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

‘Bimblebox Case’ Summary

17 January 2023

*“Humans have firmly got our hands on the temperature knob of the world by our CO2 emissions and every tonne of emissions counts”* - Professor Church as quoted in the decision.

**In a nutshell:** On 25 November 2022, local landholders and First Nations peoples across Queensland secured a historic legal victory. The Land Court recommended refusal of Clive Palmer’s Galilee Coal Project on biodiversity, climate change and human rights grounds. The Court’s decision is under appeal and the Queensland Government has not yet followed the recommendation of refusal.

Executive Summary

The Bimblebox Nature Refuge, in central Queensland, has protected quintessential Australian bush on private land for over two decades through the tireless efforts of its owners. In 2009 Clive Palmer’s Waratah Coal Pty Ltd sought to mine the area of the nature refuge for thermal coal, to be burnt in Australia and overseas, contributing to the impacts of climate change.

To mine the coal Waratah required a mining lease under the *Mineral Resources Act 1989 (Qld)* and environmental authority under the *Environmental Protection Act 1994 (Qld)*. The Bimblebox Alliance Inc and joined forces Youth Verdict Ltd, a First Nations led youth organisation concerned about the impacts of climate change, to object to the grant of the ML and EA. The objection was heard in early 2022 by the Queensland Land Court, constituted by President Kingham.

The grounds of objection included the direct impacts on the biodiversity of the Bimblebox Nature Refuge, the broader impacts on Queensland through climate change (particularly low-lying coastal areas such as the Torres Strait) and the consequential human rights impacts under the *Human Rights Act 2019 (Qld)*. It was the first case to raise the human rights impacts of climate change in an Australian court.

The Court accepted that, on the specific facts of this case, it was not in the public interest to grant the necessary approvals. The Court found that there was insufficient evidence of the potential impacts on biodiversity, and whether they can be managed, to be satisfied the impacts would be acceptable. Crucially the court was not satisfied that the mine would necessarily have a neutral or beneficial impact on climate change by substituting precisely the same amount of equivalent, or worse, quality coal (i.e. the “Perfect Substitution Proposition”). The Court found that the project would therefor make a material contribution to the impacts of climate change on Queensland including increased heatwaves, bushfires, floods and diseases. Both the local and climate change impacts on Queenslanders were found to also have unacceptable impacts on human rights.

The Land Court recommended that both the mining lease and environmental authority applications be refused. The final decisions on those applications are for the Queensland government to decide. Waratah has applied to the Supreme Court to review the Land Court decision.

Background

In 2000, local landholders banded together to save a large tract of remnant bushland from land clearing during a time of enormous biodiversity loss to agriculture. They received a grant from the federal government to buy the property on the condition that they, and successive owners, protect the natural features of the land, in perpetuity, for future generations. They called it the Bimblebox Nature Refuge (**Bimblebox**). Nine years later, an exploration licence was granted on Bimblebox for coal exploration, and a few years later, The Bimblebox Alliance Inc. (**TBA**) was formed to protect Bimblebox, and advocate for the value of nature refuges everywhere. Despite the looming mining applications, the landholders fastidiously maintained their commitments to the state and federal governments to manage, protect and conserve Bimblebox.

In that time, Bimblebox became more than a home for hundreds of plant and animal species, but a place for research, a study in sustainable agricultural practices, and the focal point of the Bimblebox Art Project, which has contributed to Queensland’s cultural landscape. As counsel put it during closing submissions:[[1]](#footnote-2)

The uniqueness of Bimblebox doesn’t come from its rarity. It’s not the last surviving species of anything, it’s not the last population of any poor creature or plant…It’s an example of something which was once everywhere in the Desert Uplands but increasingly no more and certainly not in a protected form. It’s a unique combination of an extraordinary number of things that are, or were, entirely ordinary.

