

LAND COURT OF QUEENSLAND

CITATION: *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)*
[2021] QLC 4

PARTIES: **Waratah Coal Pty Ltd**
ACN 006 670 300
(applicant)

v

Youth Verdict Ltd, The Bimblebox Alliance Inc, Scott and Julie Ann Brown, Dmitri Sharov and Svetlana Sosnina, John and Susan Brinnand
(active objectors)

and

Chief Executive, Department of Environment and Science
(statutory party)

FILE NOS: MRA050-20 (ML 70454)
EPA051-20 (EPML 00571313)

PROCEEDING: Application for further and better particulars of objections to a mining lease and environmental authority

DELIVERED ON: 8 February 2021

DELIVERED AT: Brisbane

HEARD ON: 10 December 2020
Submissions closed 8 January 2021

HEARD AT: Brisbane

PRESIDENT: FY Kingham

ORDER: **YV and TBA must provide an exhaustive list of classes of individuals whose human rights they say will be limited by the applications being granted.**

CATCHWORDS: HUMAN RIGHTS – JURISDICTION AND PROCEDURE – QUEENSLAND – where the objectors contended that the grant of a mining lease and environmental authority would be incompatible with the *Human Rights Act 2019* – where the

objectors provided particulars to that effect – where the applicant contended that particulars provided did not adequately inform the applicant as to the case they had to meet nor the real issues in dispute – where the applicant sought further and better particulars – where the Department of Environment and Science identified five steps for the Court in complying with s 58 of the *Human Rights Act 2019* – where the Department of Environment and Science submitted that the human rights case raised by the objectors was not adequately articulated – where the human rights case involves questions of law and policy as well as facts and circumstances – where the Court concluded requiring further particulars was not the best way to fully articulate the human rights case – where the Court identified different processes for that to occur

ENERGY AND RESOURCES – MINERALS – COURTS OR TRIBUNALS EXERCISING JURISDICTION IN MINING MATTERS – PROCEDURE — PARTICULARS – where the objectors contended that a mining lease and environmental authority should not be granted – where the objectors provided some particulars of their objections – where the applicant contended the particulars did not adequately inform the applicant as to the case they had to meet nor the real issues in dispute – where the applicant sought further and better particulars – where the Court has wide discretion in its procedure but must afford procedural fairness – where the Court must assess what particulars are necessary in order for the other party to know what case they must meet – where the applicant sought particulars based on five categories defined by the objectors’ reasons for refusing to provide them – where the Court considered whether other processes could clarify the real issues – where the Court ordered the objectors to provide an exhaustive list of classes of individuals whose human rights they say will be limited by the application being granted – where the Court did not order further particulars on other matters at this stage of the case

Environmental Protection Act 1994 (EPA) s 182, s 185, s 186(a)

Human Rights Act 2019 s 13, s 15, s 16, s 24, s 25(a), s 26(2), s 28, s 58, s 58(1)(a), s 58(1)(b), s 58(2)

Mineral Resources Act 1989 (MRA) s 265(1), s 265(2), s 265(10), s 268

Uniform Civil Procedure Rules 1999 r 157.

Paris Agreement, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016).

Allianz Australia Ltd v Newcastle Formwork Pty Ltd [2007] NSWCA 144, cited
BHP Billiton Mitsui Coal Pty Ltd v Isdale [2015] QSC 107, cited
Certain Children v Minister for Families and Children (No 2) (2017) 52 VR 441; [2017] VSC 251, considered
DAS v Victorian Human Rights and Equal Opportunity Commission (2009) VR 415; [2009] VSC 381, cited
Dunn v Burtenshaw & Anor [2010] QLAC 5, cited
Hail Creek Coal Holding Pty Ltd v Michelmore [2020] QLC 16, cited
Minister for Immigration and Citizenship v SZIAI [2009] HCA 39; (2009) 83 ALJR 1123, cited
Minogue v Dougherty [2017] VSC 724, cited
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [2021] HCA 2, applied
Pembroke Olive Downs Pty Ltd v Sunland Cattle Co Pty Ltd & Ors [2020] QLC 27, cited
PJB v Melbourne Health (2011) 39 VR 373; [2011] VSC 327, cited
Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors (2007) 98 ALD 483; [2007] QCA 338, applied
Re Kracke and Mental Health Review Board [2009] VCAT 646, cited
Sims v Wran [1984] 1 NSWLR 317, cited
Taxpayer v Federal Commissioner of Taxation (2006) 63 ATR 1019; [2006] AATA 598, considered
Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; [2006] NSWLEC 133, cited
Townsville City Council v Department of Main Roads [2006] 1 Qd R 77, applied
Waratah Coal Pty Ltd v Youth Verdict Ltd [2020] QLC 33, cited
Zeirensberg v Labouchere [1893] 2 QB, cited

APPEARANCES: P Ambrose QC with J O'Connor, T Jackson (instructed by DWF Australia) for the applicant
K McAuliffe-Lake (instructed by the Environmental Defenders Office) for Youth Verdict Ltd and The Bimblebox Alliance Inc
J Horton QC with A Hellewell (instructed by Litigation Unit, Department of Environment and Science) for the statutory party

- [1] Waratah Coal Pty Ltd has applied for a mining lease and an environmental authority to mine thermal coal in the Galilee Basin in Queensland. Those applications, and the objections to them, have been referred to the Court for hearing. The case is at an early stage of preparation. Waratah sought further and better particulars of most of the

grounds of objection (and the facts and circumstances relied upon in support of those grounds) advanced by two objectors, Youth Verdict Ltd (YV) and the Bimblebox Alliance Inc (TBA).

