LAND COURT OF QUEENSLAND

CITATION:	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] 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 to take on country evidence from First Nations witnesses
DELIVERED ON:	18 March 2022
DELIVERED AT:	Brisbane
HEARD ON:	10 March 2022
HEARD AT:	Brisbane
PRESIDENT:	FY Kingham
ORDERS:	**1. I will take evidence from the First Nations witnesses on country and in the manner proposed and will finalise orders in consultation with the parties.** **2. Costs are reserved, unless a party applies for a different order within 7 days, in which case I will make directions on that application.**
CATCHWORDS:	HUMAN RIGHTS – JURISDICTION AND PROCEDURE – QUEENSLAND – where the Land Court is a public entity and is doing an act within the meaning of s 58(1)(a) *Human*

Rights Act 2019 when conducting a mining objection hearing – whether confining the evidence in chief of First Nations witnesses to written statements would limit their cultural rights, and if so, in a way that is reasonable and demonstrably justifiable – where the Court found it would limit a protected right – where the Court found the limit was not reasonable and demonstrably justifiable.

ENERGY AND RESOURCES – MINERALS – COURTS OR TRIBUNALS EXERCISING JURISDICTION IN MINING MATTERS – PROCEDURE – where First Nations witnesses provided written statements of evidence in chief – where the applicant for the mining lease does not wish to cross-examine the witnesses on those statements – where the witnesses requested the opportunity to give oral evidence on country, in the company of Elders, with site inspections and, for some witnesses, to give evidence as a group – where the applicant for the mining lease opposed those orders as unnecessary and disproportionate – where the Court made the orders.

Environmental Protection Act 1994 (Qld)
Human Rights Act 2019 (Qld)
Land Court Act 2000 (Qld)
Mineral Resources Act 1989 (Qld)

Northern Territory v Griffiths and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7, cited
Owen D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273, followed
R v Oakes [1986] 1 SCR 103, cited
Re Application under the Major Crimes (Investigative Powers) Act 2004 (2009) 24 VR 415, cited
Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors [2020] QLC 33, cited

APPEARANCES: P Ambrose QC with J O'Connor, T Jackson (instructed by Hall & Wilcox) for the applicant
S Holt SC (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 objectors (self-represented)
J Horton QC with A Hellewell (instructed by Litigation Unit, Department of Environment and Science) for the statutory party

[1] One of the objections made to the thermal coal mine proposed by Waratah Coal Pty Ltd is the impact it would have on the human rights of Aboriginal and Torres Strait Islander peoples in Queensland.[1] Youth Verdict Ltd and The Bimblebox Alliance Inc, have filed statements of evidence from five First Nations witnesses in support of that objection.

[2] YV and TBA applied for an order adopting a First Nations Protocol they drafted for the Court's consideration. The draft protocol addresses cultural protocols for taking evidence from First Nations witnesses and defines the Court's approach to such evidence.

[3] Because of their collaborative approach in preparing for trial, and under the stewardship of Member McNamara through case management conferences, the active parties have formulated agreed orders on significant matters. But they have reached an impasse on something central to the arrangements for the hearing, which this judgment addresses.

[4] YV and TBA propose the Court take on country evidence from four[2] of the First Nations witnesses and conduct site inspections on Yidinji Nation (Cairns), Erub and Poruma (Torres Strait).

[5] Site inspections are a routine feature of mining objection hearings. Taking on country evidence is not; but it is a familiar process for a court hearing native title and cultural heritage claims.

[6] YV and TBA seek the following orders:

> **Group Evidence**
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> 10. Athe Kapua Gutchen, Arke Florence Gutchen and Lala Gutchen are granted leave to give evidence in chief, cross-examination and re-examination together as a group.
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> **Site Inspection, On Country evidence and evidence in chief**
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> 16. Evidence will be taken by the Court from Athe Kapua Gutchen, Arke Florence Gutchen, Lala Gutchen and Jiritju Fourmile at the

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1 YV and TBA objections to the mining lease application in COM.0012 and COM.0028 at 1.3, 1.4, 2.2 and 3.1; YV and TBA objections to the environmental authority application in COM.0042 and COM.0053 at 2.3, 2.4, 3.2 and 4.2; Further and better particulars of the objections in F.0054 at 1(1); 4; 17(1); 18; 99.