In 2011, Clive Palmer’s Waratah Coal Pty Ltd (**Waratah**) applied to mine coal under Bimblebox and the surrounding area (**the Project**). The Project initially aimed to produce 40 million tonnes of thermal coal over 40 years, which was later revised to 761,828 million tonnes over the life of the project, resulting in 1.58 billion tonnes of greenhouse gas emissions (CO2e) once burnt.[[2]](#footnote-3)

In Queensland, coal is the property of the State of Queensland.[[3]](#footnote-4) Large coal mines require both a mining lease (**ML**) and environmental authority (**EA**) from the Queensland government to mine the coal. Any person may object to the grant of the ML and EA, and objections are referred to an independent Land Court to hear evidence and submissions before the Court makes a recommendation to the final decision makers.

When Waratah’s applications for an ML and EA for the Project opened for objections, TBA objected. They were joined by Youth Verdict Ltd (**YV**), an organisation of young people led by First Nations people, concerned about the impacts of climate change on First Nations culture and future generations, among other things.

The Hearing

TBA and YV (**TBAYV**) were both represented by the Environmental Defenders Office Ltd in the Land Court and both objected on the basis of local impacts, climate change and human rights grounds. They were joined in court by John and Susan Brinnand, who also objected on nature and climate grounds. Over a dozen other objectors elected not to make submissions or provide further evidence to the court.

These objections were the first to be referred to the Court after the commencement of the *Human Rights Act 2019* (Qld) (**HR Act**), and it was the first time the Land Court has heard arguments from objectors that approval of a coal mine would unjustifiably limit the human rights of people in Queensland.

Waratah unsuccessfully sought to strike out the human rights arguments early in the proceeding.[[4]](#footnote-5)

The Court heard evidence from over twenty expert witnesses, six lay witnesses and five First Nations witnesses over 25 days in April to July 2022. This included, in a historic first for a mining objection hearing, travelling to the Countries of First Nations witnesses to hear about the impacts of climate change firsthand in a culturally respectful manner.[[5]](#footnote-6)

The Decision

After weighing all the evidence, including economic and social benefits,[[6]](#footnote-7) and considering each human right, the Court found that:[[7]](#footnote-8)

Weighing the benefits of the Project against the loss of Bimblebox alone, with or without my findings on the limits to relevant human rights, I would say the public interest does not favour the Project.

Weighing the benefits of the Project against the climate change implications of combustion of the coal alone, with or without my findings on the limits to relevant human rights, I would say the public interest does not favour the Project.

Weighing all those factors in the balance, the Project would prejudice the public right or interest.

Accordingly, the Court found that, considering all the statutory criteria and human rights, the applications for the Project should be refused.

The final decisions rest with the Minister for Mines, in respect of the ML, and the Department of Environment and Science, in respect of the EA. The Department of Environment and Science is time limited under the EP Act whereas the Mines Minister is not, so usually the EA decision precedes the ML decision. While the government is not bound to follow the Land Court recommendations, it usually does.

Waratah has applied to the Supreme Court for a statutory order of review on the Land Court’s decision alleging errors of law. The government is not bound to wait for the Supreme Court review decision before making final decisions on the EA and ML applications, but sometimes it does wait for the court processes to be resolved before making final determinations.

Weighing factors in the balance

The decision is primarily a weighing of factors for and against the proposal to determine where the balance lies. President Kingham found that benefits of the Project to strengthen and diversify the regional economy[[8]](#footnote-9) weighed in favour of approval and the following factors weighed against approval:

1. Waratah had not satisfied the Court as to the extent of impacts on the Bimblebox Nature Refuge and whether those impacts could be offset.[[9]](#footnote-10)
2. There was insufficient evidence on the appropriate noise and vibration levels to protect the health and biodiversity of the Bimblebox ecosystem.[[10]](#footnote-11)
3. The subsidence from underground mining would likely tilt the land against the current natural flow of surface water.[[11]](#footnote-12)
4. There was a level of uncertainty about the degree and extent of subsidence on Bimblebox.[[12]](#footnote-13)
5. The risk of the loss of Bimblebox as a nature refuge was both real and likely if the mine proceeded.[[13]](#footnote-14)
6. The Project would have made a material contribution to climate change, narrowing the options for achieving the Paris Agreement goals.[[14]](#footnote-15)
7. The resulting limitations of human rights (i.e. the right to life, cultural rights, rights of children, rights to property and privacy and home, and right to equality before the law) could not be justified in a fair and democratic society.[[15]](#footnote-16)
8. The best interests of children and future generations are not served by actions that narrow the options for achieving the Paris Agreement temperature goal.[[16]](#footnote-17)

