst Australia's major coal deposits

Considerable concern exists amongst some sections of society over how Australia can achieve the Paris targets at the same time as approving new coal and gas projects. Concerted action opposing new coal projects is increasingly turning to organised legal action to prevent such developments.

In three key cases involving objections to proposed large thermal coal mines in Queensland preceding the Waratah Coal case, the Land Court recommended the grant of the mining leases and approval of the environmental authorities, subject to conditions, despite evidence of climate change impacts.

Each project drew substantial opposition and featured considerable public attention:

1. Xstrata's<sup>23</sup> Wandoan Coal Mine decided in 2012 by President MacDonald.<sup>24</sup>
2. Hancock Prospecting's Alpha Coal Mine in 2014, heard by Member Smith in the first instance, which survived a judicial review and appeal to the Queensland Court of Appeal in 2016.<sup>25</sup>
3. Bravus' (Adani) Carmichael Coal Mine decided in 2015 by President MacDonald.<sup>26</sup>

<sup>23</sup> Xstrata merged with Glencore in 2013 and placed the project on hold <https://www.glencore.com.au/operations-and-projects/coal/projects/wandoan-coal-project>.

<sup>24</sup> Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management [2012] QLC 13.

<sup>25</sup> Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4) [2014] QLC 12; Coast and Country Association of Queensland Inc v Smith & Ors [2016] QCA 242.

<sup>26</sup> Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors [2015] QLC 48.

While the active objectors who appeared before the Court differed, the solicitor for each case was the Environment Defenders Office (EDO).<sup>27</sup> Grounds for the objections include that the emissions from burning the mined coal would offend the EP Act by causing unacceptable environmental harm, as well as prejudice the public rights and interests under the MR Act.

In *Xstrata*, the President's reasons accorded with the mining company's argument that the mine's direct emissions (Scope 1 and 2 emissions)<sup>28</sup> are negligible in the context of global emissions and the indirect emissions from burning the coal mined and exported (Scope 3 emissions) should not be considered under the EP Act. Her Honour held that the of burning coal produced by the mine were not 'mining activities' within the meaning of the EP Act and that consideration of prejudicing the public interest under the MR Act must involve the weighing of benefits and detriments.<sup>29</sup>

The President accepted the proposition that supposes – if Australia doesn't supply the coal, someone else would, so approving the mine has no impact on climate change. This has become known pejoratively as the Drug Dealers Defence, or using economic terms, market substitution or the Perfect Substitution argument.<sup>30</sup>

*Xstrata* effectively set the Land Court's approach for a decade prior to the Waratah Coal decision in relation to objections over the impact on climate change from mining coal.<sup>31</sup> In *Hancock*, for instance, the primary judge, Member Smith, found the scale of Scope 3 emissions were of concern and considered whether to take into account their consequences in proceedings. His Honour's approach accorded with *Xstrata* in that Scope 3 emissions are not relevant to considering 'the adverse environmental impact' under MR Act s.269(4)(j)), although a necessary consideration under the MR Act public interest criteria (s.269(4)(k)).

His Honour acknowledged the logic in the objectors' argument that limiting consideration of emissions to the extraction of the coal would be inconsistent with the principle of ecological sustainable development under the EP Act's 'standard criteria' (s.191(g) in the current version),<sup>32</sup> however, he agreed with President MacDonald in *Xstrata* that consideration of the global dimensions of environmental impacts are limited to those authorised by the environmental authority, being the mining activities not the burning of the coal. Any doubt over the correctness of this assessment were dissuaded by His Honour's acceptance on the evidence that global emissions would not fall if Hancock's Alpha Coal Mine does not proceed because coal will be sourced from elsewhere.<sup>33</sup>

Significantly, in dismissing the appeal of Member Smith's decision (following an administrative review), the opinion of one of the Court of Appeal judges, President McMurdo, was that President MacDonald's construction in *Xstrata* of the EP Act criteria was 'certainly open'.<sup>34</sup> President McMurdo favoured the view that the Land Court in considering objections to an environmental authority must consider Scope 3 emissions. Although President McMurdo saw 'no warrant to construe the provisions so narrowly' so as to limit consideration of the standard criteria directly relevant to mining activities,<sup>35</sup> Her Honour agreed with orders to dismiss the appeal based on the findings of fact that there would be no detrimental effect on global emissions, based on the Perfect Substitution argument.

In *Adani* (the decision by President MacDonald concerning the Bravus Carmichael Coal Mine), the Land Court accepted it should consider Scope 3 emissions, not only when considering the public interest under the MR Act, but also they should be taken into account in considering matters such as intergenerational equity under the standard criteria in the EP Act.<sup>36</sup> On the evidence, the Court found there would be no

<sup>27</sup> The EDO is a not-for-profit accredited Community Legal Centre that receives a mix of federal and state government funding, private and philanthropic organisation donations, and bequests <https://www.edo.org.au/>.

<sup>28</sup> Scope 1 and Scope 2 greenhouse gas emissions are respectively defined under the National Greenhouse and Energy Reporting Regulations 2008 <https://www.legislation.gov.au/F2008L02230/2012-07-19/text>. Scope 3 are defined in the World Resources Institute 'Corporate Accounting and Reporting Standard' <https://ghgprotocol.org/about-wri-wbcsd>.

<sup>29</sup> *Xstrata* para. 581.

<sup>30</sup> See for example <https://www.supermoney.com/encyclopedia/substitute-goods> for an explanation of Substitution in economic theory.

<sup>31</sup> McGrath, C. (2023). 'Waratah Coal v Youth Verdict (Galilee Coal Project)'. Case study, *Environmental Law Australia*: Brisbane. <http://envlaw.com.au/waratah/>.

<sup>32</sup> *Hancock* para. 215.

<sup>33</sup> *Ibid.* par 229.

<sup>34</sup> *Coast & Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242, para. 11.

<sup>35</sup> *Ibid.* para. 12.

<sup>36</sup> *Adani* paras. 455, 456.

difference in the quantum of global emissions if the mine is not approved because other coal will be obtained from elsewhere and it recommended the grant of the mineral leases and issuing of the environmental approval, subject to additional conditions.

Based on these cases, it appeared settled that the Land Court will effectively limit its consideration to direct environmental impacts and, while climate change and greenhouse gas emissions may be relevant, the detrimental environmental impact of Scope 3 emissions is discounted because of Perfect Substitution.

So, what changed from *Adani* in 2015 to the time of the Waratah Coal case that have contributed to a shift in the established jurisprudence? Some key events are highlighted:

- On 4 November 2016, the 'Paris Agreement' came into force – a legally binding international treaty responding 'to the urgent threat of climate change' adopted by 196 countries, including Australia, at the UN Conference of the Parties (COP21) in Paris, France, in December 2015, aimed at 'pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'. Parties shall pursue domestic mitigation measures and maintain successive nationally determined contributions (NDCs) that it intends to achieve.<sup>37</sup>
- In 2019, in Queensland's neighbouring State jurisdiction, the Chief Justice of the NSW Land & Environment Court eviscerated the Perfect Substitution argument in an appeal of a decision by the State's planning commission to refuse Gloucester Resources Ltd's metallurgical coal mine, the Rocky Hill Mine Project.<sup>38</sup>

In upholding the refusal, principally on unacceptable planning, visual, and social impacts, the Chief Justice rejected the mining company's argument that emissions from the project will occur whether the project was approved or not. He found a logical flaw in the market substitution assumption:

If a development will cause an environmental impact that is found to be unacceptable, the environmental impact does not become acceptable because of a hypothetical and uncertain alternative development might also cause the same unacceptable environmental impact.<sup>39</sup>

- On 1 January 2020, Queensland's human rights legislation commenced, with the object 'to protect and promote human rights and build a culture in the public sector that respects and promotes human rights' (s.3 HR Act). The HR Act imposes obligations not only on Parliament and 'public entities' such as Ministers, government departments and the public service, but can also apply to courts and tribunals when they are acting in an administrative capacity.

