

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Glenn E Gibson

(T13435 of 2009) [DECISION APPEALED]

and

The Minister administering the State Service Act 2000

DEPUTY PRESIDENT P C SHELLEY

HOBART, 19 January 2010

Industrial dispute - translation process – new award – classification descriptors – “best fit” – order issued

REASONS FOR DECISION

[1] On 29 April 2009, Mr Glenn Gibson, (the applicant), applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (the employer) arising out of the translation review process provided for in Appendix 1 of the *Tasmanian State Service Award* (the award).

[2] A hearing commenced at Hobart on 28 September and continued on 29 September and 1 October 2009.

[3] At the hearing Ms K Jackson of the Community and Public Sector Union (State Public Services Federation Tasmania) Inc. (the union) represented Mr Gibson. Ms J Fitton of Department of Premier and Cabinet represented MASSA with Ms J Crane of Treasury.

BACKGROUND

[4] Mr Gibson is employed in the Department of Treasury and Finance (the Department) within the Division of Liquor and Gaming (the Division) in the position of Manager, Technical and Systems Audit (TASA). The position's objective is to:

“establish and maintain effective systems to approve and monitor the operation of gaming devices, gaming equipment and gaming systems used in all forms of gaming, including interactive gaming and wagering activities and the operation of betting exchanges.”¹

[5] The Manager TASA has a team of five staff, three of whom work on approving and monitoring interactive gaming and wagering, essentially Betfair (a betting exchange). Two work in monitoring and approving gaming machines. Both

¹ Exhibit A12 Manager, Technical and Systems Audit Statement of Duties

areas are involved in accreditation and in ongoing relationships with testing facilities. TASA develops and maintains standards for equipment and systems.

[6] Under the previous award, the *Administrative and Clerical Officers Award*, the position was at Level 9; it was created in 2006 to deal with the increased complexity due to the introduction of Betfair.

[7] Mr Gibson was translated to band 6 of the new award, the *Tasmanian State Service Award*, effective from 5 March 2009. He has disputed this pursuant to Appendix 1 – Clause 3 – Review Process – of the award. The review process is complex and protracted. Mr Gibson's claim is that the work he performs is work that best fits the level of band 7.

[8] The award provides that where an employee has issues or grievances with their duties, responsibilities or translation classification band, they have 14 days in which to initiate discussion at a local level with their manager. Following that discussion, outcomes with reasons are to be provided to the employee within 14 days. Following that, if an employee is dissatisfied, they can lodge an application for review with the Director/Manager Human Resources (HR) within 28 days of the receipt of the notification of outcome. There is then an internal agency review process, which involves a review signed off by the Director/Manager of HR with recommendations to the Head of Agency or delegate. The employee is then notified of the outcome of the internal review within 28 days of the application being received. If the employee is dissatisfied with the outcome, then, if the dispute relates to the assigned classification level, the employee may seek a review of the classification band, which is the case in this instance, pursuant to clause 3(e)(iv) of Appendix 1 of the award.

[9] Mr Gibson's agreed Statement of Duties sets out his primary duties, level of responsibility, direction and supervision. The primary duties include:

- *"Efficiently supervise designated resources and provide effective leadership within the work area to ensure that work objectives are completed in a timely manner and to a high standard;*
- *Developing guidelines, systems and procedures to ensure the timely and effective approval of technical equipment and other systems used in the delivery of gaming;*
- *Managing the development of systems for the monitoring and audit of gaming operations and the development and operation of standards and technical requirements;*
- *Regulating components of, and report on all forms of gaming covered by a Tasmanian Gaming Licence including betting exchange operations;*
- *Liaising with testing facilities, gaming equipment manufacturers, gaming operators, suppliers and software developers to manage the process of testing and approval of gaming equipment and systems and represent the Branch and the Department as required;*
- *Supervising, reviewing and reporting on the performance of testing facilities;*

- *Providing advice, reports and briefings to the Tasmanian Gaming Commission and the Department on technical issues relating to the security, fairness and ability to audit gaming equipment and gaming systems including the verification of gaming taxation and broader technical policy issues;*
- *Assisting other areas of the Branch in the formulation of gaming policy:*
Preparing high level correspondence including reports and submissions to the Tasmanian Gaming Commission and other bodies as required;
- *Representing the Department and the Tasmanian Gaming Commission on working parties and other forums as may be required from time to time;*
- *Maintaining a network of peers and specialist contacts in the area of gaming equipment and system regulation;*
- *Developing a contemporary and productive work environment that fosters responsibility, accountability and improvement in meeting operational goals and objectives; and*
- *Contributing to the management of the Liquor and Gaming Branch through participation in the Branch planning process and monitoring and reporting on Branch performance, as determined.”²*

[10] The level of responsibility, direction and supervision is described as:

“The Manager, Technical and Systems Audit will operate with a significant degree of independence of action and autonomy in day to day activities and is accountable to management in terms of strategic direction and meeting objectives. The Director, Liquor and Gaming will provide broad direction. The Manager, Technical and Systems Audit may be required to provide authoritative specialist advice generally or as it relates to a particular work area. Delegations exercised at this level may include being the final authority in approving expenditure, undertakings specific policy action or reviewing previous actions or decisions. The Manager, Technical and Systems Audit may also supervise a small team of employees, which involves technical or professional skill and judgment.

...”

[11] The award at Part IIII Clause 1(c)(iv) – Classification Descriptors – defines the work in broad levels according to its focus and the framework in which it is performed. Relevantly, Bands 4, 5 and 6 are grouped together, as are Bands 7 and 8.

[12] Clause 3 sets out a summary of the differences between the general stream bands:

“(f) Difference Between Band 5 and band 6

² *supra*

band 6 work applies the decision-making framework (policies, rules and regulations) in support of program or service delivery of a defined field of activity, which may involve more than one discipline. Considerable autonomy of approach in delivering outcomes and the advice and recommendations provided are regarded as definitive for that activity.

(g) *Difference Between band 6 and band 7*

band 7 work leads a complex activity or program unit requiring the development and/or/determination of the operational methodology according to the decision-making framework and service delivery requirements."

[13] Clause 4 sets out, at considerable length, descriptors for the general stream bands.

[14] Clause 1(a)(ii) describes the "best fit" approach:

"The job components have equal weight or effect and no description within a component has more importance than another. Some descriptors, however, are more relevant in describing different types of work than others, and therefore will have more influence in classifying that work. Naturally, not each and every descriptor applies to any individual job. These descriptors are appropriately used when particular descriptors of job components and the overall theme or "feel" of a particular band provides the "best fit" to an employee's duties."

[15] The applicant is seeking to be translated to band 7 of the General Stream Band.

WITNESS EVIDENCE

For the Applicant

Mr Glenn Gibson

[16] Mr Gibson's evidence was that he managed the technical and systems audit team. There are two streams - the terrestrial gaming stream which includes gaming machines and systems and Keno; and the internet gaming stream, which includes Betfair. His team does all the approvals for gaming machine games, which go to an accredited testing facility to ensure they comply with standards. He assesses the testing report, the certification, and the features of the game. Some of them are entirely new concepts. He writes reports for the Gaming Commission so that they can assess whether the product should be approved or not; the discussion papers concern whether the product meets requirements, whether it is fair, whether it is auditable and whether it is secure. Similarly with internet gaming. He lists options and makes recommendations to the Gaming Commission.

[17] He said that in the last twelve months TASA has written a hundred such reports, and whilst some were not very complex, a lot of them are. Out of one hundred such reports, 97 of the recommendations were accepted.

[18] Mr Gibson testified that his team writes some of those reports, under his guidance. They do investigations and audits, particularly for internet gaming. They conduct audits on Betfair. He has designed about 29 computer reports on Betfair that can be done through a system that links with Betfair. He said that Betfair has continued to grow rapidly and the complexity and volume increase all the time.