After weighing up all the relevant factors the court found that the economic and social benefits of the project did not outweigh the ecological and climate change impacts of the project[[17]](#footnote-18)and it was not in the public interest to grant the approvals.[[18]](#footnote-19) The Court also considered that for each human right, considered individually, the importance of preserving that right weighed more heavily that the economic and social benefits of the mine.[[19]](#footnote-20) Additional factors for the rights of First Nations peoples, such as the existential threat from seal level rise to the Torres Strait Island peoples, weighed the scale more firmly in favour of the importance of preserving cultural rights.[[20]](#footnote-21) Accordingly the Court recommended to the final decision makers that the applications for both the ML and the EA be refused on each basis.

Key Findings

*“The applications are made and will be decided in Queensland, about the mining of coal in Queensland, the combustion of which will cause harm to the environment in and the people of Queensland, wherever the combustion occurs.”*[[21]](#footnote-22)

*“as DES submits, the permission to extract coal cannot logically be separated from burning it,*

*that being the whole point of the exercise*” [[22]](#footnote-23)

While it was a decision on the facts, and the Court does not set binding precedent, several of its findings will be of broader interest in environmental, mining and climate litigation, in particular:

1. **Keeping the common common**: The Court accepted expert opinion that, consonant with its status as a protected area, Bimblebox plays an important role in biodiversity conservation despite not supporting rare or endangered species.[[23]](#footnote-24)
2. **Adaptive management**:[[24]](#footnote-25) The Court accepted that it is common to include conditions that allow for the scope of the activity and rehabilitation requirements to be refined in response to information obtained after approval (known as ‘adaptive management’), but this should not be done where approval on such conditions could result in important environmental impacts that have not been assessed. In the facts of this case, ‘adaptive management’ conditions were proposed to alleviate significant deficits in available information about the adverse environmental impacts of the Project. The Court found that Waratah had not provided sufficient information about the potential environmental impacts to allow it to assess and determine the initial impacts and the impacts that would likely remain after mitigation measures.[[25]](#footnote-26) In essence, the uncertainty in impacts and the potential adequacy of mitigation measures was too great to be accommodated by ‘adaptive management’ conditions.
3. **Offsets**: The Court accepted[[26]](#footnote-27) that Queensland policy allowed for some residual impacts on State significant biodiversity to be ‘offset’ (where they could not be mitigated or rehabilitated)[[27]](#footnote-28) by securing and protecting equivalent or greater values elsewhere – while acknowledging the experts’ evidence that offsets carry substantial risk of not coming to fruition.[[28]](#footnote-29) However, the Court was not satisfied that the residual impacts of the Project were sufficiently known to be satisfied that they would be capable of being offset in accordance with the policy nor could any condition be imposed to overcome this uncertainty.[[29]](#footnote-30) The Court also found that offsets cannot replace the investment of time by the custodians of Bimblebox or the cultural and spiritual values associated with the place.[[30]](#footnote-31) Further, it found that some biodiversity values could not be replaced within reasonable time frames, such as the loss of large old trees containing hollows.[[31]](#footnote-32)
4. **Relevance of exported emissions**: Previous cases had questioned whether the emissions from the burning of coal from the Project could be considered an impact under the *Environmental Protection Act 1994* (Qld). However, the Court considered that the definition of impact included indirect impacts and found that there is a logical and rational connection between the act of authorising a coal mine and the harm that would be caused by the emission of greenhouse gases once the coal is burned.[[32]](#footnote-33) Accordingly the court found exported emissions to be a relevant factor to consider under the EP Act.[[33]](#footnote-34)