The HR Act is modelled on the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>40</sup> While it does not provide a stand-alone cause of action against a public entity for a decision that is made in contravention of the act, where a challenge to the lawfulness of a decision can be advanced under other laws then a claim of unlawfulness on human rights grounds can also be advanced.

### 3. Waratah Coal's proposed mine and objections

Originally heralded as the 'China First Coal Project', Waratah Coal's Galilee Coal Project proposed a \$6.4 B capital investment to develop a new coal mine and construction of a dedicated rail line between the mine and upgrading of existing port facilities at Abbot Point for planned export of up to 1.4 Bt of thermal coal (see Figure 2).<sup>41</sup>

At full production, open-cut and underground mining would produce 40 Mtpa of thermal coal over an estimated 25 to 30-year mine life. This rate of production is more than double that of Australia's largest black

<sup>37</sup> United Nations Framework Convention on Climate Change (UNFCCC), Paris Agreement <https://unfccc.int/documents/184656>.

<sup>38</sup> Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7.

<sup>39</sup> *Gloucester* para 545, cited in McGrath, C. (2023) 'Gloucester Resources ("Rocky Hill") case'. Case study, *Environmental Law Australia*: Brisbane <http://envlaw.com.au/gloucester-resources-case/>.

<sup>40</sup> Chen, B. (2020) 'The Human Rights Act 2019 (Qld): Some perspectives from Victoria'. *Alternative Law Journal*, Vol. 45(1) 4–11.

<sup>41</sup> The project was declared a 'coordinated project' on 18 Jul 2008, meaning the Coordinator-General would coordinate and oversee the government approval processes.

coal mines (challenged only by Hancock’s proposed 32 Mtpa Alpha Coal Mine, which remains undeveloped at the time of writing).

Waratah Coal’s EIS estimated 3,500 construction and some 2,300 operational jobs, with annual export revenue of \$4.6 B, plus around \$1 B in government taxes and royalties.<sup>42</sup>

The EIS was released for public for comment on 31 August 2011 for a 12-week period, receiving hundreds of submissions.<sup>43</sup> Supplementary (SEIS) information was released in April 2013, attracting further submissions.

The 2013 Coordinator-General’s Evaluation Report (dated 8 August) was satisfied with the information provided through the EIS/SEIS process. He considered that the Project could deliver significant benefits to the region and the State. He concluded that environmental impacts can be appropriately managed, and the project can proceed subject to recommendations and conditions made in his report.

Waratah Coal’s mining lease and environmental applications were ultimately released for public consultation in December 2019. During the 2019-2020 notification period, 22 objections to the mining lease and 16 to the environmental authority were received. Some objections were withdrawn, leaving 31 objections (see Appendix A for a timeline of events leading up to the case).



Figure 2 Map from EIS showing proposed railway route and port at Abbot Point

More than 90% of the submissions received by the Coordinator-General related to protecting the Bimblebox Nature Refuge (Bimblebox), which lies within the mining lease area (see Figure 3). Bimblebox is part of Glen Innes cattle station and contains some 8,000 ha of intact native vegetation in excellent condition within a region heavily impacted by extensive land clearing (see cover photo). In 2000, conservationists purchased

<sup>42</sup> Coordinator-General (2013) ‘Galilee Coal Project (Northern Export Facility): Coordinator-General’s evaluation report on the environmental impact statement’. Queensland Government: Brisbane.

<sup>43</sup> A total of 325 submissions were received over the 12-week period, including 14 from government agencies, 39 from non-government organisations, 269 from individuals and three form letters containing a total of 1517 signatures (CG 2013).

the grazing property to protect its natural values. Bimblebox was established as a Private Protected Area for Nature Conservation and gazetted a Nature Refuge under the *Nature Conservation Act 1992* (Qld) in May 2003. The Desert Uplands Biodiversity Planning Assessment by the Queensland environment department in 2005 assessed the remnant vegetation on Bimblebox as having special biodiversity values, and value as a wildlife refugia, including for threatened species. Even though Bimblebox is mapped as being of State Significance,<sup>44</sup> under the Nature Conservation Act Nature Refuges can be mined and offsets offered to compensate for ecological loss. In 2014, following approval of the Project, the Bimblebox Alliance was formed to protect and conserve the natural values of Bimblebox and prevent mining.

In weighing the merits of the case, the direct (mining activities) and indirect (climate change) threats to Bimblebox formed a substantial part of the Waratah Coal decision. Considerable evidence was heard over the detrimental effects of the Project on the ecological values of Bimblebox. The Court found that Bimblebox’s status as a nature refuge was at risk if the mine were to proceed and the expert witnesses agreed that the offset plan provided in the EIS was inadequate [433, 443, 569].<sup>45</sup>

