

DISPUTE RE COMMISSIONER'S INSTRUCTION NO. 23
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2021 WAIRC 00002

CORAM : COMMISSIONER T EMMANUEL

HEARD : TUESDAY, 17 NOVEMBER 2020, WEDNESDAY,
18 NOVEMBER 2020

DELIVERED : WEDNESDAY, 13 JANUARY 2021

FILE NO. : PSACR 3 OF 2020 & PSACR 4 OF 2020

BETWEEN : CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA
INCORPORATED
Applicant

AND

THE DIRECTOR GENERAL, DEPARTMENT OF
BIODIVERSITY, CONSERVATION, AND ATTRACTIONS
Respondent

CatchWords : S 44 application – Public Sector Commissioner’s Instruction No 23: Conversion and appointment of fixed term contract and casual employees to permanency – Construction of Public Sector Commissioner’s Instruction – Employees engaged on a series of fixed term contracts - Whether employees are eligible for conversion to permanency

Legislation : Section 44 of the *Industrial Relations Act 1979* (WA); s 22A(7) of the *Public Sector Management Act 1994* (WA); *Interpretation Act 1984* (WA)

Result : Applications dismissed

Representation:

Applicant : Mr M Amati (as agent)

Respondent : Mr J Carroll (of counsel)

Cases referred to in reasons:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)
[2009] HCA 41; (2009) 239 CLR 27

Amcor Limited v Construction, Forestry, Mining and Energy Union and others [2005] HCA 10;
(2005) 222 CLR 241

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union
[2006] FCA 813; (2006) 153 IR 426

Civil Service Association (Inc.) v Department of Water and Environmental Regulation
[2020] WAIRC 00216; (2020) 100 WAIG 325

Eclipse Resources Pty Ltd v Minister for Environment (No 2) [2017] WASCA 90

Norwest Beef Industries Limited and another v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124;
(1984) 12 IR 314

Reasons for Decision

- 1 Dr Cheryl Lohr and Dr Judy Dunlop are Research Scientists employed by the Director General, Department of Biodiversity, Conservation and Attractions (**Director General**). They have both been employed for over seven years on a series of fixed term contracts. Dr Lohr's current fixed term contract will expire on 1 October 2021 and Dr Dunlop's current fixed term contract will expire on 30 June 2021.
- 2 On 10 August 2018, the *Public Sector Commissioner's Instruction No 23: Conversion and appointment of fixed term contract and casual employees to permanency (CI 23)* came into effect. Under CI 23, public sector employers should review their use of fixed term contracts, and convert employees' fixed term appointments to permanent appointments if certain criteria are met.
- 3 The Director General considered whether Dr Dunlop and Dr Lohr were eligible to be offered conversion to permanent employment under the terms of CI 23, and decided they were not eligible to be converted to permanent employment under CI 23 for two reasons:
 - (1) the reason for Dr Dunlop's and Dr Lohr's engagements on a fixed term contract is a circumstance mentioned in the relevant industrial instrument (namely, they are working on projects with finite lives), and as such, the requirement in cl 2.1(a) of CI 23 was not satisfied; and
 - (2) the external funding for Dr Dunlop's and Dr Lohr's roles could not reasonably be expected to continue beyond the current funding arrangement, and as such the requirement in cl 11(b) of CI 23 was not satisfied.
- 4 The Director General does not rely on any other criteria set out in CI 23 for the purpose of maintaining that Dr Dunlop and Dr Lohr are not eligible to be converted to permanency under CI 23.
- 5 Dr Dunlop and Dr Lohr are both members of the Civil Service Association of Western Australia Incorporated (**CSA**). The CSA disputes the Director General's decisions that Dr Dunlop and Dr Lohr are not eligible for conversion to permanency.

What I must decide

- 6 The parties ask the Public Service Arbitrator to answer the following questions to resolve this dispute:

Question one - Was the reason Dr Dunlop was engaged on a fixed term contract a circumstance mentioned in the relevant industrial instrument?

Question two - Was the reason Dr Lohr was engaged on a fixed term contract a circumstance mentioned in the relevant industrial instrument?

Question three - Can the external funding for the role held by Dr Dunlop be reasonably expected to continue beyond the current funding arrangement?

Question four - Can the external funding for the role held by Dr Lohr be reasonably expected to continue beyond the current funding arrangement?

Remedies sought by the CSA

- 7 During the hearing the CSA was granted leave to amend the remedies it seeks. The CSA seeks:

DECLARATION

- (1) The correspondence from Mr Stephen Bradfield, A/Manager People Service Branch, to both Dr Lohr and Dr Dunlop – dated the 14 June 2019 and the 5 July 2019, respectively in that order - are of no effect ---
- (2) That Dr Dunlop and Dr Lohr meet all of the eligibility criteria in CI 23 to be appointed/converted to permanent employment

ORDER

- (1) Orders that the Director General offer [Dr] Dunlop and Dr Lohr permanent employment in accordance with cl 4.2 of CI 23.

Relevant clause of the industrial agreement

- 8 Dr Lohr's current fixed term contract began on 2 October 2018. Dr Dunlop's current fixed term contract began on 3 August 2019. At the time those contracts were entered into, the *Public Service and Government Officers CSA General Agreement 2017 (Industrial Agreement)* applied. It sets out the circumstances in which an employing authority could employ an officer on a fixed term contract.

- 9 Clause 16 of the Industrial Agreement provides:

16. Fixed Term Contract Employment

- 16.1 Subject to this clause and in accordance with clause 8 – Contract of Service of the Applicable Award, Employees may be employed on contracts having fixed terms.
- 16.2 Before employing a person as a fixed term contract Employee or providing a new or extended fixed term contract to an Employee, the Employer must first consider whether any permanent Surplus employees can undertake the role or duties required. If a permanent Surplus employee can undertake the role or duties, they will be offered the employment.
- 16.3 Notwithstanding clause 16.2 the employing authority will have discretion to renew an existing fixed term contract if the Employee has been in the same or similar role for more than two years and the arrangements are being reviewed for possible conversion under a process referred to at clause 16.8.
- 16.4 Where more than one appropriate permanent Surplus employee exists, the following hierarchy shall apply for access to the role or duties:
 - (a) internal Surplus employees are considered first;
 - (b) if no internal Surplus employees are suitable, Registered employees from other employing authorities are considered; and
 - (c) if no Registered employees are suitable, Registrable employees from other employing authorities are considered.
- 16.5 In exercising their employing authority, Employers may only employ a person as a fixed term contract Employee in the following circumstances:
 - (a) covering one-off periods of relief;
 - (b) work on a project with a finite life;