[19] He said that his team also handled complaints for gaming machines and for Betfair. They ensure that the gaming machines are operating correctly, including the return-to-player ratio. They also accredit the testers and monitor the performance of the accredited testing facilities. Mr Gibson denied that it was not necessary for him to be technically skilled, because, he said, TASA sets the standards that the accredited testing facility is working to and he is monitoring them, and "*pulling them up all the time.*"

[20] Mr Gibson's evidence was that he had attended national standards meetings since 2000. The national standards working party meets roughly six times a year. He said that he had never received any directions from anyone in relation to the national standards. The Gaming Commission is only involved at the end, when changes are agreed and go to the Gaming Commission for endorsement. The Gaming Commission has accepted the recommendations on every occasion.

[21] In relation to a COAG working party that he was part of, Mr Gibson said that he got some advice from Leon Atkinson McEwen, but no direction from the Gaming Commission.

[22] He said that he had 172 delegations under the *Gaming Control Act 1993* and that he had more delegations than any band 7 position. Twelve per cent of the delegations have some directions or criteria attached. The delegations are powers given by the Gaming Commission who only meet once a month. He is required to be familiar with the *Gaming Control Act* and to interpret it. He said that there are no written guidelines in relation to the delegations. The delegations simply give him powers, for example, the power to approve a gaming machine. In 88 per cent of instances the delegations were not subject to conditions. Even when there is something new and unprecedented he makes a judgment about whether it needs to be referred to the Gaming Commission.

[23] Mr Gibson said that there was a procedures manual the TASA team had written which deals with how work is done; they had developed the systems that are in place. His role goes further than just interpreting guidelines, he develops them as well.

[24] He had travelled to the United Kingdom in relation to Betfair and it was as a result of that and a number of telephone hook-ups he had participated in that the regulatory model became legislation. With TOTE, he was involved in writing the drafting instructions.

[25] Mr Gibson said that the role of the Branch head and the Executive Director in setting direction was a supportive one and they added value from a management perspective but they do not give directions in relation to the specifics of the work.

[26] Mr Gibson said that he has lots of autonomy in relation to the management of his staff. As long as the job is done, according to proper processes, he and his team are left alone. He looks after their training and their performance.

[27] He agreed that the work of the other managers in the Branch was spread across both liquor and gaming, but, he said, the liquor side was "very, very simple". Some of the licences are perpetual, so they do not need to be reviewed; it is quite different to gaming.

[28] Mr Gibson said that he writes the reports and the current process is that they are channelled through the Director of Liquor and Gaming. It virtually never happened that he received direction before he wrote the papers. Sometimes changes were made by the Director, such as changes to punctuation. Once it had happened that the direction of the paper was changed significantly, which upset him because his name remained on it.

[29] Mr Gibson's evidence was that the job requires a level of technical knowledge, without which he would not be able to do it, even though the Statement of Duties does not specify what that technical knowledge is.

Ms Sarah Fitzgerald

[30] A statement was provided by Ms Sarah Fitzgerald, who was the Assistant Director of the Liquor and Gaming Branch until mid 2008. She was involved in the regulation of Betfair and accompanied Mr Gibson on a trip to London to examine Betfair operations. Her statement reads:

"The following statement outlines the complexity of the role undertaken by Glenn Gibson as Manager Technical and System Audit..."

My understanding of the work Glenn undertakes is derived from managing Glenn, when his work formed part of the Research and Policy function of the Liquor and Gaming Branch..."

As I understand, the classification standards of the Band system state that band 7 work leads a complex activity or program unit requiring the development and/or determination of the operational methodology according to the decision-making framework and service delivery standards. I consider the technical component that Glenn undertakes in his role satisfies these criteria.

The decision making framework used by Glenn is provided by the Gaming Control Act (GCA). However, the Act was written in 1993 and did not anticipate the technological advances that have occurred in the interactive gaming environment. This can mean that a new product seeking approval to operate in Tasmania may not fit neatly within the existing legislative parameters.

Glenn leads a team which understands the product or service seeking authorisation to operate in Tasmania. The team, under Glenn's guidance, assess the connections under the GCA, understands its operations and therefore its risk and make a judgment about whether the authority exists to make a decision under delegation to whether to prepare briefing material so that the Tasmanian Gaming commission can make a determination. While it may appear simplistic in the way I have described the steps taken here this is often a complex task requiring an in-depth understanding of the technical and system requirements, and connections to other legislative tools such as taxation, privacy or unclaimed monies.

By way of example, Glenn and I attended the United Kingdom for a period of two weeks to investigate the integrity, security and operation of the Betfair UK operation prior to the Tasmanian Gaming commission issuing a Tasmanian Gaming Licence. At this time, a betting exchange (like Betfair) had not held a gaming licence anywhere in the world.

While I was able to provide the policy, social and political understanding and interpretation of the applicable legislation, I have limited understanding of the detailed technical operation, and how this interfaces with legislative imperatives. Glenn's superior knowledge, experience, enquiring mind and attention to detail filled this void.

His understanding of system operation in highly technical and ever changing areas such as:

- *Verification of software;*
- *Electronic identity verification;*
- *Systems and database design;*
- *Auditing; and*
- *Risk Management.*

This knowledge was invaluable. The relatively smooth transition of the project and the success of the operation once established were in no small part due to Glenn's knowledge and experience. I have no doubt that the introduction of this project would not have been as successful without his technical leadership.

In dealing with a complex technical issue from a regulatory perspective there is a need to have credibility in the eyes of the client. Without an intimate and contemporary understanding of gaming systems it would have been very easy for the Tasmanian Gaming Commission to make errors with diabolical consequences. It is through Glenn's leadership of the technical issues that this has not occurred.³

For the Respondent

Mr Peter Hoult

[31] Mr Hoult told the Commission that he had been Chair of the Gaming Commission since February 2008. The Gaming Commission was created pursuant to the *Gaming Control Act*. It comprises three part-time commissioners who meet on a monthly basis. It is a statutory body and receives advice and administrative support from the Liquor and Gaming Branch of the Department of Treasury and Finance.

[32] The Gaming Commission formally receives reports from the Branch at the monthly meetings. It provides the Branch with broad strategic direction through the meeting process and policy frameworks that have been built up over a number of years.

[33] Mr Hoult testified that the Gaming Commission delegates most matters which are routine, or complex matters where there are well understood policy parameters. Matters which are unusual or which have policy ramifications are

³ Exhibit A18 Sarah Fitzgerald statement, 22/6/09

referred back to the Gaming Commission for decision, which happens occasionally. The more straightforward delegations are given to those people directly involved in the day to day operations linked to the delegation. The Manager TASA has a trench of delegations relating to terrestrial gaming, particularly electronic gaming machines.

[34] He said that where there was a potential for policy content or conflict with stakeholders, then the delegations are given to more senior staff. The more potentially difficult and contentious, the higher up the management chain the delegations would sit.

[35] Mr Hoult's evidence was that the accredited testing facilities are private entities that do the testing on the gaming machines to ensure they meet the Gaming Commission's technical parameters in such respects as: spin rates, auditability, linkage to software systems, etc. They are the entities that provide the Gaming Commission with the technical sign-off on the functionality of electronic gaming machines.

[36] In relation to Mr Gibson's role as the Tasmanian representative on the National Standards Working Party, Mr Hoult testified that changes to national standards are the purview of the Gaming Commission and would come to them for approval.

[37] He said that when he had become chair he only wanted to see papers after they had been through a quality assurance process, so no papers have come to the Gaming Commission without being signed off by either the Director or the Executive Director of the branch, although there may have been briefing from officers on particular matters.

[38] Mr Hoult said that recommendations received from TASA do get changed by the Gaming Commission, but not often. The Gaming Commission's policy position should be well understood by those preparing papers.

[39] He said that he would regard some of the advice given by TASA to be reasonably specialist advice and some of it to be advice that you would expect a competent middle level manager with some experience in his area of expertise to provide. The person would have to have the capacity to manage the relationship with the accredited testing facilities. In his view, the role of the Manager TASA is to provide advice to senior management of the Branch.

[40] Mr Hoult agreed that the information provided by TASA is occasionally complex, such as the paper on the Betfair starting price. He said there are varying degrees of complexity [in the papers] and that a significant number came from the TASA unit relating to gaming machines. Some, however, were very straightforward.

