LAND COURT OF QUEENSLAND

CITATION:	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33
PARTIES:	**Waratah Coal Pty Ltd** (applicant) v **Youth Verdict Ltd, The Bimblebox Alliance Inc, Lance and Colleen Sypher, 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 (ML70454) EPA051-20 (EPML00571313)
PROCEEDING:	Application to strike-out objections and for declarations
DELIVERED ON:	Orders made 28 August 2020 to take effect when reasons delivered Reasons delivered 4 September 2020
DELIVERED AT:	Brisbane
HEARD ON:	7 August 2020
HEARD AT:	Brisbane
PRESIDENT:	FY Kingham
ORDERS:	**1. I dismiss the application filed by Waratah Coal Pty Ltd on 3 July 2020 for the orders sought in paragraphs 1.1, 2 and 3 of its Further Amended Annexure A to that application.** **2. Waratah Coal Pty Ltd must pay Youth Verdict Ltd's and The Bimblebox Alliance Inc's costs of the application, unless it files and serves written submissions seeking a different costs order, within 14 days.**

3. **If Waratah Coal Pty Ltd files and serves submissions in accordance with order 2, Youth Verdict Ltd and The Bimblebox Alliance Inc may file and serve written submissions in response within 14 days and costs will be determined on the papers.**

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – COURTS OR TRIBUNALS EXERCISING JURISDICTION IN MINING MATTERS – where the applicant applied to strike-out objections under the *Mineral Resources Act 1989* to the extent they rely upon the *Human Rights Act 2019* or to obtain a declaration that the Court does not have jurisdiction to consider those objections under that Act or the *Environmental Protection Act 1994* – whether the Land Court's recommendation on an application for a mining lease or its objection decision on an application for an environmental authority is an 'act' or a 'decision' – whether the Court has jurisdiction to consider objections based on the *Human Rights Act 2019* – whether the Court can consider objections based on the *Human Rights Act 2019* in the absence of a claimed relief or remedy – whether the objectors have standing under the *Human Rights Act 2019* – where the Court found that the objections are not beyond the jurisdiction of the Court to the extent they rely upon the *Human Rights Act 2019* - where the Court did not strike out the objections under the *Mineral Resources Act 1989* and did not declare the objections were beyond the jurisdiction of the Court in exercising its functions under the *Mineral Resources Act 1989* and the *Environmental Protection Act 1994*

HUMAN RIGHTS – JURISDICTION AND PROCEDURE – QUEENSLAND – whether the Court, in making its recommendations on applications made under s 245 of the *Mineral Resources Act 1989* and s 153 of the *Environmental Protection Act 1994* (as at 14 March 2013), is acting or making a decision in terms of s 58(1) of the *Human Rights Act 2019* – whether objections to such applications raising human rights issues are precluded by s 59 of the *Human Rights Act 2019* – where the Court found making a recommendation was an act or making a decision within the meaning of s 58(1) – where the Court found s 59 did not preclude objections raising human rights issues

Acts Interpretation Act 1954 s 14A(1)
Environmental Protection Act 1994 (as at 14 March 2013) s 219, s 220(2), s 222, s 223, s 225
Human Rights Act 2019 s 3(b), s 3(c), s 4(b), s 9(1), s 10(1)(a), s 15, s 16, s 24, s 25(a), s 26(2), s 28, s 58(6), s 59
Land Court Act 2000 s 4(1), s 5(1), s 12A(1)(a)

Mineral Resources Act 1989 s 265, s 267A(1), s 267, s 268, s 269, s 271, s 271A
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, considered
Bare v IBAC (2015) 48 VR 129; [2015] VSCA 197, applied
BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors [2015] QSC 107, applied
Castles v Secretary to the Department of Justice [2010] VSC 310, applied
Certain Children v Minister for Families and Children (No 2) (2017) 52 VR 441; [2017] VSC 251, applied
Director-General of Social Services v Chaney [1980] FCA 87, applied
Director of Housing v Sudi (2011) 33 VR 559; [2011] VSCA 266, considered
Dunn v Burtenshaw (2010) 31 QLCR 156; [2010] QLAC 5, considered
Hot Holdings v Creasy (1996) 185 CLR 149; [1996] HCA 44, considered
Kerrison v Melbourne City Council (2014) 314 ALR 241; [2014] FCAFC 130, considered
New Acland Coal Pty Ltd v Smith & Ors [2018] QSC 88, considered
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors [2019] QCA 184, considered
The Honourable Justice Vince Bruce v The Honourable Terence Cole and Ors (1998) 45 NSWLR 163; [1998] NSWSC 260, considered
Wall v Windridge [1999] 1 Qd R 329, [1997] QCA 408, considered

APPEARANCES: P Ambrose QC with J O'Connor, T Jackson (instructed by DWF Australia) for the applicant
E Nekvapil with K McAuliffe-Lake (instructed by the Environmental Defenders Office) for Youth Verdict Ltd and The Bimblebox Alliance Inc
T Marland (solicitor), Marland Law, for Lance and Colleen Sypher
D Harris (solicitor), Donnie Harris Law, for Scott and Julie Ann Brown
Dmitri Sharov, active objector (self-represented)
John and Susan Brinnand, active objector (self-represented)
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 develop a thermal coal mine in the Galilee Basin. Youth Verdict Ltd and The Bimblebox Alliance Inc, amongst others, have objected to the applications. The applications and the objections to them have been referred to this Court for hearing.