- (i) where a project is substantially externally funded including multiple external funding, the Employer must present a business case supporting the use of fixed term contract Employees in such positions to the Joint Consultative Committee;
 - (ii) where external funding has been consistent on an historical basis and it can be reasonably expected to continue the Employer shall assess the percentage of positions for which permanent appointment can be made;
 - (c) work that is seasonal in nature;
 - (d) where an Employee with specific skills is not readily available in the Public Sector is required for a finite period; or
 - (e) in any other situation as is agreed between the parties to this General Agreement.
- 16.6 Employees appointed for a fixed term shall be advised in writing of the terms of the appointment, including the circumstances of the appointment as provided under clause 16.5 and such advice shall specify the dates of commencement and termination of employment.
- 16.7 The Employer will provide the Union the names and work locations of all Employees on fixed term contracts within 28 days of a request being made in writing.
- 16.8 The parties acknowledge matters relating to the development of criteria for fixed term contract conversion are subject to further consultation and consideration by Government.
- 16.9 The criteria for fixed term contract conversion will be based on the following principles:
- (a) the parties recognise that the usual and preferred basis for engagement is permanent appointment; and
 - (b) to ensure that non-ongoing employment arrangements are genuine employing authorities will review the employment status of fixed term and casual Employees who are continuously employed for more than two years against determined criteria in accordance with clause 16.8.

10 Clause cl 16(5)(b) of the Industrial Agreement is at the heart of this dispute.

11 The parties agree that cl 16(5)(b)(i) is not relevant to the hearing and determination of this matter.

Construction of CI 23

CSA's submissions

12 In its submissions, the CSA argues that by operation of s 22A(7) of the *Public Sector Management Act 1994* (WA), the Public Sector Commissioner's Instructions, like CI 23, are not subsidiary legislation for the purposes of the *Interpretation Act 1984* (WA). However, the CSA says it 'would be reasonable to allocate to [CI 23] a status *semi-equivalent* to a Public Sector *instrument of employment* consistently with its scope and operation'. (original emphasis) It says that to decide this matter, the Public Service Arbitrator must 'interpret the relevant terms of [CI 23] as a consistent whole for each of the terms prescribed *vis-à-vis* Drs Dunlop and Lohr' [sic] employment material circumstances [sic].'

13 The CSA argues that CI 23 is an employment instrument and should be interpreted by drawing on the reasoning in *Norwest Beef Industries Limited and another v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 2124 at 2133; (1984) 12 IR 314, *City of Wanneroo v Australian Municipal,*

Administrative, Clerical and Services Union [2006] FCA 813; (2006) 153 IR 426, and *Amtcor Limited v Construction, Forestry, Mining and Energy Union and others* [2005] HCA 10; (2005) 222 CLR 241 at [114]. The CSA says these cases mean the interpretation of CI 23 should:

- (a) be ‘consistent with the purpose for which the relevant instrument was implemented’;
- (b) engage ‘the instrument of employment as a whole in a cogent and consistent manner’;
- (c) use the common everyday meaning of words, rather than a technical meaning; and
- (d) embody the ‘implied purpose’.

- 14 The CSA says CI 23 should be interpreted as a beneficial instrument and that in the event that ‘the circumstances to which its principles apply are somewhat unclear or arguable, an interpretation that favour [sic] the intended beneficiary is to be preferred by way of a more expansive reading’.
- 15 When CI 23 is interpreted in this way, the CSA says that ‘the terms of clause 16(5) of the [Industrial Agreement] are **not engaged** by the operation of clause 2.1(a) of [CI 23]’ because ‘the above provision is only enlivened *if - and only if* – the reason for engagement in their respective positions are listed in clause 16.5 of the [Industrial Agreement].’ (original emphasis) The CSA says this is because ‘at no time was the cause of their appointment for the purpose of covering “*one-off periods of relief*”.’ (original emphasis)

Director General’s submissions

- 16 The Director General agrees that CI 23 is not subsidiary legislation for the purposes of the *Interpretation Act 1984* (WA). However, the Director General says that it is appropriate to construe CI 23 in a way similar to how statutes are to be construed, as long as allowance is made for the fact that CI 23 was not drafted by Parliamentary drafters and therefore may be less precisely drafted than a statute: *Civil Service Association (Inc.) v Department of Water and Environmental Regulation* [2020] WAIRC 00216; (2020) 100 WAIG 325 at [13].
- 17 The Director General relies on *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27, [47] (and the authorities cited in that case) and *Eclipse Resources Pty Ltd v Minister for Environment (No 2)* [2017] WASCA 90, [120]-[121] and says the principles of statutory construction are well settled:
- (a) the task of statutory construction must begin with a consideration of the text itself;
 - (b) historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text;
 - (c) the language which has actually been used in the text of the legislation is the surest guide to legislative intention; and
 - (d) the meaning of the text may require consideration of the context, including the general purpose and policy of a provision, in particular, the mischief it is seeking to remedy.
- 18 Taking this approach, the Director General says that when CI 23 is construed as a whole, cl 4.2 of CI 23, subject to cl 11 and cl 12, provides the pre-conditions for conversion of employees on fixed term contracts. If such pre-conditions are not met, there is no basis for an employee to be converted under CI 23.

- 19 The Director General says that accordingly, if the following conditions of CI 23 are satisfied, an employing authority is ‘obliged to make an offer of permanency’:
- (a) the employee must be employed on a fixed term contract at the time CI 23 commenced;
 - (b) the reason for the employee’s engagement on a fixed term contract is not a circumstance mentioned in the relevant industrial instrument;
 - (c) the employee has completed two or more years of continuous service in the same or similar role;
 - (d) the employee is not subject to formal disciplinary or substandard performance action at the time of assessment;
 - (e) the employee has previously been subject to a proper assessment of merit and, if not, a proper assessment of merit is undertaken in accordance with cl 10;
 - (f) advertising requirements are complied with;
 - (g) the funding requirements of cl 11 are satisfied; and
 - (h) redeployment clearance is obtained.

Consideration

- 20 Broadly I agree with the approach taken by Kenner SC in *Civil Service Association (Inc.) v Department of Water and Environmental Regulation*.
- 21 I accept the Director General’s submissions in relation to the construction of CI 23.
- 22 Construing CI 23 as a whole, cl 4.2 of CI 23, subject to cl 11 and cl 12, provides the pre-conditions for conversion of employees on fixed term contracts. If those pre-conditions are not met, there is no basis for an employee to be converted under CI 23.
- 23 The Director General says, and the CSA agrees, that it is the current fixed term contracts that should be considered: ts 7. I agree. Those were the contracts in place at the time the Department considered whether Dr Dunlop and Dr Lohr were eligible to be converted to permanency.

Background

- 24 The background set out from [25] to [33] is agreed by the parties.

Department’s structure

- 25 Dr Byrne is the Executive Director of Biodiversity and Conservation Science at the Department. She reports directly to the Director General of the Department and oversees about 206 employees who work across 10 programs. Dr Lohr and Dr Dunlop work as research scientists in the animal science program.
- 26 The Biodiversity and Conservation Science division has a budget of \$21 million per year from consolidated revenue, and a further \$10 million from external funding.
- 27 Dr Byrne has delegated authority to approve contract renewals and offer contracts.