Mr Leon Atkinson-MacEwen

[41] Mr Atkinson-MacEwen told the Commission that he has been the Director of Liquor and Gaming since August 2007. The Liquor and Gaming Branch has a number of functions under the *Gaming Control Act* and the *Liquor Licensing Act*. The primary functions are licensing and compliance in relation to liquor and gaming. The TASA unit is part of the compliance function, dealing with gaming including the regulation of Betfair.

[42] He said that the other managers within the Branch have responsibilities across both liquor and gaming issues. They deal at a slightly higher level in terms of

a strategic approach to the issues that they manage [than the Manager TASA does]. The *Gaming Control Act* is very prescriptive, the *Liquor Licensing Act* less so, it is briefer, less detailed, and therefore there is more ambiguity and a need for judgment to be exercised. The Commissioner for Licensing and staff deal with more complex issues to do with individuals and their behaviour in terms of drinking and the sale of alcohol; these are more intractable and harder to deal with because the *Liquor Licensing Act* does not provide the direction that the *Gaming Control Act* does.

[43] When cross-examined, he agreed that in the proposed new structure, a new band 7 position does not have responsibility for both liquor and gaming and applied to gaming only, but, he said, the responsibility would be twice the size of the responsibilities of the Manager TASA. He said that position was going to require some significant stakeholder management.

[44] Mr Atkinson-MacEwen said that the senior roles within the Branch, band 6 and above, directly report to him. He has a role in guiding Mr Gibson, particularly where there are no precedents. The guidance he gives to Mr Gibson is not around the approvals or testing processes, which are mechanical and straightforward, but is about strategic directions, or direction around the papers going to the Gaming Commission concerning matters that are new or unprecedented. The Gaming Commission has determined that it only wishes to hear from himself, the Executive Director and his Assistant Director, therefore he represents Mr Gibson's papers to the Gaming Commission.

[45] In relation to the duties of the Manager TASA, Mr Atkinson-MacEwen said that they were to manage the approval processes for gaming machines in particular and the compliance processes around that, as well as the regulatory compliance of Betfair. They don't test gaming machines or games. Reports are received from the gaming machine testers and manufacturers ensuring that they meet the Gaming Commission's requirements. If they do, then the decision-making power has been delegated to the Manager TASA position, whose role is to approve those games or, in the case of Betfair, to approve changes. As part of that, reports are received from accredited testing facilities. There is heavy reliance on the testing regime and on protocols put in place by the Queensland Office of Liquor and Gaming Regulation (QOLGR). The Manager TASA has to manage the relationship with the accredited testing facilities. The performance of the accredited testing facilities is a matter for a national panel, on which Mr Gibson sits.

[46] Mr Atkinson-MacEwen acknowledged that the position would need to have an understanding of what the testers were saying and would need to have knowledge of the requirements. There is no requirement for the Manager TASA to be a tester; there is no requirement for a background in computing or mathematics. There is a need to understand basic mathematical concepts, but it is the kind of knowledge that can be acquired on the job, he said.

[47] He said that, being a small jurisdiction, there was no ability to have a testing laboratory, so they relied very heavily on the QOLGR to do it for them. The two and a half thousand gaming machines in hotels and clubs run on a gaming protocol managed by the QOLGR. In a sense, he said, the basic checking of the machines was done for them by Queensland. The reports that they receive from the QOLGR and the accredited testing facilities are to a set format that corresponds with delegations provided by the Gaming Commission. If aspects of a game are outside the parameters set by the Gaming Commission then it can't be approved by the person under delegation and must go to the Gaming Commission for approval.

[48] Mr Atkinson-MacEwen told the Commission that he understood that Mr Gibson had established a regime based around risk that establishes when a particular system requires testing, however, effectively, the reports are reports that meet the Gaming Commission's requirements. The traffic light system developed by Mr Gibson was, according to Mr Atkinson-MacEwen, a very common risk management approach. He said it was a very simplistic system. What Mr Gibson had done was adapt a standard risk analysis to apply to Betfair. He said he did not agree that some of the solutions put in place by TASA were at the forefront of gaming regulation. A lot of what Tasmania does is unique, but that does not necessarily make it difficult, complex or particularly technical. He said that TASA took what were standard risk management practices and applied them to Tasmania's circumstances

[49] In relation to the delegations held by Mr Gibson, Mr Atkinson-MacEwen said that the Gaming Commission delegates matters that are not complex, controversial, do not require a significant amount of judgement, but are straightforward and easily understood. He said that every decision that is delegated is as a result of many papers going to the Gaming Commission for approval, and setting out parameters around a particular issue. The Gaming Commission then says that, in those circumstances, where criteria are met, then a whole range of people can exercise the delegation. Those delegations provide quite detailed and strict guidelines to all staff as to how they should exercise delegations. The delegations are not broad; all delegations are narrow and specific. Where there is an issue that is not straightforward, then the delegation might not be exercised, but would move up the chain, perhaps to the Assistant Director, or to himself or back to the Gaming Commission for clarification and further decisions. He said that the Gaming Commission's view was that it should be taken up the chain of command to a more appropriate decision-maker, generally at his level or even above. The delegations given to Mr Gibson were straightforward; the circumstances in which they are to be exercised are well-documented. The Gaming Commission delegates to the lowest level it feels comfortable with. Where the delegations require sensitive judgment and more discernment or discretion or are more difficult, then those are delegated to the Executive Director or himself.

[50] Mr Atkinson-MacEwen testified that other responsibilities held by Mr Gibson included liaison with accredited testing facilities and with the entities that are regulated, particularly with network gaming. He has the responsibility for supervision of staff. He sits on various working groups. These are subgroups of larger national bodies.

[51] Whilst the TASA unit has responsibility for the operational approvals and day-to-day regulations, the research and policy team is responsible for the broader issues around gaming policy including those which may have broader ramifications across the whole of the gaming environment.

[52] Mr Atkinson-MacEwen did not agree with the statement by Mr Gibson that he was the only person in Tasmania with sufficient technical knowledge to provide useful guidance on the majority of the work of TASA. He said that Mr Gibson had some very good Band 5 people working for him who have very good knowledge. There are also people in the research and policy team who have very good knowledge of the same sorts of issues as those Mr Gibson deals with. Many of the issues are common to all regulators and there are sources of advice there, and the Branch can rely on the specialist advice of testers, of QOLGR, and of colleagues in Victoria, or wherever.

[53] He said that the role did not have a direct or significant effect on organisational outcomes. Like all other areas within the Branch, they contribute to

the Gaming Commission's outcomes, but everything is mediated. Everything goes to him before it goes to the Gaming Commission.

[54] Mr Atkinson-MacEwen said that Mr Gibson did represent Treasury in meetings with CEOs and compliance managers in relation to Betfair, however, generally, matters to do with the CEO of Betfair are matters that the Gaming Commission has requested that he deal with himself, although Mr Gibson may be present at the meetings. He said that the types of stakeholder issues that Mr Gibson would be involved with would concern new products, complaints or systems issues. Mr Gibson would deal with the manager compliance or a legal person, whereas the broader issues would be dealt with between himself and the CEO. When asked whether Mr Gibson had the authority to negotiate outcomes for TASA at these meetings, Mr Atkinson-MacEwen said that only for minor straightforward matters. He said that the Gaming Commission would only delegate [higher level] matters to himself or the Executive Director.

[55] In relation to the standard and complexity of the Gaming Commission papers written by Mr Gibson, Mr Atkinson-MacEwen said that they were not complex and were fairly straightforward. Often, there are issues of more complexity with broader implications, and those tend to be the ones where the Assistant Director or himself got more deeply involved in the paper and provided a lot more guidance. He said that the system for clearance of papers is that they are checked by supervisors. They are often written by a band 4 or 5 level, then checked. Then all papers come through him and no papers go to the Gaming Commission unless he has cleared them.

