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Mining Lease Objections Research

in partnership with Queensland Law Reform Commission

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Part 1 – Application and consideration of the *Human Rights Act 2019* (Qld) in Land Court of Queensland

Executive summary

We have identified seven Queensland Land Court cases that have considered the *Human Rights Act 2019* (Qld) ("*HRA*") in their recommendations to the Department of Environment, Science and Innovation regarding mining lease and associated environmental authority applications.

The human rights considered by the Land Court were:

- The right to recognition and equality before the law (s 15);
- The right to life (s 16);
- Property rights (s 24);
- The right to privacy (s 25);
- The right to protection of families and children (s 26); and
- The cultural rights of Aboriginal and Torres Strait Islander peoples (s 28).

When the Land Court conducts a mining objections hearing (under section 52A(d)(ii) and sch 2 of the *Land Court Act 2000*), they are acting in an administrative capacity and are considered a 'public entity' (subsection 9(4)(b)). Therefore, when the Land Court conducts a mining objections hearing, they are bound by the *HRA.* Section 58 of the *HRA* provides that public entities must act and make decisions compatible with human rights and give proper consideration to human rights.

The application of the *HRA* to the Land Court was confirmed in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)*.

Generally, with the exception of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)*, human rights objections were not actively brought up by objectors, but instead considered by the Court as a part of their statutory obligations under the *HRA*. However, these considerations often did not make any significant impact on the members' decisions. This is because the members weighed the human rights limitations against the prevailing economic benefits. Perhaps what distinguishes *Waratah (No 6)* is the fact that the objectors proactively raised the argument that climate change was an unjustifiable limitation on human rights. In particular, the Court considered the principle of intergenerational equity and the disproportionate impacts that approval of the mining lease and environmental authority would have on future generations and First Nations communities. On-Country evidence from First Nations witnesses was also a compelling and distinguishing factor.

Case law

Case name	*Cobbold George Tours Pty Ltd v Terry* [2024] QLC 7
URL	https://www.sclqld.org.au/caselaw/139594
Human rights provisions considered	Cultural rights – Aboriginal and Torres Strait Islander peoples (section 28); Conduct of public entities (section 58)
Facts	This case concerned objections to an application for a mining lease within the bed and banks of Agate Creek.
Human rights consideration	While there were no human rights-based objections made, the Member still considered them, pursuant to s 58. The human rights potentially affected by the matter were under s 28 of the HRA – cultural rights; "Aboriginal and Torres Strait Islander peoples must not be denied the right, with other members of their community, to enjoy, maintain, control, protect and develop their identity and cultural heritage." [72]. **Cultural rights - Aboriginal and Torres Strait Islander Peoples - s 28** A 2013 Federal Court determination held that the Ewamian people hold non-exclusive native title rights and interests over land and waters that included the proposed mining lot. As such, a Native Title Act 1993 (Cth) "right to negotiate process" was followed. The right to negotiate process had commenced, and the Applicant outlined the steps intended to be taken to ensure protection of areas of cultural significance and their intention to give appropriate compensation. Given the evidence provided, the Member was satisfied that the Applicant was aware of their role and responsibility in matters concerning native title and cultural heritage.
Recommendation	The Member considered that cultural rights were sufficiently protected under the *Native Title Act 1993* (Cth) and the *Aboriginal Cultural Heritage Act 2003* (Qld). Consequently, the Court recommended that the mining lease be granted.

Case name	*BHP Coal Pty Ltd & Ors v Chief Executive, Department of Environemnt, Science and Innovation* [2024] QLC 7
URL	https://www.sclqld.org.au/caselaw/146809
Human rights provisions considered	Recognition and equality before the law (section 15); Right to life (section 16); Property rights (section 24); Right to privacy and reputation (section 25); Protection of families and children (section 26); Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28); Conduct of public authorities (section 58)
Facts	This case considered an Environmental Authority ("EA") amendment application to extend mining activities out of an open-cut mine pit in Moranbah. BHP, along with other mining companies, were the applicants - collectively known as BMA. The Environment Council of Central Queensland (ECCQ) objected to the draft EA. The Department of Environment, Science, and Innovation (DESI; the statutory party), referred BMA's EA application to the Court for an objections decision. The Court was required to consider each matter under s 191 of the *Environmental Protection Act 1994* (Qld), as well as the evidence and submissions BMA and the statutory party provided to support their positions. Additionally, the various objections made by ECCQ were considered, as well as the implications of the *Human Rights Act 2019* (Qld) ("*HRA*").
Human rights consideration	In making an objections decision, the Court was acting in an administrative capacity and was therefore subject to s 58(1) of the *HRA*. In considering this, the Court followed the five-step approach articulated in the *Waratah Coal (No 2)* case: • Engagement – which rights? • Limitation – how might the rights be limited? • Justification – are the limitations justified? • Proper consideration – has the decision given proper consideration? • Inevitable infringement – does a statutory provision or law prescribe a different decision? First, sections **24** and **25** of the *HRA* were considered, relating to **property** and **privacy** rights. **Property rights - s 24** BMA owned the land underlying the proposal. Due to the possibility of dust, noise, and vibration at residences around the area, the right was engaged. The Member noted that the closest

	residential property was 2.2km away from the mining lease. No one from that residence had never complained about noise, dust, or vibration. The Member concluded that there was no evidence any person's property rights would be adversely affected. **Privacy rights - s 25** As for privacy rights, the Court recognised a potential for air quality, noise, vibration, and overpressure impacts to adversely affect Moranbah residents. The closest receptor was located 2.2km away from the mining lease, and this property was already being monitored by BMA for disturbance concerns. No residents of Moranbah had lodged objections against BMA. The Court was satisfied no property or privacy rights would be engaged. **Rights to life (s 16), protection of children (s 26), recognition and equality before the law (s 15)** The Court acknowledged s 58 of the *HRA*; that proper consideration must be given to human rights relevant to a decision. It recognised that the proposal to extend the pit would increase GHG emissions, albeit to a very small degree. Accordingly, s 16, s 26, and s 15 of the *HRA* were engaged. To assess these rights, the Court balanced the provisions against the importance of the proposal. Consideration was given to the substantial economic benefit the extension of BMA's operations would bring to local communities and the Queensland economy. The need for metallurgical coal, as well as its use in the production of steel - an essential requirement for the energy transition - was considered. The details of the cultural heritage survey, stakeholder consultation with traditional owners, and associated management and commitments made by BMA were considered. Any limitation on cultural heritage rights was found to be justified. Notably, Acting President Stilgoe distinguished this project from *Waratah Coal (No 6).* For one, while Waratah was a thermal coal mine, this project was a metallurgical coal mine, which is an integral component in the production of steel. Further, BHP Group outlined all the significant steps they were planning to take to keep their GHG emissions as low as possible. Perhaps most notably, this project was an extension of a pre-existing mine, and not an entirely new proposal. Therefore, this case makes evident that despite the breakthroughs made in *Waratah Coal (No 6)*, all future

	applications for the extraction of fossil fuel will not be automatically rejected.
Recommendation	As a result of these considerations, the Court was satisfied that any limitation of human rights was proportionate. It was highlighted that the Court's task is to balance competing needs and considerations between the environment and the economy. In this case, the balance favoured a recommendation to DESI that the draft EA be granted.

Case name	*Pickering v Pederson* [2023] QLC 12
URL	https://archive.sclqld.org.au/qjudgment/2023/QLC23-012.pdf
Human rights provisions considered	Cultural rights – Aboriginal and Torres Strait Islander peoples (section 28); Conduct of public authorities (section 58)
Facts	This case concerned two applications for mining claims near the Mitchell River, lodged by Mr Pickering. The respondents owned land on the Karma Waters Station, which straddled the River. The respondents objected to the granting of the mining claims, contesting that that the mining claim was in direct conflict with their tourist operations on the River. The mining would suspend a lot of sediment, discolouring the river, and impacting tourists' ability to camp and fish. Notably, the Karma Waters Station was the first place in Australia where a determination of native title was agreed between pastoralists and traditional owners. In respect of both mining claim applications, an Environmental Authority ("EA") had been issued. The Member considered compliance with Chapter 3 of the *Mineral Resources Act 1989* (Qld), concluding that all provisions were adhered to. The Member determined that all environmental impacts would be mitigated by the recommended EA, plus some extra conditions.
Human rights consideration	The Member confirmed that the *HRA* applies to recommendatory proceedings in the Land Court as determined in *Cement Australia v East End Mine Action Group.* While no human rights-based objections were made, the Member still considered them, pursuant to s 58. The potentially affected rights were cultural-based rights contained in s 28. **Cultural rights - Aboriginal and Torres Strait Islander Peoples - s 28** As the relevant area is subject to native title, the relevant Resource Authority Public Report indicated that a right to negotiate process is required where the State intends to grant a mining interest on the land. The Member considered that it is to be expected that the Department of Resources would ensure that the 'future act' requirements would be satisfied prior to the granting of the mining claim. The Member also determined that it was expected the Applicant was aware of their relevant duties of care under the *Aboriginal Cultural Heritage Act 2003* (Qld).

	With the above in mind, the Member was satisfied that because these processes were already in place, there was a level of protection afforded to the rights and interests of the impacted Aboriginal peoples and their cultural heritage. As such, the Member determined that the infringement of cultural rights was not inevitable under s 28. Consequently, there was no unjustifiable impact on human rights found.
Recommendation	The Member recommended the granting of the two mining claims subject to the EA and the additional conditions outlined.