Project funding

- 28 Dr Dunlop’s research focusses on northern quoll populations across a large area of the Pilbara (**Quoll Project**). Dr Dunlop also works on a project that involves relocating water rats from Barrow Island to the Montebello Islands (**Water Rat Project**).

- 29 Dr Dunlop spends 70% of her time on the Quoll Project, and 30% of her time on the Water Rat Project.
- 30 Dr Lohr's research focusses on the Matuwa Indigenous Protected Area, in the Goldfields (**Matuwa Project**).
- 31 Offsets from FMG and Roy Hill fund the Quoll Project, while offsets from the Gorgon gas project on Barrow Island (**Gorgon Gas Project**) fund the Water Rat Project and Matuwa Project.

Offset funding

- 32 The projects that Dr Lohr and Dr Dunlop work on are externally funded. These funds came as part of 'offset funding'. The State and Commonwealth governments have offset policies which apply to companies planning developments that may impact on environmental assets or conditions. These offset policies require proponents to either avoid, minimise or reduce the impact, or if that cannot be achieved, the impact is to be mitigated.
- 33 In around 2012, both State and Commonwealth policies relating to the provision of offsets changed.

Witnesses

- 34 Dr Dunlop, Dr Lohr, Mr Morris, Dr Algar and Dr Byrne were called as witnesses. Mr Keith Morris has previously worked as a research scientist with Dr Dunlop. Dr David Algar, another research scientist, has worked with Dr Lohr.
- 35 All witnesses generally presented as credible and I accept their evidence, subject to the below comments.
- 36 Throughout a prolonged and poorly conducted cross-examination, Dr Byrne remained resilient and focussed, providing detailed and precise evidence. Dr Byrne was forthcoming and cooperative at all times during her testimony. She was an impressive witness.
- 37 It was clear that Dr Byrne had an excellent grasp of government funding policies relevant to this matter. Unlike Dr Dunlop and Dr Lohr, Dr Byrne's evidence was not disturbed in cross-examination.
- 38 At times Dr Dunlop's evidence was inconsistent, for example in relation to whether she was familiar with definitions of direct and indirect offsets. At times Dr Dunlop and Dr Lohr were reluctant to answer questions in cross-examination where the answers to those questions did not suit the CSA's case. Unlike Dr Byrne, neither Dr Dunlop nor Dr Lohr demonstrated a clear understanding of the government funding policies or how those policies would affect their research projects in future.
- 39 For these reasons, I prefer the evidence of Dr Byrne over the evidence of other witnesses to the extent of any inconsistency.

Question one – Was the reason Dr Dunlop was engaged on a fixed term contract a circumstance mentioned in the relevant industrial instrument?

Dr Dunlop's evidence

- 40 Dr Dunlop started working for the Department in 2004 and estimates that she has been employed on at least 18 fixed term contracts since then. She gave evidence that her current fixed term contract ends in June 2021.

41 In cross-examination, Dr Dunlop agreed that according to the JDF for her current position, the position she currently fills does not form part of the permanent structure of the Department.

42 Dr Dunlop started working on the Quoll Project in 2013. The project proposal was tendered as an exhibit. It does not contain an end date. Another member of the Department worked on this project before Dr Dunlop.

Dr Byrne's evidence

43 Dr Byrne gave evidence that Dr Dunlop's position does not form part of the permanent structure of the Department. Dr Dunlop has been employed on fixed term contracts over the years because the projects Dr Dunlop has worked on have been externally funded or projects with a finite life, and there is not a permanent salary resource within the Department to fund those positions.

Mr Morris' evidence

44 Before he retired in May 2020, Mr Morris was a permanent research scientist and program leader of the animal science program at the Department. Mr Morris gave evidence that he met Dr Dunlop in 2004. He then worked with her in 2007 and has been involved with the Quoll Project. He said Dr Dunlop is renowned amongst the mining companies, has been able to attract additional funding for projects like the Quoll Project, and is well regarded in Indigenous communities.

45 Mr Morris gave evidence that the Quoll Project was for a finite life, around 10 years, which is why people were employed on 'short term contracts'. He said that when people's projects were externally funded, 'the only way we could keep them going was through repeating or extending fixed term contracts'.

46 Mr Morris gave evidence that Dr Byrne had the authority to appoint employees on a permanent basis.

47 In cross-examination, Mr Morris agreed that Dr Dunlop had been engaged on a number of fixed term contracts because the funding for the projects she was working on was external, and finite. He said that although the funding 'for the initial part' of the projects was finite, the projects would likely continue if there is further funding. Mr Morris also agreed that the only certain funding for the Quoll Project until 2023 comes from Roy Hill. In cross-examination Mr Morris agreed that Dr Dunlop was given a fixed term contract because at the time of issuing that contract, 'there was only a fixed specified and certain amount of funding that was going to be available for that project'.

48 Mr Morris gave evidence about his view that there is a reasonable chance further funding will become available in future because of the impacts of Pilbara developments on the quoll species.

CSA's submissions

49 The CSA submits that the only circumstances in which the Director General can use fixed term contracts are set out in cl 16 of the Industrial Agreement.

50 The CSA says it understands that the Director General's view is that cl 16 of the Industrial Agreement prevents Dr Lohr and Dr Dunlop being appointed as permanent employees. The CSA says that cl 16.9 of the Industrial Agreement specifically requires the Director General to 'ensure that non-ongoing employment arrangements are genuine' and 'review the employment status of fixed term and casual employees who are continuously employed for more than two

years against determined criteria in accordance with cl 16.8’.

- 51 The CSA says that based on Dr Lohr’s and Dr Dunlop’s evidence, their fixed term contracts were not for the purpose of covering one-off periods of relief as set out in cl 16.5(a) of the Industrial Agreement.
- 52 The CSA accepts that at the time when Dr Lohr and Dr Dunlop were first employed by the Director General, it ‘may be said to have been’ for work on a project for a finite life (as set out in cl 16.5(b) of the Industrial Agreement). In closing the CSA submitted that on the evidence the research projects Dr Dunlop and Dr Lohr work on were ‘shown not to be for a finite life because nothing has occurred that would justify the finitude of any project in which they have been involved.’

Director General’s submissions

- 53 The Director General says he conducted a review of Dr Lohr and Dr Dunlop’s contracts in 2019 as required under CI 23. The Director General says that neither Dr Lohr nor Dr Dunlop met the pre-conditions under CI 23 to be offered permanent employment.
- 54 The Director General submits that Dr Dunlop and Dr Lohr were not good witnesses in relation to this issue because:
- (a) they were both evasive under cross-examination; and
 - (b) the focus under cl 2.1(a) of CI 23 is on the employer’s reason for engagement on a fixed term contract. What Dr Dunlop and Dr Lohr knew or agreed about the employer’s reason for engagement on a fixed term contract is beside the point.
- 55 The Director General says the reason for engagement on a fixed term contract must be the reason that existed at the time of the engagement. The oral and documentary evidence supports a finding that both Dr Lohr and Dr Dunlop were engaged to work on projects with a finite life, which is a circumstance mentioned in cl 16.5(b) of the Industrial Agreement.