[56] When asked whether Mr Gibson's recommendations had a direct effect on service delivery, Mr Atkinson-MacEwen said that they did but not at a program and broader strategic level, which tended to come out of the research and policy broader strategic level of the Branch.

[57] He said that Mr Gibson was responsible for his staff, but he had no budget management responsibilities. Mr Gibson did have independence in determining priorities. He agreed that none of the current band 7 positions managed a budget.

[58] When asked whether Mr Gibson had responsibility for the development of strategies, policy or program implementation especially in relation to new developments, Mr Atkinson-MacEwen said that the role contributed to those, but that all staff in some way, shape or form contribute to these, but at the broader strategic level it is himself and the Assistant Director and the research and policies team which do that.

[59] He said that the TASA unit is a relatively small team of people, focussed on a fixed and narrowly focussed group of issues. It does not have an across the Branch impact.

Ms Wendy Sawford

[60] Ms Sawford told the Commission that she is currently the Executive Director of the Revenue Licensing and Gaming Division, responsible for strategic direction and high level stakeholder management for the Division. She is Commissioner for Licensing and Commissioner of State Revenue.

[61] She said that the Manager TASA heads the technical and systems audit unit within the Liquor and Gaming Branch and reports to Mr Atkinson-MacEwen, who, in turn, reports to her. She provides advice to Mr Gibson on strategic directions.

[62] The role of the research and policy unit within Liquor and Gaming and that of the Manager TASA are very similar, she said. They identify issues, investigate those issues, and provide options and recommendations. There are band 6 positions in research and policy. Policy and research have a broader focus, in that it includes liquor. She said that the differences between those roles and Mr Gibson's role were that the Manager TASA had some responsibilities for staff. The research positions might have supervisory responsibilities, but they are not responsible for the management of a unit.

[63] Ms Sawford testified that the role of Manager of TASA is to manage the processes around the approval of gaming machines and systems and to manage the relationships with the accredited testing facilities that test those machines and systems.

[64] In her opinion, a person in that type of position did not require any specific technical qualifications; they need mathematical competence and an understanding of such concepts as rate of return to player. There is a requirement for the capacity to understand such things, rather than any particular technical qualification.

[65] Ms Sawford said that the sorts of papers written by the Manager TASA are the regular management report; papers seeking approval for new gaming products and changes to systems; and papers dealing with complaints.

[66] She said that gaming machine approvals are a very specialised area of expertise, but many are straightforward and do not require the exercise of significant judgment. The papers presented [prepared by TASA] require interpretation of technical reports and relaying them to the Gaming Commission, which is a non-technical party.

[67] In relation to the stakeholder issues that Mr Gibson deals with, Ms Sawford said that he deals with complaints from people unhappy with the outcomes of their interactions with gaming providers, and sometimes they are difficult because they are very aggrieved. He is also responsible for the interactions with gaming providers and gaming machine suppliers with whom he negotiates according to the Gaming Commission's requirements. They are not necessarily contentious negotiations and where there are particular concerns then the Gaming Commission would ask Mr Atkinson-MacEwen to deal with the provider.

[68] Ms Sawford's evidence was that the National Standards Working Party that Mr Gibson was the Tasmanian representative on was set up by the gaming chief executives across Australia, so the working party reports to the gaming CEOs. The conceptual framework underlying the standards is well understood and long established. When the Manager TASA attends a working party meeting he would not need to seek direction on a position on all issues before he went because he understands the Gaming Commission's position on most matters. It is her understanding that the agenda is discussed with Mr Atkinson-MacEwen beforehand. Mr Gibson does operate with a fair degree of autonomy and independence because he understands what the Gaming Commission's requirements and expectations are.

SUBMISSIONS

Ms Jackson for the Applicant

[69] Ms Jackson told the Commission that the dispute centres on the focus, context and framework components of the classification descriptors.

[70] The organisational chart, Exhibit A1, shows that the managers of Communications and Education, Operations and Compliance are jobs at the level of band 7 that don't manage a "function". All the managers along that line, excepting for Mr Gibson, are at band 7, as shown in their statements of duties.⁴

[71] Mr Gibson has a management focus, she said. He is clearly a specialist and he is regularly called upon to provide advice to other areas of the Branch and the department. One of the main responsibilities of the Division is to ensure that gaming is properly regulated,⁵ and it is mentioned as a major factor in the Treasury Mission Statement.⁶ Gaming is, by nature, complicated, and ensuring that systems are properly regulated and audited requires the TASA team and manager to understand gaming in all its forms.

[72] Ms Jackson said that approximately \$85 million is collected per annum in gaming tax, and Betfair contributes another \$8 million in tax and product levy. The Manager TASA has a direct and significant effect on organisational outcomes and objectives.

[73] Mr Gibson holds 192 delegations under the *Gaming Control Act* and acts as the Tasmanian Gaming Commission in exercising those delegations. He is on the Australia and New Zealand National Gaming Machine Standards Working Party which sets gaming machine standards. He has participated in and chaired meetings of the COAG Industry and National Standards working groups and task forces. Mr Gibson is heavily involved in the process of reviewing and updating national standards every two years.

[74] Ms Jackson said that the role requires a high level of specialised expertise which he has gained through extensive experience. In order to obtain that highly developed expertise Mr Gibson went to London in late 2005 to examine the Betfair operations there. Whilst not all papers prepared by Mr Gibson require highly technical, specialist expertise, many of them do. In order for him to prepare reports and recommendations for the Gaming Commission, he is required to research and be on top of complicated issues, requiring translation into laymen's terms because the Gaming Commission members do not have a background in gaming. Almost all of his recommendations have been accepted by the Gaming Commission. It requires skill to translate an exceptionally complex issue into an understandable issue.

[75] Mr Jackson submitted that Mr Gibson provided advice that was not available from anyone else within the Agency. He provides advice on TOTE Tasmania. There is a scarcity of such expertise within the Agency. Mr Gibson provides advice directly to the manager of the function, Mr Atkinson-MacEwen, who is his line manager. The result of this advice has an influence on the outcomes. Proper regulation of systems and gaming machines affects those outcomes, which include the collection of \$93 million in tax revenue.

⁴ Exhibits A3 Manager Communications and Education Statement of Duties and A4 Manager Operations Statement of Duties

⁵ Exhibit A10 Department of Treasury and Finance "Our responsibilities"

⁶ Exhibit A11 Department of Treasury and Finance "The Department in brief"

[76] Mr Gibson manages a team of five staff, which requires him to plan activities and to ensure resources are appropriately and effectively applied. He is responsible for managing the performance and development of staff. As a specialist, he is responsible for mentoring and role modelling less experienced staff.

[77] There are examples of Mr Gibson developing systems and policies which have been of assistance to the organisation, such as the development of the "traffic light" risk management system and a data collection system which has greatly speeded up compliance issues in relation to return-to-player requirements.

[78] She said that the award tells us that band 7 leads a complex activity or program unit requiring the development and/or determination of operational methodology according to the decision-making framework and the service delivery requirements, all of which perfectly encapsulates everything that she has described [that Mr Gibson does].

[79] Ms Jackson said that there was a proposed new structure⁷ which showed that band 7 fitted comfortably along the line of leading activities and reporting to the function manager and that the position of Manager TASA fits in band 7. On that line is a position, not yet filled, called "Manager Terrestrial & Internet Gaming and Wagering". That new position was created after the classification structure was implemented. That position will be to oversee all that Mr Gibson does, although it was Ms Jackson's belief that it is a renamed position which will include TOTE. Mr Gibson is shown in the new structure as "Principal Compliance Analyst" and his position would have to change – he would cease being the manager. It has the same position number as his current position. However, her primary argument was that the position currently filled by Mr Gibson was band 7, in any event.

[80] Ms Jackson submitted that the evidence showed that the Department is judging Mr Gibson's role against some lofty notion of band 7 that does not bear much resemblance to the actual words in the award. A job should be classified according to the band that it fits best. The Manager TASA aligns more closely with band 6 than band 7. The bands are not so dissimilar as to be mutually exclusive, but to the extent that they differ, the job fits band 7 better.