- [2] YV and TBA responded to some requests but declined to respond to many of them. Waratah says the responses are inadequate and the reasons for declining to respond are unsatisfactory. YV and TBA say the degree of particularisation requested by Waratah is oppressive and the objections are not pleadings in a civil claim. Given other pre-hearing processes can clarify the issues in dispute, they say the requests are unnecessary or premature.
- [3] Although it has not made its own request, and did not expressly support Waratah's application, the Department of Environment and Science made submissions about the objections, to the extent they raise human rights issues. DES submitted the objectors' human rights case is not adequately articulated.
- [4] The application, and the parties' submissions raised questions about:
 - a. the articulation of the human rights objections;
 - b. the principles that apply to particulars of an objection in a mining objection hearing; and
 - c. whether the objectors should be required to respond to any of the requests that remain in dispute.

Articulation of the human rights objections

- [5] YV and TBA object that granting the applications for the mining lease and environmental authority is incompatible with the *Human Rights Act 2019*¹ and would limit certain human rights beyond the extent that is reasonable or demonstrably justifiable.
- [6] Those rights are:
 - a. recognition and equality before the law;²
 - b. right to life;³
 - c. property rights;⁴

¹ YV and TBA objections to the mining lease application at 1.3, 1.4, 2.2 and 3.1; YV and TBA objections to the environmental authority application at 2.3, 2.4, 3.2 and 4.2.

² *Human Rights Act 2019* s 15.

³ *Ibid* s 16.

⁴ *Ibid* s 24.

- d. the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with;⁵
- e. the right of every child, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child;⁶ and
- f. the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.⁷

[7] This Court is subject to s 58 of the HRA⁸ which provides:

- (1) It is unlawful for a public entity—
 - (a) to act or make a decision in a way 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.

[8] DES is conscious of its role as the statutory party⁹ and the Court's expectation that it will act as a model litigant and assist the Court in making its recommendations.¹⁰ It will be in a better position to fulfil that role if the human rights objections are more fully articulated.

[9] DES identified five steps in applying human rights under s 58:¹¹

1. **Section 58(1)(a) – 'Engagement'**: whether the prospective decision is relevant to a human right (and which right). The Objectors seek to invoke six such rights;¹²
2. **Section 58(1)(a) – 'Limitation'**: if a right is relevant, is that right limited by the decision. This is part of the compatibility question. The Objectors allege all six rights are so limited;
3. **Section 13 – 'Justification'**: whether such limits as do exist are reasonable and can be demonstrably justified (the second part of the compatibility question: HRA s 8 and s 13). There are two overlapping requirements within this 'step':

⁵ Ibid s 25(a).

⁶ Ibid s 26(2).

⁷ Ibid s 28.

⁸ *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33 at [19].

⁹ EPA s 186(a).

¹⁰ Practice Direction 4 of 2018 at [27].

¹¹ *Minogue v Dougherty* [2017] VSC 724 at [74]; *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251 (*Certain Children*).

¹² HRA s 15 (recognition and equality before the law), s 16 (right to life), s 24 (property rights), s 25(a) (privacy), s 26(2) (protection of children), and s 28 (cultural rights – Aboriginal and Torres Strait Islander Peoples).

- (i) Legality: this encompasses both procedure and substance. Any limitation must be in accordance with the procedure prescribed by law (the procedural requirements) and compatible with the rule of law (that is, sufficiently certain, accessible and non-arbitrary) (the substantive requirement);¹³
- (ii) Proportionality: human rights, not being absolute, must be balanced against one another (because they may conflict with each other) and against other competing private and public interests. There may be a need to limit those rights to achieve other legitimate purposes;¹⁴

4. **Section 58(1)(b) – ‘proper consideration’**: even if the limits be lawful and proportionate, the decision made must give proper consideration to the rights said to be engaged;

5. **Section 58(2)- ‘inevitable infringement’**: this operates where the Court could not reasonably act differently or make a different decision because of a statutory provision or under law.

[10] DES submitted that YV and TBA should be required to address, so far as they rely upon them, each of those steps and, in doing so, and for each right identified, succinctly and clearly set out the facts, matters and contentions sought to be advanced.

[11] DES did not apply for orders to that effect. Nor did Waratah.

[12] As far as I can relate DES’s 5 steps under the HRA to Waratah’s requests, Waratah made requests about the first and second steps: *engagement* and *limitation*.

[13] Broadly speaking, Waratah requested the following further and better particulars of 1.3(1) of the ML objections and 2.3(1) of the EA objections:

- a. the individual(s) whose rights are alleged to be limited (*engagement*);
- b. which of the human rights specified in the relevant section of the HRA are alleged to be limited (*engagement*); and
- c. the facts, matters and circumstances relied upon to allege those rights are limited for those individuals (*limitation*).