Consideration

- 56 It is not clear why the CSA’s submissions focussed on cl 16.5(a) of the Industrial Agreement, which relates to the use of fixed term contracts for one-off periods of relief, in circumstances where there was no evidence that either of the relevant fixed term contracts were because of one-off periods of relief.
- 57 Dr Dunlop’s evidence cannot lead to a finding other than that the reason she was engaged on a fixed term contract was because of a circumstance mentioned in the Industrial Agreement. At its highest, Dr Dunlop’s evidence about this issue was that the *need* for her research is ongoing and therefore the projects she was engaged to work on *should* be ongoing, not that she was engaged to work on projects that *are* ongoing.
- 58 I accept the evidence given by Dr Byrne about this issue, which was supported by the evidence of one of the CSA’s witnesses, Mr Morris.
- 59 Based on the evidence, I find that the reason the Department engaged Dr Dunlop on a fixed term contract was because she was engaged to work on the Quoll Project and Water Rat Project. At the time Dr Dunlop was engaged on the relevant fixed term contract, the Quoll Project was funded until 2024 and the Water Rat Project was funded until 2023. Those projects were not ongoing. They were both projects with a finite life.

60 Clause 16.5(b) of the Industrial Agreement provides that employers may employ a person on a fixed term contract to work on a project with a finite life. Work on a project with a finite life is therefore a circumstance mentioned in the relevant industrial instrument.

61 Accordingly, I find that the reason Dr Dunlop was engaged on a fixed term contract was a circumstance mentioned in the relevant industrial instrument.

62 The answer to question one is 'yes'.

Question two – Was the reason Dr Lohr was engaged on a fixed term contract a circumstance mentioned in the relevant industrial instrument?

Dr Lohr's evidence

63 Dr Lohr's current fixed term contract, which is the relevant contract to consider, started on 2 October 2018 and will end in October 2021.

64 In cross-examination, Dr Lohr agreed that the project plan for the Matuwa Project states that the proposed period of the project is from 'January 1, 2007 to June 30, 2023' and eventually she agreed that she was aware in 2018 that the Matuwa Project was for a finite period.

65 Dr Lohr gave evidence that her supervisor, Dr Byrne, has also asked Dr Lohr to work on the 'decision support system' associated with Dr Lohr's previous project for approximately one day per week. Dr Lohr says the funding for this project 'technically ended in 2017'. Dr Lohr said: 'And if - if I am truly a contract employee working on a project of a finite life, then that is the only project I should be working on. Not a project that should have ended over two years ago.'

66 Dr Lohr gave evidence about her experience and qualifications. She explained that the Matuwa Project has evolved over time as conservation needs have changed. Dr Lohr disagreed that she was employed to work on a project with a finite life, saying:

I disagree with the message within that statement, very much so. Um, for starters, I am currently being asked to work on projects that should have ended, and they have not. Um, and currently, I am working on a project that has a source of funding since 2000, um, with I believe, the Department's full intent to continue that project, given that they are currently spending millions of dollars trying to negotiate a joint management agreement with the traditional owners of that research site.

67 Dr Lohr said she is a core employee of the animal science program and collaborates with her colleagues. Dr Lohr said: '[G]iven that the project has already been ongoing since 2000 and there is considerable investment to continue having the Department a part of that project, I would suggest that the finite life part is not the truest term that could be used.'

Dr Byrne's evidence

68 Dr Byrne gave evidence that Dr Lohr has been engaged on fixed term contracts because the funding for the Matuwa Project is external and 'has a finite life in terms of the - the project funding'. Dr Byrne explained that although the funding for the Matuwa Project continues until 2023, Dr Lohr's contract expires in 2021 because the Department expects that the analysis work Dr Lohr is currently doing will be done, and the Department can assess what skills, if any, are required on the project for the final two years.

69 Dr Byrne said that the Mutuwa Project 'has a finite term for the time [the Department has] funding available to undertake it.'

Dr Algar's evidence

70 Dr Algar is a permanent employee of the Department. His work involves designing and developing techniques and strategies for the targeted control of feral cats. He gave evidence that Dr Lohr is a dedicated, enthusiastic and competent research scientist.

CSA's submissions

71 The CSA relied on its submissions set out at [49] – [52].

Director General's submissions

72 The Director General relied on his submissions set out at [53] – [55].

Consideration

73 Dr Lohr eventually conceded in cross-examination that she was aware in 2018 that the Matuwa Project was for a finite period.

74 The evidence supports a finding that Dr Lohr was engaged on a fixed term contract because she was employed to work on the Matuwa Project. That Dr Lohr may work one day per week on a previous project in order to finalise that project so that the Department may receive the remaining funding for that project does not lead to a different conclusion.

75 The Matuwa Project is funded until 2023. At the time Dr Lohr was engaged on the relevant fixed term contract, the Matuwa Project was funded for a finite period. The Matuwa Project is not an ongoing project. It is a project with a finite life.

76 Clause 16.5(b) of the Industrial Agreement provides that employers may employ a person on a fixed term contract to work on a project with a finite life. Work on a project with a finite life is therefore a circumstance mentioned in the relevant industrial instrument.

77 Accordingly, I find the reason Dr Lohr was engaged on a fixed term contract was a circumstance mentioned in the relevant industrial instrument.

78 The answer to question two is 'yes'.

Question three – Can the external funding for the role held by Dr Dunlop be reasonably expected to continue beyond the current funding arrangement?

Dr Dunlop's evidence

79 Dr Dunlop gave evidence that for 'the majority of my 16 years of employment with the Department I have been on external funds from one source or another and they have been anything from 1-year to 14-year [funding agreements]'. She said the funding comes from both industry and government.

80 Dr Dunlop said that both the Quoll Project and the Water Rat Project are funded through offsets.

Quoll Project

81 Dr Dunlop's evidence is that the Quoll Project has been funded through offsets from industry developments since 2011. There are currently two sources of funding (from Roy Hill and FMG) with a third source of funding from API expected in the future. FMG's last tranche of funding is expected in 2021. Roy Hill's last tranche of funding will end in 2024. Currently, each year Roy Hill funds \$45,000 and FMG funds \$100,000. Dr Dunlop explained that API is an iron ore company and that it had a development approved in 2012. Arising out of this

approval, when development starts, API will be required to pay offsets of \$500,000 over 10 years.

