

IN THE LAND COURT
OF QUEENSLAND

MRA050-20; EPA 051-20

BETWEEN

Waratah Coal Pty Ltd

Applicant

AND

Youth Verdict Ltd & Ors

Respondents

AND

Chief Executive, Department of Environment and Science

Statutory Party

FIRST LAW PROTOCOL

The Parties agree to the following First Law Protocol:

1. Recitals

Whereas the parties are engaged in litigation in the Land Court of Queensland and desire to conduct the proceeding in a manner which is respectful of international law norms regarding the rights and interests of First Nations Peoples, and wish to ensure, as far as possible, that the proceedings are conducted in a manner that is respectful of and consistent with the laws of the First Peoples represented in these proceedings, they agree to this protocol which:

- 1.1. **Adopts** the principles in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that were publicly supported by Australia in 2009. In particular, the Protocol recognises the UNDRIP as highly relevant to the Land Court Mining Objection Hearing (MOH) as a means of effectively recognising Queensland's obligations as they apply to First Nations peoples under international human rights instruments, in consultation and cooperation with the people concerned.¹
- 1.2. **Sets out** the agreed principles and processes that are to be applied when the Court receives and considers evidence about the Traditional Knowledge given by First Nations witnesses, including testimony concerning Oral Traditions and history, so that such evidence is tendered in a culturally appropriate way and that the hearing is conducted fairly. The hearing will be conducted fairly by giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.²
- 1.3. **Establishes** a commitment to the adoption of culturally competent practices that

¹ The following Articles should inform the Court with regard to First Nations evidence: Articles 2- 5, 7-13, 18- 20, 25- 7, 29, 31-2, 34-5, 40

² UNDRIP, Article 27.

recognise and respect the right of First Nations to maintain, control, protect and develop their cultural heritage, Traditional Knowledge and traditional cultural expressions. Including the right they have to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.³

- 1.4. **Recognises and respects** First Nations right to self-determination and First Nations peoples' unique connection to the land and waters of this continent from time immemorial.⁴
- 1.5. **Acknowledges** that First Nations are distinctive and comprised of beliefs, norms, customs, practices and values that are dynamic and living and continue to be practised and nurtured by First Nations.
- 1.6. **Acknowledges** that First Nations are the holders of unique languages, knowledge systems and beliefs and possess invaluable knowledge of practices for the sustainable management of the environment and natural resources, acquired through a special relation to and use of their ancestral lands. The ancestral lands, seas and waters of First Nations have fundamental importance for the physical, cultural and spiritual wellbeing of First Nations peoples.
- 1.7. **Ensures** the inclusive participation of First Nations peoples in the hearing process, empowering witnesses to voice their distinct and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas, knowledge and cultural expression and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom.
- 1.8. **Acknowledges** that First Nations transmit Traditional Knowledge through spoken word and cultural practice; and the emphasis on communication in First Nations' knowledge systems does not affect the reliability or probative value of evidence about Traditional Knowledge given by First Nations people, whether given by Oral Traditions or through other cultural expressions, including singing, dancing, storytelling or other forms of expression.
- 1.9. **Adopts** an approach founded on respect and dignity that does not perpetuate past injustices. One way to show respect and enable First Nations witnesses to be heard is to have regard for traditional ceremony and protocols. This includes making acknowledgement of, or enabling First Nations peoples to give welcome to, country and observing cultural protocols that govern how evidence containing Restricted Cultural Knowledge is handled.⁵
- 1.10. **Acknowledges** that individual keepers of First Nations' Traditional Knowledge are custodians, qualified by way of experience and highly respected members of their communities. First Nations are acknowledged to have the right to maintain, control, protect and develop their Traditional Knowledge as set out in Article 31 of the UNDRIP.
- 1.11. **Acknowledges** that Traditional Knowledge is:
 - an intergenerational system of institutions, norms and processes that govern knowledge production;
 - held collectively and expressed in tangible and intangible forms;

³ Applying Article 25, UNDRIP.

