

Yeelirrie Uranium Project Proposal Commonwealth Approval

A recent decision by the Federal Minister for the Environment to approve a uranium mine highlights the complex and interrelated relationship between state and federal approvals and the potential minefield awaiting proponents seeking approvals for major resource projects.

On 24 April 2019, it was unexpectedly announced that Canadian mining company Cameco's Yeelirrie uranium mine project in the Yilgarn region of Western Australia had received Commonwealth environmental approval on 10 April 2019, the day before the Morrison liberal government entered caretaker mode. This approval was unanticipated, as Environment Minister Melissa Price had previously indicated that the project would not receive Commonwealth environmental approval until a judgment was delivered in the judicial review proceedings of the state approval currently before the Western Australian Court of Appeal.

This unexpected Commonwealth environmental approval highlights the importance of industry, politicians and other stakeholders in resources projects comprehensively understanding the nuances of the environmental approvals process, particularly the bilateral element in matters where the project triggers the Environmental Protection Biodiversity Conservation Act 1999 (Cth) (EPBC Act) due to likely significant impacts on Matters of National Environmental Significance (MNES).

The project was similarly approved at a state level by the former Minister for the Environment Albert Jacob only 16 days before the Barnett liberal Western Australian state government went into caretaker mode prior to the 2017 state election. The Conservation Council of Western Australia (CCWA) and three Tjiwarl Traditional Owner applicants challenged the validity of Jacob's decision by initiating judicial review proceedings in the Supreme Court of Western Australia in 2017. At first instance, Chief Justice (as he then was) Wayne Martin found that Jacob's decision was valid, and dismissed the proceedings. The applicants appealed the decision; however, following the hearing in December 2018, the judgment was reserved, so the outcome of the appeal is not yet known. Previously, the federal Environment Minister, Hon. Melissa Price MP, indicated that no determination would be made as to Commonwealth environmental approval until the Court of Appeal delivered its judgment.

The project has been controversial from a conservation perspective, but Cameco's decision whether to advance the project will depend on market factors. The Yeelirrie uranium deposit has a low grade of uranium oxide concentration, at 0.15%, and Cameco has expressed its uncertainty about whether the project is economical given the current uranium market conditions. Currently, the market conditions are not looking favourable for the project to proceed, regardless of environmental approval status, particularly given the low concentration of uranium oxide in the deposit, and the decrease in the global demand for uranium ore.

From a legal perspective, it is controversial because the Environmental Protection Act 1986 (WA) (EP Act) stipulates that the minister may not make a decision otherwise in accordance with the decision made by the Appeal Convenor. The Environmental Protection Authority (EPA) originally recommended that the proposal should not be implemented, as it posed an unacceptable risk to the stygofauna species, and the EPA was not confident that Cameco could manage the project and meet the EPA's environmental factor guidelines on subterranean fauna. Cameco appealed this decision to the Appeal Convenor, who also recommended that the proposal should not be implemented. Ultimately, contrary to the EPA's initial recommendations, and the Appeal Convenor's view, Minister Albert Jacob recommended that the proposal be implemented, subject to a number of implementation conditions. At a state level, the minister is required to consider the EPA's recommendation; however, the minister can also consider other non-environmental matters, such as the commerciality of the proposed project.

The project requires both state and Commonwealth environmental approvals to proceed because it is considered likely to have a significant impact on three MNES: listed threatened species and communities, listed migratory species and nuclear action. The proposal was referred and determined to be a controlled action, triggering the need for Commonwealth environmental approval in addition to state approval pursuant to the EPBC Act. The project was assessed by accredited assessment, which means that the WA EPA assesses both the matters arising under the EP Act and the Matters of Environmental Significance through the state Public Environmental Review assessment process. Despite going against the EPA's recommendation, the state approval retained the majority of conditions that the EPA recommended in the event that, contrary to its advice, the proposal was to go ahead. These conditions included a requirement for Cameco to undertake further surveys and research into the subterranean fauna species to minimise impacts to the species and their habitat. The Commonwealth approval has altered these conditions, with the effect of watering down the conservation provisions aiming to protect the stygofauna species from extinction.

Both Cameco and a spokesperson for Hon. Melissa Price MP have commented that the Commonwealth approval is unrelated to the Western Australian Court of Appeal matter. However, considering that the MNES were assessed by accredited assessment, by the Western Australian EPA, the Commonwealth approval is related to the Western Australian Court of Appeal matter. If the Court of Appeal finds that the minister was required to make a decision in accordance with the Appeal Convenor's decision, then the state approval will fall away. This would also cast doubt on the validity and impact of the Commonwealth approval, as if state approval is not granted then the Commonwealth approval is rendered meaningless, as the project cannot proceed. The ambiguity surrounding the effect of Commonwealth approval in the absence of clarity on the legality of the state approval also raises questions about the efficiency of the accredited assessment process, and the impact of an invalid approval at a state level on the Commonwealth approval.

For industry, this calls into question the certainty surrounding environmental approvals. Arguably, if the Court of Appeal makes a determination that Albert Jacob's decision was invalid, then the state approval may not be granted the second time around. It is not clear what the status of the Commonwealth approval will be if the Court of Appeal decides that the state approval is invalid, and the McGowan government determines, consistent with the EPA's recommendation, that the proposal should not be implemented. Noting the McGowan government's current policy in respect to uranium mining, and the current state of the uranium market, this is indeed possible. It is unclear what Cameco's project future would look like should it proceed with additional approvals required to commence work, only to have the Court of Appeal find that Jacob's decision that the proposal may be implemented was invalid.



To discuss project approvals, or the impact of this decision for your business, please contact:



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