¹³ *Re Kracke and Mental Health Review Board* [2009] VCAT 646 [163], [165] and [744].

¹⁴ *PJB v Melbourne Health* (2011) 39 VR 373; [2011] VSC 327, [307]–[308].

- [14] Waratah did not seek further and better particulars of the allegations that the limitations extend beyond what is reasonable or demonstrably justifiable. Nor did it seek particulars of allegations of incompatibility or the Court's requirement to properly consider the relevant human rights.
- [15] Waratah's application, therefore, does not engage the three steps of *justification*, *proper consideration*, and *inevitable infringement*.
- [16] That may be because the onus to establish *justification* appears to rest with the party asserting it,¹⁵ which YV and TBA are not, and because the steps of *proper consideration* and *inevitable infringement* relate to the Court's process of deliberation and raise questions of law.
- [17] YV and TBA say that how the law should be applied in light of the facts is a matter better addressed in submissions or by way of a preliminary finding, not by giving particulars.¹⁶
- [18] I accept that submission. It is premature to require the objectors to now fully articulate their human rights case which, as DES acknowledged, involves matters of policy, weight and law, bearing on potentially competing rights and interests, including the public interest.¹⁷
- [19] However, I will consider DES's submissions about *engagement* and *limitation* in considering Waratah's requests.

Principles applying to particulars of an objection

- [20] Foremost in my mind when deciding this application is the statutory context for the hearing and the Court's function in relation to Waratah's applications for the grant of the mining lease and environmental authority.
- [21] The Court does not make the final decision on an application for a mining lease or environmental authority. Its function is to make a recommendation to the relevant decision maker. It is well established that the Court's function in a mining objection

¹⁵ *Certain Children* at [175]; *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381 at [147].

¹⁶ Objectors submissions in reply to DES at [32].

¹⁷ DES submissions at [14.f].

hearing is administrative, not judicial.¹⁸ Decisions of a procedural nature made when performing that function are also considered to be administrative.¹⁹

[22] That has consequences for the procedure that governs a mining objection hearing. Rule 157 of the *Uniform Civil Procedure Rules 1999*, which deals with requests for particulars, does not apply.²⁰ Nevertheless r 157, and judicial consideration of that rule, provides a useful point of reference, tempered by two considerations.

[23] First, the Court is subject to a requirement about the way in which it exercises its jurisdiction. Section 7 of the *Land Court Act 2000* provides:

7 Land Court to be guided by equity and good conscience

In the exercise of its jurisdiction, the Land Court—

- (a) is not bound by the rules of evidence and may inform itself in the way it considers appropriate; and
- (b) must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts.

[24] As Keane JA, as he then was, observed in *Townsville City Council v Department of Main Roads*,²¹ the statutory exhortation in s 7 “must be given effect.”

[25] The Court has a wide discretion as to its procedure.²² The Land Court has provided guidance on the procedure for these hearings by Practice Direction 4 of 2018 *Procedure for Mining Objection Hearings*.

[26] It provides for a request for particulars of an objection:

51. Any active party can ask an objector who is an active party to provide further details of their ground(s) of objection by making a *request for particulars*. Particulars may clarify or confine the scope of an objection but cannot add new grounds of objection.

[27] The practice direction contains this definition:

Request for particulars: A request for particulars is a request for details of the claim in an action before the Court which are necessary in order for the other party to know what case they must meet.

¹⁸ *Dunn v Burtenshaw & Anor* [2010] QLAC 5 at [39]; *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107 at [34].

¹⁹ *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107 at [48].

²⁰ *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107.

²¹ [2006] 1 Qd R 77 at [39].

²² *Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors* [2007] QCA 338 at [50]; *Pembroke Olive Downs Pty Ltd v Sunland Cattle Co Pty Ltd & Ors* [2020] QLC 27 at [28].

[28] In *Taxpayer v Federal Commissioner of Taxation* (2006) 63 ATR 1019,²³ the Australian Administrative Tribunal refrained from making an order for further particulars pursuant to s 38 of the *Administrative Appeals Tribunal Act 1975*. Notwithstanding deficiencies in the s 37 statement provided by the Commissioner, the Tribunal concluded:

[26] ... Having regard to the objective of providing a review mechanism that is fair, just, economical and quick, I am of the opinion that requiring an additional statement from the Commissioner setting out further and better particulars in relation to specific issues contended for by the taxpayer is not likely to advance the fairness or justice of the proceedings, but is likely to be productive of delay and further preliminary disputation in relation to technical points that are more appropriately dealt with by procedural directions or in relation to evidence and submissions at hearing.²⁴

[29] In a mining objection hearing, similar considerations apply.

[30] The precise effect of the statutory exhortation in s 7 depends on the nature of the decision to be made.²⁵ This brings me to the second consideration that tempers the Court in relying on the approach taken in a civil claim. The precise effect of s 7 depends on the administrative function the Court performs in a mining objection hearing and the statutory requirements that apply when doing so.