⁴ UNDRIP, Articles 3-4.

⁵ For a judicial example of the approach adopted by the Federal Court for taking group evidence on country, see *Yarmirr v Northern Territory (No 2)*(1998) 82 FCR 533 at 544 [22].

governed by economic, spiritual and cultural values and subject to complex relational dynamics and cultural protocols that create obligations to maintain and protect it; and associated with specific First Nations.⁶

- 1.12. **Acknowledges** that the principle of Free, Prior and Informed Consent is a pre-requisite for the meaningful participation by First Nations peoples in court processes concerning decisions and issues that involve the approval of a project and issues that affect their lands, waters, seas, natural resources and territories.⁷

2. Purpose

- 2.1. The above purpose of this protocol, consistent with sections 7 and 55 of the *Land Court Act 2000* (Qld), facilitates the use of the Court's power to apply the rules of evidence flexibly and to act according to equity, good conscience and merits of the case without regard to legal technicalities.

3. Scope

- 3.1. The Protocol applies to all evidence given by First Nations peoples (including exhibits to witness statements).

4. Words and Meanings

Ailan Kastom is island custom and means the body of law, customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, laws, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.⁸

Biculturalism or having a bicultural ability develops from prolonged successful interaction with people from the second cultural (and/or linguistic) group.⁹

Country refers to lands, seas, waters and skies and includes the natural environment, together with the spiritual and cultural connections that include songlines, stories and knowledge and cultural obligations to protect and care for Country.

First Nations refers to the group or groups of persons, being persons who identify as Aboriginal or Torres Strait Islander that have ancestral connections to the lands and waters of Australia's mainland and the Torres Strait.

Free, Prior and Informed Consent (FPIC) refers to the right of First Nations peoples to give or withhold consent, on a free and informed basis, about things that affect them. Consent must be given voluntarily without coercion, intimidation or manipulation according to a process and decision-making structure that is determined and self-directed by the community of First Nations peoples from whom consent is being sought. Prior consent implies that time is provided to understand, access and analyse information before making the decision, and respecting that time may be needed to understand, analyse and evaluate the decision under consideration, in accordance with custom and cultural protocols.¹⁰ Information about the proposed decision should be accessible, clear, consistent, accurate and transparent to allow consent to be informed. The process for achieving FPIC is ongoing.

⁶ Ruth L Okediji, 'A Tiered Approach to Rights in Traditional Knowledge' (2019) 58 Washburn Law Journal 271, 272-273.

⁷ <http://www.fao.org/3/i6190e/i6190e.pdf>; UNDRIP Article 10, 19, 32.

⁸ Acts Interpretation Act 1954 (Qld) s 36, sch 1 (definition of 'Island Custom').

⁹ Eades, Diana --- "Taking evidence from Aboriginal witnesses speaking English: some sociolinguistic considerations" (2015) 126 Precedent 44 <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2015/12.html>

¹⁰ Food and Agriculture Organization of the United Nations, 'Free Prior and Informed Consent – An Indigenous Peoples' Right and A Good Practice for Local Communities' page 12-13 <<http://www.fao.org/3/i6190e/i6190e.pdf>>

Oral Traditions refers to information about First Nations' laws and customs, traditions, beliefs, genealogies and Traditional Knowledge that is transmitted by way of oral histories passed on from generation to generation of First Nations peoples over time.

Restricted Cultural Knowledge includes Traditional Knowledge and cultural expressions¹¹ that, under the traditional laws acknowledged and the traditional customs observed, by the First Nations Peoples to whom the Restricted Cultural Knowledge relates, is sacred or otherwise sensitive and subject to restrictions on how it is communicated or recorded.¹²

Self-determination is a fundamental¹³ and inalienable collective right of all peoples that must be respected and upheld from which no derogation is permitted.¹⁴ In exercising that right, First Nations peoples have the right to autonomy or self-government in matters relating to their internal and local affairs¹⁵ and to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.¹⁶ The right to self-determination requires the full enjoyment of other subsidiary rights including cultural rights, practices and traditions such as using one's own language.