2 For the fifth First Nations witness, Harold Ludwick, there is no proposal to take on country evidence on Gugu Yimidhirr nation (Hopevale), because he cannot access sacred sites he talks about due to a Perpetual Lease.

places and on the topics specified in the Proposed Site Inspection and On-Country Evidence Plan as follows:

a. Athe Kapua Gutchen on Erub (Darnley Island);
b. Arke Florence Gutchen on Erub (Darnley Island) and Poruma (Coconut Island);
c. Lala Gutchen on Erub (Darnley Island);
d. Jiritju Fourmile in Gimuy (Cairns region).

17. Athe Kapua Gutchen, Arke Florence Gutchen, Lala Gutchen and Jiritju Fourmile are permitted to give oral evidence in chief to explain the matters covered in their written statements of evidence. Their evidence in chief is in addition to, and does not replace, their written statements of evidence.[3]

[7] Waratah opposes on country evidence as unnecessary and involving disproportionate costs. It does not wish to cross-examine the witnesses on their statements.

[8] It opposes leave being granted for further evidence in chief, but, if that were to occur, say it could be given in Brisbane or by video conference. YV and TBA say those arrangements would be entirely inadequate.

[9] The consequence, then, of not making the orders is that the witnesses' evidence would be confined to their written statements.[4]

[10] The statutory party says on country evidence is appropriate and consistent with the Court's function in this hearing. Mr Brinnand strongly endorsed the orders. Mr Harris, the solicitor for Mr and Mrs Brown, was concerned about the cost. If they could ask to be excused from attending, that would protect his clients' interests.

[11] The Court has the power to make the orders.[5] The dispute is whether it should. Before considering the merits of the application, it is important to identify the legal principles that govern the decision.

What legal principles apply?

[12] Although many of its submissions invoked necessity as a consideration, Waratah says the test is whether the proposed orders are in the interests of justice. However, in deciding that question, Waratah says the Court should note the witnesses

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3 Ex YVL.0020, paragraphs 10, 16 and 17.

4 Senior counsel for Waratah indicated that, if leave to adduce further evidence in chief were granted, it could be given in Brisbane or by video conference.T 1-10, lines 33- 35.

5 *Land Court Act* s 7, 7A *Mineral Resources Act 1989* (Qld) (MRA) s268(1) and *Environmental Protection Act 1994* (Qld) (EP Act) s 220. The latter Acts have been used as they were at 2013.

themselves do not say the proposed orders are necessary. Instead, they have used phrases such as "it is best" or "it makes it easier".

[13] Apart from some evidence to be redacted from Lala Gutchen's affidavit, which is discussed below, YV and TBA accept that the witnesses could give evidence in the way usually done in an adversarial court. They have prepared written statements. At least one of them has given evidence by affidavit in other proceedings.

[14] However, as Mr Brinnand observed, the witnesses have shown respect to the Court by complying with Court orders to provide written evidence in chief and have made this request as a matter of cultural preference and practice.

[15] This raises another legal consideration, the application of the *Human Rights Act 2019* (HRA). YV and TBA submitted the Court must not act incompatibly with the witnesses' protected rights in conducting the hearing and deciding this application.

[16] Although Waratah made no submission about the HRA, on an earlier application it has made relevant submissions. When applying to strike out the human rights objections made by YV and TBA, Waratah argued the conduct of a mining objection hearing is an "act" within the meaning of s 58(1)(a) of the HRA.[6] That section imposes the obligation YV and TBA say the Court must observe on this application.

[17] It follows from my decision on that application, that it is unlawful for this Court to conduct this hearing in a way that is not compatible with human rights. Whether it is compatible depends on whether a protected right is limited and whether that limitation is reasonable and demonstrably justifiable.

Should the application be granted?

[18] The decision about arrangements for taking evidence from First Nations witnesses engages the right protected by s 28(2)(a) of the HRA:

> to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings.

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6 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33.

[19] Ms Rose deposed to the cultural practices about imparting traditional knowledge and culturally important matters:[7]

1. Kapua Gutchen, Lala Gutchen and Florence Gutchen explained to her that Traditional Knowledge is best spoken about on Country at the place that is being discussed.