Case name	*Hannigan and Associates Pty Ltd & Anor v Da Cunha & Anor* [2022] QLC 14
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2022/14/pdf-view
Human rights provisions considered	Property rights (section 24); Privacy and reputation (section 25); Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28); Conduct of public entities (section 58)
Facts	This case concerned an application for one of the mining lease applications related to an open cut mine proposed for Bowen Basin, and the objections to that application.
Human rights consideration	There were no objections under the *HRA,* and the Act had not come into force at the time the objections were lodged. However, the Court nonetheless was conscious of its obligations to not make decisions incompatible with human rights, as per s 58(1) *HRA.* The judgment also cites the similar conclusion arrived at in *Cement*. The Court considered factors from *Cement Australia Exploration Pty Ltd & Anor v East End Mine Action Group & Anor* in applying *s 58* of the *HRA* - [77], which were first identified in *Waratah*. These factors included engagement, and which rights the objector might seek to invoke. Secondly, limitation - and how it might be alleged that the rights are limited. Next justification: if the rights are limited, it must be asked whether the limitation is reasonable and demonstrably justifiable. Lastly, it must be confirmed that the decision has given proper consideration to the rights engaged, and whether a statutory provision or other law prescribes a different decision. After these factors were considered, a recommendation was made.
Recommendation	The Court determined that property rights (s 24(2)) were not infringed, as all affected landholders either reached agreements or were finalising compensation. The right to privacy (s 25(a)) was not infringed, as there would be no interference on private land because the remaining objectors did not own property overlapping with the mining lease. Finally, cultural rights (s 28) were not infringed as a cultural heritage management agreement had been reached. On balance, the Court recommended that the mining lease should be granted.

Case name	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2022/21
Human rights provisions considered	Meaning of compatible with human rights (section 8); Human rights may be limited (section 13); Recognition and equality before the law (section 15(2)); Right to life (section 16); Property rights (section 24); Right to privacy and reputation (section 25(a)); Protection of families and children (section 26(2)); Cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28); Conduct of public entities (section 58)
Facts	This case concerned an application by Waratah Coal Pty Ltd for a mining lease and environmental authority. The project would involve mining on several properties north of Alpha in Central Queensland, including Glen Innes, a protected area under the *Nature Conservation Act 1992* (Qld) known as the Bimblebox Nature Refuge (Bimblebox). Human rights arguments were raised by the objectors to the mine relating to climate change and impacts to Glen Innes. At the time of hearing, there were a total of 31 objections. These objections included that the projected greenhouse gas emissions from the proposed project would "unjustifiably limit the enjoyment of several human rights." There were two arguments raised: the "climate change" argument which related to greenhouse gas emissions, and the "Glen Innes" argument which related to proprietary/private interests impacted by the noise, dust, and subsidence from the mine.
Human rights consideration	**Climate Change Argument** With respect to the 'climate change' argument, the issue was whether the Court could consider the emissions from the combustion of the coal. The Court considered the following six human rights: the right to enjoy human rights without discrimination (s 15(2)), the right to life (s 16), property rights (s 24), privacy and reputation (s 25), protection of children (s 26), and the cultural rights of First Nations people (s 28). The right to enjoy human rights without discrimination - s 15(2)) The Court found that the impacts of climate change disproportionately affect present and future children, older people, people living in poverty, other disadvantaged people, and First Nations peoples. Furthermore, the burdens of increasing climate change will not be experienced equally. In this case, the disproportionate impact arises in multiple ways, falling more heavily on those who have vulnerabilities due to age, whether very young or old, or because of underlying health conditions.

	The right to life - s 16 The Court determined that the right to life was infringed. In particular, the Court was guided by four propositions. First, the right to life cannot be interpreted in a restrictive manner. Second, recognising the interconnectedness of humans with our physical environment. Third, the right to life can be violated by a life-threatening situation, without the loss of life occurring. Fourth, climate change constitutes a pressing and serious threat to the ability to enjoy the right to life. Considering these propositions, the Court considered that the project's contribution to climate change was not proportionate to the economic benefits. The limit on human rights extended beyond what was reasonably necessary to achieve the project's purpose. A clear and pressing threat to the right of life is experienced now and would only be exacerbated by increasing emissions. Therefore, the right to life weighed more heavily than the economic benefits. Property rights - s 24 Property rights were also infringed because of the loss or damage that would occur to property with the increased severity and frequency of weather events. The project would contribute to the *de facto* deprivation of property for at least thousands of Queenslanders. The Court also considered that increasing the risk to property will have economic consequences. When the human cost of *de facto* expropriation of property is added to the equation, the scales weigh in favour of preserving the right. Privacy and reputation rights - s 25 Privacy was infringed because climate change presents a real and serious risk to the homes of residents of the Torres Strait. Extreme heat is also expected to make parts of Queensland unliveable. The Court noted that the home is a 'sanctuary' in the Australian way of thinking, reflected in common expectations and practices. Here, the balance favoured preserving the right. The rights of children - s 26 This was considered in some depth. The Court observed that the importance of this right lies in the special vulnerabilities of children and their inability to control the decisions that affect them. The adverse impacts of climate change will disproportionately affect present and future children. Their learning, recreation and working conditions will become increasingly hostile with rising temperatures. The Court also considered that the principle of intergenerational equity places responsibility on today's decision-makers to make wise choices for future generations. In this case,

	the best interests of the future generations were not served by the project. The rights of First Nations peoples - s 28 Section 28 was a significant factor for the Court and was compelling due to the On-Country evidence provided by First Nations witnesses. The Court noted that the importance of cultural rights should be seen in the context of native title and the importance of protecting these rights to reframing the relationship between the government and First Nations peoples. The Court also placed weight on the fact that First Nations peoples are disproportionately affected by climate change. Additional factors also weighed the scale more firmly in favour of preserving these rights. In particular, the Torres Strait Island peoples face an existential risk from sea level rise, and First Nations peoples in the northern parts of Australia are already experiencing the effects of climate change. **'Glen Innes' Argument** The Court considered the noise, dust, and subsidence impacts of mining with respect to property (s 24) and privacy/reputation (s 25) rights. Property rights - s 24 The evidence about the subsidence, noise and dust impacts of mining established that there would be a significant restriction on the use or enjoyment of property. Furthermore, the evidence showing likely non-compliance with conditions and the uncertainty about the extent of residual serious harm on Bimblebox was found to be relevant. Significant impacts from the underground mining were also considered, especially as some of those impacts could not be remediated at all. Privacy and reputation rights - s 25 There was a dispute about whether the nature refuge could be a home for any person. However, the Court found that it could be because the landowners in question had devoted substantial time and effort to both care for and understand the natural environment of Bimblebox. They would be devastated if its ecological condition was damaged and the value of their years of labour and the long-term research was lost, which is enough to find a link that it is a 'home'. In balancing the economic benefits of the mine against the limitations on these two human rights, the Court found that the project and the evidence about its economic and other benefits is

	not cogent and persuasive in justifying the limit. The mine was unlikely to meet the operating conditions proposed to minimise nuisance impacts, at least some damage will be permanent, and there was no credible offset plan in place. The loss was considered contrary to public benefit because nature refuges comprise almost one-third of Queensland's total protected area system and should therefore only be interfered with if there is a compelling reason.
Recommendation	The Court ultimately concluded that the limitations to human rights imposed by the mine were unjustifiable. The Land Court recommended that both the mining lease and environmental authority applications be refused by the Minister and the Chief Executive, respectively.

Case name	*Cement Australia (Exploration) Pty Ltd & Anor v East End Mine Action Group Inc (No 4)* [2021] QLC 22
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2021/22
Human rights provisions considered	Commencement (section 2); Meaning of compatible with human rights (section 8); Human rights may be limited (section 13); Property rights (section 24); Conduct of public entities (section 58); Legal proceedings (section 59)
Facts	This case concerned objections to an application for a mining lease and an Environmental Authority regarding the East End limestone mine near Gladstone, operated by Cement Australia. Cement Australia already operated the mine and were seeking an application for a mining lease and amendment to its Environmental Authority for the purpose of extending the mine. The *HRA* had not commenced when the relevant opportunity for lodging objections ended. As such, no *HRA* based objection was made. However, the Member considered that a failure to consider the *HRA* would mean the relevant Minister would not have the benefit of a recommendation made after considering the relevant human rights. Accordingly, the Member considered the limitations on the rights objectors might seek to invoke.
Human rights consideration	**Property rights (section 24(2))** The Court considered the five factors identified in *Waratah (No 2)* to examine the impacts to human rights under the *HRA*. Firstly, engagement - the right the objector may seek to invoke is the right to property, namely the right to not be arbitrarily deprived of their property (s 24(2) *HRA*). Using *PJB v Melbourne Health and Another (Patrick's Case)* (2011) 39 VR 373 as authority, it was identified that deprivation of property encompasses economic interests and deprivation in a broad sense. Secondly, formal expropriation is not required, and de facto expropriation of property is sufficient to breach the right. Finally, while it is not contained within the *HRA*, the right to ownership and peaceful enjoyment of property are key features of the common law: [388]. The Court then considered limitations. It was found that the additional ground water losses as a result of the proposed mine expansion might affect private bores in the East End. However, there was no evidence of current use of bores for irrigation. Additionally, flood modelling demonstrated no significant adverse effects. However, it was recognised that the loss of Mrs Derrington's (a non-active objector) view from her property due to the mine may affect the common law right to peaceful enjoyment of property.

	As for justification, there were two relevant elements. First, the limitation must be in accordance with the procedure prescribed by law and compatible with the rule of law (that is, sufficiently certain, accessible, and non-arbitrary). Secondly, the limitation on human rights must be proportionate to other competing private and public interests. The Court was required to consider a range of criteria identified by the governing legislation (the *Mineral Resources Act 1989* (Qld) and the *Environmental Protection Act 1994* (Qld)).The Court concluded that reduced landholder access to ground water and visual amenity was reasonably and demonstrably justified. This was found with reference to the mitigation actions in the make good provisions of the lease, and the public benefits regarding regional employments and community engagement and interactions, and through royalties which accrue to the State. As for proper consideration, the Court reasoned that since the parties did not raise human rights in the objections, the rights were already properly considered in the reasoning above. The Court concluded that while there will be property right impacts associated with the expansion of the East End mine, the deprivation of property was not arbitrary and was demonstrably justifiable. As such, the Court found that the recommendation would not differ based on the consideration of the right to property.
Recommendation	The Member made the recommendation to the Minister that both the Mining Lease be granted, and the Environmental Authority be issued.