Traditional Knowledge refers to the cumulative body of knowledge, know-how, practices, representations, skills and innovations developed by First Nations peoples through extended histories of interaction with the natural environment and passed down from generation to generation in Oral Traditions. These sophisticated sets of understandings, interpretations and means are part of the distinctive, dynamic and living cultures and knowledge systems of First Nations Peoples that is not limited to cultural practices and encompasses naming and classification systems, resource use practices, spirituality, and specialised knowledge of place, landscapes, land and sea, languages, local history, species, contemporary land and seas management, genetic resources,¹⁷ seasons and weather patterns.¹⁸

5. Foundational concepts

These protocols are underpinned by the foundational concepts of Biculturalism and Respect

5.1. Biculturalism

¹¹ Cultural expressions refer to the expression of traditional cultural practices or knowledge by First Nations Peoples, such as through verbal, non-verbal, physical, tangible or non-tangible forms: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Knowledge: Draft Articles* WIPO/GTRKF/IC/40 (June 2019)

¹² For judicial example of directions regarding restricted cultural knowledge see *Yarmirr v Northern Territory* [1998] FCA 771 at [21].

¹³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 54-59 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21).

¹⁴ Vienna Convention on the Law of Treaties Art. 53, May 23, 1969, 1155 U.N.T.S. 331.

¹⁵ United Nations Universal Declaration on the Rights of Indigenous Peoples art 4.

¹⁶ United Nations Universal Declaration on the Rights of Indigenous Peoples art 5.

¹⁷ Intellectual Property Australia, 'Indigenous Knowledge Consultation Paper' (February 2021) https://www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf

¹⁸ <https://www.wipo.int/tk/en/tk/>

First Nations cultures are both diverse and distinct but also intertwined with contemporary Australian society. Effective measures should be taken to ensure that First Nations peoples can understand and be understood in legal and administrative proceedings.¹⁹

The parties acknowledge that:

- 5.2. Different ways of communicating do not impact the credibility or reliability of First Nations evidence.
- 5.3. First Nations witnesses will have varying bicultural abilities. For example, First Nations people that are not bicultural may be disadvantaged by the interview format, which is based on assumptions about the central role of questions in seeking information.²⁰
- 5.4. Where it is practical and desirable, First Nations evidence and submissions may be heard according to cultural protocols.
- 5.5. Cultural protocols, bicultural abilities and circumstances of First Nations witnesses must not be generalised. Each First Nations witness should be consulted about their participation in the hearing process and given the opportunity to identify cultural protocols that may apply or other cultural or language considerations that affect how their evidence is given.
- 5.6. Cultural protocols may require that evidence is received on a restricted basis and subject to suppression orders on the basis that the information may only, or may not be heard by certain people, genders, and/or levels of seniority.
- 5.7. Certain evidence may be best able to be given at the place which is being discussed.
- 5.8. Certain evidence may be best given in the company of other witnesses or the presence of Elders.
- 5.9. Certain evidence and places may trigger immediate or delayed trauma responses.
- 5.10. Evidence and submissions from First Nations witnesses may be given in the witnesses' language because:
 - 5.10.1. some First Nations peoples do not speak English as their first language, or may speak in a manner that is different from other speakers of Australian English;²¹
 - 5.10.2. ordinary English words may be used by First Nations peoples in a way which is culturally different from Standard Australian English. ²² For example, the answers: 'I don't know' and 'I don't remember' do not always directly refer to a witnesses' knowledge or memory and may be a statement about the inappropriateness of the question;²³ and
 - 5.10.3. information given by the witness about climate change that refers to cause and effects may be contextualised by the witnesses' ongoing local

¹⁹ See per Article 13, UNDRIP.