5. **The Court as an institution in the Earth System**: The Court accepted expert evidence from the climate scientists about the Earth System to explain the causes and impacts of climate change. Earth System is defined as the suite of interlinked physical, chemical, biological and human processes that cycle (transport and transform) materials and energy in complex, dynamic ways within the system.[[34]](#footnote-35) Within that Earth System, the Court is part of the ‘anthroposphere’ as an institution within a decision making framework that can determine whether or not an activity that will emit greenhouse gases can proceed.[[35]](#footnote-36) This is an important conceptual step by the science in demonstrating the consequences of institutional decisions on the climate.
6. **Perfect substitution**: As in previous cases,[[36]](#footnote-37) the miner argued that, as the global demand for coal would be unchanged by approval of the Project, the Project coal would displace (or ‘perfectly substitute’) the same amount of lower quality coal in the market resulting in less emissions, thereby helping to ameliorate climate change impacts.[[37]](#footnote-38) The Court rejected that argument upon the following finding:
   1. Coal fired power stations are designed to burn coal of a consistent quality[[38]](#footnote-39) so it is likely that any substitution would be by coal of a similar quality, and would therefore not result in a substitution of ‘high quality’ coal for brown coal and there would be no material reduction in emissions if the Project is approved.[[39]](#footnote-40)
   2. While it was not necessary to decide the point, the Court considered there is merit in the argument that its task is to consider the impacts of the Project if approved, rather than the impacts if it is refused, which results in a logical flaw in the perfect substitution argument.[[40]](#footnote-41)
   3. On the evidence, the Court accepted that:
      1. global demand for coal is falling and renewable energy will become more available and, with the development of energy storage, will be a suitable replacement for the Project coal;[[41]](#footnote-42)
      2. considering the woeful track record of carbon capture and storage, which is only operational in one of the 8,500 operating power stations, little weight could be placed on it in predicting future coal demand or emission;[[42]](#footnote-43)
      3. there is already enough coal supply to exceed the Paris Agreement goal of 1.5C;[[43]](#footnote-44)
      4. the current nationally determined contributions under the Paris Agreement are not yet sufficient to reach the stated temperature goals;[[44]](#footnote-45)
      5. achieving the aims of the Paris Agreement would require further falls in global coal consumption;[[45]](#footnote-46)
      6. further improvement in global policy settings to constrain emissions is likely;[[46]](#footnote-47)
      7. of the parties, only Waratah proposed to predict the future demand for coal using a proprietary model from Wood Mackenzie[[47]](#footnote-48) but, as Wood Mackenzie had consistently downgraded its coal demand projections over time, the Court had little confidence in the reliability of Wood Mackenzie predictions.[[48]](#footnote-49) Rather, the court found that Wood Mackenzie predictions were just another scenario about a potential future,[[49]](#footnote-50)
      8. considering the Wood Mackenzie scenarios together with those of the International Energy Agency and the Intergovernmental Panel on Climate Change, the court found that the future scenarios which included sufficient demand for coal to sustain the viability of the Project were scenarios where the world exceeded the temperature goals of the Paris Agreement.[[50]](#footnote-51) In other words, a possible future where the world achieved the stated aims of the Paris Agreement is one in which there is not sufficient demand for the Project to be viable.
      9. Considering the detailed assessment of numerous variables which would be required to determine the precise degree of any market substitution, the Court could not make a finding on substitution with any certainty on the evidence before it[[51]](#footnote-52) expect that some substitution is possible but perfect substitution is not likely. [[52]](#footnote-53)

Accordingly, the Court rejected the argument that approval of the Project would make no difference to emissions, and instead had regard to the Project’s material contribution to the impacts of climate change in Queensland.[[53]](#footnote-54)