The Court's function is to make a recommendation on each application to the ultimate administrative decision maker.

[2] Youth Verdict and Bimblebox Alliance's grounds of objection include that to grant the applications would not be compatible with various human rights[1] and, therefore, unlawful under s 58(1) of the *Human Rights Act 2019*.

[3] Waratah seeks to either strike out any objections that rely upon the HR Act or obtain a declaration that the Court does not have jurisdiction to consider those objections. The Court has power under the *Mineral Resources Act 1989* to strike out objections to an application for a mining lease as beyond the Court's jurisdiction.[2] For the objection to the application for an environmental authority, there is no equivalent provision in the applicable version of the *Environmental Protection Act 1994*.[3] In its amended application, Waratah asks the Court to use its declaratory power[4] to declare the objections are beyond the Court's jurisdiction, to the extent they rely on the HR Act.

[4] On 28 August 2020, I announced my orders on the application, to take effect upon publication of my reasons. These are the reasons for those orders.

[5] On the hearing of its application, Waratah framed its submissions around four propositions, each of which is in contest. I have used them to frame my reasons:

1. The Land Court's recommendation on an application for a mining lease or an environmental authority is not an 'act' or a 'decision' as those terms are used in s 58(1) of the HR Act.
2. It is beyond the Court's jurisdiction to consider objections based on the HR Act.
3. The Court cannot consider HR Act objections in the absence of a claimed right or remedy under s 59 of the HR Act.
4. The Objectors do not have standing to make such a claim under s 59 because they are corporate entities and only individuals possess human rights.

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1 *Human Rights Act 2019* 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).

2 MRA s 267A(1)(a).

3 EPA as at 14 March 2013. Unless stated, all further references to the EPA are to the Act as at 14 March 2013.

4 LCA s 12A(1)(a).

Does the Land Court act or make a decision, within the meaning of s 58(1) of the HR Act?

[6] To answer that question the Court must consider whether its function in this case falls within the scope of s 58(1), properly interpreted.

What is the Court's function in this case?

[7] Waratah's applications under the MRA and the EPA have been referred to this Court because there are objections to the Minister for Natural Resources Mines and Energy granting the mining lease,[5] and to the Chief Executive of the statutory party issuing an environmental authority in the terms of the draft environmental authority.[6]

[8] But for the objections, the Court would have no function in relation to the applications.

[9] Where there are objections to both types of applications, the Court is required to conduct the hearings together.[7] The Court's function is to hear the applications and the objections to them and, considering statutory criteria, make a recommendation to the ultimate decision maker on each application.[8]

[10] For the application for the mining lease, the Court must make a recommendation to the Minister. It may recommend the application be granted or rejected in whole or in part, or that the application be granted subject to stated conditions.[9]

[11] For the application for the environmental authority, the Court must make an objections decision directed to the Chief Executive of the statutory party. It may recommend the application be granted on the basis of the draft environmental authority; the application be granted, but on different conditions; or the application be refused.[10]

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5 MRA s 265.
6 EPA s 219. The Chief Executive of the statutory party is the language used by the current EPA (EPA s 190, Sch 4 – definition of administering authority). This term will be used from here on in.
7 MRA s 265(9); EPA s 220(2).
8 MRA ss 268, 269; EPA ss 222, 223.
9 MRA s 269(2) and s 269(3).
10 EPA s 222(1).

[12] The Court's recommendation on the mining lease and its objections decision on the environmental authority are not finally determinative of the respective application. That does not mean they have no effect.

[13] The Court's process plainly has the capacity to affect, in a practical sense, the rights and interests of the parties.[11] Its legal consequence is recognised by the fact that the Court's recommendation under either Act is amenable to judicial review under both the *Judicial Review Act 1991*[12] and at common law.

[14] Further, the Court's recommendation on a mining lease is a pre-condition to the application proceeding and the Minister must take it into account in deciding the application.[13] The only circumstance in which the Minister may proceed without a recommendation from the Court is if the Minister decides to refuse the application for non-compliance with a requirement for the application or because the Minister considers it is not in the public interest to grant the lease.[14]

[15] Similarly, the Court's objections decision triggers a requirement for the Chief Executive of the statutory party to make a final decision on the application for an environmental authority, having regard to the objections decision.[15]

[16] Although they do not finally dispose of the applications, each of the Court's recommendations under the MRA and the EPA has both practical and legal consequences.

What is the scope of s 58(1)?

[17] The objectors rely on s 58(1) of the HR Act, 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.

[18] Waratah accepts the Court is a public entity when fulfilling its function under either the MRA or the EPA for these applications.