²⁰Eades, Diana --- "Taking evidence from Aboriginal witnesses speaking English: some sociolinguistic considerations" (2015) 126 Precedent 44 <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2015/12.html>

²¹ Public Lecture Aboriginals in the Criminal Justice System (2008) 29 Adelaide Law Review 7, appendix A: Direction Concerning Aboriginal Witnesses, 25.

²² 'The Aboriginal Witness – Part 1' in the little red book of advocacy (second edition) quoting anthropologist Dr Diana Eades an expert in critical sociolinguistics, language in the legal process, and intercultural communication, particularly involving Australian Aboriginal people who speak varieties of English. <https://lawsocietynt.asn.au/images/stories/publications/the-little-red-book-of-advocacy-second-edition.pdf>

²³ Public Lecture Aboriginals in the Criminal Justice System (2008) 29 Adelaide Law Review 7, appendix A: Direction Concerning Aboriginal Witnesses, 27.

- observations of changes to seas, landscapes and places²⁴ and given meaning through semantic structures of language that require translation;
- 5.10.4. there may be grammatical differences between First Nation English speakers and other kinds of English. For example, the use of verbs in the present tense when referring to a time in the past or future. Clarification may be sought where it is not clear in the context of the giving of evidence whether the witness is referring to the past, present or future;²⁵ and
 - 5.10.5. the pronunciation of some consonants or words in English may give rise to misunderstandings and to prevent misunderstanding, the context in which words are used should be considered, where possible.²⁶
- 5.11. Interpreters may be required to interpret questions and directions from the Court to the First Nations witness and Active Parties in the witnesses' first language if requested by a witness.
 - 5.12. Acknowledgment is given to the differing cultural values that may impact the way in which First Nations peoples communicate. For example, it may be common for some First Nations people to:
 - 5.12.1. have long lapses of silence from time to time during speech to consider the question or to think carefully prior to talking about serious matters;²⁷
 - 5.12.2. avoid direct eye contact with those speaking to them;²⁸
 - 5.12.3. say 'yes' to a question if asked 'a leading question' even if they do not agree with the proposition being put to them in the question or do not understand the question.²⁹ This phenomenon is more commonly referred to as gratuitous concurrence. This can also occur where the proposition is put to the witness in a negative question which is leading. The witness will often answer 'no' in the same way which does not always mean that they agree with the questioner.³⁰
 - 5.12.4. none of these factors affect the reliability or truthfulness of what the First Nations witness is communicating or the credibility of the witness.
 - 5.13. Measuring distance may be done in terms of relationships between places and objects, rather than using numbers or units of length such as the metric system.
 - 5.14. First Nations people should be consulted about their preferred spelling for words in First Nations' languages, names, place names and culturally appropriate uses of names and pronouns.
 - 5.15. Cultural mourning protocols should be observed when using the names, images and representation of First Nations' people who have died.

²⁴ Melissa Nursey-Bray et al, 'Old Ways for New Days: Australian Indigenous Peoples and Climate Change' (2019) 24(5) *Local Environment* 473.

²⁵ Public Lecture *Aboriginals in the Criminal Justice System* (2008) 29 *Adelaide Law Review* 7, appendix A: Direction Concerning Aboriginal Witnesses, 25.

²⁶ Public Lecture *Aboriginals in the Criminal Justice System* (2008) 29 *Adelaide Law Review* 7, appendix A: Direction Concerning Aboriginal Witnesses, 25 - 26.

²⁷ Public Lecture *Aboriginals in the Criminal Justice System* (2008) 29 *Adelaide Law Review* 7, appendix A: Direction Concerning Aboriginal Witnesses, 25.

²⁸ ²⁸ Public Lecture *Aboriginals in the Criminal Justice System* (2008) 29 *Adelaide Law Review* 7, appendix A: Direction Concerning Aboriginal Witnesses, 26.

²⁹ Public Lecture *Aboriginals in the Criminal Justice System* (2008) 29 *Adelaide Law Review* 7, appendix A: Direction Concerning Aboriginal Witnesses, 26.