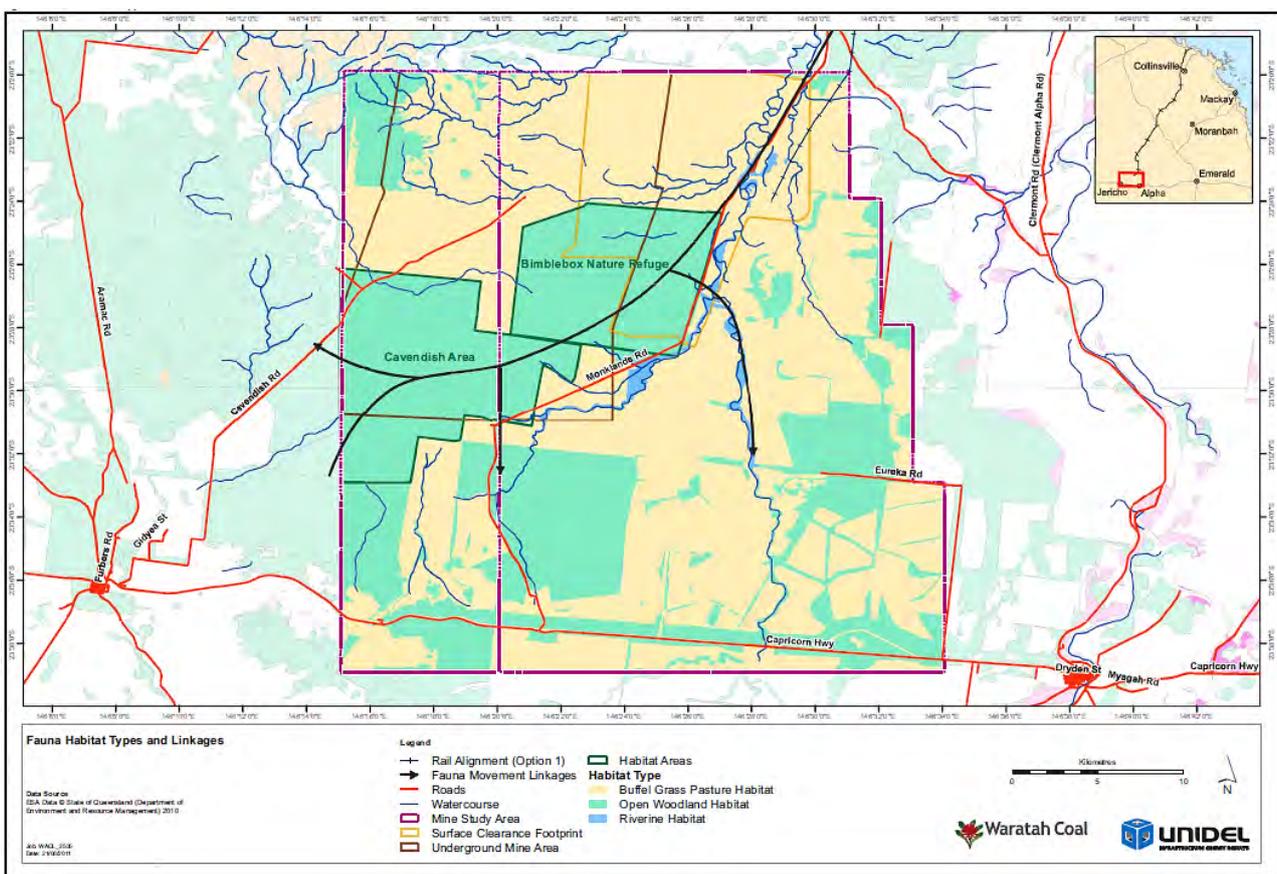


Figure 3 Map of Waratah Coal's mining lease showing Bimblebox Nature Refuge<sup>46</sup>

Arguments over Bimblebox are not elucidated further in this paper. Rather, the focus is on how the reasoning over greenhouse gas emissions related to the Project is advanced from previous decisions and the links to human rights, particularly First Nations human rights.

Waratah Coal’s Galilee Project is on the traditional lands of the Jagalingou First Nations People who are part of the Clermont-Belyando Area Native Title Claim registered in 2004 under the *Native Title Act 1993* (Cwth), which includes Wangan, Jagalingou and Wirdi peoples.<sup>47</sup> The Native Title Act offers registered claimants no

<sup>44</sup> Waratah Coal Galilee Coal Project EIS Vol.2 Chapter 6 Terrestrial Ecology, p.170.

<sup>45</sup> This paper deviates from convention by enumerating in square brackets the relevant paragraph references to the Court’s decision in the Waratah Coal case, *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)*. This is simply to achieve a tidier page format.

<sup>46</sup> Map copied from Waratah Coal Galilee Coal Project EIS Vol.2 Chapter 6 Terrestrial Ecology.

<sup>47</sup> In Mar 2022, the Federal Court of Australia determined that native title does not exist (case no. QUD25/2019) <https://www.comcourts.gov.au/file/Federal/P/QUD25/2019/3846014/event/30993804/document/2077764>.

power to refuse mining, only provisions for making agreements over a project proceeding.<sup>48</sup> By March 2022, the agreement-making option was removed following the determination of the Federal Court of Australia that native title does not exist over the claim area.

No agreement with local Indigenous groups over the Project is evident. Instead, Jagalingou people sought to halt further major mines on their traditional lands. Senior spokesperson, Adrian Burragubba, and youth spokesperson, Murrawah Johnson, for the Wangan & Jagalingou Family Council said in voicing opposition to Bravus' (Adani) Carmichael Coal Mine north of Waratah Coal's applications in 2017 that:

The inalienability of our rights in land must be respected. It is the ground[s] on which we seek to protect our country and heritage from the mass destruction that would ensue from the Carmichael mine. [...] Significant values, heritage and sites are at great risk. Our identity as traditional owners and the basis of our law and custom can be destroyed with the land.<sup>49</sup>

With no prospect of recognition of inalienable traditional rights under the Native Title Act processes, Jagalingou First Nations people joined with Youth Verdict Ltd to resist the mine. Youth Verdict was formed in 2019 by a group of young Queenslanders aged between 13 to 30 determined to take concerted action over climate change. Youth Verdict founder and co-director, Monique Jeffs, wanted to build on youth climate strikes,<sup>50</sup> claiming 'young people have a right to a safe future just like every other generation has had; and that is not going to happen because of climate change' (see Figure 4).<sup>51</sup>

As with Bimblebox Alliance, Youth Verdict submitted that the Land Court recommend the applications for Waratah Coal's applications for a mining lease and an environmental authority be refused. Both parties objected to the mining lease and the environmental authority on the same climate change grounds, with both represented by the EDO.



Figure 4 Youth Verdict members, Serena Thompson, Murrawah Johnson, and Monique Jeffs<sup>52</sup>

Youth Verdict and Bimblebox Alliance together elected to be active parties in the hearing, along with Bimblebox volunteers, Mr and Mrs Brinnand, who self-represented.<sup>53</sup> Speaking as Jagalingou youth

<sup>48</sup> No such agreement with local Indigenous groups over the Project is evident.

<sup>49</sup> Wangan & Jagalingou Family Council (2017) Submission to the Senate Constitutional and Legal Affairs Committee re: the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*.

<sup>50</sup> See School Strike 4 Climate, Australia. <https://www.schoolstrike4climate.com/>.

<sup>51</sup> 3CR Radical Radio. (2022). 'Fighting for climate justice with Youth Verdict'. Radio interview, 12 December. <https://www.3cr.org.au/womenontheline/episode/fighting-climate-justice-youth-verdict>.

<sup>52</sup> Photo courtesy of Stefan Armbruster.

<sup>53</sup> Of the 22 objections received over the ML and 16 over the EA, some were withdrawn. Of the 31 objections remaining, only Youth Verdict and Bimblebox, and the Brinnands elected to be 'active parties' in the hearing [143, 144]. Although the other objectors did not elect to be active parties, the Court must consider their objections in deciding what recommendations to make.

spokesperson and Co-director of Youth Verdict at EDO's launch of the Waratah Coal case on 14 May 2020, Marrawah Johnson declared:

Mines are imposed upon us and we are denied our right to say 'no'. [...] Our birthright is to enjoy and protect our homelands and live by our law. We cannot do that when our lands are systematically targeted for destruction by the policies of the government, which takes away our right to care for the land and pass on our culture. Our connection to our sacred water, the essence of our being and livelihoods in Country is severed by coal extraction and climate change.<sup>54</sup>

Youth Verdict and Bimblebox Alliance said with respect to the MR Act, 'there will be significant adverse environmental impacts, including social and economic impacts, caused by those operations' and 'the public right and interest will be prejudiced'. Recognising the global dimensions of the environmental impacts, a decision to approve the mine would not be consistent with the objects of the EP Act and core objectives of ecological sustainable development, including intergenerational equity and the precautionary principle.

The objections listed the adverse impacts from increased greenhouse gases in the atmosphere, such as effects from increased surface temperature of the earth, including increased frequency, intensity and duration of heat waves, high temperatures, drought, cyclone activity, coral bleaching, and increase in sea level rise.

Continuing to emit greenhouses gases will cause increasingly adverse impacts to the health, life and way of life of humans and communities, as well as other species and ecosystems, resulting in loss of life, extinctions and ecosystem destruction.<sup>55</sup> Approval would be contrary to the public interest and contrary to international agreements to limit the emissions of greenhouse gases and conventions on biodiversity.<sup>56</sup>

Further, in relation to human rights, Youth Verdict and Bimblebox Alliance claimed the Land Court, the Department for the Environment and Science, and the Resources Minister, which are 'public entities in the meaning of HR Act, would be acting unlawfully should they approve the applications. These objections relied on s.58(1) HR Act that says that it is unlawful for a 'public entity' to:

- a) to act or make a decision that is not compatible with human rights; or
- b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

The objections say the development for which approval is sought would limit the relevant human rights mentioned in the HR Act beyond the extent that it is reasonable, including the:

- right to life of people in Queensland (s.16)
- rights of First Nations Peoples (s.28)
- rights of children (s.26(2))
- right to property (s.24(2))
- right to privacy, family, and home (s.25(a))
- right to enjoy human rights without discrimination (s.15(2)).