Case name	*New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc & Ors (No 2)* [2021] QLC 44
URL	https://www.sclqld.org.au/caselaw/132284
Human rights provisions considered	Human rights may be limited (section 13); Property rights (section 24); Privacy and reputation (section 25); Cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28); The conduct of public entities (section 58); Application of Act – generally (section 108)
Facts	This case concerned an open-cut coal mine near Acland, which had attracted significant controversy from the locals, who believed the mine had destroyed the amenity of their rural community, as well as native flora and fauna. There was a proposed expansion of the mine, referred to as Stage 3. This decision focuses on the granting of the Environmental Authority ("EA"). Oakey objected to the grant of the EA.
Human rights consideration	The Member, relying on *Waratah Coal (No 2)*, determined that it is subject to s 58 of the *HRA* when it makes a recommendation on a mining objection, and as such, must make a decision compatible with human rights. New Acland Coal submitted that this case could be distinguished from *Waratah* because of s 108 of the *HRA*, which states that the Act does not affect proceedings commenced or concluded before the commencement and does not apply to an act, or decision made, by a public entity before the commencement. The Member conceded that although this was a powerful submission to assist the final decision-makers, they should consider the 5-steps identified by DESI to consider the impact on the *HRA.* There was no resolution as to whether the *HRA* could apply on the basis of the concerns New Acland raised. DESI indicated that two human rights were relevant: property rights (s 24(2)), the right to privacy (s 25(a)), while New Acland Coal identified that the cultural rights of Indigenous peoples were also relevant (s 28). **Property rights - s 24(2)** One of the objectors, Mr Beutel, owned two properties in Acland. His property rights may have been affected due to unacceptable impacts on groundwater. However, the Member determined that there was no evidence to support the groundwater impact. Instead, the Member determined that noise, vibration, and dust impacts would impact Mr Beutel, as well as other neighbours in the area. Despite the limitations on homeowner's rights, the Member considered the limitation to be demonstrably justified,

	noting that the EA purports to regulate the impact. 'The limits to human rights will be the result of a legal process in which the people affected had a right to participate': [279]. **Right to privacy - s 25(a)** In relation to s 25(a), it was determined that Mr Beutel's right to privacy would be infringed, for one of the properties he owned in Acland was his residential home. However, for the same reasons as above, the Member held the limitation to human rights to be demonstrably justified. **Cultural rights - Aboriginal and Torres Strait Islander peoples - s 28** In relation to s 28, New Acland developed a Cultural Heritage Management Plan. The Plan conceded that cultural rights would be limited due to the Stage 3 expansions but would be appropriately protected due to the steps listed in the document. The Member accepted this. Notably, Member Stilgoe referred to section 28 as the 'cultural rights of Indigenous peoples', omitting the reference in the *HRA's* section to Torres Strait Islander peoples. This difference in terminology highlights the distinction between the two Indigenous groups.
Recommendation	The Member was satisfied that, pursuant to s 13(2)(g) *HRA,* the correct balance had been struck between the human right and the purpose of the limitation. With the above in mind, both mining leases related to Stage 3 were recommended to be granted, subject to the proposed EA. Notably, there is a brief discussion as to the right to a fair hearing. Member Stilgoe noted that the *HRA* gives parties to a civil proceeding the right to a fair and public hearing. Highlighting section 268(3) of the *MRA* and section 58(2) *HRA*, the Member concluded that even though the Oakey Coal Action Alliance's right to a fair trial may have been infringed, she could not have acted any differently because of the statutory limitations imposed by the *MRA.*

Case name	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4
URL	https://archive.sclqld.org.au/qjudgment/2021/QLC21-004.pdf
Human rights provisions considered	Human rights may be limited (section 13); Recognition and equality before the law (section 15); Right to life (section 16); Property rights (section 24); Privacy and reputation (section 25); Protection of families and children (section 26); Cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28); Conduct of public entities (section 58)
Facts	This case was purely procedural. Waratah sought further and better particulars of most of the grounds of objection. The objectors argued that the degree of particularisation requested by Waratah was oppressive. The Department submitted that the objectors' human rights case was not adequately articulated. The Department was conscious of its role as a statutory party and the Court's expectation that it would act as a model litigant and assist the Court in making its recommendations. It considered that it would be in a better position to fulfil that role if the human rights objections were more fully articulated.
Human rights consideration	The Department identified five steps in applying human rights under section 58: 1. **Section 58(1)(a) - Engagement:** whether the prospective decision is relevant to a human right (and which right) 2. **Section 58(1)(a) - Limitation:** if a right is relevant, is that right limited by the decision. This is part of the compatibility question. 3. **Section 13 - Justification:** whether such limits as do exist are reasonable and can be demonstrably justified (the second part of the compatibility question: HRA s 8 and s 13). There are 2 requirements: a. Legality: this encompasses both procedure and substance. Any limitation must be in accordance with the procedure prescribed by law and compatible with the rule of law. b. Proportionality: human rights, not being absolute, must be balanced against one another and against other competing private and public interests. There may be a need to limit those rights to achieve other legitimate purposes. 4. **Section 58(1)(b) - Proper consideration**: even if the limits be lawful and proportionate, the decision made must give proper consideration to the rights said to be engaged. 5. **Section 58(2) - Inevitable infringement**: this operates where the Court could not reasonably act differently or make

	a different decision because of a statutory provision or under law. The Department contended that the objectors should be required to address each of the above 5 steps and for each right identified, clearly set out the facts, matters and contentions which sought to be advanced. Neither the Department nor Waratah had applied for orders to that effect. However, Waratah's requests appeared to pertain to the first and second steps. Their application therefore does not engage the three steps of justification, proper consideration and inevitable infringement. The Court accepted the objectors' submission that it is premature to require them to fully articulate their human rights case now. But the Court did consider the Department's submissions about engagement and limitation. The Land Court has a wide discretion as to its procedure. Providing particulars of a ground of objection may sharpen the issues, but that is not the only process used. Even with unparticularised objections, the experience of the Court was that the parties can significantly narrow the issues between them with the benefit of expert opinion. The Court can also make further directions to clarify the issues. The key question was, as a matter of procedural fairness, whether Waratah needed further particulars, given the other processes that may provide the clarity it sought.
Decision	In exercising the Court's discretion, the Member's primary concern was procedural fairness of the parties, in the context of the Court undertaking an administrative function and having regard to other pre-hearing processes to clarify the issues for the hearing. The objectors must provide an exhaustive list of classes of individuals whose human rights they say will be limited. Except for this, the Court was satisfied that the objectors had provided enough detail for Waratah to nominate experts. However, the Court found that the objector did not need to respond further to Waratah's requests for evidence regarding the species at Bimblebox and why they might be important. The objectors also did not need to respond to Waratah's requests for details on why the use of thermal coal is inconsistent with the Paris Agreement and requests regarding the intergenerational equity principle because this would require an expert opinion. The Court did not find that further particulars in relation to the limitation of human rights and causation had utility at this stage because the objectors would, in due course, articulate their arguments on the human rights objections.

Part 2 – Consideration of section 28 of the *Human Rights Act 2019* (Qld) and its comparative provisions in other Australian and international jurisdictions

Queensland case law

Section 28 of the *HRA* arises in a variety of different contexts. It is invoked in mining claims, property claims and burial disputes, to judicial review, mental health reviews, and other administrative claims concerning blue cards.

In the context of major resource projects, there appears to be a trend emerging with respect to section 28 of the *HRA*. The cases of *Hannigan and Associates Pty Ltd & Anor v Da Cunha & Anor, New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc & Ors (No 2)* and *Pickering v Pedersen* demonstrate that where there is an existing plan or process to consider and protect the interests or rights of Indigenous people (for example, Cultural Heritage Management Plans), then there will likely be no infringement of section 28. Alternatively, if an infringement is found, it will likely be considered justifiable.

The *Waratah* litigation was novel in terms of section 28 as the Court allowed evidence to be heard On-Country. In *Waratah (No 5),* the Court was persuaded that hearing On-Country evidence would ensure that the best evidence would be received from First Nations peoples. Refusing the application for On-Country evidence was not reasonable and justifiable in the circumstances. Similarly in *Waratah (No 6),* the existential threat of climate change to the Torres Strait Island peoples was fundamentally at odds with the purpose of section 28: the survival of culture. Given that the *Waratah* litigation produced landmark decisions, it is difficult to predict how section 28 will be interpreted post-*Waratah.* However, President Kingham's comments might show that the purpose of section 28 and what it protects is an important consideration. Decisions that are at odds with the cultural rights of First Nations peoples may be found to be unjustifiable.

It is difficult to discern a particular pattern as to how section 28 has been interpreted and applied by courts and tribunals in other contexts. Many cases referred to section 28 briefly, particularly where the applicant identified as an Indigenous person, but no further elaboration was provided. The patchwork of cases summarised below might indicate that claims made under section 28 can be examined based on objective evidence of how cultural rights are enjoyed, with weight being given to Indigenous customs. Where the cultural rights of section 28 are being promoted rather than infringed, this might take precedence over other rights in the *HRA*, such as equality before the law. What courts and tribunals may consider under section 28 is also broad, but the importance of Indigenous identity and kinship ties may be critical.

Case name	*Pickering v Pedersen* [2023] QLC 12
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2023/12
Court/jurisdiction	Land Court of Queensland
Facts	This case concerned two applications for mining claims near the Mitchell River, lodged by Mr Pickering. The respondents, the Pedersens, owned land on the Karma Waters Station, which straddled the River. The respondents objected to the granting of the mining claims, citing the fact that the mining claim was in direct conflict with their tourist operations on the River. The mining would suspend a lot of sediment, discolouring the river, and impacting tourists' ability to camp and fish. There were no submissions made regarding the *HRA,* nor was there any human rights-based objection made. The Court found that the potentially affected rights were those found in section 28.
Consideration	As the relevant area is subject to native title, the relevant Resource Authority Public Report indicated that a right to negotiate process is required where the State intends to grant a mining interest on the land. The Member considered that it is to be expected that the Department of Resources would ensure that the 'future act' requirements would be satisfied prior to the granting of the mining claim. The Member also determined that it was to be expected the Applicant was aware of their relevant duties of care under the *Aboriginal Cultural Heritage Act 2003* (Qld).
Decision	With the above in mind, the Member was satisfied that because these processes were already in place, there was a level of protection afforded to the rights and interests of the impacted Aboriginal peoples and their cultural heritage. As such, the Member determined that the prospect of infringement of Indigenous was not inevitable under section 28. Consequently, there was no unjustifiable impact on human rights found
Implications for interpretation of section 28	Similar to the *New Acland Coal Case,* this case arguably demonstrates that where there is an existing plan or process in place to consider and protect the interests or rights of Indigenous people, then there will probably be no infringement of section 28, or any infringements will be justifiable.

