

LAND COURT OF QUEENSLAND

CITATION: *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 3)*
[2021] QLC 36

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 to determine jurisdiction

DELIVERED ON: 5 October 2021

DELIVERED AT: Brisbane

HEARD ON: 14 September 2021
Submissions closed 28 September 2021

HEARD AT: Brisbane

PRESIDENT: FY Kingham

ORDER: **1. The matter will be listed for further hearing on a date fixed in consultation with the parties.**

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – COURTS OR TRIBUNALS EXERCISING JURISDICTION IN MINING MATTERS – PROCEDURE – where the applicant revised its mine plan after the applications for a mining lease and environmental authority had been referred to the Court for hearing – whether the Court can conduct the hearing on the revised mine plan – where the Court must comply with

the requirement to afford parties procedural fairness – where the Court adjourned the matter for further hearing to allow the Department of Environment and Science to consider the potential environmental impacts of the revised mine plan

Environmental Protection Act 1994

State Development and Public Works Organisation Act 1971

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd
[2021] HCA 2, cited

APPEARANCES: P Ambrose QC with J O'Connor, T Jackson (instructed by Hall & Wilcox) for the applicant
E Nekvapil with K McAuliffe-Lake (instructed by the Environmental Defenders Office) for Youth Verdict Ltd and The Bimblebox Alliance Inc
D Harris (solicitor), Donnie Harris Law, for Scott and Julie Ann Brown
John and Susan Brinnand, active objector (self-represented)
D Sharov, active objector (self-represented)
J Horton QC with A Hellewell (instructed by Litigation Unit, Department of Environment and Science) for the statutory party

- [1] Can the Court hear applications for and objections to a mining project if the applicant revises the mine plan after the applications have been referred to the Court for hearing?
- [2] That question arises because Waratah Coal Pty Ltd, which has applied for the necessary approvals to mine thermal coal in the Galilee Basin, has revised its proposed mine plan as it affects an area of land known as the Bimblebox Nature Refuge.
- [3] The BNR is a private landholding, protected for its biodiversity values by agreement between the owner and the Queensland Government. Waratah sought approval for a project which, the Coordinator-General concluded, would lead to a total loss of the BNR.
- [4] It is common ground Waratah complied with the statutory regime for the applications before referral and the Court's jurisdiction was properly invoked.

- [5] Since the applications were referred to the Court, Waratah has revised its plan for an open cut mine pit that was to include part of the BNR. It no longer proposes to include the BNR in that pit.
- [6] YV and BA say the assessment of Waratah's application for the environmental authority, which occurred prior to it being referred to the Court, considered impacts by reference to the complete destruction of the BNR required for open cut mining. YV and BA says the change is so significant that the Court is being asked to consider a different application. They argue the Court does not have jurisdiction to hear that application on the revised mine plan, because it has not been assessed as required under the *Environmental Protection Act 1994* and the *State Development and Public Works Organisation Act 1971*. The Court is seized of the application as originally made. If Waratah wishes to revise the project, it should make a fresh application so that it can be assessed in the usual way.
- [7] Waratah denies the revision to its mine plan means this a different application for an environmental authority. Waratah has not applied to amend that application. There is no procedure for it to do so. The change is responsive to the objections about the impacts on the BNR. Waratah says it will reduce those impacts. Nonetheless, it does not oppose conditions in the draft environmental authority that would require it to provide environmental offsets as if there was to be a total loss of the BNR.
- [8] Waratah says the Court should dismiss YV and BA's challenge to the Court's jurisdiction. In the alternative, it supports the submissions of the Department of Environment and Science that to decide the point now is premature.
- [9] Waratah accepts that a change to a mine plan may be so fundamental, whether because of a change in the activities or a change in the nature and scale of the impacts of the activities, that the Court should not proceed with the hearing. Its primary position is that the Court has all the information it needs now to decide whether the revised mine plan is such a change. Waratah always sought approval for 2 open-cut pits and 4 underground mines. The change reduces the length of the open-cut pits so they do not extend into the BNR. Further, YV and BA's objections are sufficiently broad to allow them to be heard on the potential impacts on the BNR of the revised mine plan.

[10] The Department of Environment and Science is a statutory party to the hearing because it is the assessing authority for the environmental approval. It has requested further information from Waratah so it can consider the potential environmental impacts of the revised mine plan. Once it has done this, it will be in a position to assist the Court with submissions about whether the hearing should proceed. It submitted there were 4 circumstances in which the Court should not proceed:

- ‘(a) if, following receipt of the further information requested by the Statutory Party and indicated at paragraph 19-20 of our Primary Outline it becomes clear that the reassessment by DES of the Draft EA would not be possible or practicable;
- (b) if the Court were satisfied the changes sought are outside of Waratah’s Application which was referred to this Court;
- (c) if the objections originally made are not wide enough fairly to raise the effects that flow from Waratah’s changed activities which could not reasonably be identified from the Application given what was then stated in the Environment Management Plan and the Environmental Impact Statement (and if there is no mechanism by which those additional objections could be incorporated, for example, by Waratah agreeing to take no issue with their inclusion); and
- (d) if this Court’s process and procedures or considerations of fairness would not reasonably permit any necessary adjustments and amendments to be made in the course of this objections hearing.’¹

[11] Although YV and BA framed their argument as a question of jurisdiction, the statutory party submitted it is more a question of power. The boundaries between the two can be difficult to discern. However, all parties identified the degree of the change, whether to activities or impacts or both, is the critical factor. Further, all parties linked the answer to that question to the fairness of the proceeding.

[12] The Court must comply with the requirement to observe procedural fairness in the exercise of its administrative function. Failure to do so would deprive its recommendation of legal force.²

[13] The statutory party considers it cannot assist the Court to assess the degree of the change and its implications for assessment of impacts, and the scope of the objections, without the further information it has requested from Waratah. It would be imprudent for the Court to decide the challenge to jurisdiction in those circumstances.

¹ DES.0011 Further Statutory Party Submissions – Revised Mine Plan [20].

² *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 at [48].

[14] The matter will be listed for further hearing on a date fixed in consultation with the parties. The Court will hear from the parties about directions for filing further material and other necessary steps before that hearing.