An extensive trial ensued, involving seven weeks of hearings over a four-month period where the Court heard evidence from six lay witnesses, five First Nations witnesses, and over 20 expert witnesses. In a historic first, out of respect to Aboriginal and Torres Strait Islander peoples, some hearings were held on the land of the First Nations witnesses (see Figure 5).

<sup>54</sup> Johnson, M. (2020). 'W&J support for human rights and climate change case against Palmer's coal plans'. Latest News. *Wangan and Jagalingou Traditional Owners Family Council* website accessed 13 Dec 2023.

<sup>55</sup> EDO. (2020) 'Attachment to mining lease objection notice – Galilee Coal Project (Northern Export Facility)', 3 April.

<sup>56</sup> EDO. (2020) 'Attachment to environmental authority objection notice – Galilee Coal Project (Northern Export Facility)', 3 April.

Most of the issues considered were under the broad topics of the Bimblebox Nature Refuge (direct impacts), climate change (indirect impacts), economic and social benefits, and human rights. It is the climate change and human rights arguments that are examined in the following sections.



Figure 5 Land Court of Queensland taking evidence on-Country<sup>57</sup>

## 4. Climate change implications of the Project

Objections based on the climate change implications of the proposed mine lie at the heart of both environmental and human rights objections in the Waratah Coal case. As with the previous Land Court cases mentioned, in dispute was whether the Court could take into account the emissions from combustion of the coal in weighing its decision.

There was no dispute that greenhouse emissions contribute to climate change. Waratah Coal accepted climate change is occurring and combustion of the Project coal will contribute to climate change but it said the responsibility for emissions lay with the nation burning the coal [574, 575].<sup>58</sup>

Youth Verdict and Bimblebox Alliance argued that combustion of coal that Waratah Coal proposes to extract and sell is not compatible with the goal of the Paris Agreement to limit the increase in global temperature.

The approach taken by President Kingham to explore ‘the multifarious issues raised by the parties’ [584] in this case sought to:

- establish the causes and impacts of climate change and estimate the greenhouse gas emissions for the Project
- examine global climate scenarios to understand the remaining ‘carbon budget’ and the significance of the Project’s potential contribution to that budget<sup>59</sup>
- determine the extent the impact of emissions from coal sold can be considered by the Land Court in making its recommendation over the applications for Waratah’s mining lease and environmental authority.

The conclusions on these matters informed the Court’s weighing of the costs and benefits of the Project.

<sup>57</sup> Photo credit: Brendan Mounter, ABC Far North.

<sup>58</sup> Herewith, this paper deviates from convention by enumerating in square brackets the relevant paragraph references to the Court’s decision in the Waratah case, *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)*. This is simply to achieve a tidier page format.

<sup>59</sup> The carbon budget in this case being the remaining amounts of CO<sub>2</sub> that can be emitted globally and still meet 1.5°C and avoiding 2°C global warming scenarios.

The parties agreed that human emissions of greenhouse gases into the atmosphere since the industrial revolution have caused climate change impacts and that continued emissions will cause increasingly adverse impacts, including on human health and way of life, and ecosystems and the environment more broadly [594, 611].

Agreed also was that climate change impacts are not evenly experienced. Geographically, Queensland is likely to experience a disproportionate cost as it straddles the tropical latitudes. It is more susceptible to damaging cyclones and heatwaves and the pronounced effects of ocean warming, which is especially deleterious to the health of the World Heritage-listed Great Barrier Reef that lies off the extensive Queensland coast.

It was accepted also that climate change impacts are not experienced in the same way by all people. There was no dispute that disproportionate costs will be borne by future generations 'who will experience the worst impacts of climate change' [1841]. Climate change impacts will adversely affect Aboriginal and Torres Strait Islander peoples in specific ways, including damage to and displacement from traditional lands and waters, disruption of traditional cultural practices, connection to place and ecological systems, and impediments to culture maintenance into the future and for future generations [631].

Statements taken 'on-Country' from First Nations witnesses emphasised the impact of the sea level rises on Torres Strait Islanders and coastal Aboriginal peoples, which was backed by expert evidence that flooding events and coastal erosion poses an existential threat and even the loss of islands.<sup>60</sup>

The health vulnerability of First Nations peoples was said by experts to be greater because of higher rates of underlying chronic conditions and socioeconomic disadvantage, and mental health may also suffer through disruption to traditional knowledge and cultural practices, which depend on connection to country and development for future generations [630].

While it was recognised that continued emissions will destroy human health and life, and the ecosystems and environments on which human and other life depends, Waratah Coal argued that these are characterised at such a high level of generality it is impossible to attribute any particular harm to emissions related to the Project [634].

## 4.1 Significance and relevance of greenhouse emissions

Given the complexities around cause and effect at the local and global level, President Kingham held that an assessment of an individual project's impact on climate change can only be considered in terms of contribution. Leaning on the definition of *Environmental harm* in the EP Act (s.14), particularly that the cause of environmental harm may result from activity, including indirect activity, 'alone or from combined effects of the activity and other activities or factors' (s.14(2)(b)), the President proceeded by weighing the significance of the contribution [637].

The Court's analysis was to understand the scale of emissions related to the Project as the first step and then determine the extent to which the impact of those emissions can be considered in weighing the merits of the case. Evidence before the Court estimated the scale of the greenhouse gas emissions associated with the Project, with these being calculated using legally accepted greenhouse reporting categories that distinguish direct and indirect emissions from the Project:<sup>61</sup>

- **Scope 1** emissions are direct emissions from the activities on the mine, estimated at 36.5 MtCO<sub>2-e</sub>.
- **Scope 2** emissions are indirect upstream emissions such as the purchase of electricity consumed by the mine, estimated at 21.0 MtCO<sub>2-e</sub>.<sup>62</sup>

<sup>60</sup> The rate of sea-level rise in northern Australia in the last 30 years has been higher than the global average and higher than that in the rest of the country [626].

<sup>61</sup> Emissions associated with the mine used the system of classification of emissions by scopes 1, 2 and 3, consistent with the Greenhouse Gas Protocol and the Australian National Greenhouse Gas and Energy Reporting requirements.

<sup>62</sup> Based on 2020 grid electricity emission factor, which is possibly an overestimate where grid power generation transitions away from fossil fuels.

- **Scope 3** emissions are all other indirect emissions that are the consequence of mining (downstream), including transport and burning of the mined coal. The Court focussed on emissions from burning the Project coal, which represents 97.9% of the total Scope 3 emissions. Estimates were based on 761,828 Mt of saleable coal over the life of the mine (2029 to 2051) resulting in 1,580 MtCO<sub>2-e</sub> (or 1.58 Gt) [642-649].

The Project's Scope 3 emissions are clearly much larger than combined Scope 1 and 2 emissions. While the quantum was not in dispute, Waratah Coal argued the mine's Scope 3 emissions have little relevance in considering their applications because responsibility for the combustion emissions rests with the country in which the coal is burnt.

The Court accepted evidence of climate change experts on the remaining 'carbon budget'. In recognising the complex relationship between atmospheric CO<sub>2</sub> concentrations, global temperature, and CO<sub>2</sub> emissions, climate change experts use a carbon budget to estimate the cumulative emissions that can be allowed if the world is to achieve a desired global temperature goal. In the Waratah Coal case the targets in the Paris Agreement were settled on as a reference point.