Case name	*Bowie v Queensland Police Service and Ors* [2022] QLC 8
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2022/8
Court/jurisdiction	Land Court of Queensland
Facts	This case concerned an application for numerous orders under the *Land Court Act 2000* (Qld), the most pressing of which was an injunction to prevent the execution of a warrant of possession against a house sublet to the applicant. The applicant was a native title holder of Badu Island. The applicant submitted that his human rights would be breached if he were to be evicted from the property. Consequently, the Court considered s28 of the *HRA*.
Consideration	The applicant submitted that the breach of section 28 upon eviction would arise due to him being prohibited from exercising his cultural rights to maintain a connection to Badu Island as a native title holder. The Court recognised that Indigenous people must not be denied the right with other members of their community to enjoy, maintain, control, protect and develop their kinship ties: [33].
Decision	However, the Court was not convinced the applicant's eviction would result in this right being infringed, as evidence demonstrated he had continued to enjoy cultural rights despite long absences from Badu Island: [35]. Additionally, the *HRA* had no bearing on the Queensland Police Service's execution of a lawfully granted warrant of possession.
Implications for interpretation of section 28	This case examined kinship ties and how the right to kinship ties can be infringed. The Court found evidence that cultural rights can continue to be enjoyed despite an absence of being On-Country. This suggests claims made under section 28 regarding prohibitions of exercising cultural rights can be critically examined based on objective evidence as to how cultural rights are enjoyed.

Case name	*Hannigan and Associates Pty Ltd & Anor v Da Cunha & Anor* [2022] QLC 14
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2022/14/pdf-view
Court/jurisdiction	Land Court of Queensland
Facts	The case concerned an application for a mining lease. The Court briefly discussed its obligation to properly consider human rights, although the *HRA* (Qld) had commenced after objections had been lodged (see part A). The Court then provided an outline of the submissions that the applicants had made on human rights. They did not make any further remarks on human rights.
Consideration	In relation to cultural rights, the applicants had entered into a cultural heritage management agreement with the Clermont-Belyando Area Native Title Claim Group. The applicants also submitted that, if necessary, they would negotiate a cultural heritage agreement with the claimants of the Jangga People: [82]. The right was not discussed any further than this.
Decision	The Court ultimately found that section 28 would not be prejudiced by the development. Therefore, there was no limitation on human rights
Implications for interpretation of section 28	This case suggests that where a cultural heritage agreement or plan exists, section 28 is unlikely to be considered as infringed. Alternatively, any infringement is more likely to be considered justifiable.

Case name	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2022/4/pdf
Court/jurisdiction	Land Court of Queensland
Facts	This case concerned an application for an order to take evidence from First Nations witnesses On-country.
Consideration	The Court considered that the evidence about the cultural protocols was central to the objection that the evidence related to. The Court observed that refusing the request for On-Country evidence would limit the witnesses' ability to enjoy and maintain their cultural heritage, to uphold their cultural protocols, and to determine how their traditional knowledge is imparted: at [22]. The Court considered that, while it would be possible for the witnesses to give evidence On-Country using videoconferencing technology, it would limit the ability of the witnesses to fully observe the ceremonial aspect of imparting traditional knowledge: at [29]. The witnesses were to give evidence about the future impacts of climate change on their community's ability to enjoy and maintain their cultural rights: at [33] and [37].
Decision	The Court held that it would assist in its evaluative function by seeing and hearing this evidence being given in that community: at [37]. Further, the Court found that there was utility in the evidence being given in the way proposed, that it would not impose an unreasonable and disproportionate burden on the parties or the Court, and that it would ensure that the best evidence would be received from the First Nations witnesses: at [41]-[43]. The Court considered that refusing the request to give evidence On-Country would not respect the cultural and group identity of the witnesses: at [40]. In deciding the application, the Court balanced the collective right to enjoy and maintain culture against the public and private interests in minimising the inconvenience and cost of litigation. The Court recognised that confining the First Nations witnesses to their written statements was a limit to their individual and collective right to maintain their culture and how they passed on traditional knowledge. The Court was not persuaded that the limit

	was reasonable and demonstrably justifiable in the circumstances of the case: at [44].
Implications for interpretation of section 28	The Court balanced the cultural rights of Aboriginal and Torres Strait Islander peoples under section 28 of the *HRA* against the public and private interests of minimising the inconvenience and cost of litigation. This case demonstrates that time and cost-effectiveness do not always outweigh a party's right to have their case fairly heard. The Court was persuaded that hearing On-Country evidence would ensure that the best evidence would be received from First Nations witnesses. To refuse the request would be at odds with the cultural rights that section 28 protects.

Case name	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2022/21
Court/jurisdiction	Land Court of Queensland
Facts	This case concerned an application by Waratah Coal Pty Ltd (Waratah) for a mining lease and environmental authority.
Consideration	Regarding the nature of the rights, the Court found that section 28(1) *HRA* is expressed in positive terms – Aboriginal and Torres Strait Islander peoples hold distinct cultural rights. The Explanatory Notes also use positive language, stating the right protected by section 28 is 'directed towards ensuring the survival and continual development of culture'. While section 28(2) *HRA* is expressed in negative terms, the Court did not find this to be significant, as section 19 of the *Victorian Charter* and Article 27 of the *ICCPR* are also expressed in the negative. Reading the two provisions together, the Court found that Aboriginal and Torres Strait Islander peoples have distinct cultural rights which must not be denied. The Member then noted seven themes: • Indigenous cultural rights are distinct from other cultural rights; • International jurisprudence identifies culture as an expression of self-determination (not explicit in section 28, but stated in *Preamble 6*); • International rights are intended to prevent destruction of culture; • International rights recognise the holistic nature of Indigenous culture; • Like Article 29(1) of *UNDRIP*, section 28(2)(e) protects the right to conserve and protect the environment and productive capacity of land, water and other resources; • *ICCPR*, *UNDRIP* and section 28(2) all protect the right to enjoy, maintain, control, protect, develop and use language and traditional cultural expressions; and • International jurisprudence acknowledges cultural rights are both collective and intergenerational. The Court then discussed the importance of preserving cultural rights in section 28. In the context of systematic dispossession and destruction of culture, these rights are of fundamental importance to First Nations peoples. Section 28 does not depend on the recognition of native title; however, the Queensland Government has identified protecting these rights as an important step in reframing the relationship between the government and

	First Nations peoples. The Court observed that First Nations peoples will be disproportionately affected by climate change and Queensland has a higher-than-average population of First Nations peoples. Particularly the Torres Strait and coastal Queensland will be affected by sea level rise. The sea level rise will have a significant impact on the severity and frequency of coastal flooding events and may pose an existential threat to Torres Strait Island peoples. The judge recorded their appreciation to the witnesses for sharing cultural knowledge that they might otherwise not have revealed, particularly their creation stories: [1551]. In terms of the First Nations evidence, a striking and enduring theme in the evidence from the First Nations witnesses was their active commitment to and participation in caring for country. This relationship is reciprocal – it is not just a right, but an intergenerational responsibility. The Court understood that climate change impacts will have a profound impact on cultural rights and, for some peoples who will be displaced from their country, it risks the survival of their culture, the very thing s 28 is intended to protect: [1565].
Decision	In balancing the limitation and the right, the Court found that there are additional factors for the rights of First Nations peoples which weighs the scale more firmly in favour of the importance of preserving the right. The First Nations right in section 28 is about the survival of culture. The Torres Strait Island peoples face an existential risk from sea level rise. More severe impacts mean greater interference with cultural rights. In this case, displacement had the potential to destroy culture – this is something that cannot be measured in monetary terms and is at odds with the purpose of section 28, set against the history of dispossession.
Implications for interpretation of section 28	The Judge in this case heard evidence On-Country. The evidence of First Nations witnesses was compelling, and the Judge heavily emphasised the purpose of section 28: the survival of culture. Because climate change posed an existential threat to the Torres Strait Island peoples, the Judge found that this was at odds with the purpose of section 28. The implication to take away from this case is that actions that undermine the very purpose of section 28 and erode the survival of culture may be found to be inconsistent with the *HRA* and may be a reason why the rights in section 28 are weighed heavier.

Case name	*Sandy v Queensland Human Rights Commissioner* [2022] QSC 277
URL	https://www.queenslandjudgments.com.au/caselaw/qsc/2022/277
Court/jurisdiction	Supreme Court of Queensland
Facts	This case concerned a complaint under the *Anti-Discrimination Act 1991* (Qld) and the *HRA* with the Queensland Human Rights Commissioner. The complainant sought judicial review of the Commissioner's decision. One of the grounds (Ground 4) was that the decision was unlawful for the purpose of section 58 HRA because the decision: • was made in a way that was not compatible with human rights; and • was made in a way that failed to give proper consideration to human rights relevant to the decision. The complainant was a 30-year-old Aboriginal man from Lockhart River who was in prison when he was diagnosed with gastric cancer. The complainant commenced a treatment program involving chemotherapy, investigation, surgery, and then further chemotherapy. He applied to the Parole Board for exceptional circumstances parole but was refused on 4 December 2020. He claimed that: • by refusing the application for exceptional circumstance parole and/or by failing to properly consider his race and its characteristics in reaching that decision, the Parole Board had treated the complainant unfavourably by denying him the ability to enjoy his cultural rights and receive an equivalent standard of medical care to that which is available in the community, during a period of significant, potentially life-threatening illness [direct discrimination]; • the Parole Board imposed an unduly narrow interpretation of the exceptional circumstances parole test which failed to have proper regard to culturally appropriate health care that was available in the community and the complainant's distinct cultural rights as an Aboriginal person; and • he would and did suffer serious disadvantage from having to undergo treatment and recover from surgery in custody, without the same level of culturally appropriate health care

	that was available in the Lockhart River community, while being forcibly removed from country and kinship ties.
Consideration	Although the Commissioner did not identify or acknowledge the potential/actual impact on human rights in the reasoning process (let alone consider whether the limit was reasonable or justified), the Court did not find it necessary to explore this further because the Commissioner's decision not to accept the complaint was beyond power and not authorised. Therefore, there was no effective decision to consider for the purposes of section 58 HRA. While Ground 4 may remain, there was no utility in analysing the *HRA* provisions because the decision was beyond power: [108]-[110].
Implications for interpretation of section 28	This case was not very useful to our inquiry as it did not discuss the implications on section 28, as the decision itself was ultra vires. However, if the decision had been determined to be within the relevant power, section 28 may have been relevant.