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11 *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 [97].
12 Ibid [6].
13 MRA ss 271, 271A.
14 Ibid s 267.
15 EPA s 225.

[19] That concession is well made. The Court is a specialised judicial tribunal, established under the *Land Court Act 2000*.[16] In conducting this hearing the Court is performing functions conferred on it by the MRA and the EPA.[17] In doing so, it is a public entity under the HR Act[18] provided it is acting in an administrative capacity.[19] The parties agree, and it is well established, that the Court's function is administrative, for both types of application.[20]

[20] Section 58(1) is subject to stated exceptions in s 58 (2)-(4). It is common ground those exceptions do not apply.

[21] The HR Act is modelled on the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[21] In those circumstances, it is legitimate and instructive to have regard to the text of the Victorian Charter, and relevant jurisprudence about it, paying due regard to any differences in the text of the two Acts.

[22] The analogous provision in the Victorian Charter is s 38(1) which provides:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

[23] There is a material distinction between s 38(1) of the Victorian Charter and s 58(1) of the HR Act.

[24] The Victorian Charter creates separate and cumulative obligations: not to act in a way that is incompatible with a human right (substantive) or in making a decision, not to fail to give proper consideration to a relevant human right (procedural).[22] As explained by Dixon J in *Certain Children*:[23]

> "The substantive obligation requires public authorities in acting, failing to act, or proposing to act, not to limit human rights unless that limitation is a

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16 LCA s 4(1).
17 LCA s 5(1); HRA s 10(1)(a).
18 HRA s 9(1)(f).
19 Ibid s 9(4)(b).
20 *Dunn v Burtenshaw* (2010) 31 QLCR 156 [46]; [2010] QLAC 5; *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 [34]; *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 [6].
21 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No. 26, February 2019); Queensland, *Parliamentary Debates*, 32 October 2018, 3184 (Hon. YM D'Ath) stated that the Bill was consistent with the government's "commitment to the introduction of a human rights act for Queensland based on the Victorian Charter of Human Rights and Responsibilities Act 2006"; Explanatory Notes, *Human Rights Bill 2018* (Qld).
22 *Bare v IBAC* (2015) 48 VR 129 [245]; [2015] VSCA 197; *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; [2017] VSC 251.
23 *Certain Children (by their Litigation Guardian Sister Marie Brigid Arthur) v Minister for Families and Children (No 2)* (2017) 52 VR 441; [2017] VSC 251.

> reasonable limit that is demonstrably justified in a free and democratic society based on human dignity, equality and freedom. The procedural obligation is a duty on public authorities as decision-makers to give proper consideration to relevant human rights. The procedural and substantive limbs of s 38(1) of the Charter are cumulative. That is, in making a decision, a public authority must both give proper consideration to engaged human rights and reach an outcome that is, in substance, compatible with those rights."[24]

[25] Under s 58(1)(a) the substantive limb applies to both an 'act and making a decision'. Under s 58(1)(b) the procedural limb applies 'in making a decision'.

[26] Waratah says that, in conducting the hearing, the Court acts. However, it draws a distinction between the conduct of the hearing and the making of a recommendation. Waratah submits, and I accept, the objections are directed to the Court's recommendations, not to the conduct of the hearing.

[27] On Waratah's submission, making a recommendation is not an 'act' under s 58(1) nor is it making a 'decision'. Both the objectors and the statutory party say that making a recommendation is an 'act', although the objectors say the phrase 'make a decision' is the more apt description of the activity and that is the focus of their submissions.

[28] For that reason, it makes sense to first consider whether the Court will make a decision when it makes its recommendation on the application for a mining lease and when it makes its objections decision on the application for an environmental authority. I will turn to that question now.

Make a decision

[29] The phrase 'to make a decision' means "to decide; to come to a judgement, conclusion, or resolution".[25] On its ordinary meaning, the phrase is broad enough to encompass the Court's decision about what recommendation to make. Waratah proposes a more restricted construction for 'decision'. It refers to Mason CJ's interpretation of the word when used in s 3(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In *Australian Broadcasting Tribunal v Bond,*[26] his

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24 Ibid [177].
25 *Oxford English Dictionary* (online at 26 August 2020) 'decision, n.' (def 1).
26 (1990) 170 CLR 321; [1990] HCA 33.

Honour construed it to mean "final, or operative and determinative" and not "merely a step taken in the course of reasoning on the way to the making of the decision".[27]

[30] Waratah urges the Court apply that meaning to s 58(1).

[31] There is some support for that interpretation. In *Dunn v Burtensha*w *& Anor*,[28] the Land Appeal Court interpreted the word 'decision' that way, when used in s 64 of the LCA. The Land Appeal Court found:

> "[46] …the resultant recommendation is in no way finally determinative of the issue of the grant of a mining lease and, indeed, any objector dissatisfied with the recommendation would still retain an entitlement to agitate with the Minister the terms of the recommendation.
> [47] … the recommendation of the learned Land Court member below is not a "decision" of the sort contemplated by s 64 of the LCA insofar as it is not a proceeding but rather an administrative step consequent upon a statutorily prescribed inquiry conducted by the learned Land Court member".