³⁰ Public Lecture *Aboriginals in the Criminal Justice System* (2008) 29 *Adelaide Law Review* 7, appendix A: Direction Concerning Aboriginal Witnesses, 26.

6. Respect

- 6.1. Parties agree that First Nations witnesses should be afforded the respect that they are accustomed to receiving in their own communities.
- 6.2. Parties embrace the principle that First Nations' Traditional Knowledge encompasses a broad range of collective knowledge held by First Nations peoples that has developed over time through the process of interaction between First Nations and the environment, and that Traditional Knowledge is a reliable, authoritative source of information about the natural environment that is to be given equal weight to other forms of knowledge and which complements and informs knowledge in the sciences, social sciences and humanities.
- 6.3. Parties embrace the principle that First Nations peoples' traditional knowledge is a branch of knowledge that can inform understanding of ecology and ecological processes and can inform and intersect with western physical sciences, social sciences, and the humanities.
- 6.4. Parties agree that Oral Traditions are in essence timeless and an intrinsic part of First Nations' culture³¹ that are passed down through oral histories and are an important record of the past.³²
- 6.5. First Nations Peoples have the right to use their Oral Traditions, and effective measures should be adopted to ensure that they can understand and be understood in the MOH and to ensure evidence of their Oral Traditions provided to the Court is handled in accordance with cultural protocols.³³
- 6.6. Parties agree that recordings of evidence given by First Nations witnesses that contain Traditional Knowledge must only be used for the purpose for which it was tendered and First Nations' Indigenous Cultural and Intellectual Property rights in such material must be observed.

7. Protocols for the presentation of evidence - accommodating First Nations traditional ways of transmitting and verifying First Law

In this clause 6, the phrase “**cultural or customary nature**” means of a nature relating to the culture, genealogy, customs or beliefs, traditions of First Nations people.

The following protocols are agreed for management of the hearing in progress to ensure the integrity of the MOH in line with the FPIC principle. It is acknowledged that these protocols complement but do not replace, the Court's authority to ensure that appropriate standards of conduct are maintained throughout the hearing. The parties now agree:

- 7.1. In line with the FPIC principle, First Nations witnesses should be able to:
 - 7.1.1. participate in an environment free from intimidation; and
 - 7.1.2. have sufficient time to discuss in their own language and in a culturally appropriate way, matters affecting their rights, lands, natural resources, territories, livelihoods, knowledge, social fabric, traditions, governance systems, and culture or heritage (tangible and intangible).³⁴
- 7.2. First Nations ceremonies may be part of the process of presenting Oral Traditions and evidence. This includes giving evidence of cultural or customary nature by way of singing, dancing, storytelling, or other forms of cultural expression.³⁵

³¹ Zia Akhtar, *Aboriginal Oral Testimony, Hearsay and the Reception Theory of Admissibility* (2016) 42(3) *Commonwealth Law Bulletin* 396, 402.

³² *Delgamuukw v. British Columbia* [1997] 3 SCR 1010

³³ United Nations Declaration of the Rights of Indigenous Peoples (INDRIP) art 13.

³⁴ *Ibid.*

³⁵ *Federal Court Rules 2011* (Cth) r 34.123.