Case name	*LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/333/pdf-view
Court/jurisdiction	Queensland Civil and Administrative Tribunal
Facts	This was a review of a decision to cancel the applicant's blue card. QCAT accepted that proper consideration of human rights under section 58(1)(b) of the *HRA* required the tribunal to consider whether its decision affected human rights. As the applicant identified as Aboriginal, it was necessary to consider section 28 of the *HRA*. The applicant held a blue card, and in 2018 the Queensland Police Service notified Blue Card Services that the applicant's criminal history disclosed she had been charged with assault occasioning bodily harm and pled guilty to the lesser charge of common assault. The victim was an 8-year old Indigenous child in her foster care. As part of the Tribunal's consideration, it was acknowledged that *'for a decision to be compatible with human rights it must not limit human rights, or if it does, then no more that is reasonable and justifiable':* [40].
Consideration	Cultural rights were particularly significant, not only due to the applicant's Aboriginal identity, but because of her work in the field of health care and Indigenous affairs. Section 28(2) and (3) were mentioned specifically. The applicant asserted that her cultural rights were limited by the negative notice based on her identity as Indigenous, the significant work she had done in Aboriginal and Torres Strait Islander communities, the trust, and relationships she had built, and the bond she had with her local community. This bond included cultural ties including language, cultural expressions, kinship, spiritual practices, beliefs, and teachings: [396].
Decision	The Member accepted that the applicant's rights under section 28 may be limited by a decision denying her a blue card clearance. It was concluded that the limits and associated hardships imposed by limiting the applicant's rights under section 28 were reasonable and justifiable in accordance with section 13(2) of the *HRA*.
Implications for interpretation of section 28	While this case concluded the applicant's cultural rights under section 28 were justifiably limited, there was still considerable discussion of section 28 of the *HRA*. Aspects of section 28 that were considered included the applicant's bond with the local community, and what made her bond critical to exercising her cultural rights and her identity as an Indigenous woman.

Case name	*Sunshine Coast Regional Council* [No 2] [2021] QCAT 439
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/439
Court/jurisdiction	Queensland Civil and Administrative Tribunal
Facts	This case concerned an application by the Council for an exemption from the *Anti-Discrimination Act 1991* (Qld) concerning a proposed policy that would allow the Council to grant permits to conduct certain tourism businesses on Council land solely to First Nations peoples.
Consideration	With respect to section 28, it was determined that the cultural rights of First Nations peoples would be promoted by the policy. The Tribunal balanced the limitation against equality before the law in section 15 with the promotion of the human right to culture contained in section 28. There is a direct relationship between the limitation on equality before the law and the purpose of the limitation (to promote the welfare measure for First Nations peoples, and promotion of First Nations culture). There was no less restrictive and reasonably available way of achieving the purpose of the welfare measures, and there were four other categories of permit available to anyone.
Decision	The Tribunal dismissed the application because an exemption was unnecessary to implement the proposed policy. This was an interesting case where there was no limitation on section 28 but rather, section 28 was being promoted at the expense of section 15. However, the Tribunal found that this was permissible.
Implications for interpretation of section 28	Where section 28 is being promoted, this might take precedence over impositions on other human rights (if there were no other reasonable or necessary ways to promote section 28).

Case name	*Attorney-General v GLH* [2021] QMHC 4
URL	https://www.queenslandjudgments.com.au/caselaw/qmhc/2021/4
Court/jurisdiction	Queensland Mental Health Court
Facts	This was an appeal of a decision by the Mental Health Review Tribunal to remove a condition from the respondent's forensic order preventing him from having unsupervised contact with children. The respondent filed a Form 1 notice under the *HRA* providing a question of law, namely, what consideration the Mental Health Court must give to the *HRA* in conducting review of the forensic order - particularly in relation to section 28(2)(c).
Consideration	This decision specifically focused on the risk the respondent posed to his children due to his mental health and substance abuse. However, the consideration of section 28 is relevant. Weight was given to the negative effects that cultural isolation would have on his mental health: [57]. It was also emphasised that a direction preventing the respondent from having unsupervised access to children would be harmful to his role as an uncle, combined with his Indigenous identity.
Decision	The decision to remove the condition preventing the respondent from unsupervised contact with children was affirmed. The appeal was dismissed.
Implications for interpretation of section 28	While section 28 was not the decisive factor in this case, considerable weight was given to the cultural effects that the decision would have on the respondent's Indigenous identity and right to maintain kinship ties.

Case name	*New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc. & Ors (No 2)* [2021] QLC 44
URL	https://www.queenslandjudgments.com.au/caselaw/qlc/2021/44
Court/jurisdiction	Land Court of Queensland
Facts	This case concerned an open-cut coal mine near Acland, which had attracted significant controversy from the locals, who believed the mine had destroyed the amenity of their rural community, as well as native flora and fauna. There was a proposed expansion of the mine, referred to as Stage 3.
Consideration	Discussion of section 28 cultural rights was brief because a Cultural Heritage Management Plan had been agreed to by the developer and the affected Indigenous community.
Decision	The Court accepted the Management Plan.
Implications for interpretation of section 28	This case might indicate that where a Cultural Heritage Management Plan has been agreed to, this might justify any limitations upon the section 28 rights.

Case name	*Accoom v Pickering* [2020] QSC 388
URL	https://archive.sclqld.org.au/qjudgment/2020/QSC20-388.pdf
Court/jurisdiction	Supreme Court of Queensland
Facts	The Court considered an application for orders regarding a family dispute over the burial location of a deceased Indigenous man.
Consideration	In applying section 28 of the *HRA*, Justice Henry held that the application of the section would not produce a different approach than that already taken by the Court in similar disputes. Both parties presented arguments based on Aboriginal custom to support their conflicting views as to why the deceased should be in a particular location. In assessing the evidence related to Aboriginal culture, Justice Henry highlighted that *'if the outcome of Aboriginal custom in this case was clear cut and yielded a singular result, I would readily honour it',* [yet] there was a *'difficult mix of custom related considerations at play'*: [20].
Decision	Justice Henry relied on practical considerations related to each proposed burial location. The application was ultimately granted due to the deceased's stronger cultural connections to Mareeba over Croydon, though it was noted that the matter was finely balanced.
Implications for interpretation of section 28	This case demonstrates the potential weight given to First Nations customs in applying section 28. Where custom can be identified, a court may follow Justice Henry's intention to 'readily honour' custom to a considerable extent. However, where custom is unclear, it appears an objective and fact-based approach is taken to weigh up claims made from opposing viewpoints of First Nations peoples on appropriate custom to be followed.

Other section 28 cases		
Case name	**URL**	**Brief description**
BSE, Re [2020] QCAT 494	https://www.queenslandjudgments.com.au/caselaw/qcat/2020/494	S 28 mentioned briefly as impacted right, but no further discussion
Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2) [2021] QLC 4	https://www.queenslandjudgments.com.au/caselaw/qlc/2021/4	S 28 just relied upon by the objectors but no elaboration.
HDK v Director-General, Department of Justice and Attorney-General [2021] QCAT 97	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/97	S 28 mentioned briefly as an impacted right
TSG v Director-General, Department of Justice and Attorney-General [2021] QCAT 98	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/98	S 28 mentioned briefly as an impacted right
JB v Director-General, Dept of Justice and Attorney-General [2021] QCAT 433	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/433	S 28 mentioned briefly as impacted right, but no further discussion.
ST v Director-General, Dept of Justice and Attorney-General [2021] QCAT 337	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/337	S 28 mentioned briefly as impacted right, but no further discussion.
NPK v Director General, Department of Justice and Attorney-General [2022] QCAT 395	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/395	S 28 mentioned but no further discussion
*JZ v Director-General, Dept of Justice and Attorney-Genera*l [2022] QCAT 183	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/183	S 28 mentioned briefly as impacted right, but no further discussion.
EST & ERE v Department of Child Safety, Seniors and Disability Services [2023] QCAT 305	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/305	The Court considered s 28 as a potentially impacted right but there was no further discussion.
TD v Director-General, Department of Justice and Attorney General [2023] QCAT 397	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/397	S 28 just mentioned as a relevant right, but ultimately the Court found that any limitation on the applicant's human rights was consistent with the object and purpose of the WWC Act (i.e., the welfare and best interests of children are paramount).
DR and YO v Department of Child Safety, Seniors and Disability Services [2023] QCAT 333	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/333	S 28 mentioned as a potentially impacted right but ultimately the Court found that there was no interference with the right to enjoy culture.
DM [2023] QCAT 402	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/402	S 28 listed in catchwords but no further explanation provided; the applicant was an Aboriginal woman
KLW v Director General Department of Justice and Attorney-General [2023] QCAT 446	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/446	S 28 mentioned as a relevant right because the applicant identified as Aboriginal on her father's side, but no further discussion.
JRL v Director General, Department of Justice and Attorney General [2023] QCAT 499	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/499	S 28 mentioned briefly as impacted right, but no further discussion.