[32] However, as Deane J observed in *Director-General of Social Services v Chaney*,[29] "the word 'decision' is a word of indeterminate meaning" and must be interpreted in context.[30]

[33] Chief Justice Mason approved that observation in *Bond*:

> "The word [decision] has a variety of potential meanings. As Deane J. noted in *Director-General of Social Services v Chaney* … in the context of judicial or administrative proceedings it ordinarily refers to an announced or published ruling or adjudication. In such a context, the word may signify a determination of any question of substance or procedure or, more narrowly, a determination effectively resolving an actual substantive issue. Even if it has that more limited meaning, the word can refer to a determination final or intermediate or, more narrowly again, a determination which effectively disposes of the matter in hand: see Chaney".[31] (references omitted)

[34] In interpreting 'decision' in s 3(1) of the ADJR Act, Mason CJ examined textual and contextual factors before asking whether policy considerations called for "an answer different from that dictated by the textual and contextual considerations".[32] Senior Counsel for Waratah said the Court should apply the same method in interpreting 'decision' in the context of s 58(1) of the HR Act .[33]

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27 Ibid [30], [32].
28 (2010) 31 QLCR 156; [2010] QLAC 5.
29 [1980] FCA 87.
30 Ibid.
31 (1990) 170 CLR 321; [1990] HCA 33 [27].
32 Ibid [32].
33 T 1-11, lines 7 to 27.

[35] The importance of context is illustrated by *Dunn v Burtenshaw.*[34] The context for interpreting 'decision' in that case was whether the parties to a hearing on a mining lease application were parties to a 'proceeding' with a consequent right of appeal pursuant to the LCA. The administrative and recommendatory nature of the Court's function for a mining lease application distinguished it from a 'proceeding'. That was the basis upon which the Land Appeal Court reasoned the recommendation was not the type of decision contemplated by a section conferring appeal rights.[35]

[36] An example of a broader construction in a different context is provided by *Bruce v Cole,*[36] in which the NSW Court of Appeal interpreted the word 'decision' when used in the *Judicial Officers Act 1986* (NSW) to encompass "all forms of deliberative process … including the formation of an opinion".[37]

[37] Both of those cases, and the case of *Bond*, demonstrate the importance of interpreting the phrase 'make a decision' "by reference to the text, scope and purpose of the statute itself".[38]

[38] Turning to the text of the HR Act, it contains no definition of either the word 'decision' or the phrase 'make a decision'. Further, s 58 contains no textual indications that might qualify the type of decision to which the section applies. It does not use the term 'final decision'. The word 'decision' does not appear in a composite phrase that qualifies its meaning. The section does not include examples that might limit, by implication, the meaning of the word. There are no other provisions which extend to, or exclude from, the word 'decision' or the phrase 'make a decision', matters that might otherwise be encompassed by the ordinary meaning of the word or phrase.

[39] In short, the textual context does not suggest it is necessary or appropriate to read down the ordinary meaning of the words.

[40] That is a significant difference between s 58(1) and s 3(1) of the ADJR Act, the provision interpreted in *Bond*, the case on which Waratah relies.

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34 (2010) 31 QLCR 156 [46]; [2010] QLAC 5.
35 Ibid [47].
36 *The Honourable Justice Vince Bruce v The Honourable Terence Cole and Ors* (1998) 45 NSWLR 163; [1998] NSWSC 260.
37 Ibid 171.
38 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; [1990] HCA 33 [28].

[41] In that case, Mason CJ identified a number of textual features of s 3 of the ADJR Act that favoured a narrow interpretation of 'decision'.[39] In s 3(1), the word 'decision' does appear in a composite phrase that qualifies the type of decision contemplated by the section (i.e. decision of an administrative character made under an enactment). The section does include examples of decisions which have the character or quality of finality. There are other provisions which either extend the term 'decision' to include, or qualify it to exclude, deliberative processes, such as reports and conduct preparatory to a final decision, that might otherwise fall within the ordinary meaning of the word.

[42] In contrast, the absence of textual indications of that nature in s 58 favours a less restrictive interpretation.

[43] As for contextual indications, a broad interpretation of 'make a decision' is consistent with the purpose of the HR Act.[40] The objects of the HR Act include to protect and promote human rights and to help build a culture in the Queensland public sector that respects and promotes human rights[41] by "requiring public entities to act and make decisions in a way compatible with human rights".[42] This evinces an intention, consistent with the interpretation given to the Victorian Charter, that "consideration of human rights is intended to become part of decision-making processes at all levels of government".[43]

[44] Waratah accepts the Court is a public entity for the purpose of hearing the applications and objections under the MRA and the EPA. It seems incongruent with the purpose of the HR Act to draw the distinction that Waratah does between the conduct of the hearing and the making of the recommendation, without a clear expression of that intent.