[81] Bands 4, 5 and 6 describe work which involves maintenance and modification of guidelines, systems and processes according to a defined policy, as distinct from band 7, which is work involving the interpretation and modification of policy in regulatory settings according to operational requirements. Mr Gibson's work involves interpreting and modifying policy in regulatory settings.

[82] He is required to interpret requirements and apply complex policies, to exercise judgment and to develop options and recommendations. His role has a direct effect on the organisation outcomes and corporate objectives. Whilst it was never suggested that he operate entirely without guidance, the evidence showed that he operates with considerable autonomy within a specialised, complex environment.

[83] The respondent's witnesses gave evidence that Mr Gibson prepares complex papers, advice and recommendations to the Gaming Commission. Whilst not all papers require the full extent of his expertise, a job has to be classified according to the breadth and depth of its requirements. Mr Gibson is required to prepare or oversee the preparation of papers that translate complicated information into terms

⁷ Exhibit A15 Liquor and Gaming Branch flow chart

the Gaming Commission can digest and deal with. The fact that not every issue involves enormous complexity is not a reason to assign a lower classification.

[84] Band 7 tells us a person would identify, define and develop options and recommendations to implement and improve the delivery of complex specialised programs and also oversees within a functional area, which may include responding to new and emerging developments. This is exactly the kind of work Mr Gibson performs.

[85] The fact that he consults with the Branch head is entirely consistent with band 7, according to Ms Jackson.

[86] The fact that Mr Gibson does not manage a budget is immaterial, she said.

Ms Fitton for the Respondent

[87] Ms Fitton submitted that this application differed from the usual s29 application because it was specifically about the translation review process and the translation arrangements. It was an agreed process in matters T13394 and T13411. She said that the review processes set out in clause 3 of appendix 1 has been followed. Mr Gibson submitted a preliminary request for review, and, as per the agreed process this was initially assessed by the Branch head (Mr Atkinson-MacEwen) in discussions with Mr Gibson and he was assessed against classification descriptors. It was the Branch head's view that Mr Gibson was correctly classified at band 6. As Mr Gibson was not happy with that, it was referred to the agency's formal internal review process. A panel comprised of the Assistant Director of Liquor and Gaming, a senior human resources officer and the Assistant Director of Human Resources, undertook an internal review. The panel reviewed the documents and had discussions with Mr Gibson, the Branch head and the Executive Director.

[88] The major area of dispute encompasses all of the job components. There was disagreement about the degree of guidance and direction given to the role and how the role operates under delegation from the Gaming Commission. It is the respondent's submission that the role operates under strong guidance and direction and the strategic programs set out by the Gaming Commission, the Executive Director, Wendy Sawford and the Director of Liquor and Gaming, Leon Atkinson-MacEwen. Guidance is provided in a number of ways, such as policy directions and decisions relating to the manner and operation of delegations. The evidence showed that employees acted under delegations from the Gaming Commission and precedents set by the Gaming Commission. When anything unusual or unprecedented arises it is expected that the employee will refer that back through the lines of control.

[89] Ms Fitton submitted that the role did not require a high level of technical expertise and that it operates within well-understood frameworks, as do other positions at band 6 within the Liquor and Gaming Branch. In support of that Ms Fitton provided statements of duties for the positions of Principal Research Officers within the Branch, who are classified at band 6.⁸

[90] She said it is acknowledged that there are some very minor aspects of the duties that could be considered to be band 7, and this is implicit in the classification descriptors. However, when the "best fit" descriptor provides the overall view, the

⁸ Exhibits R8 Principal Research Officer Statement of Duties Position Number 723367, 723810 and R9 Principal Research Officer Statement of Duties Position Number 722948

duties align with the band 6 descriptors and the overall theme or feel of the position clearly fits within band 6.

[91] Ms Fitton submitted that the position requires a degree of technical knowledge and capability similar to other band 6 positions in other parts of the Branch. All that is required is for the incumbent to have some mathematical statistical competency. The purpose of the role is not to primarily provide the technical advice required for approval of gaming machines; there are independent testing facilities for this purpose. The role is to obtain the relevant technical information and to provide reports and briefings, approved by the Branch head, for submission to the Gaming Commission, relating to the auditing of gaming equipment and gaming systems, in line with the requirements of the *Gaming Control Act*, with a framework of delegations and broader parameters provided by the Branch head, the Executive Director and the Gaming Commission.

[92] Ms Fitton provided a document, prepared by the respondent for the Commission proceedings, which aligned Mr Gibson's duties against the band 6 descriptors in the award.⁹ She emphasised that it had been written against the role, not against the specific qualities and qualifications held by Mr Gibson. She said that each job component has equal weight and each descriptor has equal value, although some parts of the descriptors will have more relevance than others. Not every single part of each descriptor will apply in its entirety at a particular band level. The Agency's response has been worded using the descriptors for band 6.

[93] The award states that it is important to consider the organisational structure and reporting requirements above and below the role. Bands 7 and 8 have a broader whole of government and whole of community and whole of discipline perspective. In this case, the duties do not have a broader application; rather they relate to systems and processes within a regulatory environment.

[94] Ms Fitton submitted that whilst any work performed may range across one or more aspects of the reference framework, usually one principal objective of the work aligns more closely with one aspect than another. The argument in this case has been around the support of the operational activities of a defined field of activity compared to the wider requirements of band 7, which relate to a program of complex activities integrating varying and diverse organisational policies and rules. This position has a narrower span of control than that envisaged for band 7.

[95] The employer's argument is that the field of activity is around gaming machines and Betfair which is not a broad span of control. Duties at band 7 would show a wider span connecting with the whole Branch. The reference framework defines a function as typically a Branch within an agency. The function would be the liquor and gaming Branch. Mr Gibson's role is to manage systems to approve and monitor the operations of gaming equipment, gaming systems and betting exchanges and is a subset of the gaming operations of the Liquor and Gaming Branch.

[96] Ms Fitton said that, even though Mr Gibson's role is complex and specialised, it is narrow in its focus.

[97] The proposed new structure¹⁰ shows a new position, Principal Compliance Officer TOTE and Corporate Bookmakers, which is a position which has essentially

⁹ Exhibit R10 Primary Duties against band 6 Descriptors: Manager; Technical and Systems Audit

¹⁰ Exhibit A14 Liquor and Gaming Review Issue 3 Volume 5

the same duties as those performed by Mr Gibson, operating under the same guidance with the same delegations. That same chart shows Mr Gibson at the same level as Principal Compliance Officer, Betfair and Terrestrial Gaming, which is the same role as Manager TASA, but with a new name. The new structure creates a new band 7 position, that of Manager Terrestrial and Internet Gaming and Wagering. That position will have a span of control over all areas and will have a wider spectrum.

[98] She said that band 6 positions have a more operational focus and whilst there is no doubt that Mr Gibson deals with some levels of complexity, the position does not have the strategic focus and breadth and span of control expected of a band 7. A program at band 7 would have a higher level policy role, greater decision making responsibility and a higher level of stakeholder management. The classification descriptors are a continuum. The position of Manager TASA is not as large as the other band 7 positions referred to and does not align with band 7 as the best fit.

[99] In relation to the evidence of Ms Sarah Fitzgerald, who was the Assistant Director of Liquor and Gaming from April 2004 to August 2008, Ms Fitton said her statement was based on her understanding of Mr Gibson's personal abilities and not based on the duties required for the role. She also fails to note that there are layers of decision making and accountability between Mr Gibson's position and the Gaming Commission. The evidence was that guidance and direction is provided by the Branch head and the Executive Director. Her statement does not negate the employer's position that the role operates within a narrow span of control.

[100] Ms Fitton submitted that whilst other band 6 roles do not have management responsibilities, that is balanced by the breadth of issues that they are responsible for. The fact that one role has management responsibilities and the other doesn't is irrelevant when determining the classification level.

[101] The evidence of Mr Atkinson-MacEwen and Ms Sawford showed that the papers prepared by Mr Gibson do not require difficult or sensitive judgments to be made nor do they require a high level of technical knowledge, she said.