The climate change experts say the remaining carbon budget (in 2022) for meeting a 1.5° C goal is 320 GtCO<sub>2-e</sub> and a 1.7° C goal is 620 GtCO<sub>2-e</sub> (with a 67% probability) [767]. This equates to about 8 and 15.5 years of emissions respectively at 2022 emission rates of about 40 GtCO<sub>2</sub> per year. On this analysis, President Kingham found 1.58 GtCO<sub>2-e</sub> to be emitted from combustion of Project coal would be in absolute terms a meaningful contribution to the carbon budget available for achieving the long-term temperature goal [775].

Waratah submitted that the Court cannot consider these emissions when deciding about the environmental authority and are of little relevance to the recommendation over the mining lease application. Waratah Coal argued:

- as to whether it is in public interest to grant the **mineral lease** – while Scope 3 emissions are relevant, they are of 'limited significance' as they are best dealt with as 'a matter of high policy' by national governments under international agreements and not at the decision-making level of an individual project. They do not usually form part of the economic Cost Benefit Analysis for a mine and, using the Perfect Substitution argument, whether the mine proceeds or not will make no material difference to climate change [664].
- in relation to the **environmental authority** – the Court cannot consider scope 3 emissions because the Court is confined to assessing the physical activities that will take place on the mining lease that are authorised under the MR Act, i.e. extracting coal [666].
- in considering the **human rights** implications of granting the mineral lease and environmental authority – Scope 3 emissions are not relevant as neither authorises the combustion of coal. Therefore, no sufficient link can be drawn between the recommendation the Court makes and limits on human rights arising from emissions [655].

As to whether the Court can consider Scope 3 emissions, President Kingham emphasised the Court's role, as with previous decisions, is to consider the case on its merits, and in doing so 'it is not a question of putting policy to one side' [672]. Her Honour noted in *Hancock*, Member Smith recognised the 'dire consequences from climate change' and found it a matter to be addressed by the international community and the federal government. At that time the Paris Agreement had not been reached. Evidence in the Waratah Coal case was that after six years of the agreement being in force the international mitigation targets and plans are inadequate to achieve the global temperature goal [672].

The federal and State governments' policy response to climate change *vis-à-vis* the Paris commitments and Queensland's Climate Transition Strategy is to stabilise greenhouse gas emissions, which is marked by evidence of a history of increasing ambition over emission targets.<sup>63</sup> While the Queensland's Resources Industry Development Plan recognises opportunities for Queensland's high quality thermal coal, it is within a

<sup>63</sup> Queensland Climate Change Response of 2017 was updated in Dec 2023  
<https://cabinet.qld.gov.au/documents/2017/Jun/ClimChg/Queensland%20Climate%20Change%20Response.docx>.

declining global market influenced by international and national policy to reduce emissions. Government support remains for coal projects provided they stack up economically, environmentally, and socially. President Kingham found those policy objectives ‘are relevant considerations when the Queensland government makes decisions with global consequences that could promote or constrain those objectives’ [686], and that:

It does not subvert international, national and state policy on either climate change or resource development for the Queensland government to take into account the effect of scope 3 (including combustion) emissions when making a decision on this Project [695].

On whether the EP Act confines the Court from considering Scope 3 emissions, much turns on the interpretation of the matters the EP Act says the Land Court must consider, especially the ‘standard criteria’ (s.191(g) in the current version), a defined term which references the principle of ecologically sustainable development. The version in force at the time of the Waratah Case, refers specifically to ‘National Strategy for Ecologically Sustainable Development’<sup>64</sup> endorsed collectively in 1992 by State and federal governments through the Council of Australian Governments, with the goal for ‘development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends’.<sup>65</sup>

The Court considered four essential guiding principles of ecologically sustainable development as contained in the national strategy, being:

- intergenerational equity
- the precautionary principle
- recognising the global dimensions of environmental impacts, and
- the need for a strong, growing and diversified economy.

Waratah Coal relied on previous cases including *Xstrata* and *Hancock*, which ruled the public right and interest would not be prejudiced by the grant of the mining lease because of Scope 3 emissions associated with those mines and that the Court is limited to considering the activities authorised by the environmental authority, which does not include the burning of coal.

President Kingham did not accept Waratah Coal’s construction of the Court of Appeal’s dismissal on appeal of Member Smith’s decision in *Hancock* - that being, it is not within the Land Court’s jurisdiction to have regard to Scope 3 emissions [702]. Her Honour said that the President in *Xstrata* interpreted ‘narrowly’ the standard criteria [699], and noted that the Justices in the Court of Appeal did not express a concluded view on that interpretation of the EP Act. Rather, the appeal was dismissed because the EP Act did not require the Land Court to give any particular weight to emissions and the Member was entitled to make a factual finding on the evidence before the Court that global emissions would not increase with the mine proceeding [706], i.e., because of Perfect Substitution.

President Kingham preferred President McMurdo’s reasons for interpreting the standard criteria more broadly than President MacDonald had in *Xstrata* and was of the view that President McMurdo’s interpretation is consistent with the jurisprudence in NSW outlined by Chief Justice Preston in *Gloucester Resources* with respect to considering Scope 3 emissions [711].<sup>66</sup>

Her Honour emphasised the interpretation of the standard criteria should be guided by the object of the EP Act, i.e., ‘to protect Queensland’s environment while allowing for development that improves the total quality of life both now and in the future in a way that maintains ecological processes on which life depends (ecologically sustainable development)’ (EP Act (s.3)). The object provides more than just context:

<sup>64</sup> Australian Government (1992) ‘National Strategy for Ecologically Sustainable Development’, Dept of the Environment and Energy.

<sup>65</sup> The current version of the EP Act defines the ‘standard criteria’ using principles of environmental policy as set out in the Intergovernmental Agreement on the Environment, including (i) the precautionary principle; (ii) intergenerational equity; (iii) conservation of biological diversity and ecological integrity, and, ‘any Commonwealth or State government plans, standards, agreements or requirements about environmental protection or ecologically sustainable development’ (Schedule 4 Definitions).

<sup>66</sup> *Xstrata Coal Queensland v Friends of the Earth & Ors* (2012) 33 QLCR 79, paras 596 - 601.

There is a clear and direct link between the object and the first of the ‘standard criteria’ – “(a) the principles of ecologically sustainable development as set out in the ‘National Strategy for Ecologically Sustainable Development’” [710].

Further, the definition of environmental harm provides for direct and indirect causes as well as combined effects of activities additional to the authorised activities, hence Her Honour’s finding that ‘the environmental harm to which emissions related to this Project will contribute will be experienced in the Queensland environment that the EP Act seeks to protect’ [712].

On comparing the notion of the public interest contained in the EP Act standard criteria and the public interest in the MR Act (s269(4)(k)), which has been interpreted as sufficiently broad to allow consideration of Scope 3 emissions, President Kingham said ‘it would be an anomalous outcome’ for the public interest criteria under the EP Act to be interpreted more narrowly than under the MR Act.

For these reasons and in the absence of any clear intention to limit the scope of broadly stated criteria, such as the statutory criteria, the Court found ‘the impact of Scope 3 emissions is a relevant factor when considering what recommendation to make on the environmental authority application’ [717].

## 4.2 Net impact of greenhouse gas emissions of the Project

Having established the Scope 3 emissions are relevant, and finding their contribution to global climate change meaningful, the Court assessed arguments over the extent climate change impacts of the Project can be considered given market substitution. Waratah Coal’s assertions are summarised thus:

1. The market for coal is *demand-driven* and, regardless of what the demand is, the demand for and the consumption of coal in the target market will be the same, whether the mine proceeds or not.
2. Because the same amount of coal will be burned, there will be no difference to climate change (*no net impact*).
3. Because of the relative quality of the Project coal and the existing supply of coal in the target market there will be:
  - a beneficial environmental outcome if the mine is approved because the Project coal will displace lower quality coal resulting in fewer greenhouse gas emissions in meeting the demand (*beneficial outcome*).
  - an adverse environmental outcome if the mine is not approved because lower quality coal will substitute for the Project coal resulting in more greenhouse emissions to meet the demand (*adverse outcome*) [783].