[45] Another contextual indication that supports a more generous interpretation than that given in *Bond* is the limited and prescribed consequences that attend unlawfulness of an act or decision under s 58(1). The act or decision is not invalid. Breaching s 58(1) is not an offence.[44] An unlawful act or decision under s 58(1) does not confer

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39 Ibid [30].
40 *Acts Interpretation Act 1954* s 14A(1).
41 HRA s 3(b) and s 3(c).
42 Ibid s 4(b).
43 *Castles v Secretary to the Department of Justice* [2010] VSC 310 [185].
44 HRA s 58(6).

a right or remedy on any person. Section 59 defines the circumstances in which a person may seek a remedy for unlawfulness under s 58. It requires the person to otherwise have a right to seek relief or remedy about the act or decision (the piggy-back provision).[45]

[46] As a matter of policy, the HR Act is intended to supplement other administrative law statutes in Queensland, including the *Judicial Review Act 1991*.[46] The Court's recommendation on a mining lease and its objections decision on an environmental authority are amenable to judicial review under that Act. It may be, as Waratah submits, that the lack of contention about the amenability of recommendations to review under that Act was informed by s 6 of the JR Act which provides:

> **6 Making of report or recommendation is making of a decision**
> If provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision.

[47] There is no equivalent provision in the HR Act that a recommendation is a 'decision' for the purposes of the Act. Waratah says this supports a narrow construction. However, that submission does not confirm with Mason CJ's reasoning in *Bond*. His Honour considered the presence in the ADJR Act of a provision which extends a definition, to something that might otherwise fall within the ordinary meaning of the word, was an indication that 'decision' should be narrowly interpreted. Applying that reasoning, it follows the absence of such provision would support a more expansive reading.

[48] Further, s 59, the piggyback provision, governs when relief or remedy may be sought for s 58 unlawfulness. Section 59(4)(a) provides:

> (4) This section does not affect a right a person has, other than under this Act, to seek any relief or remedy in relation to an act or decision of a public entity, including-
> (a) A right to seek judicial review under the *Judicial Review Act 1999* or the *Uniform Civil Proceedings Rules 1999*…

[49] The definition of decision in the JR Act cannot determine the meaning of decision in s 58(1) of the HR Act. However, the reference to the JR Act in s 59, when dealing with unlawfulness under s 58, tends to support an interpretation which is consistent as between ss 58 and 59 and, by reference, the JR Act.

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45 Ibid s 59.

46 Explanatory Notes, *Human Rights Bill 2018* (Qld), p 5.

[50] As to common law judicial review, recommendations of the type under consideration are amenable to prerogative writs. In *Hot Holdings v Creasy*,[47] the High Court held that:

> "[a] preliminary decision or recommendation, if it is one to which regard must be paid by the final decision-maker, will have the requisite legal effect upon rights to attract certiorari". [48]

[51] There, the High Court was examining a similar statutory scheme to the MRA involving a mining warden's recommendation on an application to a Minister. The High Court concluded:

> "…the Minister may not exercise the discretion to grant or refuse applications until the warden's recommendation and report, expressing as it must the warden's decision … is received and taken into account. The result of this statutory process is that … the warden's decision has a discernible legal effect upon the Minister's exercise of discretion".[49]

[52] In *Wall v Windridge,*[50] the Queensland Court of Appeal applied *Hot Holdings* to the exercise of power by a mining warden fulfilling the function under the MRA now conferred on this Court.

[53] Another consideration is the practical effect of interpreting s 58(1) as Waratah contends. There is no dispute the Minister and the Chief Executive of the statutory party are each subject to s 58 when they make their final decision on the relevant application. To avoid acting unlawfully, they must not act or make a decision that is not compatible with human rights, and in making their decision, they must properly consider relevant human rights. If the question of compatibility with human rights is beyond this Court's jurisdiction, the Minister and the Chief Executive of the statutory party will not have the benefit of a recommendation made after consideration of the engaged human rights. Both decision makers would likely have to develop some additional process to comply with s 58(1). Given the role the Court's recommendation plays in the decision making process for both applications, as a matter of policy, an interpretation that avoids that burden better achieves the purpose of the HR Act.

[54] For those reasons, I interpret 'make a decision' to include the Court's recommendation under the MRA and its objections decision under the EPA.

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47 (1996) 185 CLR 149; [1996] HCA 44.
48 Ibid 165.
49 Ibid 174.
50 [1999] 1 Qd R 329.

[55] I will now address whether making a recommendation falls within the meaning of 'act' in s 58(1).

Meaning of act

[56] The ordinary meaning of the verb 'act' is "[t]o perform actions, to do things".[51] There is a definition in the HR Act, which extends the ordinary meaning to include a failure to act and a proposal to act.[52]

[57] The objectors and the statutory party submit the Court acts when it makes the recommendation. Waratah submits the words 'act' and 'make a decision' have distinct and separate meanings. It says the word 'act' relates to the conduct of the public function, in this case, conducting the hearing. The recommendation is the outcome of the Court discharging the public function. It is not an act in itself.