- 82 In cross-examination, Dr Dunlop said that the budget for the Quoll Project is about \$150,000 - \$250,000 per year. Dr Dunlop's salary is close to \$100,000 per year. Dr Dunlop conceded that even if API's funding started, after next year, the Quoll Project would only receive a total of \$95,000 per year which is not enough to fund the annual budget.
- 83 Dr Dunlop confirmed that other than Roy Hill and FMG, there is no current obligation to fund the Quoll Project.

Water Rat Project

- 84 Dr Dunlop agreed in cross-examination that the Water Rat Project is funded by 'direct offsets' from the Gorgon Gas Project, which ends in 2023. She also agreed there is no confirmed funding for the Water Rat Project after 2024.

Policy changes

- 85 Dr Dunlop agreed in cross-examination that in around 2012, government policies in relation to environmental offsets changed. The Director General put to Dr Dunlop that the Commonwealth policy related to 'direct' and 'indirect' offsets, which were defined in that policy. It was clear from her evidence that Dr Dunlop did not know how 'direct' and 'indirect' offsets were defined. She was reluctant to concede that she didn't know this. The Director General put it to Dr Dunlop that Dr Byrne's evidence would be that under the Commonwealth policy, going forward, only 10% of offset funding should be allocated to indirect offsets like research projects. Dr Dunlop disagreed that the work she does 'would fall exclusively within the research category because the majority of the work that I do is, ah, baseline monitoring and management to assess the impact of, um – impacts on those species.'
- 86 Dr Dunlop said in cross-examination that the work she does (or has done) should be considered a direct offset 'because you - you need to know what is happening on the ground for those, ah, for those populations to assess the effectiveness of any management intervention.'
- 87 Dr Dunlop agreed policy settings have changed but disagreed that meant there is likely to be less funding available for projects involving scientific research in future. She was reluctant to answer questions about whether Australia is experiencing an economic downturn or economic uncertainty due to COVID-19.

Pilbara Environmental Offsets Fund

- 88 Dr Dunlop gave evidence about the Pilbara Environmental Offsets Fund (**PEOF**), which has been recently introduced to manage offset funding for the Pilbara. A document providing an overview of the PEOF was tendered. Dr Dunlop explained that this document is presented by the Department and the Minister, and it gives a summary of how the PEOF is intended to work. Dr Dunlop explained that the PEOF is new and that the first projects to be funded were chosen last year. She said 'they were nothing to do with my work, they were, um, flora projects that have come up'.
- 89 When asked about what the effect of the PEOF would be on the likelihood of funding research like hers, Dr Dunlop said:

I think the goal of [the PEOF] is to have more oversight in how offsets are spent and to work towards that goal of no net loss. Um, my program with the Northern Quoll and with the [Water Rat Project] both of those were done with an extraordinary amount of oversight but that was,

um - that was by our design. Um, there would still be a number of offsets going on throughout Western Australia that the money is paid and we don't really know what the outcome of those has been whether it has - it has assisted the species or not. Um, and so the goal of [the PEOF] is to make all future offset funding more like what I have been working with so far, um, and to engage, um, traditional owner groups more fully with the process...

- 90 In cross-examination, Dr Dunlop agreed that only one project had been approved out of the PEOF so far, and it did not relate to animal research or conservation. The organisation undertaking that project is a non-governmental organisation. In re-examination, Dr Dunlop clarified that it is not yet clear how funding from the PEOF will be allocated.

Possible BHP project

- 91 Dr Dunlop tendered a letter dated 16 January 2020 from BHP (**BHP Letter**). The BHP Letter requested that Dr Dunlop and two of her colleagues from the Department design and undertake a 10-year monitoring project for two animal species. Dr Dunlop explained that the proposal that BHP requested she write (with her two colleagues) was in relation to the first 10 years of a 'one hundred year offset'.
- 92 In cross-examination, Dr Dunlop conceded that there is currently no agreement for the Department to undertake the scope of works provided to BHP and receive funding for it.

Need for Dr Dunlop's work

- 93 Dr Dunlop focussed on the need for her work, saying:

DUNLOP, DR: Part of our core business is to conserve and protect the threatened species of Western Australia. The - the exact focus of that changes over time, um, according to, um, threatening processes that are going on species listings at that time. Species may be upgraded in their listing, like closer to endangered, or delisted if they're doing well. And our - our focus within the animal science group changes according to that and according to, ah, funding availability. And when, um, when the need comes up, for example, with the, um, Barrow Island offsets or with the increase of mining in the Pilbara it's recognised that these are issues that we need to address.

...

AMATI, MR: Thanks. Insofar as the - if say funding was to be cut for the project on which you are what would happen to the quoll, for example?

DUNLOP, DR: Um, there would still be an emphasis from the State government, the Federal Government and from mining to - they - they would still require knowledge about what is happening with that species and they still need, um, results from our (indistinct 12.03.04) monitoring to provide relevance and context, ah, for which the rest of their actions can - can go forward. So, um, a mining company needs to know, um, the context of - of the - of the whole population of Northern Quoll, for example, so that, um, any future impacts can be assessed adequately.

- 94 Dr Dunlop said that if the funding for the Quoll Project were to be cut, then the need for her research would not go away. She said:

DUNLOP, DR: Well, I - I didn't agree that the funding would - is likely to come to an end. The majority of this work is funded from iron ore offsets. The iron ore price is, um - has been picking up again in the last couple of years, ah, nearly to the boom that we saw in 2010 to 2012. There's a great deal of new projects being assessed and being approved. Um, and so the requirement for offsets to mitigate this - these new projects will not go away.

AMATI, MR: So there is a live substantive need effectively?

DUNLOP, DR: There's a need - there's a need for the threatened species and there is also a need on the side of the legislative requirements for mining companies to the State and Federal Governments to continue this sort of work.

Dr Byrne's evidence

Quoll Project

- 95 Dr Byrne's explanation of the funding arrangement for the Quoll Project was broadly the same as Dr Dunlop's explanation. Going forward, the only funding that is certain for the Quoll Project is four payments of approximately \$45,000 each by Roy Hill. Dr Byrne's evidence was slightly different to Dr Dunlop's in that she said that FMG's final payment was made in 2020, whereas Dr Dunlop said the final payment would be made in 2021.
- 96 Dr Byrne said that API had a development approved in 2012 on the condition that once development began, API would pay \$50,000 per year for 10 years to the Quoll Project. However, no development has begun so no payments have been made at this stage. There is no indication that the development will proceed in the near future. Even if it did, and the Quoll Project received both the \$50,000 per year from API and the \$45,000 per year from Roy Hill, there would still not be enough funding to sustain the Quoll Project which would need a budget of about \$250,000 per year.