- 7.3. Group evidence will be permitted whereby two or more First Nations witnesses give evidence together or a witness can consult with other persons.³⁶ Furthermore, during the presentation of evidence concerning Oral Tradition, the Court should allow:
 - 7.3.1. witnesses to stand or sit as a group while giving evidence;³⁷ and
 - 7.3.2. other First Nations community members present to prompt or correct each other and thereby reach consensus on important points.
- 7.4. Where possible, evidence should be received in narrative form via video, audio or oral testimony without cross-examination.
- 7.5. Video and audio testimony is permitted where difficulties with travelling to Brisbane are faced by First Nations witnesses either because of locality, travel restrictions, health reasons or other commitments.
- 7.6. To ensure that First Nations Witnesses are provided a more comfortable and familiar environment to present their testimony and in recognition of the fact that some Oral Traditions or certain ceremonies can only be told or performed at appropriate locations:
 - 7.6.1. where possible, the Court should travel to the countries of the First Nations witnesses during the trial to take evidence on country;³⁸ or
 - 7.6.2. if it is not possible for the Court to visit the witnesses then the Court allow all First Nations witnesses to be supported by the other witnesses or members of their chosen community in the courtroom.
- 7.7. Certain knowledge may be identified by a witness as Restricted Cultural Knowledge that may, for example, be restricted to certain individuals, groups of individuals or gender restricted. In order to observe these restrictions, the Court may:
 - 7.7.1. direct that hearings be held in private or restrict certain people from the hearing;
 - 7.7.2. prohibit publication or restrict disclosure (including to parties) of Restricted Cultural Knowledge. Parties agree to observe First Nations' cultural protocols and Ailan Kastom when doing so.
- 7.8. Evidence may be taken only in the presence of a limited class of persons or restricted in its dissemination to a defined class of persons, for example, a proposed protocol may be provided with a general summary of evidence, avoiding particular sensitivities.
- 7.9. During cross-examination, counsel will treat all witnesses with respect, and the Court may intervene as necessary to avoid confrontational or disrespectful cross-examination of First Nations witnesses:
 - 7.9.1. Questions put to First Nations witnesses should be courteous in keeping with the respect afforded the witness by their community.
 - 7.9.2. Questions seeking gratuitous concurrence are impermissible.
 - 7.9.3. Counsel should take into account the cultural approach of the First Nations witnesses in making best efforts to ensure that the witness understands the

³⁶ *Federal Court Rules 2011* (Cth) r 34.125.

³⁷ *Nudding and Strickland v Western Australia* (2002) 121 FCR 82; Black CJ, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13 Public Law Review 16, pp 20–5.

³⁸ *Federal Court Rules 2011* (Cth) r 34.120(d); The practice of hearing evidence on country was adopted in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Ward v Western Australia* (FCA, WAG6001/1995, Lee J, 11 April 1997, unreported); *Yarmirr v Northern Territory* (1998) 82 FCR 533; *Hayes v Northern Territory* DG6002/96.

³⁸ *Ibid* [84], [87].

questions asked.

7.9.4. The Court may intervene where questions stray from the issues that the court must consider in the MOH, or breach the rules of evidence as if the *Evidence Act 1977* (Qld) applied, or where the First Nations witnesses may have difficulty understanding the questions.

7.9.5. Where the special context of the testimony of First Nations witnesses suggests, alternative ways of questioning on cross-examination should be explored.

8. In assessing First Nations evidence and when conducting the Mining Objection Hearing, parties request the Court to adopt the following guiding principles:

- 8.1. To take account of the cultural protocols of First Nations witnesses.
- 8.2. When assessing the evidence of First Nations witnesses, consideration should be given to the sociolinguistic features of a witness's evidence that may lead to misunderstandings particularly where there is variation in the way that English is used.³⁹
- 8.3. Approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of Traditional Knowledge, acknowledging the evidentiary difficulty in proving a fact through Oral Traditions, the basis for which originates from times when there were no written records of the practises, customs and traditions engaged in. Further acknowledging that Oral Traditions are transmitted through oral histories that are not recorded or written down and that this will require the Court to rely upon evidence given in the personal observations of First Nations witnesses.
- 8.4. That it does not reduce the reliability or credibility of the evidence presented by First Nations witnesses simply because the evidence does not conform precisely with the evidentiary standards applied in other contexts, including where evidence is given as by more than one witness simultaneously.⁴⁰
- 8.5. Recognition that First Nations evidence about their traditional laws and customs and their rights and responsibilities with respect to land and waters, deriving from them, is of the highest importance. All else is second order evidence.⁴¹
- 8.6. Evidence of Oral Traditions given by First Nations witnesses is to be given equal and independent weight.⁴² The nature of Oral Traditions demands an approach which accords due weight to the perspective of First Nations peoples.⁴³ Oral Traditions should not be undervalued.
- 8.7. In assessing the weight given to Oral Traditions, significant weight should be given to evidence that is consistent with written records or is uncontradicted or 'rings true' in the context of events at the time or reflects common sense.⁴⁴
- 8.8. The parties agree that First Nations Oral Traditions do not require corroborating documents.⁴⁵ The parties recognise that there are appropriate checks and balances

