

CASE NOTE:

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21

Court/tribunal	Land Court
Type of proceeding	Application for mining lease and environmental authority
Application of the <i>Human Rights Act 2019</i>	7 (direct application)
Rights engaged	16 (right to life), 28 (cultural rights of First Nations peoples), 26 (rights of children), 24 (right to property), 25 (right to privacy), 15 (right to equality), 58 (obligations on public entities)
Outcome	The Land Court recommended that a mining lease and environmental authority for the Waratah mine be refused, amongst other reasons because of climate change impacts (including scope 3 emissions) and human rights impacts.
Date of decision	25 November 2022

Background

The Queensland Land Court has recommended that the mining lease and environmental authority for a coal mine in Queensland's Galilee Basin be refused on several grounds, including because the resulting limitation on human rights caused by climate change was not demonstrably justified.

Waratah Coal Pty Ltd applied for a mining lease and an environmental authority to allow it to mine thermal coal in the Galilee Basin (the Project). Youth Verdict and others objected to both being granted. The role of the Land Court is to consider these applications and recommend to the Queensland Resources Minister and the Department of Environment and Science whether the mining lease and environmental authority should be granted. Among several relevant factors, the Court took into account human rights in the process of assessing where the public interest lies.

Direct application of the HR Act

The Court concluded it was acting in an administrative manner in making the recommendation and was therefore a public entity under the Human Rights Act 2019 (HR Act). The Court's obligations under s 58 of the HR Act, including to properly consider human rights, did not 'graft' on to the court additional functions or power. Rather the conclusions the Court reached about human rights formed part of the process of assessing where the public interest lies in relation to the applications. The HR Act added

another dimension to the court's decision-making process but did not alter its nature. It considered the limits on human rights caused by climate change, and from the impact of the Project on landholders.

In relation to climate change, the Court accepted the logical and rational connection between the act of authorising the applications and the harm that will be caused by the emission of greenhouse gas when the mined coal is burnt. This created a sufficient causal relationship to find the Project had the capacity to limit several human rights:

- Right to life (s 16)

The Court considered relevant international law, under which this right is absolute, and described as 'the supreme right'. It was not necessary for the claimant to have suffered harm to establish a limit on this right. The increased risks of climate change, even if the risks did not materialise, were sufficient to demonstrate a limitation because of the life-threatening consequences of climate change caused by burning the mined coal.

- Cultural rights of First Nations peoples (s 28)

The Court noted that First Nations people will be disproportionately affected by climate change impacts and that Queensland has a higher-than-average population of First Nations peoples. The primary threat to life from climate change in Queensland is from heatwaves and significant populations of First Nations peoples would be exposed to extreme temperatures, particularly those in the Torres Strait and in North Queensland. The Torres Strait Islands are also at an increased risk of more frequent severe and damaging coastal flooding events and damage from storm surges. The Court found a striking and enduring theme in the evidence from the First Nations witnesses was their active commitment to and participation in caring for country. Their evidence invoked each of the rights specified in s 28(2) of the HR Act and demonstrated that climate change impacts would have a profound impact on their cultural rights and for some peoples displaced from their country, risking the survival of their culture.

- Rights of children (s 26(2))

This right was limited by the Project due to the vulnerability of children to climate change impacts and the disproportionate burden those impacts will have on children today and in the future. The intersection of rights and impacts for First Nations children was an additional consideration for this right. Queensland's First Nations population is heavily skewed towards children and young people.

- Right to property (s 24)

This right is limited by the arbitrary deprivation of property. At a broad and general level of assessment, the deprivation of property would be arbitrary in the sense of not being proportionate to the legitimate aim.

- Right to privacy and home (s 25(a))

This right is limited by unlawful or arbitrary interference with home. It was engaged because of the evidence about sea level rise and plans to relocate up to 2,000 people from the Torres Strait. This demonstrated an arbitrary interference with the right to privacy.

- Right to enjoy human rights equally (s 15)

The relevant attributes for this right were age and race, based on the court's assessment of other rights. In particular, there was an additional intergenerational dimension to the disproportionate impact on Aboriginal and Torres Strait Islander children because of changes to their environment and displacement which would impair their ability to learn, enjoy and maintain their culture.

The Court was not persuaded that the limits on human rights were demonstrably justified, even taking into account the economic benefit and supply of thermal coal to Southeast Asia. The court disagreed with Waratah's argument that if the mine were not approved, there would be adverse environmental outcomes by the burning of alternative lower quality coal, emitting more CO₂. Rather, the supply of other coal in the market was likely to be coal with similar greenhouse gas emissions.

Additionally, the Court found the limits on the rights to property and privacy of landholders caused by the nuisance and environmental damage of the Project were not justified.

Outcome

The Court clarified that its role was to properly consider human rights, including in weighing the public interest in each application, and to make a decision that is compatible with human rights. Its function was not to make a legal ruling that the Project would not be compatible with human rights. While the Court's decision is not binding on the government, it is a significant one for how the Human Rights Act applies to resource projects and climate change.

The evidence of First Nations witnesses, preserved in audio recordings and transcripts, may also prove to be a significant archive in the years to come.

You can read the decision online at <https://www.sclqld.org.au/caselaw/QLC/2022/21>