Water Rat Project

- 97 Dr Byrne gave evidence that the Water Rat Project is funded by the Gorgon Gas Project, the same source of funding as the Matuwa Project. This funding is also expected to end in 2023.
- 98 In cross-examination, Dr Byrne gave evidence that the FMG and Roy Hill funding currently available for the Quoll Project is not enough to fund both a research scientist and a technical officer, but in the past Dr Dunlop has been able to bring in other sources of funding. These are ad hoc and unreliable on an ongoing basis. Dr Byrne said that the Director General gave Dr Dunlop the longest term contract that he could, recognising the associated risks with the project funding. Where possible, if one project ends, the Department tries to fund another project for that scientist, like it did for Dr Lohr when her previous project ended and the Department offered her work on the Matuwa Project.

Offset funding

- 99 Dr Byrne explained 'offset funding' as follows:

Offsets funding is when there's a - an impact of an economic development on - on an environmental assets, conditions, then there's under the offsets policy there's a requirement for proponents to - to either avoid the impact, to minimise the impact, to reduce the impact or if there is a residual impact that can't be avoided, minimised or reduced then it has to be mitigated. And so an offset is a mechanism by which a company developer can propose to mitigate the impact.

- 100 Dr Byrne said that offset funding can be required under both State and Commonwealth legislation.

Policy changes

- 101 Dr Byrne gave evidence that in 2011, the State government developed the 'State Offsets Policy', followed by guidelines in 2014. Under that policy, offsets are now separated into 'direct' and 'indirect' offsets. Research comes under indirect offsets, but the primary focus is now on direct offsets, and indirect offsets are only needed 'when there is a high degree of uncertainty or new science is required to develop mitigation measures'.

102 It was clear from Dr Byrne's evidence that she is very familiar with the definitions of direct and indirect offsets under the policies. Dr Byrne said that in 2012 at the Commonwealth level, indirect offsets were limited to 10%, and under the Pilbara Environmental Offsets Implementation Plan, indirect offsets are also limited to 10%. The State offsets policy does not say there is a '10%' limit but it says indirect offsets are 'limited to where there is a high degree of uncertainty and new science is required to develop mitigation measures'. The WA Environmental Offsets Policy and Commonwealth policy were tendered.

103 Dr Byrne said that before the introduction of the State and Commonwealth offset policies, there was little guidance about what a suitable offset might be and it was up to the proponents to propose offsets. The effect of Dr Byrne's evidence was that before 2012, indirect offsets were not limited to 10%.

104 She said that:

A lot of the significant levels of offset funding that we currently have available that have been maybe in place for some years were in place for projects that were or developments that were assessed prior to 2011 and 2012 when those ministerial conditions were then applied. It doesn't mean to say that the development actually happened then. It might have happened later and they'd come in later. But they were generally assessed in that timeframe prior to that, and so were assessed under previous policy settings or not - or probably they didn't exist at the time.

...If my memory serves me right, I think the actual agreement for the Barrow Island agreement, it was originally in 2007 but it was actually 2011 before the development actually occurred and the offsets became payable.

105 Dr Byrne's evidence was that both Dr Lohr and Dr Dunlop's work falls into the 'indirect' offset category, and therefore would be affected by the policy changes. She confirmed this in cross-examination.

106 In response to a suggestion that previous funding indicates funding will be provided in future, Dr Byrne said:

BYRNE, DR: So, um, as I explained previously the circumstances where for the funding arrangements for offsets funding in particular has changed since the introduction of the offsets policy at both Commonwealth level and the state level where the arrangements for, ah, applying research as offsets has changed significantly in that process. So historically there was more funding available for, um, offsets, research projects because of the approach then which was quite different to the approach that it is now.

EMMANUEL C: A different approach and no caps in the past?

BYRNE, DR: That's right.

107 Dr Byrne denied that she was exaggerating the uncertainty of future external funding.

Pilbara Environmental Offsets Fund

108 Dr Byrne explained that in 2012, the Minister directed that offsets relating to developments in the Pilbara be put into a strategic fund so that projects under that fund could be applied for conservation benefit across the Pilbara.

109 The PEOF was mandated in 2012, but was not established until 2018 and it was only in 2019 that a plan was released to guide the activities of the PEOF.

110 Dr Byrne gave much evidence about how the PEOF is run and governed. She said that the Minister approves the projects that received the funds, based on recommendations from a board. There is also a Project Recommendation Group and an Implementation Advisory Group.

The Department's involvement with this process is limited but it has representatives involved. Dr Byrne said that so far, one project has been approved out of the PEOF. This happened in August 2020 and is primarily about protection of the Fortescue Marsh ecosystem. A vegetation scientist is employed to do that work.

Other funding

- 111 In cross-examination, Dr Byrne explained that generally projects have two types of funding: external and in-kind. There's an explicit cash budget for a project, then in-kind contributions from companies, for example vehicles, accommodation, facilities, equipment etc. Occasionally the Department will make an in-kind contribution by funding part of a research scientist's salary. Dr Byrne explained that in some circumstances the Department might deploy a permanent employee on an externally funded project, where there are enough funds to cover that employee's salary or as an alternative to making an employee redundant in the short term.
- 112 Occasionally, projects may have a long but finite life, for example 30 years or 50 years. In those circumstances the Department could appoint someone permanently to work on a project with a finite life.

Possible BHP project

- 113 Dr Byrne gave evidence that BHP has not provided any formal response to the project proposal prepared by Dr Dunlop and her colleagues. In mid-September 2020, there was an email from BHP which indicated consideration of the project had been put on hold while BHP underwent a restructure. It was not clear from BHP's response whether BHP had been considering a 1-year or 3-year project.
- 114 Dr Byrne's evidence appeared to be that, in any event, it would be unlikely for the possible BHP project to be able to employ someone in a full-time position given the way the scope of works has been designed. Even if successful, the proposed project would only fund 0.3FTE of a research scientist.
- 115 Dr Byrne gave evidence that all projects must have a research agreement. There is no research agreement with BHP, merely emails saying consideration of the project is on hold.

CSA's submissions

- 116 The CSA says the evidence shows that the funding for Dr Dunlop and Dr Lohr's roles has arisen out of legislative provisions which require resource companies to contribute to funds like the PEOF. These offsets are where the Department gets its funding for Dr Dunlop and Dr Lohr's positions. Dr Lohr and Dr Dunlop's work is about the protection and management of endangered flora and fauna, and so there has been and will continue to be a need for their work.
- 117 Further, the CSA says the Public Service Arbitrator should apply *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813 when interpreting the word 'reasonable' in the context of determining whether there is a 'reasonable' expectation of ongoing funding for the two roles. The CSA appears to argue that the following factors mean that the funding can be reasonably expected to continue into the future:
- (a) the continuity of previous existing activities;
 - (b) the fate of the endangered species currently being protected through the work of both Dr Lohr and Dr Dunlop;
 - (c) the 'legislative provisions enacted'; and

(d) the ‘new undertakings having been approved and funded but not started yet’.