1. **Social costs of carbon**: The court considered the range of estimates available for social costs of greenhouse gas emissions and considered the lowest value that could be justified in the Cost Benefit Analysis was $120/tonne that was likely an underestimate of the actual costs of greenhouse gas emissions.[[54]](#footnote-55)
2. **Discount rate** **and future generations**: The active parties agreed that the adverse impacts of climate change will disproportionately affect children who are living now and are born in future, at an ever-increasing level into the future.[[55]](#footnote-56) The economist for Waratah accepted that when trying to apply equity between generations there is a good case not to discount the harm caused by greenhouse gas emissions.[[56]](#footnote-57) Thus the Court found than economic assessment which discounts greenhouse gas impact on future generations must be approached with some circumspection when considering intergenerational equity.[[57]](#footnote-58)
3. **Population apportionment of climate impacts:** The economist for Waratah divided the global costs of greenhouse gas emissions form the project by Queensland’s share of the global population, an approach he described as ‘dubious’ and ‘questionable’ when engaged by government.[[58]](#footnote-59) The Court found that this approach might make sense within the confines of the Cost Benefit Analysis methodology, but it did not relieve it from deciding how the full weight of greenhouse gas emission impacts weighs in the balance in making a decision.[[59]](#footnote-60)
4. **Viability is separable from financial capacity/capability:** Waratah objected to evidence that the mine would become unviable in its lifetime on the basis that the objectors had abandoned grounds related to the financial and technical capability of the applicant. The Court found that financial viability could be raised as it also related to whether the resource would be utilised and whether the full economic benefits would be realised.[[60]](#footnote-61)
5. **Human rights**: Consistent with its earlier decision that it was bound by the *Human Rights Act 2019*,[[61]](#footnote-62) the Court found that it could take human rights into account as a matter relevant to the public interest. The Court found that five human rights were engaged by the impacts of the Project: the right to life, cultural rights, right to equality, rights of children and rights to property and privacy. These were engaged by the impacts on Queensland through climate change, and for property and privacy rights, the local impacts on the Bimblebox Nature Refuge. Waratah contended for an interpretation of ‘limit’ founded in causation tests. The Court rejected that construction, noting that its role is administrative and ‘forward looking’ as to whether the impacts of an action (direct and indirect) should be allowed, rather than being about attributing liability.[[62]](#footnote-63) The Court accepted that combustion emissions are sufficiently connected to the applications as to constitute a limit to human rights,[[63]](#footnote-64) and found that the limitations of those rights by the Project were not reasonably and demonstrably justified in a fair and democratic society. The Court found that there was a clear and pressing threat to the right to life that is now experienced by people in Queensland and would only be exacerbated by increasing emissions to which the Project would make a material contribution.[[64]](#footnote-65) In respect of cultural rights under s 28, the Court:
   1. considered the importance of the rights against the backdrop of systematic dispossession and destruction of culture;[[65]](#footnote-66)
   2. acknowledged the First Nations witnesses’ active commitment to and participation in caring for country, and the significance of that to the protection afforded by s 28(2)(e);[[66]](#footnote-67) and
   3. concluded that the evidence demonstrates climate change will have a profound impact on cultural rights, including risking the survival of culture.[[67]](#footnote-68)

Conclusion

Like the *Rocky Hill[[68]](#footnote-69)* decision before it, the Bimblebox case will become a reference point for climate litigation in Australia and globally.

More importantly, the case protects the natural values of the Bimblebox Nature Refuge, and the rights of those who care for it, in perpetuity. It is also the first time the Land Court has considered the impacts of climate change on culture and Country as weighing against approval of a coal project. This represents another step towards ensuring that the voices of First Nations peoples are heard and respected in matters that affect their Country, their connection to that Country, and their culture.