[31] The Land Court has been established as a court of record. That circumstance means that any jurisdiction conferred on it, including this administrative function, is “necessarily conditioned by the requirement that it observe procedural fairness in the exercise of that jurisdiction.”²⁶

[32] The Court is required to hear an application for a mining lease, so long as there is a properly made objection.²⁷ Relevantly for this matter, a properly made objection must state the grounds of objection and the facts and circumstances relied on by the objector in support of those grounds.²⁸

²³ [2006] AATA 598.

²⁴ Ibid at [26].

²⁵ Ibid at [38].

²⁶ *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 at [47].

²⁷ *Mineral Resources Act 1989* (MRA) s 265(1), s 265(2), s 265(10), and s 268(1).

²⁸ MRA s 260(3).

- [33] Similar provisions apply for an objection notice for an application for an environmental authority, although the objection notice need not state the facts and circumstances relied upon in support of the objection, only the grounds of objection.²⁹
- [34] The Court must consider all properly made objections even if they are unparticularised.³⁰
- [35] An objection, whether to a mining lease or an environmental authority, is not a pleading. It is a statement of opposition to the application being granted. Waratah is not required to respond to an objection, by way of pleading. There is no strict onus of proof on any party. The Court is required to consider a range of criteria identified by the governing legislation, regardless of whether they are raised by an objection.
- [36] An objector need not prove its ground of objection is valid. An applicant need not prove a ground of objection is without merit.³¹ However, as a matter of practicality, an applicant will likely want to meet an objection head on.
- [37] The Court has the power to inform itself in the way it considers appropriate. That does not impose on the Court a duty to inquire, save to the extent that it may establish a critical fact that is easily ascertained.³² Nor does it relieve a party from the Court's expectation that parties will clarify the real and substantial issues for a mining objection hearing.³³
- [38] The Court's objective is to conduct these hearings in a way that is accessible, fair, just, economic, and expeditious.³⁴ The Court's requirement to afford procedural fairness to the parties, its obligation to hear unparticularised objections, and its limited duty to inquire demonstrate the importance of a process by which the parties, and the Court, can identify the real issues raised by a ground of objection.
- [39] Providing particulars of a ground of objection may sharpen the issues, but that is not the only process used in a mining objection hearing to do so. Some directions have

²⁹ *Environmental Protection Act 1994* (EPA) s 185 and s 182.

³⁰ *Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors* [2007] QCA 338 at [53].

³¹ *Hail Creek Coal Holding Pty Ltd v Michelmore* [2020] QLC 16 at [15]–[16].

³² *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [25].

³³ Practice Direction 4 of 2018 at [68].

³⁴ Practice Direction 4 of 2018 at [2].

already been made to prepare the case for hearing and more will be made as the case progresses.

[40] The parties have agreed lay evidence, and statements by First Nations people, will be filed before expert witnesses are nominated and commence their conference process.³⁵

[41] Further, the case is subject to Court Managed Expert Evidence, the Court's process for supervising the preparation of expert evidence for the hearing.³⁶ A Member of the Court, sitting as a CMEE Convenor, will work with the parties, and the experts, to intensively manage the process of the parties nominating and briefing expert witnesses, and the expert witnesses conferring and preparing their reports.

[42] Even with unparticularised objections, the experience of this Court is that the parties can significantly narrow the issues between them with the benefit of expert opinion.³⁷ If difficulties arise for the parties in briefing the experts, or for the experts in preparing their reports, the CMEE Convenor can explore a practical way forward. If such issues cannot be resolved by agreement, the matter can be brought before me for directions.

[43] Finally, the Court has and can make further directions to clarify the issues. On 7 October 2020, the parties consented to directions that include one of the Court's model directions for mining objection hearings:

3. The issues for the hearing will be those issues raised by any ground of objection, as particularised, unless all active parties advise the Court that a hearing is no longer required on any issue raised by an objection.

[44] Given the number of grounds of objection, the details already provided, and the complexity of some of the issues raised by the objections, that direction will be revisited at the conclusion of the CMEE process. At that point, the parties will be in a better position to agree on a list of issues to define the scope of the hearing.

[45] Each of these steps is intended to ensure that no party, including the applicant, is taken by surprise by a new issue emerging at the hearing.

[46] Given those processes, the following questions arise, and I have taken them into account when exercising the Court's discretion on this application:

³⁵ Orders by consent made on 7 October 2020.

³⁶ Practice Direction 6 of 2020.

³⁷ *Pembroke Olive Downs Pty Ltd v Sunland Cattle Co Pty Ltd & Ors* [2020] QLC 27 at [34]–[35].

- a. Is the nature of the objection clear enough, even if broadly expressed?
- b. Has the objector provided detail that would allow Waratah to choose and prepare to brief its expert witnesses?
- c. If not, can that be remedied by lay evidence or First Nation witnesses' statements filed prior to the expert witnesses being nominated?
- d. Is Waratah prejudiced materially in participating in further pre-hearing steps without having further particulars now?
- e. Will Waratah have the opportunity to seek further directions if it is prejudiced during the pre-hearing process?

[47] Against that background, I turn to Waratah's requests.