- 118 The CSA says cl 11(b) of CI 23 requires focus on historical consistency. There is no evidence the projects will end at their proposed end dates and ‘no reason to be so pessimistic about it’. It says Dr Lohr and Dr Dunlop’s evidence shows ‘there is scope for being optimist [sic]’.
- 119 The CSA submits that the quantum of any 10% cap is unknown and while Dr Byrne may have a better understanding of the government funding policies, Dr Dunlop and Dr Lohr have a better understanding of the need for the research. The CSA says there is no documentary evidence of a reduction in funding for research and refers to the possibility of funding from BHP as ‘the BHP contract’.
- 120 The CSA says *Civil Service Association (Inc.) v Department of Water and Environmental Regulation* should not be followed ‘because it’s bad law’ and need is inherently part of consideration of whether external funding can be reasonably expected in future.

Director General’s submissions

- 121 The Director General says that Dr Byrne’s evidence shows that because of changes to the way environmental offset funds are allocated to projects, it cannot be reasonably expected that funding will continue for either Dr Lohr or Dr Dunlop’s projects beyond the current funding arrangements. This is because of a decrease in development and increase in restrictions on offset funding being used to fund indirect offsets such as research.
- 122 Further, the possibility of funding from other sources, including API or BHP, is speculative, and in any event would be insufficient.
- 123 The Director General argues that the mere fact of historical consistency in funding does not necessarily mean reliability of future funding.

Consideration

- 124 The CSA’s representative insisted on asking questions in evidence about and making submissions to the effect that the Department:
- (a) in the past, should have offered Dr Dunlop and Dr Lohr permanent employment instead of fixed term contracts;
 - (b) should convert Dr Dunlop and Dr Lohr to permanent employment because the Department can fund their work using internal funding.
- 125 Those issues are not relevant to the four questions to be answered under the *Memorandum of Matters Referred for Hearing and Determination under Section 44*. Accordingly, they fall outside of the scope of matters to be determined, something that had to be explained to the CSA’s representative at least 16 times (see ts 7, 8, 85, 115, 129, 194, 195, 202, 215, 216, 217, 218, 220, 223, 225 and 226).
- 126 Similarly, the CSA’s representative seemed determined to confuse certainty of need for research with certainty of external funding continuing, notwithstanding it being put to him many times that the two are not the same.
- 127 In my view, the consistency of historical funding is of limited assistance in this matter, because I accept that:
- (a) the work Dr Dunlop does is research;
 - (b) research is considered an indirect offset or ‘other compensatory measure’, and not a

direct offset;

(c) changes to policy settings mean funding available for research is now restricted in a way that it was not when funding was confirmed for the Quoll Project and Water Rat Project; and

(d) economic conditions in Western Australia have resulted in fewer development applications and approvals, which means there is less likelihood of offset funding.

128 I find there is no funding agreement with BHP. Consideration of the proposed BHP project has been put on hold while BHP undergoes a restructure. On that basis, I find that the prospect of BHP funding is speculative.

129 Similarly, on the evidence I consider there is no certainty about when (or if) the API development will start. Funding from API is therefore speculative.

130 The parties did not make submissions about the meaning of ‘reasonable expectation’, perhaps because it has a well-understood ordinary meaning. I consider that ‘expectation’ in the context of this matter relates to the likelihood or probability of external funding continuing beyond the current funding arrangement.

131 For an expectation about external funding continuing beyond the current funding arrangement to be reasonable, there must be some proper basis for such an expectation. Speculative funding cannot give rise to a reasonable expectation.

132 Need for research is not the same as funding for that research. Clearly need does not necessarily result in funding. That there may be need does not lead to a finding that external funding can be reasonably expected.

133 On the evidence before me, there is no proper basis to ground an expectation that external funding for the role held by Dr Dunlop will continue beyond the current funding arrangement. Such an expectation is not reasonable.

134 The answer to question three is ‘no’.

Question four - Can the external funding for the role held by Dr Lohr be reasonably expected to continue beyond the current funding arrangement?

Dr Lohr’s evidence

135 The work that Dr Lohr is doing on the Matuwa Project is funded by the Gorgon Gas Project. Dr Lohr’s salary is paid by this external funding, however the Matuwa area maintenance (for example including the fence that surrounds the area) is mostly paid for by public funds. In cross-examination, Dr Lohr agreed that the departmental funding goes into maintaining and conserving the facilities on the land and some fauna management (for example the removal of cattle). At times, staff that are paid for by the Department in that region assist Dr Lohr with her work at Matuwa.

136 Dr Lohr’s evidence is that there is no confirmed funding for the Matuwa Project beyond 2023. She said:

EMMANUEL C: What funding agreements, to your knowledge are in place beyond the funding provided by the Gorgon State agreement?

LOHR, DR: Mm hmm.

EMMANUEL C: Which you’ve explained is likely to go until 2023?

LOHR, DR: Mm hmm.

EMMANUEL C: So beyond that funding, what funding agreements are in place for the Matuwa project?

LOHR, DR: So to my knowledge, um, there is the plan for our parks funding, has been, to some degree, allocated to the Matuwa project, in that it would join, um, a group of other land areas. Um, it's all under negotiation with the joint management negotiation that is currently ongoing, so it is difficult to speak to the certainty of that funding.

EMMANUEL C: So not in place, but under negotiation?

LOHR, DR: Yes.

- 137 Dr Lohr agreed in cross-examination that the Gorgon Gas Project funds at least three projects, including the Matuwa Project.
- 138 In cross-examination, Dr Lohr agreed that the Gorgon Gas Project is unique in that there was particular legislation created in relation to that development that 'set in stone' 10 to 15 years of offset funding. Dr Lohr's evidence is that she is not aware of any general economic downturn in Australia at the moment and does not agree that significant economic uncertainty could impact on future developments which would lead to offset funding.

Policy changes

- 139 Dr Lohr initially gave evidence that she didn't think the policies that outline how offsets should be formulated have changed. Later, she clarified that the funding that is currently coming from the Gorgon Gas Project, which funds the Matuwa Project, is a unique situation where legislation was required to determine the offsets, because Barrow Island was a class A nature reserve. She said that around 2010, offsets were determined on a case-by-case basis and since then, the only thing that has changed is that 'they are trying to standardise how offsets are designed' and that:

LOHR, DR: And so all the offset money is going into one pool, and people must then compete for money from within that pool to do their projects. Ah, to my knowledge, that would only then apply to indirect offsets, um, because direct offsets would have to go back to, ah, the site that has - the assets that are being damaged. Um, in my world, I mean, I'm still working on a project that's been funded in 2010, so it has not changed in ---

AMATI, MR: So are you saying the PEOF, the fund itself, doesn't relate to direct offsets, it only relates to indirect offsets?

LOHR, DR: ---yes. Cos the money's all going into a pool, but people are then having to compete for their individual projects. At least my understanding of a direct offset is you are damaging an asset with your development. A direct offset is you are trying to then save some portion of that asset. You are - you are directly targeting that asset that is being damaged. Whereas an indirect, you've admitted there's nothing you can do about that particular asset, so you are paying money to try and derive some net conservation benefits elsewhere.