[58] In support of that interpretation, it relies on the Full Federal Court decision of *Kerrison v Melbourne City Council*.[53] That case concerned s 38(1) of the Victorian Charter. The question was whether the Melbourne City Council passing subordinate legislation was an 'act' for the purpose of that section. The Full Federal Court decided it was not. It found the passing of the subordinate legislation was the outcome of the Melbourne City Council discharging a public function. It did not involve the making of a decision to take an 'action'.

[59] That decision may well reflect the legislative nature of the Council's public function under consideration. The Court observed that, subject to an argument not relevant here, and which it did not resolve, a public authority's conduct e.g. issuing a notice under subordinate legislation, could be considered an action for the purposes of s 38(1).[54]

[60] By analogy, in making a recommendation under the MRA or the EPA, the Court may 'act' for the purpose of s 58(1). The Court making a recommendation on an application bears a greater functional resemblance to a public authority issuing a notice than one enacting subordinate legislation.

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51 *Oxford English Dictionary* (online at 26 August 2020) 'act, v.' (def 2).
52 HRA Sch 1.
53 (2014) 314 ALR 241; [2014] FCAFC 130.
54 Ibid [200].

[61] In interpreting s 58(1) by reference to jurisprudence on the analogous provision in the Victorian Charter, it is necessary to bear in mind material, and, one must assume, deliberate differences in the language used in the HR Act. As already noted in these reasons, there is a material distinction between s 38(1) of the Victorian Charter and s 58(1) of the HR Act. In s 38(1) of the Victorian Charter, the substantive limb applies only to an 'act'. In s 58(1) of the HR Act the substantive limb applies to both an 'act' and 'making a decision'.

[62] Without the substantive/procedural distinction drawn between the obligations applying to an 'act' and when 'making a decision', there is a firmer foundation for the statutory party's submission that, under s 58(1), the Court's recommendation could be both an 'act' and a 'decision'.

[63] The objectors say the Court should not interpret 'act' and 'decision' so that its recommendations fall between the two stools. The appearance of the two words in a conjunctive phrase supports that submission.

[64] In the absence of textual or contextual factors that favour a restricted meaning and taking into account the policy considerations discussed when interpreting the word 'decision', I consider the ordinary meaning of the word applies. That is broad enough to capture the act of making a recommendation.

Does the Land Court have jurisdiction to consider HR Act issues in an objections hearing?

[65] In relation to this issue, senior counsel for Waratah referred me to [16] to [18] of their primary submissions.[55] Those paragraphs address the scope of a hearing under s 268 of the MRA and the matters the Court must consider under s 269(4) of that Act. Although he did not mention them, Waratah's submissions contained similar submissions at [27] to [29] about the relevant provisions of the EPA.

[66] The proposition stressed by Waratah in both sections of the submissions is not controversial. A hearing of an application and any objections to it under each of the MRA and the EPA is not an open-ended administrative enquiry. The scope of the hearing is confined by the relevant provisions of each Act and is directed to the activities that would be authorised by the mining lease or environmental authority.

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55 T1-14, lines 4 to 5.

[67] In *New Acland Coal Pty Ltd v Smith & Ors*,[56] Bowskill J made the following observations:

1. In relation to the hearing of an application for a mining lease and the objections to it:

> "There is no dispute that the decision of the first respondent is a decision to which the JR Act applies. Judicial review is the only available avenue for review of a decision of this kind, as it has been characterised as an exercise of the Land Court's administrative, rather than judicial function. The making of a recommendation under s 269 of the MRA has been described as "an administrative step consequent upon a statutorily prescribed inquiry conducted by the learned Land Court member", and not a decision in relation to a proceeding in the Land Court, from which an appeal lies to the Land Appeal Court. The same reasoning logically applies to the making of a recommendation under s 190 of the EPA".[57] (references omitted)

2. In relation to the hearing of an application for an environmental authority and the objections to it:

> "Importantly, what is referred to the Land Court is "the application", being the application (for an environmental authority) for a mining activity relating to a mining lease…The objections hearing is not an open-ended inquiry about matters concerning the environment or environmental values. It is an inquiry in relation to the merits of the application for a mining lease and objections to that application, and objections to the application for an environmental authority…for the purpose of the Land Court making a recommendation to the relevant decision-makers under the MRA and the EPA. The focus, under the EPA, as under the MRA, is upon the activities the putative holder of the mining lease will be entitled to carry out under the MRA or the mining lease, if it is granted".[58]

[68] Her Honour's decision on jurisdiction was affirmed by the Court of Appeal in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*.[59] President Sofronoff reasoned in the same way about the Court's jurisdiction in a hearing such as this one:

> "[110] It is fundamental that the *Mineral Resources Act*, including to the extent that it operates in tandem with the *Environmental Protection Act*, is concerned only with the significance of activities that are prohibited unless authorised by a mining lease or an environmental authority. It is axiomatic that the provisions of these Acts have nothing to say about any activities which are prohibited by other laws and which these Acts cannot authorise. That is why s 269(4)(i) uses the expression "operations to be carried on under the authority of the proposed mining lease" and why s 269(4)(j) refers back to that expression. Activities that are prohibited by other laws cannot be

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56 [2018] QSC 88.
57 Ibid [6].
58 Ibid [65].
59 [2019] QCA 184 [115].