The requests for particulars

[48] I appreciate the considerable effort involved in Waratah producing 9 schedules to assist the Court to deal with their application. The schedules demonstrate the point made by YV and TBA that they were overwhelmed by the requests. While the number of requests reflects the number of objections, the volume of the material is somewhat daunting.

[49] The 9 schedules state Waratah's requests for particulars, YV and TBA's responses, and Waratah's answers to those responses under the following 5 categories:

1. non-exhaustive (sch 1);
2. request for evidence (schs 2 & 3);
3. evasive or non-responsive (schs 4 & 5);
4. repetition (schs 6 & 7); and
5. vague or inadequate (schs 8 & 9).

[50] The responsive nature of the schedules and the oral submissions distracted attention from the key question. As a matter of procedural fairness, does Waratah need further particulars at this stage of the case, given the other processes that may provide the clarity it seeks?

[51] Waratah addressed its application at a high level. Senior counsel for Waratah said I could resolve the disputes as a matter of principle rather than deciding each request individually.³⁸ Consistent with that submission, he took me to only a few requests. I assume he presented Waratah's case at its highest in doing so.

³⁸ T 1-9, lines 25 to 33.

[52] For that reason, I have not descended to the detail of the individual requests in each of the schedules.

[53] Waratah did not lead evidence to demonstrate it was prejudiced if it did not have the information requested at this point in the case.

[54] Against that background, I will broadly each category.

Non-exhaustive

[55] Amended Sch 1 “YV and TBA’s Objections to EA and MLA – the Non-exhaustive list Category” refers to parts of the objections (or particulars) that are expressed in inclusive terms.

[56] Waratah said the particulars given by YV and TBA for paragraph 1.3(1)(a) of the MLA objections is illustrative.

[57] In 1.3(1)(a), YV and TBA said that granting the mining lease application will limit the human right identified in s 15 of the HRA (recognition and equality before the law).

[58] Waratah sought particulars of the individual or individuals whose human rights are said to be limited.

[59] YV and TBA provided the following response:

In respect of paragraph 1(a) of the April ML Request, the individuals whose human rights are alleged to be limited are those human beings in Queensland now and in the future, including:

- (1) to a disproportionate extent, those stated at paragraph 48 of the April ML Objections, being children living now and in the future, older people, people living in poverty, other disadvantaged people, and First Nations Aboriginal and Torres Strait Islander peoples; and
- (2) where other disadvantaged people include, but are not limited to, people in Queensland:
 - (a) with pre-existing health conditions, including mental health conditions;
 - (b) who are susceptible or vulnerable to development of health conditions, including mental health conditions;
 - (c) living in coastal, remote or rural communities;
 - (d) living in communities with limited food and water security;
 - (e) situated in regions that experience high mean temperatures;
 - (f) living in insecure housing, including housing in low-lying areas, housing in flood zones and housing with poor insulation and housing with structural deficiencies;
 - (g) who are financially vulnerable and/or are residents of low-socio economic areas; and

- (h) who are disabled or mobility impaired; and
- (i) who are young, being aged under 30.

- [60] Waratah says it is entitled to know “exhaustively” the class of individuals whose human rights YV and TBA say will be limited if the MLA is granted. The use of the word “including” in the chapeaus of [1.] and “include, but are not limited to” in the chapeau to [1(2)] would allow YV and TBA to introduce a new class of individual, take Waratah by surprise and risk an adjournment during the hearing.
- [61] YV and TBA say it is not necessary for them to further particularise the individual subjects of human rights limitations to adequately particularise their human rights grounds.
- [62] They rely on the reasoning of Dixon J in *Certain Children v Minister for Families and Children (No 2)*:
- “...it is not necessary for an identifiable individual to be affected in order for a human right to be engaged so as to trigger the obligations imposed on public authorities by s 38(1). This conclusion applies equally to the substantive obligation imposed by s 38(1), just as it does to the procedural obligation. A potential effect on the rights of a class of persons is sufficient for a Charter right to be engaged by an act (including a proposal to act) of a public authority, or the making of a decision by a public authority.”³⁹
- [63] The point his Honour was considering is different to the one Waratah raises.
- [64] In *Certain Children*, the Minister argued the plaintiffs were only entitled to relief if the act complained of actually and unjustifiably limits the plaintiffs’ human rights. Justice Dixon rejected that submission and, in doing so, made the observations quoted above. It is not authority for the proposition that a party raising human rights concerns need not identify the class of individuals whose rights might actually or potentially, be limited.
- [65] The classes of persons whose rights are said to be limited may affect Waratah’s choice of experts to provide an opinion about the asserted limitation. That clarity is required, then, before Waratah is called on to nominate its expert witnesses.
- [66] YV and TBA must provide an exhaustive list of classes or individuals whose rights may be limited. That direction will apply to 1.3(1)(a) of the MLA objections and to

³⁹ *Certain Children* at [190]

any other paragraphs identified in sch 1 (for either the MLA or the EA objections) that raise the same issue.

- [67] However, I make no direction about any other requests in sch 1. They appear to raise matters upon which the parties will need expert assistance, such as more details about the types of impacts identified by the objectors. I am satisfied the Court's pre-hearing process provide an appropriate means to provide that detail.