³⁹ Dean Mildren, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 Criminal Law Journal 7, 21-22,

⁴⁰ See principles laid down in *Regina v Van der Peet* (1996) Supreme Court of Canada [9]

⁴¹ *Sampi v State of Western Australia* [2005] FCA 777 [48]. The Full Federal Court agreed with this view: *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537 [57].

⁴² *Tsilhqot'in Nation v British Columbia* (2007) Supreme Court of British Columbia, per Justice Vickers at [154].

⁴³ *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [82].

⁴⁴ *R v Marshall; R v Bernard* 2005 SCC 43 [68]-[69].

⁴⁵ Zia Akhtar, 'Aboriginal Oral Testimony, Hearsay and the Reception Theory of Admissibility' (2016) 42(3) *Commonwealth Law Bulletin* 396, 402.

within the First Nations groups, tribes and clans with respect to oral stories such as repetition of story-telling and testing of accuracy at community gatherings. Traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.⁴⁶

- 8.9. The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the Traditional Knowledge of First Nations Peoples.⁴⁷
- 8.10. The opinion rule does not apply to evidence of an opinion expressed by a First Nations witness about the existence or non-existence, or the content, of Traditional Knowledge. Australian Courts have accepted that a non-expert witness can be qualified or an 'expert through experience'⁴⁸ or that evidence is admissible on the basis it is 'facts ascertained by observations'⁴⁹ and not opinion.
- 8.11. First Nations Traditional Knowledge has been acquired through and intrinsically linked to their spiritual and cultural connection to Country. This Traditional Knowledge includes long-term observations about the changing environment such as seasonal weather patterns and events.⁵⁰ First Nations Traditional Knowledge is not limited to cultural practices, it includes specialised knowledge of place, landscapes, land and sea, languages, local history, species, and contemporary land and seas management.⁵¹
- 8.12. The Multiple Evidence Base approach should be adopted which highlights the importance of Indigenous knowledge systems on their own terms.⁵²
- 8.13. The Court will give due treatment to First Nations Peoples' perspectives by ensuring that evidence of First Nations People's cultural and Traditional Knowledge is weighed equally and given equal footing with other expert evidence, and acknowledging that First Nations People's Traditional Knowledge and understanding of the natural environment enables First Nations witnesses to give reliable, expert evidence on the impacts of climate change on their culture and their Country.

⁴⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [46].

⁴⁷ Evidence Act 1995 (Cth) s 72.

⁴⁸ *Dodds v The Queen* (2009) 194 A Crim R 408; *Australian Securities and Investments Commission v Adler (No 1)* (2001) 20 ACLC 222 [17]-[19]; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 [85].

⁴⁹ *Weal v Bottom* (1996) 40 ALJR 436 [442].

⁵⁰ https://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf

⁵¹ Melissa Nursey-Bray et al, 'Old Ways for New Days: Australian Indigenous Peoples and Climate Change' (2019) 24(5) *Local Environment* 473.

⁵² Tengö, Maria & Brondízio, Eduardo & Elmqvist, Thomas & Malmer, Pernilla & Spierenburg, Marja. (2014). Connecting Diverse Knowledge Systems for Enhanced Ecosystem Governance: The Multiple Evidence Base Approach *AMBIO A Journal of the Human Environment*; <http://www.unesco.org/new/en/natural-sciences/priority-areas/links/biodiversity/projects/indigenous-knowledge-within-the-framework-of-ipbes/tokyo-workshop/case-studies/case-study-29/>.