2. Jiritju Fourmile said that under Yidinji Lore, the Elders conduct a ceremony when evidence is given where the senior Lore man explains to the Court's Law people how the Knowledge has and will be transmitted.

3. Those four witnesses say that to comply with cultural protocols:
   (a) evidence should be given orally at the place which is being discussed given the level of cultural sensitivity and importance of the topic;
   (b) it is best to be discussed in the company of other members of the community who are knowledge or Lore keepers for particular topics due to the way that knowledge is held collectively;
   (c) it is best given in the presence of Elders; and
   (d) a proper explanation of particular topics cannot be done without showing or demonstrating a particular place or impact or landscape on Country and this explanation can't be done any other way.

[20] Further, Ms Rose deposed to a particular difficulty for Lula Gutchen giving evidence about certain matters that the parties have agreed will be redacted from her written statement. Ms Gutchen said that under Erub Customary Lore she cannot give evidence about those matters. Certain Elders are Knowledge Keepers for their land before Traditional Knowledge is transmitted. Some of them have recently passed. Ms Gutchen cannot seek permission about these matters at this time of sorry business. She would have to defer to her father Athe Kapua Gutchen, who is a Senior Elder in the Meuram tribe. She proposes to give evidence with her father, who will invite the Elders to be present to ensure an accurate account is given to the Court in accordance with Customary Lore.

[21] Waratah says that the evidence given by Ms Rose is insufficiently specific. It does not descend to the detail of what protocol applies to what evidence. It argues Ms Gutchen must have received permission to give the written evidence that will be redacted and there is a process for her to get that permission in the future. That may

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7 Affidavit of Alison Rose affirmed 1 March 2022, YVL.0283.0001.

be so, but that argument addresses necessity, not whether a protected right is engaged by the application.

[22] The witnesses have described the cultural protocols they would be expected to observe in giving evidence of traditional knowledge and culture. Evidence about those matters is central to the objection their evidence relates to. Refusing the witnesses' request would limit their ability to enjoy and maintain their cultural heritage, specifically about how traditional knowledge is imparted. If they are confined to their written statements they cannot observe those cultural protocols.

[23] Section 13 of the HRA defines when a limitation of a protected right is lawful.

> **13 Human rights may be limited**
> (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant –
> (a) the nature of the human right;
> (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
> (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
> (e) the importance of the purpose of the limitation;
> (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
> (g) the balance between the matters mentioned in paragraphs (e) and (f).

[24] Respectfully, I adopt Martin J's interpretation of s 13 in *Owen D'Arcy v QCS.*[8] His Honour found that section was enacted with the intention of embodying a proportionality test.[9] He also followed the reasoning of Warren CJ in *Re Application under the Major Crimes (Investigative Powers) Act 2004* in interpreting an equivalent provision in the *Victorian Charter of Human Rights*:[10]

> "[145] A free and democratic society is the fundamental hallmark of our system of governance and way of life. Notions of the 'public interest' stem

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8 *Owen D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.
9 Ibid [104].
10 (2009) 24 VR 415.

> from notions of what is best for a free and democratic society. I find I am assisted by the remarks of Dickson CJ in *Oakes*:
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> 'The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and fair in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."[11]

[25] The onus of demonstrably justifying a limitation rests with the party seeking to uphold it. The issue for the Court is balancing the competing interests of society, including the public interest.[12]

[26] Putting aside the question of necessity, which Waratah accepts is not the test, Waratah says the cost is disproportionate and would not assist the Court because it does not contest the witnesses' evidence.

[27] The nature and the purpose of the limitation would be to avoid the commitment of time and resources in taking the evidence on country. This involves some days of hearing time and expense to the parties and the Court.

[28] Time and expense are relevant considerations. A court should be prudent in making directions about the conduct of proceedings. It has a responsibility to wisely use public resources to discharge its functions fairly and efficiently. It should not impose an unjustified burden on litigants. Declining the proposed orders would help to achieve that purpose.

[29] Waratah estimates their costs would be in the order of $80,000, which it says is prohibitive. It is possible, as Waratah suggested, for the witnesses to give evidence on country using videoconferencing technology, but that would limit the witnesses' ability to fully observe the ceremonial aspect of imparting traditional knowledge.