[102] Ms Fitton said that, whilst it was agreed that Mr Gibson had suggested the "traffic light" system of risk management, and had developed it and implemented it, the evidence was that it was a commonly used risk management approach.

[103] She said that whilst Mr Gibson was Tasmania's representative on the National Standards Working Party, it is a working party directed by the CEOs group, of which Ms Sawford is a member. Mr Gibson's evidence was that he negotiates and agrees to positions in relation to national standards, the evidence has shown that he must seek approval to negotiate outside of set guidelines or delegations.

[104] The employer's submission is that a technical knowledge of gaming is not required. This is done by the accredited testing facilities. There are no special technical qualifications required for the role. What is required is an ability to understand spreadsheets, a degree of mathematical competence and the ability to develop an understanding of the concepts underlying the regulation of gaming, for example, return-to-player and some basic statistical concepts such as standard deviation. The role is predominantly procedural and is required to manage a range of approval processes; not to provide technical reports, Ms Fitton said.

FINDINGS

[105] State service employees were transferred from a number of awards to a single new award – the *Tasmanian State Service Award*. An aggrieved employee is able to have their classification reviewed, either because:

- “*Actual duties and responsibilities were not agreed; or*
- *Disagreement with the assessment of classification band”.*

[106] Mr Gibson has challenged the assessment of the classification band.

[107] The first stage of the review was a discussion with his manager, Mr Atkinson-MacEwen. Mr Atkinson-MacEwen was of the view that the position was a band 6 position, and Mr Gibson was notified accordingly. The second stage was an assessment by a panel, who viewed the documents and conducted discussions with Mr Gibson, Mr Atkinson-MacEwen and the Executive Director, Ms Wendy Sawford. Ms Sawford and Mr Atkinson-MacEwen gave evidence before the Commission.

[108] The evidence showed that the parties were agreed as to the position description, which sets out the actual duties and responsibilities. A lot of the evidence showed that Mr Gibson’s duties aligned with the position description.

[109] The employer submitted that it is the Statement of Duties, not what the person does, that determines the classification level. Whilst the actual Statement of Duties is not in dispute in the instant case, I disagree with this proposition. In my view, the classification level is determined by what the employee actually *does*, it is not determined by what the words on the position description say, although, of course, the words are of interest and may be an aid in determining the correct classification level. However, it is possible, and, indeed, in my experience, it is not uncommon, for there to be a dissonance between what is written in a Statement of Duties and what duties are actually performed.

[110] There was some suggestion that Mr Gibson may have been operating at a level in advance of what was required of the job. Ms Fitton said that the evidence of Ms Fitzgerald (previously the Assistant Director of the Branch) was based on her understanding of Mr Gibson’s personal abilities and was not based on the duties required for the role. I observe that if an employee is performing duties at a higher classification level than is required, then it is the responsibility of the appropriate manager to instruct that employee to cease performing duties that are not required of the position, or to remunerate the employee for the higher duties, or to take steps to more appropriately classify the position. In the absence of any of these, then a reasonable inference to be drawn is that the employee is performing their duties at the appropriate level and the level required by the employer. There is no evidence that Mr Gibson has ever been instructed that the duties he was performing and the level at which he was performing them were not what was required of the position.

[111] The dispute is essentially about which band best fits the duties, skills and level of responsibility of the work performed by Mr Gibson; whether it should be band 6 or band 7.

[112] Most of the employer’s evidence and argument was aimed at establishing that Mr Gibson’s role was a “best fit” with band 6; and they did not address to any great extent the descriptors for band 7. Conversely, the union’s evidence was directed at proving that the “best fit” was with band 7, and they did not address in any detail whether the position aligns with descriptors for band 6. In my opinion, the

proper approach is to assess the position against both bands, and *then* to determine which is the “best fit”.

[113] As was submitted more than once, the bands are part of a continuum moving from band 1 to band 10. In my opinion, the fact that a position meets a number of the descriptors for the band below is not an argument that the lower level is the appropriate level. Being a continuum, it is to be expected that a position would meet most if not all of the descriptors for a band and also meet a number of the descriptors for the bands immediately above and below. Where a position sits on the continuum can be difficult to determine, especially where the position is on the cusp. A judgment must be made as to whether it falls above or below.

[114] The bands are grouped in four broad levels, with 4,5,6 forming one of these levels and 7 and 8 another.

[115] Bands 4, 5 and 6 are defined as follows:

“(2) Work involves the maintenance and modification of guidelines, systems and processes according to a defined policy and regulatory operating environment. The operating environment is Agency-specific in terms of organisational design, planning, structures and interpretation of government objectives.”

[116] Bands 7 and 8 are defined as:

“(3) Work involves the interpretation and modification of policy and regulatory settings according to operational requirements (internal – how we work) and service delivery (external – what we do) demands. A broader whole-of-Agency and/or whole-of-government perspective.”

[117] The employer relied upon the reference in the band 7 definition to a *“broader whole-of-Agency and/or whole of government perspective”*, in particular, the fact that the position only deals with the gaming and Betfair aspects of the Branch’s operations, and does not include the liquor licensing side. I have no doubt that there are many positions across the state sector which are at band 7 and above which are specialised positions with a focus which it could be argued is not *“whole-of-Agency”* or *“whole-of-government”*. It is difficult to determine what is meant by *“perspective”* in this context. The proper regulation of gaming must surely be essential from both an Agency and government perspective. Ms Jackson said that \$85 million per annum is collected in gaming tax plus \$8 million from Betfair. She said that his role had a direct and significant effect on organisational outcomes.

[118] It seems to me that the liquor and gaming versus gaming only argument is of little use in determining the classification level. Obviously, specialist skills and knowledge may be of a higher order than generalist skills and knowledge, an obvious analogy is the medical profession. What is of use in the definition is the reference to *“interpretation and modification of policy and regulatory settings according to operational requirements...and service delivery...”*. For reasons that follow, I have concluded that the work Mr Gibson performs aligns with the band 7 definition in this respect. However, Mr Gibson also performs work included in the band 4,5 and 6 definition, in that his work involves the maintenance and modification and interpretation of guidelines, systems, processes, policy and regulatory settings. As stated earlier, it is logical that a position would align with a particular band on the continuum and would *also* encompass many of the requirements of the band below.

[119] There is disagreement between the parties about the level of guidance and direction given to Mr Gibson. Ms Fitton submitted that Mr Gibson operated under strong guidance and direction. Mr Gibson's agreed Statement of Duties says that the Manager TASA:

*"will operate with a significant degree of independence of action and autonomy in day to day activities and is accountable to management in terms of strategic direction and meeting objectives. The Director, Liquor and Gaming will provide broad direction."*¹¹

[120] Mr Gibson's evidence was that he "virtually never" received direction before he wrote the papers that went to the Gaming Commission and that his role went further than just interpreting guidelines, he developed them as well. He said he had never received any directions from anyone in relation to the national standards working parties that he represented Tasmania on. He had developed the procedures manual under which his team operated. He was involved in writing the drafting instructions for a regulatory model for TOTE. He said that the Branch head and the Executive Director did not give directions in relation to the specifics of the work, although he receives guidance on occasions. His evidence was that he had autonomy in relation to the management of his staff.

[121] Mr Atkinson-MacEwen's evidence was that the senior roles report directly to him and he had a role in guiding them and that he gave direction around papers going to the Gaming Commission which were new or unprecedented.

[122] Ms Sawford's evidence was that the conceptual frameworks underlying the standards were well understood and that Mr Gibson would not need to seek direction on positions before he attended those meetings, although it was her understanding that the agenda is discussed with Mr Atkinson-MacEwen beforehand. She testified that Mr Gibson understood the Gaming Commission's requirements and expectations and he operates with a fair degree of autonomy.