First Nations cultural rights in other Australian and international jurisdictions, in the context of decisions about major resource projects

Domestic jurisdictions

Two other jurisdictions in Australia have human rights legislation: Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic)) and the Australian Capital Territory (*Human Rights Act 2004* (ACT)). Both pieces of legislation have sections that are equivalent to section 28 of Queensland's *HRA.*

After thorough research into both jurisdictions, it is apparent that there is little to no judicial consideration of Aboriginal and Torres Strait Islander cultural rights in the context of major resource projects, or in relation to land use more broadly. Therefore, little about the interpretation of section 28 *HRA* (Qld) can be gleaned from other domestic jurisdictions.

While Victoria and the ACT are the only other Australian states with equivalent human rights legislation, they only account for 2.6% of the mining project work in the nation. Therefore, case law consideration of major resource projects in these states/territories is scarce.

(i) Victoria

The Victorian Charter's *Preamble*, similar to Queensland, makes mention of the special significance of Aboriginal cultural rights. The *Preamble* recognises that human rights have a special significance to Aboriginal peoples, in light of their 'diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.'

Victoria's Charter contains a cultural rights provision in section 19(2), specific to Aboriginal and Torres Strait Islander peoples:

> *(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—*
>
> *(a) to enjoy their identity and culture; and*
>
> *(b) to maintain and use their language; and*
>
> *(c) to maintain their kinship ties; and*
>
> *(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.*

Victoria's mining lease objections process is similar to that in Queensland. Both mining applications and objections processes are governed by the *Mineral Resources (Sustainable Development) Act 1990* (Vic). Under section 24 of this Act, any person may object to a licence being granted. These licences include applications for mineral or extractive exploration, as well as prospecting, mining, or retention licences.

In the context of mining projects, no case law was found considering section 19(2) of the Charter. There was a recent case in the Victorian Supreme Court that considered of section 19 of the Charter in relation to a major infrastructure project, *Ned Kelly Centre v Australian Rail Track Corporation*. However, the Court ultimately concluded there was no evidence of shared cultural practices so as to engage section 19.

The cases below consider section 19(2) in the context of land usage more broadly. While not entirely analogous to the section 28 *HRA* (Qld) major resource projects, they provide some guidance on how Victoria's Charter is interpreted by the relevant courts.

Case name	*Thorpe v Head, Transport for Victoria* [2021] VSC 750
URL	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2021/750.html
Court/jurisdiction	Supreme Court of Victoria
Facts	This case concerned orders for the protection of certain places and things said to constitute Aboriginal cultural heritage within the meaning of the *Aboriginal Heritage Act 2006* (Vic) ('*Heritage Act*'). The proposal was to construct a 12-km section of road, namely, the Western Highway Duplication project. The applicant contended that the construction would inappropriately infringe on the cultural heritage of the area.
Consideration	Sections 27 and 28 of the *Heritage Act* make it an offence to harm Aboriginal cultural heritage. The plaintiff contended that the construction of a road would harm Aboriginal cultural heritage in a way that was not permitted by the Heritage Act. While the majority of the case focused on the *Heritage Act*, the plaintiff also sought remedies under the Victorian Charter. The plaintiff also sought two declarations of unlawfulness under section 38 of the Charter, in light of the fact that the decision was incompatible with section 19(2)'s cultural rights.
Decision	Because the decision made in regard to the non-Charter relief was against the applicant, the Court did not consider the merits under the Charter claim, for the claims could no longer be maintained.Therefore, unfortunately, there was no substantive consideration as to whether the right contained in section 19(2) had been unjustifiably limited by the proposed road construction.

Case name	*Gardiner v Attorney General (No 2)* [2020] VSC 252
URL	https://jade.io/article/728341
Court/jurisdiction	Supreme Court of Victoria
Facts	This case concerned a judicial review of a decision made by the Attorney-General of the State of Victoria to enter into the Taungurung Recognition and Settlement Agreement, under

	section 4 of the *Traditional Owner Settlement Act 2010* (Vic) ('*Settlement Act*'). The plaintiffs claimed that the assessment completed by the Attorney-General and the decision to enter into the Settlement Agreement was in excess of jurisdiction and manifest in legal error.
Consideration	The plaintiffs also claimed that the Attorney-General acted contrary to section 38(1) of the Charter by failing to give proper consideration to cultural rights under section 19(2). The plaintiffs sought to add a procedural fairness ground to the proceedings. After detailed consideration, the Court concluded that the ground had a real prospect of success. It was persuaded that its inclusion would facilitate the just resolution of the real issues in dispute between the plaintiffs and the defendants. On the 'Charter grounds', the Court considered that there was no suggestion that the decision was not a 'decision' to which the Act applies. The cultural rights that are protected in section 19(2) do not correspond exactly with the rights of traditional owners recognised by the *Settlement Act*. However, because of the limited judicial consideration of the Charter right, the Court determined that it was at least arguable that the section 19(2) cultural rights may be enjoyed by Aboriginal persons beyond the members of a traditional owner group within s 3(a) of the *Settlement Act*. As such, the ground was not suitable for summary determination.
Decision	The Federal Court quashed the Registrar's decision and remitted it for consideration.

(ii) Australian Capital Territory (ACT)

Similar to Queensland and Victoria, the Preamble to the ACT *Human Rights Act 2004* mentions the importance of cultural rights for Aboriginal and Torres Strait Islander peoples, as 'the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.'

The Act contains a cultural rights provision in section 27(2), specific to Aboriginal and Torres Strait Islander peoples:

> *(2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—*
> *(a) to maintain, control, protect and develop their—*
> *(i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and*
> *(ii) languages and knowledge; and*
> *(iii) kinship ties; and*
> *(b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.*
>
> *Note: The primary source of the rights in s 27(2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31.*

The ACT occupies an exceptionally small portion of mining in Australia, accounting for less than 0.1%.

Unlike other Australian jurisdictions, the ACT does not have a mining statute with provisions specifying the grants and conditions of mining leases. However, the *Lands Acquisition Act 1994* (ACT) is empowered to make regulations about mining on land. Specifically, the mining for, or recovery of, minerals on or from relevant land is provided under section 104. There is also no special court in the ACT providing a general jurisdiction for actions against mining. Any arising mining actions are heard in ACT's regular courts.

Given this background, no case law was found directly on First Nations peoples' rights in major resource projects. Below are a few cases that relate to land use more generally. Throughout the research process, it was challenging to find relevant cases.

Case name	*House v Chief Minister of Australian Capital Territory* [2022] ACTSC 317
URL	https://plus.lexis.com/apac/document/?pdmfid=1539278&crid=5085dbc0-2e4a-4dd7-ba2b-b0deb3ccb8dc&pddocfullpath=%2Fshared%2Fdocument%2Fcases-au%2Furn:contentItem:67KM-MSX1-FFMK-M4J3-00000-00&pdcontentcomponentid=267716&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=d23bc0f7-2cd3-418a-8e9d-65ab2e6ce524&ecomp=x85k&earg=sr5
Court/jurisdiction	Supreme Court of the Australian Capital Territory
Facts	This was an unreported case in relation to a proceeding brought by two Ngambri people who claimed entitlement to recognition as traditional custodians of land on which Canberra was built. Sections 27(2), 40B, and 40C(4) of the *HRA* (ACT) were considered.
Consideration	The plaintiffs sought for a declaration under section 40C(4) of the *HRA* that a protocol by the ACT Government provided some time ago violates section 27(2) of the HRA. The protocol denied the Ngambri people and other traditional custodians of the land the right to maintain, protect and develop connection to the land. It was further argued that the defendants contravened section 40B by failing to consider human rights of the Ngambri people under section 27(2).
Decision	The Court found in favour of the plaintiffs, believing that the conclusion would be respected by all members of the community. The application was granted.

Case name	*Oberoi v ACT Planning and Land Authority* [2015] ACAT 65
URL	https://anzlaw.thomsonreuters.com/Document/I0f470580802811e8b22785ae5ff38a3b/View/FullText.html?originationContext=kcCitingReferences&transitionType=Document&contextData=(sc.Search)&docSource=c959056a510e4b66a99e847855ae0745&rank=6&rulebookMode=false&ppcid=4dde1b3de90b41168b37ff7737435385&comp=wlau
Court/jurisdiction	ACT Civil and Administrative Tribunal
Facts	The applicant sought review of a decision by the ACT Planning and Land Authority reject a development application in relation to her house. The applicant's cultural background required them to care for elderly family members. They claimed that their current house does not provide adequate facilities to do so and sought to rectify house defects through lodging a development application. However, the Authority had refused the approval because of concerns regarding the heritage impact of the proposed development.
Consideration	In the review, the applicant contended that the refusal violated section 27. Upon consideration by the Tribunal, the application was ultimately approved. However, the Tribunal found that submissions regarding the *HRA* (ACT) were insufficient to draw conclusions on the issue without additional comprehensive submissions. The Tribunal nonetheless provided some preliminary comments on human rights, noting that human rights may be engaged in planning decisions under the *Planning Act* (ACT).

Case name	*Stewart v Wreck Bay Aboriginal Community Council* [2014] ACTSC 334
URL	https://jade.io/article/362735EF
Court/jurisdiction	Supreme Court of the Australian Capital Territory
Facts	This case concerned land rights on an Aboriginal site. The key question for the Court was whether the plaintiffs were entitled to a lease of Aboriginal land. Stewart and his family had been living in an area of Wreck Bay since 1996. They claimed to be the traditional owners of the area and therefore possessed a right to live on the land. The Wreck Bay Aboriginal Community Council (WBACC) claimed ownership of the land, believing the Stewarts were living unlawfully and wished to evict them. The Stewards argued that the WBACC had an obligation to consider human rights, as it was a public institution pursuant to section 40 of the *HRA* (ACT).
Consideration	The Court found that the WBACC was not a public institution for the purposes of the *HRA*. Therefore, it did not have to consider human rights. However, should it have been determined that WBACC was a public institution, it is likely that section 27(2) would have been raised.

(iii) Other states

Even in the absence of human rights legislation and state-protected First Nations cultural rights, other Australian states have considered these rights to some degree in major resource projects. In these jurisdictions, international obligations and considerations remain at play.