Request for Evidence

- [68] In Schs 2 and 3 Waratah identified requests for particulars of the MLA and EA objections which YV and TBA refused to provide because they amounted to requests for evidence.
- [69] In a jurisdiction that relies on pleadings to define the issues for trial, it is accepted that a valid request for particulars should be answered even if the answer will reveal some evidence.⁴⁰ Sufficient particulars should be provided to identify the case to be put at trial.⁴¹
- [70] In a mining objection hearing, in which lay and expert evidence will be prepared before the hearing, enough particulars should be provided to enable the parties to effectively participate in the pre-hearing processes.
- [71] Apart from challenging the basis for refusing the request, Waratah did not address why the particulars are necessary, now.
- [72] Counsel for YV and TBA said Waratah's requests required an unnecessary level of specificity, including precisely how the Bimblebox Nature Refuge (BNR) operates as a seed bank. This is a request for evidence about what species are there and why they might be important.⁴²
- [73] Senior counsel for Waratah said this submission misrepresented the request. He said the request was why BNR is a spiritual place and what are the circumstances relied upon for that.⁴³

⁴⁰ *Zeirensberg v Labouchere* [1893] 2 QB 183 at 187–188.

⁴¹ *Allianz Australia Ltd v Newcastle Formwork Pty Ltd* [2007] NSWCA 144 at [18]; *Sims v Wran* [1984] 1 NSWLR 317 at 321–322

⁴² T 1–32, lines 9 to 14.

⁴³ T 1–52, lines 34 to 46.

[74] I could not find a request like that. The relevant request appears to be this one:

28. As to paragraph 31, provide particulars of:

...

(a) the facts, matters and circumstances relied upon to allege the proposed offsets will be:

- (i) inadequate;
- (ii) incomplete; and
- (iii) unacceptable;

[75] YV and TBA's response was to refer Waratah to paragraphs 5 to 17 of the ML objections and some further particulars at paragraphs 57 and 70 of their response. I will not include the passages here, as they are lengthy. Paragraphs 5 to 17 provide details of the characteristics of the BNR. Paragraph 50 of the response includes details about the ecosystem services the objectors assert the BNR provides. Paragraph 70 of the response adds some limited detail about the state of Glen Innes when purchased, presumably for the BNR. On a fair reading of the response to the request, YV and TBA have identified what facts, matters and circumstances it proposes to rely on to further that ground of objection.

[76] Waratah did not take me to any other requests in schedules 2 & 3.

[77] I do not require YV and TBA to respond further to the requests in those schedules.

Evasive or non-responsive; Vague or inadequate

[78] Although framed as 2 categories (involving schedules 4 & 5, and 8 & 9), Waratah addressed these as one during the hearing. Waratah identified the following requests as illustrative:

- why use of thermal coal is inconsistent with the Paris Agreement (Sch 8 item 1); and
- inconsistency of the application with economic development that safeguards the welfare of future generations (Sch 5 item 1; Sch 6 item 13).

[79] Waratah says the only argument made by the objectors is that Waratah is seeking particulars of the objectors' particulars. Waratah says that is irrelevant. The particulars do not adequately meet its original request.

[80] Waratah said I could decide the application in relation to the requests in these schedules on its submissions about one request.⁴⁴

⁴⁴ T 1-17, lines 22 to 24.

[81] In 3.6 of the MLA objections, YV and TBA objected that “the term of the lease applied for is not appropriate (MRA, section 269(4)(e)).”

[82] Waratah requested “particulars of the facts, matters and circumstances relied upon” to make that allegation.

[83] YV and TBA provided the following response:

26. In respect of paragraph 10 of the April ML Request, the Objectors repeat and rely on the facts, matters and circumstances stated in paragraphs 52-61 of the April ML Objections to allege that the term of the lease applied for is not appropriate, and further state:

(1) the term of lease applied for, 35 years, would allow the mining and burning of coal well beyond the time by which thermal coal must be phased out to achieve the aims of the Paris Agreement.

[84] Waratah says that response is inadequate in three respects. First, it does not identify when thermal coal must be phased out to achieve the aims of the Paris Agreement. Second, it does not identify the aims of the Paris Agreement. Third, it does not provide any facts, matters or circumstances which articulate why thermal coal must be phased out to achieve the aims of the Paris Agreement.

[85] It is true that the objectors have not said when thermal coal must be phased out to achieve the aim of the Paris agreement. It has clearly asserted a term of 35 years is too long. That is enough to identify the issue.

[86] Nor is it necessary to identify the aims of the Paris Agreement. That is evident from the italicised words in Article 2 of that Agreement:

Article 2

1. *This Agreement*, in enhancing the implementation of the Convention, including its objective, *aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty*, including by:

- (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
- (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
- (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.⁴⁵

⁴⁵ *Paris Agreement*, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016).