1. *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 at p42. [↑](#footnote-ref-2)
2. At [649]. [↑](#footnote-ref-3)
3. *Mineral Resources Act 1989 (Qld),* s8. [↑](#footnote-ref-4)
4. *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33. [↑](#footnote-ref-5)
5. *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* *(No 5)* [2022] QLC 4. [↑](#footnote-ref-6)
6. At [1882]. [↑](#footnote-ref-7)
7. At [1799]-[1801], see also [1655]. [↑](#footnote-ref-8)
8. At [1882]. [↑](#footnote-ref-9)
9. At [567]-[569]. [↑](#footnote-ref-10)
10. At [273]. [↑](#footnote-ref-11)
11. At [344]. [↑](#footnote-ref-12)
12. At [357]. [↑](#footnote-ref-13)
13. At [302], [439], [443] and [1855]. [↑](#footnote-ref-14)
14. At [1409] and [1793]. [↑](#footnote-ref-15)
15. At [1513]. [↑](#footnote-ref-16)
16. At [1603]. [↑](#footnote-ref-17)
17. At [1177], [1287] and [1786] [↑](#footnote-ref-18)
18. At [1799]-[1801]. [↑](#footnote-ref-19)
19. At [45]. [↑](#footnote-ref-20)
20. At [1567]. [↑](#footnote-ref-21)
21. At [1371] see also [26] and [668]. [↑](#footnote-ref-22)
22. At [713] see also the submission to the same effect recorded at [1307]. [↑](#footnote-ref-23)
23. At [177]-[193]. [↑](#footnote-ref-24)
24. See [350]-[351], [405], [545]-[552], [1853] and [1866]. [↑](#footnote-ref-25)
25. At [554]-[561]. [↑](#footnote-ref-26)
26. At [459]-[471]. [↑](#footnote-ref-27)
27. At [454]. [↑](#footnote-ref-28)
28. At [517]-[520]. [↑](#footnote-ref-29)
29. At [561], [564]-[565]. [↑](#footnote-ref-30)
30. At [569]. [↑](#footnote-ref-31)
31. At [569]. [↑](#footnote-ref-32)
32. At [1352]. [↑](#footnote-ref-33)
33. At [717]. [↑](#footnote-ref-34)
34. At [595]. [↑](#footnote-ref-35)
35. At [596]. [↑](#footnote-ref-36)
36. See [785]-[786]. [↑](#footnote-ref-37)
37. At [784] and [954]. [↑](#footnote-ref-38)
38. At [962] and [986]. [↑](#footnote-ref-39)
39. At [1006], [1010]. [↑](#footnote-ref-40)
40. At [787]-[790] with reference to *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257 at [545], *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216 at [81], *Minister for Environment v Sharma* (2022) 400 ALR 203 at [285]. See also Bell-James and Ryan (2016), *Climate Change Litigation in Queensland: a case study in incrementalism*, 33(6) EPLJ 515-537. [↑](#footnote-ref-41)
41. At [865]-[867], [883]. [↑](#footnote-ref-42)
42. At [905]-[921]. [↑](#footnote-ref-43)
43. At [860]. [↑](#footnote-ref-44)
44. At [866]. [↑](#footnote-ref-45)
45. At [866]. [↑](#footnote-ref-46)
46. At [873] and [880]. [↑](#footnote-ref-47)
47. At [847]-[849]. [↑](#footnote-ref-48)
48. At [854], [923]. [↑](#footnote-ref-49)
49. At [855]. [↑](#footnote-ref-50)
50. At [859], [939]. [952]-[953]. [↑](#footnote-ref-51)
51. At [992]. [↑](#footnote-ref-52)
52. At [1005]. [↑](#footnote-ref-53)
53. At [1409], [1489] and [1616]. [↑](#footnote-ref-54)
54. At [1212]. [↑](#footnote-ref-55)
55. At [1589]. [↑](#footnote-ref-56)
56. At [1220]. [↑](#footnote-ref-57)
57. At [1223]. [↑](#footnote-ref-58)
58. At [1227] [↑](#footnote-ref-59)
59. At [1239] [↑](#footnote-ref-60)
60. See [34], [64], [814], [1734] ,[1747]-[1756] and [1802]. [↑](#footnote-ref-61)
61. *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33. [↑](#footnote-ref-62)
62. At [1320]-[1329]. [↑](#footnote-ref-63)
63. At [1346] and [1352]. [↑](#footnote-ref-64)
64. *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (n 1) [1505]. [↑](#footnote-ref-65)
65. At [1537]. [↑](#footnote-ref-66)
66. At [1557]. [↑](#footnote-ref-67)
67. At [1565]. [↑](#footnote-ref-68)
68. *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7. [↑](#footnote-ref-69)