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11 *Owen D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [107]; *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 [145]; *R v Oakes* [1986] 1 SCR 103, 136 [40].

12 *Owen D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [108]; *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 [147].

[30] Waratah did not lead evidence of financial incapacity and it might employ a leaner legal team than routinely appears before me in Brisbane. The cost estimate made by YV and TBA is more modest and draws on their recent experience of travelling to these places to take statements from the witnesses. They have offered to assist Waratah to raise funds, a matter I leave with the parties. Importantly, they offer to take the lead on logistics and have done some advance work in organising the visits. This would reduce the inconvenience and, likely, the costs.

[31] Turning to whether evidence taken as proposed would assist the Court, Waratah draws a distinction between this case and one involving a native title claim where the Court must make factual findings about cultural matters. Waratah does not contest the factual matters the First Nations witnesses have deposed to. It accepts they have a very strong connection with the sea and the land, and the flora and fauna. It does not dispute there will be sea level rise, that the climate will warm, that the fish may not be as plentiful, or that different aspects of the witnesses' traditional way of life will change.[13]

[32] That does not mean there will be no contest about their evidence.

[33] Evidence is led from these witnesses to establish how physical climate change impacts will affect their cultural rights. If YV and TBA establish the mine would limit the ability of First Nations peoples of Queensland to exercise their cultural rights, I will need to weigh that in the balance with other relevant factors in deciding whether the limit is reasonable and demonstrably justified. That is an evaluative, not a fact-finding process.

[34] There is another dimension to this that Waratah did not address.

[35] YV and TBA propose the witnesses give evidence in the presence of the people who have the collective authority to speak about matters of place and culture. Section 28 of the HRA frames these cultural rights in collective terms. It protects the rights of Aboriginal and Torres Strait Islander peoples to do specified things *with other members of their community*.

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[13] T 1-15, lines 20-25.

[36] The High Court has long accepted the communal nature of the rights, and recently recognised as a compensable loss a group's sense of failed responsibility, under the traditional laws and customs, to have cared for and looked after land.[14]

[37] The witnesses will be giving evidence about the impact climate change will have on their community's ability to enjoy and maintain their cultural rights. The Court will be assisted in its evaluative function by seeing and hearing this evidence being given in that community.

[38] Further, as the statutory party observed, this is a specialist Court. In my experience as a lawyer and judicial officer, written evidence from a First Nations witness is a poor substitute for oral evidence given on country and in the company of those with cultural authority.

[39] Finally, I have been assisted by site inspections, even where factual matters are not in dispute. A site inspection can aid understanding. Importantly for an evaluative hearing, it can provide context and proportionality.

Conclusion

[40] To return to whether the limit is demonstrably justified in a free and democratic society, refusing the witnesses' request to give evidence in this way orders does not respect their cultural and group identity or accommodate their beliefs.

[41] There is utility in the evidence being given in the way YV and TBA propose. It will not impose an unreasonable and disproportionate burden on the parties or this Court.

[42] If the orders are not made, the First Nations witnesses will be confined to their written statements. If the orders are made, they will be able to explain that evidence in the presence of those they are speaking for and Elders who can ensure the Court receives an accurate account.

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[14] *Northern Territory v Griffiths and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 [225].

[43] The orders will ensure I receive the best evidence from the First Nations witnesses. That, and the site inspections, will assist me in discharging my administrative and evaluative function in this hearing.

[44] In deciding this application, I have balanced the collective right to enjoy and maintain culture against the public and private interests in minimising the inconvenience and cost of litigation. Confining the First Nations witnesses to the written statements is a limit to their right, and that of their community, to maintain their culture about how they transmit traditional knowledge. I am not persuaded that limit is reasonable and demonstrably justifiable in the circumstances of this case.

[45] The same considerations are relevant in deciding that it is in the interests of justice to make the orders sought.

Orders:

1. **I will take evidence from the First Nations witnesses on country and in the manner proposed and will finalise orders in consultation with the parties.**
2. **Costs are reserved, unless a party applies for a different order within 7 days, in which case I will make directions on that application.**