Whereas in *Xstrata*, *Hancock* and *Adani*, the Perfect Substitution argument was said to support a finding that there would be no net impact if the mine were approved, President Kingham saw merit in Youth Verdict’s and Bimblebox Alliance’s submission that the level of substitution is irrelevant because ‘the Court’s statutory task is to consider the environmental harm if the mine *is* approved, not harm caused if it *is not*’ [787].

President Kingham favoured the term Perfect Substitution when referring to the argument that the same amount of coal would be burned whether the mine proceeds or not and therefore the Project coal would produce either the same or fewer greenhouse gases than the coal it would displace or be substituted for.

She drew on *Gloucester* where the NSW Land & Environment Court found of a ‘logical flaw’ in the substitution argument (see Section 2.2), as well as the judicial review of the *Hancock* decision where the Judge’s finding about substitution was open on the evidence [788].

Relevant factors considered in the Waratah Coal case were the market for the Project coal, including the factors that will influence supply and demand of thermal coal, as well the relative qualities of the coal it might displace. Waratah Coal argued there will be sufficient demand until 2051 in the seaborne thermal coal market. Youth Verdict and the Bimblebox Alliance disagreed, saying such continuing demand is not certain, and, if there is demand for thermal coal at the level predicted, then that is inconsistent with the objective of the Paris Agreement and the climate change consequences are unacceptable.

No reliable conclusion about the level of demand could be reached because of the multiple variables across such a long timeframe. There was agreement, however, that the Paris Agreement is influencing thermal coal demand. Financing is becoming more challenging. Greater compliance and increasing ambition will drive down demand, along with transformations in the electricity sector toward renewables.

On the supply side, Waratah Coal submitted there is sufficient supply of thermal coal available to the target market to substitute for the Project coal if its applications are not approved. Market expert evidence was that supply presents no impediment to the market substitution proposition. They agreed there is potential for the Project coal to displace existing supply and, that if the mine is not approved, the demand for thermal coal in the market can be met by existing supply, although neither side's expert said there will be Perfect Substitution [973]. The market experts identified coal quality and cost competitiveness as the primary factors influencing displacement, but agreed import policy, competitor behaviour, and contract arrangements are relevant factors.

President Kingham accepted that substitution is complicated but a simple one-for-one substitution is not a realistic assumption given the many variables acting on the coal market. 'With so many variables it is impossible to make a finding with any certainty on the evidence before the Court' [992]. On all the evidence from the market experts, she made 'no certain finding about substitution, except that Perfect Substitution is not likely, but some substitution is possible' [1005].

Because President Kingham was not satisfied with the Perfect Substitution argument, Her Honour could not find *no net impact* if the mine proceeds. Nor was she satisfied there will be a *beneficial outcome* if the mine proceeds or alternatively, an *adverse outcome* if it didn't, because competition for the Project coal is other high-quality coal. President Kingham concluded:

This mine would contribute to climate change directly and indirectly. The most significant contribution would be through the combustion of the mined coal. Neither the ML nor the EA authorise combustion, but there is no other purpose for the mine. The Court is not prevented by policy or law from considering the impacts of the combustion of coal from the proposed mine, as well as the direct emissions from the mine itself [1018].

In weighing the cost and benefits of the project, evidence was heard that the main beneficiaries of the Project would be the Queensland government, and the mining company and their investors. To ascertain the benefits of the Project, the Court heard evidence from economic experts on the financial benefits generated by the Project, such as Cost Benefit Analysis (CBA), which estimates and compares the total benefits and costs of the Project to members of a specified community (using a common dollar value across the life of the mine).

Waratah Coal relied on their CBA to demonstrate the Project will result in net present value economic benefits to the State of between \$2.5 B and \$4 B, depending on how the cost of transport is treated [1111]. Royalties comprise 80% of the net benefit on a CBA that includes transport costs. Other evidence heard was that the estimates of economic benefits are price sensitive and optimistic given the uncertain coal market and assumptions about the payment of company tax and full production throughout the Project life.

In summary, President Kingham found the economic assessments overstated the benefits of the mine. Transport costs were not consistently factored-in and Her Honour held reservations over the estimated revenue as estimated coal prices appeared too high, noting a generous treatment of income from payroll tax [1161]. At issue was that the cost of the climate change implications of the mine were not adequately assessed in the economic estimates because the modelling excludes the cost of the Scope 3 emissions. Taking into account costs of climate change, the evidence was that such costs will be borne by future generations of the Queensland and global community through climate impacts.

On considering all the evidence, including the direct environmental impacts on Bimblebox, President Kingham 'could not find as a fact that the economic and social benefits outweigh the ecological and climate change costs of the Project' [1286, 1287].

## 5. Limits on human rights on climate change grounds

With the commencement of the HR Act in 2020 arises the legal obligation for public entities, such as the Land Court to act and make decisions in a way compatible with human rights (s.58). Additionally, s.48 confers a requirement on courts to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights.

‘Compatible’ in the meaning of the act is constructed around the notion human rights are not absolute but may be ‘limited’. ‘A human right may be subject to ‘reasonable limits under law that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’ (s.13(1)). In what President Kingham refers to as a ‘proportionality test’, limits on a human right may be compatible provided they meet s.13(1). The President took care to explain the Court’s role as a procedural obligation and not a function to decide whether the Project would be incompatible with human rights:

The HR Act does not graft onto the Court’s function some additional function or power which departs from the MR Act and EP Act. The conclusions I reach about human rights matters will form part of the process of assessing where the public interest lies in relation to the applications. I will weigh those conclusions in the balance in deciding what to recommend about the applications [1290].

Moreover, the key question for the Court is whether individual human rights are engaged, how they are limited, and whether the limitation is justified [1297].

Youth Verdict and Bimblebox Alliance submitted the adverse consequences of greenhouse gas emissions from the Project will unjustifiably limit the following rights: the **right to life**, rights of **First Nations peoples**, rights of **children**, right to **property**, rights to **privacy and home**, and to **enjoy human rights without discrimination** (see Section 3.3.1).

Waratah Coal accepted that these human rights are ‘engaged’ but argued the Project could not constitute a limit to any human right on climate change grounds because the act of recommending and granting the mining lease or environmental authority does not authorise the combustion on the mined coal. They argued there can only be a limit to a human right attributable to the Project where there is a sufficient causal relationship between the grant of the applications and the harm that is said to limit the human right. Waratah contended the Court could not distinguish what harm would be the cause of past emissions and could not attribute any particular harm to the Project.

For Youth Verdict and Bimblebox Alliance, unless the mine is approved the coal won’t be burnt, which is a strong enough causal relationship.

For President Kingham, the relevant question is ‘whether the act (the decision) and the harm (climate change and its impacts) are sufficiently connected to be a limit on a human right’ [1300].

Her Honour refuted the notion the proceedings are about responsibility for harm attributable to combusting emissions, rather the Court’s task in deciding what recommendation to make ‘is forward looking, anticipating the possible consequences, not adjudicative in the sense of attributing liability after the fact’ [1329]. Having regard to the definition of environmental harm in the EP Act that explicitly recognises harm may be caused indirectly or by more than one activity or factor, President Kingham found a sufficient causal relationship between the act of authorising the applications and the harm caused by the greenhouse gas emissions from burning the Project coal.