> undertaken whether or not a lease is granted or an environmental authority is issued.
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> [111] For this reason, when considering a referral to it, the Land Court is also concerned only with those activities in which an applicant proposes to engage lawfully because they will be permitted under the proposed statutory instruments or, not being generally prohibited, will be freely undertaken as part of the mining activities that would be authorised".[60]

[69] In that case, the question was whether the Court had jurisdiction to 'fully consider' groundwater issues when the miner would be required to obtain a separate approval under the *Water Act 2000* to authorise interference with groundwater. The activities authorised by either the mining lease or the environmental authority, as the law stood in that case, did not include interfering with groundwater. To 'fully consider' groundwater issues on those applications was, then, beyond the Court's jurisdiction.

[70] The issue here is different. The objectors say that to grant the applications would be in breach of s 58(1) because it would not be compatible with specified human rights. The objection is directed to the impact on human rights of the activities that would be authorised by the mining lease and environmental authority.

[71] Waratah's argument the Court lacks jurisdiction appears to rest on the assertion made by senior counsel at the hearing that, without a specific provision in the MRA and the EPA, the Court cannot consider human rights issues when making its recommendation on the applications.[61]

[72] That submission overlooks s 108(1) of the HR Act which applies the HR Act to "all Acts and statutory instruments, whether passed or made before or after the commencement."

[73] Unlike the groundwater question dealt with in *New Acland Coal Pty Ltd v Smith & Ors*,[62] there is no distinct process that applies under the HR Act. Assuming s 58(1) does apply, it is directed to the administrative function being performed by the Court, not the proposed activities of the miner. In fulfilling its function under the MRA and the EPA, in deciding what recommendations to make on the applications, the Court is subject to the substantive and procedural requirements imposed on the Court as a public entity.

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60 Ibid [110]-[111].
61 T 1-14, lines 7 to 9.
62 [2018] QSC 88.

[74] The substantive requirement is not to act or make a decision that is not compatible with human rights. The procedural requirement is to give proper consideration to a human right relevant to the decision. The HR Act gives guidance about what is meant by 'proper consideration':

> 58(5) For subsection 1(b), giving proper consideration to a human right in making a decision includes, but is not limited to -
> (a) identifying the human rights that may be affected by the decision; and
> (b) considering whether the decision would be compatible with human rights.

[75] The procedural limb in s 38(1) of the Victorian Charter has been held to require the decision maker to:

> (1) "understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision;
> (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person;
> (3) identify the countervailing interests or obligations; and
> (4) balance competing private and public interests as part of the exercise of justification."[63]

[76] If s 58(1) applies, it does not matter whether an objector raises human rights based objections, the Court will be required to consider human rights in deciding what recommendation to make on the applications.

[77] I have found s 58(1) applies to the Court making a recommendation on the applications under the MRA and EPA. Provided that interpretation is correct, the Court necessarily has jurisdiction to consider human rights issues in making its recommendations.

Can the objectors rely on s 58 of the HR Act without seeking a relief or remedy under s 59 of the HR Act?

[78] Section 59 of the HR Act specifies the circumstances in which a person may seek relief or remedy for an act or decision which is unlawful pursuant to s 58(1):

> (1) Subsection (2) applies if a person may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful.
> (2) The person may seek the relief or remedy mentioned in subsection (1) on the ground of unlawfulness arising under section 58, even if the person may not be successful in

63 *Bare v IBAC* (2015) 48 VR 129 [288]; [2015] VSCA 197.

obtaining the relief or remedy on the ground mentioned in subsection (1).

(3) However, the person is not entitled to be awarded damages on the ground of unlawfulness arising under section 58.

(4) This section does not affect a right a person has, other than under this Act, to seek any relief or remedy in relation to an act or decision of a public entity, including—

a. a right to seek judicial review under the *Judicial Review Act 1991* or the *Uniform Civil Procedure Rules 1999*; and

b. a right to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or an exclusion of evidence.

(5) A person may seek relief or remedy on a ground of unlawfulness arising under section 58 only under this section.

(6) Nothing in this section affects a right a person may have to damages apart from the operation of this section.

[79] Waratah argues that unlawfulness under s 58 cannot not be raised absent a relief or remedy captured by s 59. In seeking to employ s 58(1) in the objections hearing, the objectors are circumventing the statutory prohibition in subsection 59(5) by contending that, because they do not seek a remedy, s 59 has no application. That, Waratah says, is the very situation Parliament sought to avoid by enacting s 59.