- 140 Dr Lohr confirmed that the funding for the Matuwa Project is separate to (and does not come from) the PEOF.
- 141 In cross-examination, Dr Lohr accepted that under the Commonwealth policy, which changed in around 2012, only 10% of funding from offsets can go towards research projects. However, Dr Lohr did not consider that 'adaptive management' formed part of research. Dr Lohr said she was not unaware that before the 2012 change in policy, there was no limit on how much offset funding could be directed towards research.

Need for Dr Lohr's project

142 Dr Lohr gave evidence that the Department is guided by nine principles of fauna conservation, and that her work on the Matuwa Project directly relates to five of those principles. She said that:

I would describe [the Matuwa Project] as an ongoing joint - the - the intent is for it to be an ongoing joint management project that involves the restoration of threatened species in the arid zone.

143 Dr Lohr said that she believes she has all the skills necessary to finish both the Matuwa Project and her previous project that she still works on one day per week.

Dr Byrne's evidence

144 Dr Byrne gave evidence that Dr Lohr was working on the Matuwa Project. In relation to how the Matuwa Project is funded, Dr Byrne said:

CARROLL, MR: Now, how is - if I refer to this as the Matuwa Project, do you understand what I'm referring to? How is the Matuwa Project funded?

BYRNE, DR: So the Matuwa Project is funded through offsets from the Gorgon Joint Venture for the Gorgon Gas Joint Venture on Barrow Island which is a major investment for the - for the State. But its offsets are under a State agreement Act which articulate how the - the mitigation that the company will put in place for the impact that they're having on the Barrow Island which is an A class nature reserve. Part of that mitigation is this offset to translocate animals from - of which part of that offset is to undertake translocations of animals that are impacted on the island to a more secure populations but it has - there are broader activities that occur under that offset. This is one component of - that's what the projects that are funded under that offset.

CARROLL, MR: Okay, so the - the offset from the Gorgon Gas - from the Gorgon Joint Venture are not being applied solely to the Matuwa project?

BYRNE, DR: No, there's -

CARROLL, MR: There's the other projects?

BYRNE, DR: There's other projects as well.

CARROLL, MR: Which that funding, that those offsets are funding?

BYRNE, DR: That's right, yes.

145 Dr Byrne gave evidence that the Matuwa Project's funding, which comes from the Gorgon Gas Project, was initially due to last until 2021, but when an additional gas train was put on Barrow Island, the pro rata contribution to offset that further development was a further two years of funding.

146 Dr Byrne explained that although the funding continues until 2023, Dr Lohr's contract expires in 2021 because the Department expects that the analysis work Dr Lohr is currently doing will be done, and the Department can assess what skills are required on the project for the final two years. In cross-examination, Dr Byrne explained that in relation to the Matuwa Project:

The initial focus was on the translocation of the animals and so we had a veterinary, ah - or a staff member with a veterinary, um, expertise to oversee that component of the project. Dr Lohr is now undertaking the analysis and - and write-up of those and we will then see as to what is required further for that project which there may be some work, there may not be. I - I have yet to see what the outcome of that, ah, evaluation of that monitoring data is.

147 Dr Byrne explained that some departmental funding goes into the management of the Matuwa site as a conservation area, but the science project fits within that framework and is directly

funded by offset funding. There is no funding from consolidated revenue for the science project.

- 148 Dr Byrne's view is that it is unlikely that a development as significant as the Gorgon Gas Project would arise in the near future. In relation to what kind of developments and offset funding she thought she could expect in the future, Dr Byrne said:

We've certainly seen a reduction in the number and an extent of offsets that are - have been conditioned more recently because of the number of developments that are happening has been less. And essentially since the - the end of the boom, the mining boom there's been a lot less. A lot of proponents have actually put through potential developments to get approvals but have not implemented them. So there is - no offsets can flow. The development isn't - isn't implemented even though there's - there might be a ministerial condition. And some of that funding is where there is a development but it's not likely to be implemented and so there will be no funding come through. So it's a - it's a very dynamic space.

- 149 Dr Byrne said that there were several other reasons why the Matuwa Project may not continue into the future. These included the downturn in mining, meaning there may not be further opportunities to have investment in the area, and the exclusive native title determination that applies to Matuwa. Dr Byrne's evidence was that the Aboriginal corporation that represents the Indigenous people for Matuwa has exclusive say over what happens in that area. There is no formal agreement in place between the Aboriginal corporation and the Department so the Department could be asked to vacate the site at any time. This means there is uncertainty about whether the Department can do anything on the land.

- 150 Dr Byrne denied that she was exaggerating the uncertainty of future external funding.

CSA's submissions

- 151 The CSA relies on its submissions set out at [116]-[120].

Director General's submissions

- 152 The Director General relies on its submissions set out at [121] and [123].

Consideration

- 153 Again, the consistency of historical funding does not assist the CSA in this matter. This is because I accept Dr Byrne's evidence and find that:

- (a) the work Dr Lohr does is research;
- (b) research is considered an indirect offset or 'other compensatory measure', and not a direct offset;
- (c) changes to policy settings mean funding available for research is now restricted in a way that it was not when funding was confirmed for the Matuwa Project;
- (d) economic conditions in Western Australia have resulted in fewer development applications and approvals, which means there is less likelihood of offset funding;
- (e) the downturn in mining means there may not be further opportunities to have investment in the relevant areas; and
- (f) in circumstances where an exclusive native title determination applies to Matuwa and there is no formal agreement between the Department and the Aboriginal corporation that represents the Indigenous people for Matuwa, there is meaningful uncertainty about whether the Department can do anything on the land.

154 The reasoning from [130] to [132] applies here as well.

155 On the evidence before me, there is no proper basis to ground an expectation that external funding for the role held by Dr Lohr will continue beyond the current funding arrangement. Such an expectation is not reasonable.

156 The answer to question four is 'no'.

Conclusion

157 Reading CI 23 as a whole, it is clear that the conditions set out at [19] above must be satisfied before an employing authority must make an offer of conversion to permanency.

158 Relevantly here, the requirements in cl 2.1(a) and cl 11(b) of CI 23 must be met.

159 I consider Dr Dunlop and Dr Lohr are not eligible for conversion under CI 23 because those requirements are not met:

(a) neither Dr Dunlop nor Dr Lohr satisfy the eligibility criteria in cl 2.1(a) of CI 23, for the reasons set out above; and

(b) the positions held by Dr Dunlop and Dr Lohr are externally funded and such funding cannot reasonably be expected to continue beyond the current funding arrangement, for the reasons set out above, such that cl 11 of CI 23 is not satisfied.

160 Applications PSACR 3 of 2020 and PSACR 4 of 2020 must be dismissed.