With sufficient causal relationship established and finding that the Court’s decision on the applications have the capacity to limit human rights, the task turned to ‘deciding whether the limit is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom’ (s.13(1) HR Act).

President Kingham adopted a framework offered by the HR Act. Section 3(2) lists factors that ‘may be relevant’ in deciding ‘whether a limit on a human right is reasonable and justified.’ These go to the purpose and importance of the limitation ((2)(b)&(e)), whether the limitation helps achieve the purpose ((2)(c)) and whether there are any less restrictive and reasonable ways to achieve the purpose ((2)(d)).

To determine these, President Kingham undertook a detailed proportionality analysis for each human right engaged by the Project. Her analysis considered the importance of the right, taking into account the nature and extent of the limitation, and balanced against the importance of the Project. The constant point of reference was the approval to mine coal that will be combusted to generate electricity which:

- generates economic benefits, including:
  - profits to the miner, royalties and taxes to the State, and social and economic benefits in regional employment and associated activity.
- provides electricity to homes, businesses, industries, hospitals, and infrastructure in Waratah's target market of Southeast Asia
  - electricity demand in the region is increasing. Energy security is an aspect of the United Nations Sustainable Development Goals (Goal 7: ensure access to affordable, reliable, sustainable and modern energy for all).
- is consistent with a free and democratic society based on human dignity, equality and freedom [1430].

The following summarises key aspects of Her Honour's considerations over each human right and whether any identified limit is justified, taking into account the purpose and importance advanced by the Project.

## 5.1 Right to life of the people in Queensland

President Kingham noted the scope of the right to life had not been judicially considered in Queensland and that no court in Australia has considered the relationship between the right to life and threats posed by climate change [1455]. With reference to international sources,<sup>67</sup> she recognised the interconnectedness of humans with the physical environment and that the right to life can be violated by a life-threatening situation without the loss of life occurring. Environmental degradation, climate change, and unsustainable development constitute pressing and serious threats to the ability to enjoy the right to life [1480].

Based on the expert evidence, her conclusion was climate change presents 'a clear and pressing threat to the right to life that is now experienced by people in Queensland such as increase heatwave risk and associated threats to human health and will only be exacerbated by increasing emissions, to which the Project would make a material contribution' [1505].<sup>68</sup> The Court found the importance of preserving the right to life weighed more heavily in the balance than the economic benefits of the mine and furthering energy security for Southeast Asia.

## 5.2 Rights of First Nations Peoples

Section 28 of the HR Act recognises the distinct cultural rights held by Aboriginal and Torres Strait Islander peoples and they have the right not to be subjected to forced assimilation or destruction of their culture. As a community, they must not be denied the right:

- to enjoy, maintain, control, protect and develop their identity and cultural heritage, use of their language, and kinship ties
- to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom
- to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

The Court noted Queensland has a higher than average population of First Nations peoples<sup>69</sup> and significant populations will be exposed to extreme temperatures, particularly those in the Torres Strait and in north

<sup>67</sup> Such as the Human Rights Commission of the United Nations.

<sup>68</sup> Including from illness, injury, and death from more frequent heatwaves, severe storms, floods, and dangerous fires; drought affecting fresh food and psychological distress; increased mosquito-borne diseases; reduced water and food security.

<sup>69</sup> As compared to the rest of Australia.

Queensland. These communities will be affected by sea level rise. Scientific research indicates that continuing inundation events are expected to require long-term relocation plans for Torres Strait Islanders. The Torres Strait Islands are at a significantly increased risk of more frequent severe and damaging coastal flooding events and damage from storm surges [1544].<sup>70</sup> Evidence on the way Indigenous cultural rights would be limited came directly from the First Nations witnesses, both through their affidavits and their on-country evidence, with insightful extracts of transcripts recorded in the Court's decision.

Florence Gutchen, who lives on her husband's island of Erub (Darnley Island) in the Torres Strait, gave evidence of her connections to Country when the Court visited her island of Poruma (Coconut Island):

Poruma is my home and is my mother, although I am separate from Poruma to go to mine other [her husband's] home. But my heart is still here and am still thinking about my home, for something good. Like, as I see the changes in this place, like, I want something good for this place. I believe this morning, where I felt my mother talking to me, she's happy that I'm returning home. Like, it's a special thing that I'm home here to fight against climate change for my island.

Torres Strait Islander, Lala Gutchen, explained obligations to look after Country this way:

We are obligated to look after the land and the sea. When you born into the world, you open your eyes, your parents tell you them things, it's stuck in your head. You have to do it. You can't neglect them because of something that's taking over. You have to look after it and make it a better place so our children and their children can still practice [our law] and culture on our country [1559].

The magnitude of potential cultural loss from sea level rise was illustrated in evidence from Kapua Gutchen on the damage occurring to the concrete grave of his grandfather (who was born in the late 1800's) on Erub Island:

[C]ommon sense will tell us that when he died there, his family at that time - on that day didn't say, 'Let's bury granddad at the high water mark.' [No], he would've been [buried] on the area further in. [...] So now that high water mark is there at his grave, so that tells you the village was further out [away from the high water mark]. They would have buried him in the backyard, not where the erosion will be taking place [1561].

Evidence on what is conveyed when speaking of culture and identity came from Harold Ludwig, a Guugu Yimidhir man from Hopevale Aboriginal community in north Queensland:

It is the definition of who we are, where we're from and our knowledge of Country, the environment, and the species that live within it, in each ecosystem or landscape. Before, when we had this completely, we lived. Now, we simply exist. The environment gave us everything: the spiritual strength, nourishment, the cause and the life [1553].

Juritju Fourmile, a Gimuy Walubara Yidninja man living in Cairns, gave evidence highlighting the intergenerational nature of Indigenous culture and the heat impact on important cultural species, such as the loss experienced with the mass deaths of flying foxes.<sup>71</sup>

We as Indigenous people, First Nations people don't just think about one generation or ourselves. We think about the generations that come after us, those that come before us as well. We learn their lessons and we take on their lessons and their knowledge. Their trials and errors tell us about what's to come, and we are here as a conduit to tell the next generation about what's to come, the changes here on country [1563].

Well, you look at the stories that we get from those bats, you know, the medicine that we get from those bats. Now, we used to use those bats for our asthma and stuff and for our breathing. We would boil those bats up and then we'll eat them. Now, due to climate change, if all these bats start dying off and they die, then that's medicine gone. That's connection to country gone. That's our stories gone as well [1560].

<sup>70</sup> Because of sea level rise alone, the climate change experts agreed the potential changes in the climate system over the next few centuries could well pose an existential threat to Torres Strait Island peoples.

<sup>71</sup> For example, see <https://www.abc.net.au/news/2018-12-19/heat-wipes-out-one-third-of-flying-fox-species/10632940>.

On First Nations' evidence, President Kingham found a striking and enduring theme of active commitment to and participation in caring for Country, which is critical given the environmental impacts of climate change.<sup>72</sup> The President concluded that climate change impacts will have a 'profound impact on cultural rights and, for some peoples who will be displaced from their country, it risks the survival of their culture, the very thing s.28 is intended to protect' [1565].

### 5.3 Limits on the other specified human rights

Careful analysis of each of the remaining human rights engaged by the Project was undertaken, being:

- rights of children
- the right to property
- right to privacy and home
- right to enjoy human rights without discrimination.

The Court found that the scales weigh in favour of preserving each of these rights, with particular consideration given to the intergenerational nature of climate change. 'The decisions we make today have far more consequences for children alive and those yet to be borne than it does for today's adults' [1580].