For example, New South Wales does not have an expressly protected First Nations cultural right. And yet, the *Rocky Hills* case heard in the New South Wales Land and Environment Court (*Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7) provides in-depth consideration of cultural rights and impacts.

The mining process in NSW is similar to that in Queensland, in that there must be approval of the mining lease. However, instead of an environmental authority, the NSW State must grant development consent. Should there be an objection to the mining lease, only a landholder or licence holder can raise it. This significantly reduces the number of people who can raise cultural arguments to the courts.

In *Gloucester v Minister for Planning,* Chief Justice Preston made the following observations as to the impact the proposed Rocky Hill mine would have on cultural rights:

- The project would adversely impact Aboriginal culture and connection to Country;
- The Social Impact Assessment failed to assess the social impacts of the mine on Aboriginal people, nor were they adequately addressed in the social baseline;
- There was no relevant consultation with Aboriginal people (which was considered concerning, given that consultation with a marginalised and vulnerable population should be considered best practice);
- Noted the special significance of Country and landscape to Indigenous peoples;
- The negative impacts on culture would endure long after the duration of the Project; and
- Aboriginal people have high sensitivity to the adverse changes and are vulnerable to changes caused by the social impacts of the Project.

Therefore, even though big mining jurisdictions such as NSW have no state-wide human rights act, this does not preclude courts from considering cultural rights of Indigenous peoples. However, the clear limitation is that there is no mandate that they do so.

International jurisdictions

Upon assessment of comparable international jurisdictions, it is evident that there are few implications for Queensland law that can be drawn from international considerations of cultural rights.

Queensland is in the minority by having a domestically entrenched First Nations cultural right in its *HRA.* Numerous international jurisdictions do not have a cultural right enshrined in a human rights instrument, let alone one which expressly mentions the special position of Indigenous peoples. For example, while South Africa does have precedent concerning major resource projects and their impacts on cultural rights, they do not have a provision in their Bill of Rights which expressly protects the cultural rights of Indigenous peoples. Meanwhile, Canada does have an Aboriginal right in their Charter, but it differs in its operation to Queensland's section 28 due to the existence of Canadian Aboriginal treaties.

The most utility is found in comparing the Queensland position with New Zealand due to similarities in wording and operation of the relevant provisions.

Should Australia seek to further incorporate international obligations such as UNDRIP and FPIC, then perhaps jurisdictions like South Africa will be more influential on the interpretation of section 28 *HRA* by Queensland courts.

(i) New Zealand

New Zealand has two pieces of legislation in relation to human rights: the *New Zealand Bill of Rights Act 1990* (NZ) ("*NZBORA*") and the *Human Rights Act 1993* (NZ). While the former includes all the country's protected rights, the latter is more focused on procedures from the Human Rights Commission, as well as discrimination law.

Section 20 of the *NZBORA* contains the right of minorities, which is similar to the Queensland *HRA* section 28:

> *A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of the minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.*

The below case law considers section 20 of the *NZBORA*, both in the context of major resources projects, as well as cases that provide some consideration of how the section is to be applied in practice.

Case name	*Smith v Fonterra Co-Operative Group Limited* [2024] NZSC 5
URL	https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZSC-5.pdf
Court/jurisdiction	Supreme Court of New Zealand
Facts	Mr Smith, a Maori elder, alleged that seven companies in the agricultural and fossil fuel industries had contributed materially to the climate crisis; and damaged, and would continue to damage, places of customary, cultural, historical, nutritional, and spiritual significance to him and his whānau (an extended family group). A public nuisance and negligence claim was made, with the proposal of a new climate change tort also brought before the Court.
Consideration	This case has not had a full trial yet - this was an interlocutory appeal. As such, the human rights arguments were not considered in any substantive way. However, the Human Rights Commission raised human rights grounds for consideration by the Court when it reaches trial. They submit that courts are required to ensure that the proposed climate change tort is considered in a manner not inconsistent with the rights and freedoms contained in the *NZBORA*. The Commission identified the right to not be deprived of life (section 8) and the right of minorities to enjoy their culture (section 20) as being engaged by the proposed tort. They also submit that NZ's common law should be compatible with NZ's international obligations, including international human rights law.
Implications for interpretation of section 28	As this authority is just an interlocutory appeal, there is not yet any implication as to the interpretation of section 28 of the *HRA* (Qld). Once this case goes to trial, the likelihood is that it will be decided similarly to the below case (*Smith v A-G*).

Case name	*Smith v Attorney-General* [2024] NZHC 3702
URL	https://jade.io/article/1059297
Court/jurisdiction	High Court of New Zealand
Facts	The same plaintiff as above, Mr Smith, also made a similar claim against the NZ government. Mr Smith alleged that the government failed to act quickly to mitigate or prevent climate change in NZ, despite being aware of the causes and effects of climate change from human impact.
Consideration	The essential human rights cause of action was that the government failed to comply with section 20 of the *NZBORA*. The plaintiff claimed that section 20 puts a positive obligation on the government to protect the rights of minorities. As such, Mr Smith claimed that the Crown breached their positive obligation in two ways: • by failing to reduce its own and national emissions; and • by failing to carry out any comprehensive assessments of the impacts of climate change on the cultural rights of Maori and take this into account when setting emissions reduction standards. In response to the claim that they have breached their obligations under section 20, the Crown said that they were taking steps to address climate change impacts on Maori people by continuing to undertake consultation with them. The Crown then listed all the frameworks they had in place to assist with the protection of Maori people and culture in the wake of climate change. The Crown says that to find that the Crown had breached section 20 in these circumstances would push the provision well beyond its available scope. They also pointed to the NZ Court of Appeal authority, *Mendelssohn v Attorney-General* [1999] NZCA 67, to make clear that section 20 does not impose positive duties on the State except in exceptional cases.
Decision	The Court concluded that the claim that the Crown has breached their obligations under section 20 *NZBORA* was untenable.
Implications for interpretation of section 28	In New Zealand, the protected right for minorities to enjoy culture has been held not to be a positive obligation. While not binding on any interpretation of section 28 in Queensland, this jurisprudence may indicate that as long as cultural rights have been considered to some degree in the major resource project, this will be enough to satisfy the obligation.

Case name	*Police v Taurua* [2002] DCR 306
URL	https://plus.lexis.com/apac/document/?pddocfullpath=%2Fshared%2Fdocument%2Fcases-nz%2Furn:contentItem:58Y3-W901-F5KY-B0T0-00000-00&pdmfid=1539278&crid=56de5b07-b51d-4edf-95fa-a73740c5b702
Court/jurisdiction	District Court of New Zealand
Consideration	While this case is not relevant to major resource projects, [20] provides that the rights of minorities to enjoy their culture, contained in section 20, cannot be used as a barrier against equality before the law. "*The right to enjoy the culture, profess and practice the religion and use the language of a minority cannot be used as a weapon against equality or the other rights expressed in that Act*" : [20]. While section 20 recognises positive personal rights, they must not be exercised at the expense of the rights of others to enjoy freedoms.
Implications for interpretation of section 28	Section 28 should not be interpreted in a way that limits other rights contained in the *HRA* (Qld).

Case name	*Manukau & Ors v Attorney-General & Anor* [2000] NZAR 621
URL	https://plus.lexis.com/apac/document/?pddocfullpath=%2Fshared%2Fdocument%2Fcases-nz%2Furn:contentItem:5B3G-1XF1-K0HK-250X-00000-00&pdmfid=1539278&crid=03c11fb1-5309-4d47-a708-1592996b0b9c
Court/jurisdiction	High Court Auckland
Consideration	While not relevant to major resource projects, this case stands for the proposition that section 20 *NZBORA* does not challenge parliamentary sovereignty.
Implications for interpretation of section 28	The same proposition can be applied to the application of section 28 in Queensland. It seems self-evident that the application of the *HRA* (Qld) by no means challenges parliamentary sovereignty.

(ii) United Kingdom (UK)

The *Human Rights Act 1998* (UK) gives domestic effect to the European Convention on Human Rights ('ECHR'). However, there is nothing in the ECHR that protects cultural rights. The closest that they get is the protection of freedom of expression or protection from discrimination by virtue of a protected attribute, such as race. Ultimately, the focus of the ECHR is on civil and political rights.

It should be noted that, considering Brexit, there may be changes to the human rights framework now that the UK is not a part of the European Union.

(iii) Canada

The Canadian Charter of Rights and Freedoms is included in Part 1 to the *Canadian Constitution Act 1982*. Notably, this is binding on acts of government, not private actors. While there is a *Canadian Human Rights Act*, as was the case in New Zealand, this piece of legislation covers discrimination law and the procedural processes of the relevant human rights commissions. Therefore, it is not akin to the protected human rights from the Queensland *HRA.*

The Canadian Charter of Rights and Freedoms, at section 25, covers Aboriginal rights and freedoms:

> *25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:*
>
> - *a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and*
> - *b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.*

This section seeks to protect the cultural rights of Indigenous peoples by making clear that any of the other rights and freedoms contained in the Charter may not infringe on the rights and benefits contained in Aboriginal treaties, protected by the Constitution.

R v Kapp [2008] 2 SCR 483, which concerned Aboriginal fishing rights, makes clear that section 25 in the Canadian Charter does not create a new right or freedom, but instead operates to shield pre-existing Aboriginal rights and freedoms from erosion by the protection of other Charter rights. This includes the Indigenous rights contained in the Royal Proclamation of October 7, 1763. As is stated in *Dickson v. Vuntut Gwitchin First Nation,* [2024] S.C.J. No. 10, "when an individual's Charter right abrogated or derogated from an Aboriginal, treaty, or other right, s. 25 of the Charter required the

collective Indigenous right to take precedence, even if the Charter claimant was a member of the Indigenous group concerned"

Breach of Aboriginal treaty rights was a cause of action relied on the following cases (none are major resource project cases, but do involve land usage):

- *Wahsatnow v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] F.C.J. No. 1665;
- *R. v. Blais*, [2001] M.J. No. 168
- *First Nation of Nacho Nyak Dun v. Yukon*, [2017] S.C.J. No. 58

However, there was no reliance on the Charter of Rights and Freedoms specifically in any of the above listed cases. Where section 25 of the Charter is mentioned in a case, it is in the context of whether the section acts as a shield for Indigenous rights where they are in conflict with an individual's rights protected under the Charter itself. Section 25 is not considered as a positive right itself.