[123] Much was made of the fact that Mr Gibson operates under delegations from the Gaming Commission. That is also the case for employees within the Branch who are classified at higher levels than Mr Gibson. In any event, in my view, the fact that an employee is acting under delegation is irrelevant. Neither is the number of delegations particularly significant. What is at issue is the level of skill, responsibility, expertise and knowledge necessary to carry out those delegations. It was argued that the delegations themselves contained guidance as to how they should be exercised, although the evidence did not support this. Mr Gibson testified that in 88% of cases the delegations were not subject to conditions and that only 12 per cent of the delegations had directions or criteria attached. This was not challenged in cross examination. He said that even when something was unprecedented he was required to make a judgement about whether to refer it to the Gaming Commission.

[124] Exhibit R14 was a list of the delegations under the *Gaming Control Act*. A number of them have decisions numbers shown against them, which are decisions of the Gaming Commission. It was argued by the employer that those decisions provided guidance. There was no evidence as to what those decision numbers referred to, although it was agreed that a number of them could be decisions simply changing the name of the holder of the delegation. It is certainly the case that in a considerable number of cases the same decision number appears opposite a large

11 Exhibit A12 Manager, Technical and Systems Audit Statement of Duties

number of the delegations, which would seem to support that proposition. Obviously, such procedural decisions would not provide anything to guide the actual exercise of that delegation. Mr Gibson said that there are no written guidelines in relation to delegations.

[125] The weight of the evidence does not support the employer's submission that Mr Gibson's role operates under "strong guidance and direction". The band descriptors provide:

"Band 6:

The role operates with considerable independence in determining priorities, procedures and approach in implementing policies, plans, systems and procedures in a complex specialised environment

Guidance and instruction may on occasion be received on the implementation of modifications consistent with policy, regulatory and/or technological requirements and developments.

Band 7:

Guidance and instruction may on occasion be received on the implementation of highly technically complex modifications that provide solutions consistent with policy, regulatory and/or technological requirements and developments.

Operates with considerable autonomy and is required to provide leadership regarding the design, development and operation of function and/or program activities."

[126] I find that, on the evidence, the band 7 descriptor more closely aligns with Mr Gibson's role.

[127] The employer argued that Mr Gibson's role did not require a high level of technical expertise. Ms Fitton said that what was required was mathematical competency. She said that it was not Mr Gibson's role to provide the technical advice required for the approval of gaming machines [because] there are independent testing facilities for this purpose. His role was to obtain the relevant technical information and to provide reports and briefings relating to the auditing of gaming equipment and gaming systems. In fact, his Statement of Duties requires him to provide advice on technical issues relating to the security and fairness of gaming equipment and gaming systems. Mr Hoult testified that Mr Gibson's role was to provide advice to senior management.

[128] His primary duties, according to the Statement of Duties include: "*manage the process of testing and approval of gaming equipment and systems...supervising, reviewing and reporting on the performance of testing facilities*"

[129] Mr Gibson's evidence was that he assessed the testing reports provided by the accredited testing facilities and writes reports for the Gaming Commission to assess whether the product should be approved, or not. His team do investigations and audits, including for Betfair, where he has designed some 29 computer reports through a system that links with Betfair, in which area the complexity and volume is constantly increasing. He said that even though the Statement of Duties does not specify the technical knowledge, without that knowledge he would not be able to perform the duties.

[130] The Statement of Duties, at "position objective" says:

- *"a high level of understanding of the operation of gaming devices, gaming equipment and gaming systems, and the ability to keep abreast of rapid technological advances."*¹²

[131] Under "primary duties" it specifies:

"providing advice, reports and briefings to the Tasmanian Gaming Commission and the Department on technical issues relating to the security, fairness and ability to audit gaming equipment and gaming systems including the verification of gaming taxation and broader technical policy issues."

[132] The selection criteria, under the heading "technical and professional, says:

"Possesses the professional or technical skills need to perform the position objective, primary duties and responsibilities..."

[133] Therefore the technical skills required are those described in the "position objective", namely a *"high level of understanding...and the ability to keep abreast of rapid technological advances."* The fact that no specific technical qualifications are required does not mean that the job does not require technical skills and knowledge. Clearly, it does.

[134] Ms Fitzgerald described the assessments made by Mr Gibson as being *"...often a complex task requiring an in-depth understanding of the technical and system requirements..."* She said:

"His understanding of system operation in highly technical and ever changing areas such as:

- *Verification of software;*
- *Electronic identity verification;*
- *Systems and database design;*
- *Auditing; and*
- *Risk Management.*

*This knowledge was invaluable.*¹³

[135] She refers to his technical leadership and to him dealing with a complex technical issue from a regulatory framework.

[136] Ms Jackson submitted that Mr Gibson had developed a world first monitoring system, using the "traffic light" approach in relation to the registration, monitoring and ongoing approval of Betfair. Requests are ranked by risk category: red, amber or green. The testing regime is based on the rankings. He had also designed a system in relation to gaming machines. Mr Atkinson-McEwen said that the "traffic light system" was a very common risk management approach, and that what Mr Gibson had done was to adapt a standard risk analysis to apply to Betfair. I am of the view that the fact that the "traffic light" risk ratings approach may be "common" does not detract from the complexity of the actual *application* of the system to a particular situation, in this case, Betfair.

12 supra

13 Exhibit A18 Sarah Fitzgerald statement, 22/6/09

[137] Ms Jackson argued that Mr Gibson's job required a high level of technical expertise. She said that gaming was complicated and that machines were becoming progressively more complicated. Mr Atkinson-MacEwen acknowledged that, whilst TASA does not test the machines, Mr Gibson would need to have an understanding of the accredited testing facilities' reports. He said that approvals and testings processes are "*mechanical and straightforward*" and the technical skills required were "*a basic understanding of mathematical concepts; a need to be numerate.*"

[138] Ms Sawford's evidence was that there is a requirement for the capacity to understand mathematical concepts, rather than a requirement for a particular qualification. She said that whilst the gaming machine approvals are a "*very specialised area of expertise*" many approvals were straightforward. She said the papers prepared by Mr Gibson required the interpretation of technical reports and relaying them to a non-technical party – the Gaming Commission.

[139] Mr Hoult acknowledged that the information provided by TASA is occasionally complex; he said that there were varying degrees of complexity in the papers, however some were very straightforward.

[140] I think it illogical to suggest that because Mr Gibson does not actually do the testing of the gaming equipment, but "only" assesses the testing, then he in some way is required to have a lesser degree of technical expertise than those doing the testing. This is akin to saying that the marker of an examination has less knowledge than the examinee. In order to examine, the person must have knowledge of what is being examined. In fact, his Statement of Duties requires him to supervise, review and report on the performance of testing facilities. The Commission was told that Mr Gibson's team is required to accredit the testers and monitor their performance. Witnesses made reference to the highly specialised area of knowledge required. Mr Gibson is required to ensure that the gaming machines comply with the national standards. He is required to assess the reports and the certification provided by the accredited testing facilities. He is required to make recommendations to the Gaming Commission. His team is required to audit internet gaming. His team is required to validate that gaming machines are operating correctly. His team sets the standards the accredited testing facilities are required to work to. The employer's submission that a technical knowledge of gaming is not required for the position is not supported by the evidence. That is precisely what he is required to have.

[141] Similarly, the fact that all papers prepared by Mr Gibson are channelled through, and signed off on by Mr Atkinson-MacEwen does not detract from the level of complexity of those papers. The evidence was that everything that goes to the Gaming Commission, no matter what, goes first to Mr Atkinson-MacEwen.

[142] There is a striking difference between the evidence of Mr Atkinson-MacEwen, in describing the work as "*straightforward*" and that of the other witnesses, including Mr Gibson's own evidence, Ms Fitzgerald's reference to "*highly technical areas*", Ms Sawford's evidence that the approvals required a very specialised area of expertise, and Mr Hoult's evidence that the TASA papers were occasionally complex. The evidence was that although not all reports prepared by Mr Gibson for the Gaming Commission required highly technical specialist expertise, many of them did. According to Ms Sawford's evidence by the time they get to the Gaming Commission they have already been interpreted by Mr Gibson in such a way as to enable the non-technical members of the Gaming Commission to understand them. The witnesses were generally agreed that there were occasionally complex papers and issues. As with many other areas of work, the evidence showed that a lot of what Mr Gibson

does is relatively straightforward, but it is the ability and requirement to deal with complex issues as they arise that assists in the determination of the value of the work. In Mr Gibson's case, the evidence showed that he does deal with highly technical and occasionally complex issues in an area requiring specialist expertise.