- [87] Why thermal coal must be phased out to achieve the aim of the Paris Agreement is a matter that will require expert opinion and will likely involve questions of policy and weight as well as fact. I am not satisfied further particulars are necessary now.
- [88] Waratah made specific submissions about one other request from these schedules.
- [89] YV and TBA objected to both the MLA and the EA on the ground that to grant them would be inconsistent with the core objectives of ecologically sustainable development to enhance individual and community well-being and welfare, by following a path of economic development that safeguards the welfare of future generations.
- [90] Waratah requested “particulars of the facts, matters and circumstances relied upon” to make that allegation.
- [91] YV and TBA provided the following response:
- 24.** In respect of paragraph 10(a) and (b) of the April Request, regarding the principle of intergenerational equity:
- (1) the Objectors repeat and rely on the facts, matters and circumstances stated in paragraphs 7, 14-18, 23-27, 28.1, 28.3, 29-47 and 48-63 (with reference to paragraphs 19-21) of the April Objections, and further state;
- (2) approval of the application would result in the loss of the economic, cultural, educational, scientific, agricultural, conservation, environmental and biodiversity values, and ecosystem services of Bimblebox Nature Refuge, and the opportunities for future generations to benefit from and further those values where
- (a) its economic values are stated in paragraph 101 below;
- (b) its ecosystem services are stated in paragraph 15 of the April Objections as further particularised at paragraph 55 below; and
- (c) its other values are stated in paragraphs 6-18 of the April Objections and paragraph 47 below.
- [92] Waratah says that response is inadequate in a several respects. First, it does not particularise the facts, matters and circumstances relied on to assert the development would result in the loss of those values. Second, it does not clarify what the loss(es) would be. Third, it simply repeats grounds of objection, some of which have no correlation to the objection, such as the financial circumstances of the applicant (para 63 of the objection).
- [93] It is clear enough that YV and TBA allege approving the mine is not consistent with economic development that safeguards the welfare of future generations, because of

the impact on the BNR and the alleged associated loss of a range of values articulated in the cross-referenced passages.

[94] A careful reading of the objection and particulars, as a whole, supports YV and TBA's submission that they have provided sufficient detail.

[95] They have identified the values they say will be lost, many of which relate to the environment. For example, the economic values of the BNR are articulated in the particulars to [59] of the objection to the EA as follows:

101. In respect of paragraph 53 of the April Request, the economic benefits of protecting the Bimblebox Nature Refuge in perpetuity include:

(1) those direct and indirect economic benefits derived from the matters stated in paragraph 15 of the April Objections, and further:

- (a) its operation as a sustainable grazing property;
- (b) the facilitation of scientific, educational, cultural and recreational activities on the property, and secondary activities taken as a consequence of those primary activities, including activities described at paragraph 47 above;
- (c) continued access to and use of its natural resources in perpetuity under sustainable management; and
- (d) its provision of ecosystem services as stated in paragraph 55 above and paragraph 15 of the April Objections.

[96] The objection calls up the principles of ecologically sustainable development which, amongst other things, involves the internalisation of environmental costs into decision-making about economic plans.⁴⁶ It is unrealistic to expect an objector raising that principle to provide the level of detail Waratah seeks without expert opinion.

[97] Waratah did not explain how it was hindered in nominating or briefing expert witnesses to consider the issues raised by the objection. I am not persuaded further particulars are necessary, now, for Waratah to engage in pre-hearing processes.

[98] As Waratah did not take me to any other request in those 4 schedules, I will not direct YV and TBA to respond further to the requests made in schedules 4, 5, 8 & 9.

Repetition

[99] In the remaining schedules (6 & 7), Waratah identifies requests to which, it says, YV and TBA responded by cross-reference to other paragraphs of the objections or particulars, without providing clarity about the objection.

⁴⁶ *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133 at [119].

- [100] There are two categories of grounds of objections included in the schedules: one relates to the limitation of human rights; the other relates to the statutory criteria that must be considered for the application.
- [101] I will deal with the second category first. Senior counsel for Waratah did not take me to any specific request to demonstrate that, without the particulars, it could not nominate and brief its expert witnesses or otherwise engage in pre-hearing processes.
- [102] It is true that, for some of the cross-references in some of the particulars, the link to the ground of objection is not immediately apparent. Waratah identified an example in a different schedule – schedule 5, item 1, a request that I dealt with above. For present purposes, I accept Waratah’s submission that it is not clear how paragraph 63 of the EA objections, which is about the financial circumstances of the applicant, relates to the objection about welfare of future generations. I expect that matter will be clarified once the expert evidence is obtained.
- [103] Turning now to the first category in this schedule, Waratah seeks clarity about the alleged limitation of the identified human rights. For example, in [1.3(1)(b)] of the objections to the MLA, YV and TBA allege that granting the mining lease would limit the right to life. Waratah sought particulars of the facts, matters and circumstances relied upon to allege their rights would be limited.
- [104] YV and TBA responded by reference to other paragraphs of the objections. In relation to the right to life, they identified paragraphs 19 and 33 to 50. Paragraph 19 identifies the application. Paragraph 33 states the relative contributions, in percentage terms, of human activity from burning fossil fuels and land-use change. Paragraphs 34 to 50 assert a range of impacts from continued emission of greenhouse gases.
- [105] Waratah says those paragraphs do not say “how any of the impacts referred to arbitrarily deprive any person of a right to life”.
- [106] The same type of request, response, and submission is made in relation to each of the human rights invoked by the objections.
- [107] These requests relate to the second step DES identified for the Court in applying s 58 of the HRA. I accept DES’s submission that YV and TBA should better articulate that case. However, that is not what Waratah requested them to do.