In relation to property, President Kingham accepted climate change impacts will include destruction of property or 'a sufficient restriction on the ability to use and enjoy property to amount to a de facto expropriation' [1611]. Referencing threats to homes on islands such as Poruma, she considered interference with the sanctuary of the home a serious matter, which in balance, favour preserving the right to property.

With respect to the right every person has to enjoy the person's human rights without discrimination (s.15(2)), President Kingham said it is wrong to conceive harm from climate change operating indiscriminately. The HR Act says every individual is equal before the law without discrimination, which requires the Court to focus any effects that reinforce, perpetuate, or exacerbate disadvantage. On this measure it was agreed there will be disproportionate effects of climate change on children, old people, those living in poverty, and others disadvantaged such as Indigenous people. Hence, the 'burdens of increasing climate change will not be experienced equally' and 'disproportionate impact arises in multiple ways' [1649].

Taking all the human rights together, President Kingham concluded the limitation imposed on the engaged human rights is not a reasonable limit that can be demonstrably justified in a free and democratic society based on human dignity, equality, and freedom. The President found the balance weighs against approving Waratah Coal's applications and decided 'approving the applications is not appropriate because, taking the nature and extent of the limit into account, the importance of preserving the human rights is more important than the purpose of the Project' [1656].

## 6. Conclusion

In the ultimate weighing of all the factors, including direct ecological impacts on Bimblebox, the Court recommended the mining lease application be refused, having found the Project would prejudice the public right or interest under the MR Act. The Court also recommended the environmental authority be refused after applying the principles of ecologically sustainable development in accordance with the EP Act, including avoiding intergenerational inequities and honouring the precautionary principle.

This paper has sought to highlight the significance of the Waratah Coal decision and elucidate some of the contestation and legal arguments over the proposed development of the mine. Particularly in the context of such a mining-reliant economy, the decision stands as a substantial case worthy of the wide attention it has received. Substantial, not only its 372 pages of reasons, but particularly for the implications for future

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<sup>72</sup> Here Kingham P highlights the distinct significance because of s.28(2)(e) HR Act which say Indigenous people must not be denied the right 'to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources'.

arguments over carbon-intensive developments in Australia. In this case, the nexus between the public interest including future generations and the environmental threats from climate change is carefully and clearly established. Although this is a decision on the facts, and not necessarily a binding precedent, many of its findings and arguments will be of significance to broader environmental and mining jurisprudence.



Figure 6 Indigenous objectors celebrate on learning of the Land Court's decision<sup>73</sup>

Significantly, Scope 3 emissions cannot be logically separated from burning the coal to make electricity in weighing the environmental cost and limits on human rights. Perfect Substitution arguments would have to be backed by clear evidence and take in account the market influence of relevant policy settings.

We see also the authentic adherence to the long-standing principles of ecologically sustainable development. Substantial too is the acuity shown to First Nations witnesses and the demonstrative sense of respect and inclusion felt as a result (Figure 6). Youth Verdict Co-director Marrawah Johnson, in thanking the First Nations witnesses who gave evidence in the case said:

For some of them, this has been a chance to share with the world their deep knowledge and understanding of Country and its ecosystems and wildlife. For others it was a moment to share the pain of the loss of place, of culture that they are already experiencing due to climate impacts like sea-level rise and heatwaves. We could not be more grateful and humbled by the heartfelt evidence they gave during the on-Country hearings.<sup>74</sup>

Using human rights to protect the environment has hopefully gained a firm basis in Australian jurisprudence, particularly on how effects of climate change limit the cultural rights of First Nations peoples. As Marrawah Johnson Co-director Youth Verdict summed-up:

We are absolutely overjoyed and elated that for the first time ever a coal mine in Queensland has been recommended for refusal on human rights grounds. What we really wanted to do was show human rights apply to all people but also have First Nations People run that baton with human rights because for so long we've been separated from our humanity by the colonial powers that be. It is a great way to shift how human rights are talked about. They are not just a white concept, they didn't arrive from over the sea; they have always been here embedded in our law and it's about looking at First Nations first principles in terms of relationship to land.<sup>75</sup>

<sup>73</sup> Photo credit: Darren England (AAP).

<sup>74</sup> The National Tribune (2022) 'Youth Verdict and Bimblebox Alliance victory over Clive Palmer coal mine after historic human rights and nature legal decision', 25 Nov <https://www.nationaltribune.com.au/youth-verdict-and-bimblebox-alliance-victory-over-clive-palmer-coal-mine-after-historic-human-rights-and-nature-legal-decision/>.

<sup>75</sup> EDO (2022) 'The stories behind the biggest wins for nature of 2022', Dec 20 <https://www.edo.org.au/2022/12/20/the-stories-behind-the-biggest-wins-of-2022/>.

## Appendix A Timeline of events leading to proceedings

Date	Event
2008 Nov	Queensland Coordinator-General declared the Project a 'coordinated project' under the <i>State Development and Public Works Organisation Act 1971</i> (Qld) which required an EIS.
2009 Mar	The federal Minister for Environment determined the Project was a 'controlled action' under <i>Environmental Protection and Biodiversity Conservation Act 1999</i> (Cwth), and in April the Minister decided it should be assessed by an EIS.
2011 May	Waratah applied for mining lease 70454 and environmental authority 00571313.
2011 Aug	Waratah lodged an EIS with both the Queensland Coordinator-General and the federal Environment Minister. The EIS was released for public and agency comment between September and December. <ul style="list-style-type: none"> <li>324 submissions were received during consultation on the EIS: 14 from government agencies, 35 from NGOs, 272 from individuals and 3 form letters with 1,517 signatories. More than 90% of these related to protecting Bimblebox from mining.</li> </ul>
2012	The Coordinator-General required Waratah to provide further information.
2013 Mar	Waratah provided a SEIS. <ul style="list-style-type: none"> <li>A further 76 submissions were made during consultation on the Supplementary EIS (SEIS) [129].</li> </ul>
2013 Aug	The Coordinator-General's released an evaluation report on the EIS and the SEIS.
2013 Dec	The federal Minister for Environment gave a Controlled Action Approval under the EPBC Act, subject to conditions.
2014 Jul 18	Brimblebox Alliance was established, following the tour of 40 environmental protectors who travelled to the Galilee Basin to visit affected landholders and the Bimblebox Nature Reserve. <sup>76</sup>
2015 Nov	Waratah submitted and then revised an Environmental Management Plan, which was accepted by the Queensland environment department as meet the requirements of the EPA.
2015 Dec	The Queensland environment department issued the draft environmental authority.
2019 Nov 13	Youth Verdict Ltd registered as a not-for-profit Australian public company.
2019 Dec 19	Waratah lodged an application with the local government council for approval under the <i>Planning Act 2016</i> (Qld) to construct and operate a 1400 MW coal fired power station to utilise coal from the project. <ul style="list-style-type: none"> <li>Waratah proposed to supply 4.8 Mtpa of coal from the project when the power station was fully operational, with the remaining coal to be exported.</li> </ul>
2019 Dec	Waratah's mining lease and environmental applications were released for public consultation. <ul style="list-style-type: none"> <li>22 objections were received to the application for the mining lease and 16 to the application for the environmental authority. Some objections were withdrawn, leaving 31 objections.</li> </ul>
2020 Jan 1	HR Act 2019 commenced. Imposes obligations on "public entities" to consider human rights when making a decision.
2020 Apr 22	The applications were referred to the Land Court.

<sup>76</sup> Garlick, J. 2023. 'Hey Jude Beyond'. Blog <https://heyjudeblog.com/blog/2014/12/the-bimblebox-alliance.html>.



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