[80] The objectors say they do not rely on, and are not constrained by, s 59. While the Court has the power of the Supreme Court to 'grant any relief or remedy',[64] that applies to a 'proceeding' and not when the Court is performing a function under a recommendatory provision.[65]

[81] The objectors submit their objections raise, as grounds of objection to the applications under the MRA and EPA, that on the proper consideration of relevant human rights the grant of those applications would be not compatible with human rights, would therefore be unlawful, and the Court should recommend that neither application be granted.

[82] The objectors note that, as the Court has not yet made its recommendations on the applications, no claim for relief or remedy can be raised. There is no act or decision they can be relieved of or about which they can seek a remedy. Section 59 would be engaged if, after the Court makes its recommendations, the objectors seek relief or remedy on the ground the recommendations are unlawful acts or decisions under s

64 LCA s 7A(1).

65 Ibid s 52B(1); *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107.

58(1). That is, it would apply at the stage the objectors sought judicial review of the Court's recommendations.

[83] Waratah said the effect of the Court hearing these objections is that the Court would have to undertake an internal review of its decision in the course of making its recommendation. It argued this was contrary to s 59 and akin to undertaking a collateral review. In making that submission Waratah relied on the decision of the Victorian Court of Appeal in *Director of Housing v Sudi.*[66]

[84] That was an appeal from a decision of Bell J, then the President of VCAT. The Director of Housing applied to VCAT for a possession order for tenanted premises. Justice Bell relied on the Victorian Charter to conclude the Director's application was an act that was incompatible with human rights, and therefore invalid. The Court of Appeal found VCAT did not have review jurisdiction under the analogous provision of the Victorian Charter and it could not undertake what amounted to a collateral judicial review of the lawfulness of the tenancy application itself.

[85] The critical point of distinction is that, in this case, the Court is not being called on to review the validity of an act or decision made by another public entity. The Court is being invited to conclude that it should not recommend the grant of the applications because, to do so, would not be compatible with human rights and would therefore be unlawful.

[86] As already observed in these reasons, if s 58(1) applies, the Court is subject to the substantive and procedural limbs of s 58 (1). Borrowing the language of Dixon J in *Certain Children,*[67] in making its recommendations, the Court must give proper consideration to engaged human rights, and reach an outcome that is, in substance, compatible with those rights.

[87] I accept the objectors' submission that whether the grant of the relevant application would, on a proper consideration of relevant human rights, be not compatible with human rights, and therefore unlawful, is an issue that arises directly for the Court's consideration in the performance of its function. No issue of collateral review arises.[68]

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66 (2011) 33 VR 559; [2011] VSCA 266.
67 (2017) 52 VR 441; [2017] VSC 251.
68 *Director of Housing v Sudi* (2011) 33 VR 559 [152]–[153]; [2011] VSCA 266.

Do the objectors have standing as 'persons' capable of seeking 'relief or remedy' under s 59 of the HR Act?

[88] Finally, Waratah submits the objectors, as corporate entities, are not 'persons' as that word is used in s 59 and, therefore, are not capable of seeking relief or remedy for unlawfulness of an act or decision under the HR Act.

[89] I am not persuaded that is an issue I must or should address on the current application.

[90] Although the objectors contest Waratah's interpretation of s 59, they do not rely on that section in making their objections. If s 58(1) applies to the Court in its administrative function, there need be no mover to raise human rights issues, because that section requires the Court to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights.

[91] The question of the objectors' standing to seek relief or remedy pursuant to s 59 may well arise at another stage of these applications. If the Court makes positive recommendations, and if the objectors seek judicial review of those recommendations, their standing under s 59 of the HR Act seems likely to be in contest. It is appropriate for that question to be determined if and when it arises, and in the proper forum.

Conclusion

[92] I find the Court is subject to s 58(1) of the HR Act in fulfilling its function under the MRA and the EPA because it is a public entity for that purpose, and in making its recommendations on the applications, the Court will 'act or make a decision' within the meaning of that section.

[93] I am satisfied the Court has jurisdiction to entertain the objections the subject of this application because it is required to comply with the substantive and procedural limbs of s 58(1) when fulfilling its function.

[94] I find s 59 does not apply to the Court's hearing of the applications and the objections to them and that it does not preclude the objectors from making the contested objections.

[95] It is not appropriate to resolve the question of the objectors' standing pursuant to s 59.

[96] The necessary consequence of those finding is that the objections to Waratah's application for a mining lease should not be struck out as beyond the Court's jurisdiction. Nor should the Court make a declaration to that effect about the objections to Waratah's applications under either Act.

Orders:

1. **I dismiss the application filed by Waratah Coal Pty Ltd on 3 July 2020 for the orders sought in paragraphs 1.1, 2 and 3 of its Further Amended Annexure A to that application.**
2. **Waratah Coal Pty Ltd must pay Youth Verdict Ltd's and The Bimblebox Alliance Inc's costs of the application, unless it files and serves written submissions seeking a different costs order, within 14 days.**
3. **If Waratah Coal Pty Ltd files and serves submissions in accordance with order 2, Youth Verdict Ltd and The Bimblebox Alliance Inc may file and serve written submissions in response within 14 days and costs will be determined on the papers.**