[108] Waratah asked for the facts, matters and circumstances YV and TBA rely upon to assert the rights will be limited. YV and TBA did that, albeit by cross reference to other parts of the objection or particulars.

[109] When asked to give an example of how the lack of clarity impeded it in nominating or briefing expert witnesses, Waratah referred to the allegation that the human rights of First Nations people would be affected. Senior counsel said Waratah did not know what case it must meet in relation to First Nations people and, until it did, it could not decide whether anthropological or sociological or lay evidence was required.

[110] It seems to me that the types of impacts on First Nations people that YV and TBA assert are articulated in the objections. For example, in paragraph 45 of the objections to the EA, as particularised, YV and TBA make these allegations:

45. Accretion of greenhouse gases in the atmosphere will also adversely affect First Nations Aboriginal and Torres Strait Islander peoples in specific ways, including by causing:

45.1 disruption of traditional cultural practices, including those which depend on connection to place and ecological systems;

Particulars

88. In respect of paragraphs 43, 44, 45 and 46 of the April Request, the Objectors repeat and rely on the facts, matters and circumstances stated in paragraphs 30, 31, 39-42 of the April Objections.

45.2 displacement from traditional lands;

Particulars

88. In respect of paragraphs 43, 44, 45 and 46 of the April Request, the Objectors repeat and rely on the facts, matters and circumstances stated in paragraphs 30, 31, 39-42 of the April Objections.

45.3 impediments to the continuation, preservation and development of culture into the future and for future generations;

Particulars

88. In respect of paragraphs 43, 44, 45 and 46 of the April Request, the Objectors repeat and rely on the facts, matters and circumstances stated in paragraphs 30, 31, 39-42 of the April Objections.

45.4 irreversible harm to their traditional lands and waters;

Particulars

88. In respect of paragraphs 43, 44, 45 and 46 of the April Request, the Objectors repeat and rely on the facts, matters and circumstances stated in paragraphs 30, 31, 39-42 of the April Objections.

45.5 other limits on the rights referred to in s 28(2) of the HRA.

Particulars

89. In respect of paragraph 47(a) of the April Request, the Objectors contend the accretion of greenhouse gases in the atmosphere will limit the human rights stated in paragraph 19 above.

90. In respect of paragraph 47(b) of the April Request, the accretion of greenhouse gases in the atmosphere will limit the human rights stated in

paragraph 19 above in the following ways other than those stated in paragraphs 45.1-45.4 of the April Objections, by causing:

- (a) impacts to spiritual wellbeing where spirituality is connected to place, ecological systems and cultural management of nature;
- (b) ecological degradation of traditional lands, waters and seas, as well as lands, waters and seas upon which culture is practiced, sacred and/or significant places and stories that are dependent on ecological systems;
- (c) impediments to engagement with cultural practice due to factors including the human health-related impacts of climate change;
- (d) impediments to conservation practices and practices of sustainable management of lands, waters and seas; and
- (e) impediments to use of traditional language, including song and dance, where language is connected to place and ecological systems.

91. In respect of paragraph 47(c) of the April Request, the Objectors repeat and rely upon the facts, matters and circumstances outlined in paragraphs 34-45 of the April Objections to contend approval of the application would limit the rights stated in paragraph 19 above.

92. Paragraph 47(d) of the April Request is answered by paragraph 90 above.

- [111] YV and TBA will provide statements from First Nations witnesses prior to the nomination of expert witnesses. That will give better definition of the issues as they pertain to First Nations people. Waratah will have an opportunity to provide lay evidence in reply should it wish to. It will have the First Nation witnesses' statements before deciding whether to nominate anthropologists or sociologists to address those objections.
- [112] Waratah also submitted YV and TBA had not established a causative link between the proposed mine and human rights, as opposed to climate change generally and human rights. Senior counsel put the question in this way: "So if it's a favourable recommendation, how will Waratah's mine affect those human rights as opposed to other causes of greenhouse gases?"
- [113] That raises a legal question about causation. I was not able to find a request for particulars about that. Although, I may have overlooked something in the detail of the 170 or so requests, Waratah did not take me to one that did so.
- [114] As DES observed in their written submissions, the articulation of a human rights case involves questions of law and policy, as well as allegations of fact. I will hear from the parties about how and when YV and TBA should articulate their argument on the

human rights objections. I am not persuaded requiring further particulars now has utility.

- [115] YV and TBA are not required to respond further to the requests in schedules 6 & 7.

Conclusion

- [116] In conclusion, in exercising the Court's discretion on the application my primary concern is procedural fairness for the parties, in the context of the Court undertaking an administrative function and having regard to other pre-hearing processes to clarify the issues for the hearing.
- [117] Except for those requests I identify below, I am satisfied YV and TBA have provided enough detail for Waratah to nominate their experts. If problems arise for the parties in briefing the expert witnesses, that can be addressed in the ways indicated in these reasons.
- [118] YV and TBA must provide an exhaustive list of classes of individuals whose human rights they say will be limited by the applications being granted.