Therefore, despite having some protection of Canadian Indigenous cultural rights, there is not a substantial comparison to be made to the right to practise their culture that Aboriginal and Torres Strait Islander peoples enjoy in Queensland.

Notably, Canada is a signatory to UNDRIP and has attempted to implement its international obligations into domestic law through the *Impact Assessment Act 2019*. Under the Act, an impact assessment system is listed to actively involve Indigenous peoples in federal assessments and decision-making. The system includes the following:

- early and regular engagement, consultation and participation;
- collaboration and cooperation;
- respect for rights and jurisdiction;
- mandatory consideration of Indigenous knowledge; and
- building Crown-Indigenous relations and capacity.

The Act also affirms Canada's commitment to secure free, prior, and informed consent (FPIC) through the impact assessment process.

This appears to be a successful way to incorporate international obligations into domestic law, which Australia could seek to emulate in future. However, it would be hard to implement such a piece of legislation on a federal level.

(iv) South Africa

In South Africa, human rights are protected by the Bill of Rights, contained in Chapter 2 of the *Constitution of the Republic of South Africa 1996*.

While South Africa does not have any First Nations specific cultural rights in the Bill of Rights, they do have two cultural rights listed in the protected rights: section 30 and section 31.

Section 30 protects language and culture:

> *Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.*

Section 31 protects cultural, religious and linguistic communities

> *1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community*
>
> *a. to enjoy their culture, practise their religion and use their language; and*
>
> *b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.*
>
> *2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.*

In 2019, a landmark case regarding Indigenous cultural rights in relation to major resource projects was handed down in South Africa. In particular, this case cemented the existence of FPIC in South African domestic law where there are informal rights held over the relevant land. It is summarised below.

Case name	*Baleni and Others v Minister of Mineral Resources and Others* [2019] 1 All SA 358 (GP)
URL	https://www.saflii.org/za/cases/ZAGPPHC/2018/829.html
Court/jurisdiction	High Court of South Africa
Facts	This case was between the local Umgungundlovu community and Transworld Energy and Mineral Resources (TEM). TEM had applied for a mining right in the Xolobeni area, on the Eastern Cape. The proposed area for the mine site was home to the Umgungundlovu community. The lands were home to family graves and were considered to be essential sites for family and

	community rituals, as well as for livestock and crop cultivation that the Umgungundlovu relied on to live.
Consideration	The case focussed on the notion of free and prior informed consent. The matter was held to require a consideration of the provisions in the *Interim Protection of Informal Land Rights Act 31 of 1996* (‘*IPILRA*’) and the *Mineral and Petroleum Resources Development Act* (‘*MPRDA*’) in respect of the level of engagement that must be achieved prior to the grant of a mineral right. In the former, the Umgungundlovu people were granted informal rights over the land. In relation to the latter, TEM argued that the *MPRDA* did not grant the applicants a right to consent but instead, a more limited right to be consulted. The importance of customary law was considered by the Court. Referencing *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580, the Court said that the basic laws of South Africa and its Constitution put it beyond doubt that customary law should be accommodated, and not merely tolerated. Sections 30 and 31 of the Constitution specifically serve to entrench respect for cultural diversity.
Decision	The High Court of South Africa, after considering both domestic and international law, declared that the Umgungundlovu community had a right to consent before the exploitation of mineral resources in their traditional lands occurred. The Court concluded that in applying the relevant international instruments, FPIC is to be considered as akin to a veto. TEM was obliged to obtain the full and informed consent of the community, as the land was communally held by Indigenous peoples. Therefore, it was held that there was no lawful authority to grant a mining right to TEM, as they had not obtained the full and informed consent of the Umgungundlovu
Implications for interpretation of section 28	FPIC is not a concept that has been entrenched into Queensland law. It has not been incorporated into the interpretation and application of section 28. Should lobbying be successful and FPIC become a part of the Australian framework (discussed below), then *Baleni* may bear influence on how limitations to section 28 should be considered by the courts. If consent to limit section 28 rights have not been obtained, then perhaps the court may not recommend approval of the mining lease. There is a distinction to be made in this case in regard to informal land rights and common law owners. This decision was made in respect of the former.

(v) The Americas

25 countries in the Americas have ratified a regional bill of rights, namely, the American Convention on Human Rights. This includes countries like Brazil, Chile, Mexico, and Argentina.

However, the Convention does not include a cultural right analogous to Queensland's section 28.

(vi) International human rights law obligations

Key in this assessment are the international human rights law obligations that signatories have agreed to abide by.

Relevant international human rights law obligations include:

International Convention on Civil and Political Rights

- ARTICLE 27: *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*
- Notably, in Norway, the ICCPR has been incorporated into domestic law through their *Act Relating to the Strengthening of the Status of Human Rights in Norwegian law (the Human Rights Act) of 21 May 1999.* A landmark decision was made in 2021 regarding wind power plants on the Fosen peninsula (English translation of the case can be accessed here):
    - The wind farms were located in an area where reindeer husbandry was practised by native Sami people. The herders claimed that the construction interfered with their right to enjoy their own culture according to Article 27.
    - The Supreme Court held that the licence was invalid due to an unjustifiable burden on the ability for the Sami people to practise their culture.
    - This case is an important decision as the Supreme Court of Norway held it to be a direct infringement of ICCPR international law.

International Convention on Economic, Social and Cultural Rights

- ARTICLE 1(1): *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
    - ARTICLE 15(1)(A): *The States Parties to the present Covenant recognise the right of everyone to take part in cultural life.*

Convention on the Rights of the Child

- ARTICLE 30: *In those States in which ethnic, religious or linguistic minorities or persons of indigenous original exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.*

International Convention on the Elimination of All Forms of Racial Discrimination

- ARTICLE 5: *States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without discrimination as to race, colour or national or ethnic origin, to equality before the law, notably to the enjoyment of the following rights … (e) economic, social and cultural rights in particular right to housing, right to education, right to health services.*

UNDRIP: the United Nations Declaration on the Rights of Indigenous Peoples

This Declaration was adopted by the General Assembly in 2007.

The Declaration establishes a universal framework of minimum standards for the survival, dignity, and wellbeing of Indigenous Peoples, elaborating on the existing human rights standards and fundamental freedoms as they apply to the specific situations of Indigenous Peoples.

The substance of the rights that are distinct from what is included in the *HRA* have a lot to do with culture, spirituality and passing on traditional customs.

Australia was initially against the Declaration upon its ratification (on the grounds that it elevated customary law above national law), but the Government reversed its position in 2009 to give formal support to the Declaration. Therefore, in theory, the interpretation of section 28 by Queensland courts may be bolstered by the guidance of the Declaration. Use of extrinsic material in the interpretation of an Act is allowed via s 15AB of the *Acts Interpretation Act.*

However, the Declaration is not implemented into domestic law. Further, the Declaration itself does not create binding legal obligations on Australia, though it echoes many of the same sentiments as section 28 does.

After looking at consideration of section 28 *HRA* (Qld) by the courts in **(A)**, it does not appear that the ratification of UNDRIP in Australia makes any great impact on the consideration of human rights by the court. As the Declaration was ratified in 2009, but the *HRA* did not in force until 2020, it is difficult to determine whether the UNDRIP has any substantial impact on the way that the right is interpreted by the courts.

Internationally, and particularly in Canada, a clearer intention to implement the UNDRIP obligations into domestic law has been taken through the creation of the *Impact Assessment Act.*

Free and Prior Informed Consent ("FPIC")

FPIC is a specific right recognised in UNDRIP, which aligns with the universal right to self-determination. This idea centres on obtaining consent from Indigenous peoples for any activities undertaken on their land. This allows Indigenous peoples to provide or withhold/withdraw consent regarding projects impacting their territories. Essentially, this means that Indigenous peoples must be informed about mining, logging, dams, and other large projects in a timely manner.

In Australia, domestic law does not require projects to achieve FPIC (despite ongoing legislative reform lobbying and inquiry). This point was made in the following cases:

- *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121.
- *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

However, FPIC is gaining more traction, and as such, may have significance for the ongoing interpretation of section 28.

Internationally, FPIC much more ingrained in domestic practice. In both Canada and South Africa, FPIC has either been included in domestic legislation or confirmed through High Court jurisprudence. Should Australia make similar strides to include FPIC in its decision-making framework regarding mining lease objections, not only must there be a consideration of the limitations of the rights themselves, there also must also be consultation with the traditional landowners to obtain consent. This could be an added hurdle for mining lease applications to be recommended for approval by the Queensland courts.

Summary of potential implications for the interpretation of section 28 of the *HRA* (Qld)

In Queensland, precedent suggests that where a Cultural Heritage Management Plan or a similar arrangement exists between developers and affected Indigenous communities, any limitations on section 28 will likely be considered justifiable. Outside the major resource project context, section 28 has generally been relied upon in an ancillary manner where an applicant identifies as an Indigenous person. Post-*Waratah*, it is unclear how courts will approach the interpretation of section 28. We may be seeing a shift in how cultural rights are being perceived by the courts. Where an action erodes the survival of culture, that might be a reason for a court to find an unjustifiable infringement of section 28. However, without further precedent, it is difficult to precisely predict what the implications of the *Waratah* litigation will be.

Regarding other domestic and international jurisdictions, there remains a lack of judicial consideration. Coupled with the different operation of human rights regimes, little about the interpretation of section 28 can be drawn from domestic and international jurisprudence. As Queensland is the only jurisdiction in Australia with both a human rights instrument *and* a large portion of mining work, the state remains unique in the way that cultural rights are considered. Should Australia further incorporate their international law obligations into domestic law, concepts from UNDRIP (particularly FPIC) may become more instrumental in the assessment of First Nations cultural rights for major resource project applications.

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