[143] The Statement of Duties says that the Manager TASA may "*be required to provide authoritative specialist advice generally or as it relates to a particular work area...*"¹⁴

[144] Based on the weight of the evidence, I find that the Manager TASA's role requires high level specialist expertise.

[145] Ms Sawford's evidence was that the difference between Mr Gibson's role and that of other band 6 positions in the Branch was that he had responsibilities for staff. She said that whilst the other positions might have supervisory responsibilities they are not responsible for the management of a unit.

[146] The evidence showed that Mr Gibson was responsible for managing a team of five people.

[147] The Statement of Duties says...."*The Manager, Technical and Systems Audit may also supervise a small team of employees, which involves technical or professional skill and judgment.*"

[148] Mr Gibson testified that his team write reports under his guidance. They also do investigations and audits. His team also handles complaints for gaming machines and for Betfair. They accredit the testers and monitor the performance of the accredited testing facilities.

[149] Mr Atkinson-MacEwen said that other managers had a very broad focus because they had responsibilities across both liquor and gaming issues, and that issues in relation to liquor are harder to deal with. He said that they dealt at a slightly higher level in terms of strategic approaches to the issues that they manage, but provided no examples. He said that they dealt with more complex issues to do with individuals and behaviour, such as drinking. I am of the view that problems related to human behaviour and gambling would also be complex. Mr Atkinson-McEwen acknowledged that in his proposed new structure there was a band 7 position that had responsibilities for gaming only. Mr Gibson was of the view issues to do with gaming were more complex. I think that is not relevant to the issues to be decided, it is the management of people and the unit that is relevant, rather than the complexity or otherwise of the matters to be dealt with.

[150] Mr Atkinson-MacEwen testified that, whilst Mr Gibson had responsibility for staff, he had no budget management responsibilities. I think this is not relevant; the other band 7 position descriptions put into the evidence do not have budget responsibilities, nor are budgetary responsibilities part of the band 7 classification descriptors.

[151] I think that a clear difference between band 6 and band 7 is the management aspect. The award at Part III Clause 3 specifically deals with this difference:

"(f) Difference Between Band 5 and band 6

¹⁴ Exhibit A12 Manager, Technical and Systems Audit Statement of Duties

band 6 work applies the decision-making framework (policies, rules and regulations) in support of program or service delivery of a defined field of activity, which may involve more than one discipline. Considerable autonomy of approach in delivering outcomes and the advice and recommendations provided are regarded as definitive for that activity.

(g) *Difference Between band 6 and band 7*

band 7 work leads a complex activity or program unit requiring the development and/or/determination of the operational methodology according to the decision-making framework and service delivery requirements." (my emphasis)

[152] The evidence has revealed that Mr Gibson leads a complex program unit according to a decision making framework.

[153] The classification descriptor under the heading "focus" for band 6 describes:

"A management role interprets policies, regulations and guidelines and designs and implements plans, systems and procedures to deliver services consistent with program objectives."

[154] The descriptor for band 7 describes:

"Roles with a management focus, or specialists involved with a specialised program, lead an activity or program unit within a functional area."

[155] The award defines "program" as "...may stand alone or located within a functional unit" and "function" as "a related and aligned areas of activities combined to form a unit (typically a Branch)..." If the "functional area" is the Liquor and Gaming Branch, then TASA is the activity or program unit.

[156] The descriptor for band 7 goes on to say:

"A management role interprets policies, regulations and guidelines to determine milestones, objectives, methods and priorities to support complex activities within a specified area."

[157] The Band 7 descriptor, on the whole, fits with the evidence given in relation to the role of Manager TASA. It is unlikely that any position will exactly align in all respects with descriptors. Mr Gibson does interpret policies, regulations and guidelines, and does determine methods and priorities to support complex activities within a specified area. Mr Atkinson-MacEwen agreed that Mr Gibson determined priorities.

[158] The descriptor for Band 7 describes:

"manages staff and stakeholders and promotes co-operation, teamwork and understanding in undertaking specialised processes."

Develops productive relationships with specialists and stakeholders with similar levels of skill and experience in related field or program area to share ideas and to resolve problems."

[159] This descriptor aligns well with Mr Gibson's role according to his evidence and that of Ms Sawford. There is no equivalent reference to the management of stakeholder relationships in the descriptor for band 6. This is a significant difference between the bands.

[160] The evidence was that Mr Gibson has significant stakeholder management responsibilities, including, according to Ms Sawford's evidence, dealing with difficult situations. Mr Atkinson-MacEwen's evidence was that he personally dealt with stakeholder personnel at the highest level, for example, the head of the Federal Group, whereas Mr Gibson would deal with, for example, the manager of compliance or legal personnel. The fact that Mr Gibson might not deal with the head of a large organisation does not detract from his role in stakeholder management. Ms Jackson was not arguing that Mr Gibson should operate at the same level as the Director Liquor and Gaming. Ms Sawford's evidence was that Mr Gibson's role was to manage the relationships with the accredited testing facilities. He is also responsible for the interactions with the gaming providers and gaming machine suppliers. His team handles complaints in relation to gaming machines and Betfair.

[161] Mr Gibson was the Tasmanian representative on a COAG working party and he was a member of a national standards working party. The primary duties listed in the Statement of Duties includes: *"Representing the Department and the Tasmanian Gaming Commission on working parties and other forums as may be required from time to time.* Mr Gibson's evidence was that he never received directions from anyone in relation to those meetings. However, Ms Sawford said that the conceptual framework for the standards was well understood and long established.

[162] The descriptor at band 6 says:

"May represent the organisation with the authority to negotiate and conclude outcomes that meet the specified requirements and objectives of the program or service delivery unit".

[163] A descriptor at band 7 says:

"Represents the organisation with the authority to conduct and commit to a negotiated outcome regarding operational processes for the area of responsibility and which may have operational implications beyond the functional area of program activity."

[164] The descriptor at band 6 best describes Mr Gibson's role in representing the Branch at the COAG and national standards meetings.

[165] Clause 1(a)(ii) describes the "best fit" approach:

"The job components have equal weight or effect and no description within a component has more importance than another. Some descriptors, however, are more relevant in describing different types of work than others, and therefore will have more influence in classifying that work. Naturally, not each and every descriptor applies to any individual job. These descriptors are appropriately used when particular descriptors of job components and the overall theme or

"feel" of a particular band provides the "best fit" to an employee's duties."

[166] The employer submitted that there were "very minor aspects" of Mr Gibson's duties that could be considered to be band 7, but the "best fit" was with band 6. This is not borne out by the evidence. The definition for bands 7 and 8 describes the work performed by Mr Gibson, although he also performs work described at band 6. The position aligns with band 6 *and* with band 7 in relation to the descriptors dealing with autonomy and technical skills. However, whereas the descriptors are the same in relation to technical skills, band 7 is at a higher level as far as autonomy is concerned. Substantial and significant aspects of the work, such as management responsibilities and management of stakeholder relationships, align more closely with band 7 than with band 6. In respect of the management role, the descriptor for band 7 exactly describes the role of the Manager TASA. I find that the "best fit" is with band 7.

[167] I find that the position held by Mr Gibson, Manager Technical and Systems Audit, is at band 7 of the award.

[168] I hereby order, pursuant to section 31 of the Act, that the position of Manager Technical and Systems Audit be classified at band 7 of the *Tasmanian State Service Award* and that Mr Glenn Gibson be translated to band 7 of the *Tasmanian State Service Award*, effective from 5 March 2009.

P C Shelley
DEPUTY PRESIDENT

Appearances:

Ms K Jackson of CPSU representing Mr Gibson
Ms J Fitton for the Minister administering the State Service Act 2000
Ms J Crane of Treasury representing MASSA

Date and place of hearing:

2009
September 28 and 29
October 1
Hobart