

COMMONWEALTH OF AUSTRALIA
Fisheries Management Act 1991

RE: SOUTHERN AND EASTERN SCALEFISH AND SHARK FISHERY (No 1)
Allocation of Provisional Grant of Alfonsino Statutory Fishing Rights.

STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL

P J BASTON (PRINCIPAL MEMBER), B M YEOH AND W EDESON (MEMBERS)

24 March 2006

10 August 2006¹

ADMINISTRATIVE LAW – Fisheries – Allocation of Provisional Grant of Statutory Fishing Rights – Statutory Fishing Rights Allocation Review Panel – Panel’s powers on review – Whether Panel entitled to treat operative provisions of a fisheries Management Plan as invalid where it is satisfied on proper grounds there is reason to do so.

FISHERIES — Statutory Fishing Rights Allocation Review Panel – Panel’s powers on review – AFMA’s powers to vary decision once it is the subject of review before Panel

FISHERIES – Statutory Fishing Rights Allocation Review Panel – Panel’s powers on review – Whether Parliament intended the Panel not to have jurisdiction where application for review lodged outside “14 day” period provided for in *Fisheries Management Act 1991*

Evidence Act 1995

Fisheries Management Act 1991

Southern and Eastern Scalefish and Shark Fishery Management Plan 2003

(Dated 5 September 2003, Accepted 23 September 2003)

Southern and Eastern Scalefish and Shark Fishery Plan of Management Amendment 2005(No.1)

(Dated 1 July 200, Accepted 12 October 2005)

Acts Interpretation Act 1901

Legislative Instruments Act 2003

¹ Revised 10 August 2006

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Re Callaghan and DFRDB Authority (1978) 1 ALD 227 (AAT)
Re Adams and The Tax Agent's Board (1976) 12 ALR 239 (AAT)
Re Moodie & Ors; Ex parte Mithen (1977) 17 ALR 219
Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW) (1978) 1 ALD 167 (AAT)
Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338; 24 ALR 307; 2 ALD 1
Re Costello and Secretary, Department of Transport (1979) 2 ALD 934
Re Babinda Co-operative Sugar Milling Association Limited and Australian Industrial Research & Development Incentive Board (1980) 2 ALD 851 (AAT)
Re Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 [56 ALJR 164; 38 ALR 439]
Re Bloomfield & sub-collector of Customs ACT (1981) 4 ALD 204
Re Sarina & Secretary, Department of Social Security (1988) 14 ALD 437
Re Jonnson and Marine Council [No2] (1990) 12 AAR 323
Secretary, Department of Primary Industries & Energy v Collins (1992) 26 ALD 265
Lattitude Fisheries Pty Ltd & Ors v Minister for Primary Industries and Energy and Anor (1992) 110 ALR 209
Lavery v Registrar, Supreme Court of Queensland [1996] AAT 10620B
Doyle v Commissioner of Police [1999] NSWADT 84
Pioneer Electronics Australia Pty Ltd and Chief Executive of Customs [1999] AATA 483
Saitta Pty Ltd & Anor v Commonwealth of Australia & Others [2000] FCA 1546, (2000) 106 FCR 554
Makbool and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 985 (22 October 2002)
Re Radar Investments Pty Ltd v Health Insurance Commission [2004] AATA 166
McWilliam and Civil Aviation Safety Authority [2005] AATA 1148
Reine and Secretary, Department of Family and Community Services [2005] 435

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RE:SOUTHERN AND EASTERN SCALEFISH AND SHARK FISHERY (No 1)

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DECISION AND REASONS FOR DECISION

Decision

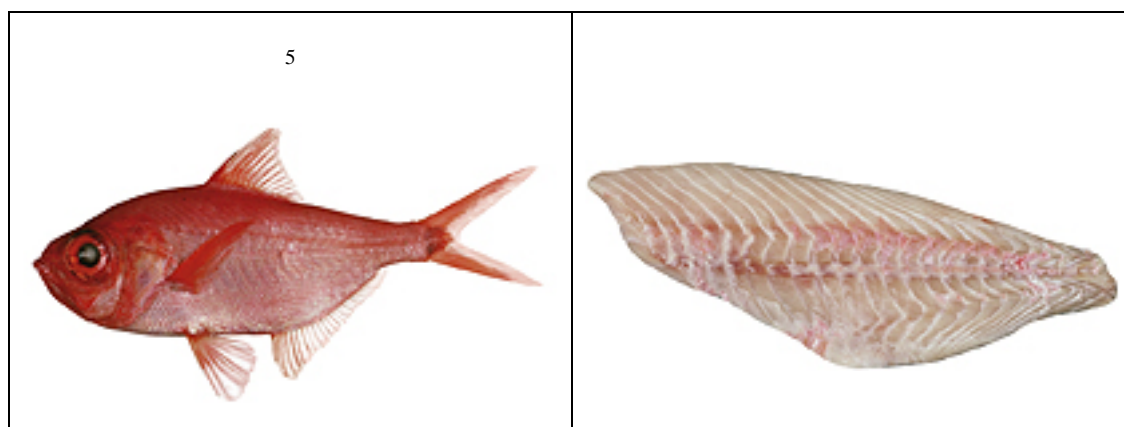
Decision the Subject of Review:	SFRARP Decision:
AFMA Decision of 4 November 2005 to make a provisional allocation of statutory fishing rights to various fishers	<ol style="list-style-type: none">1. The application to summarily dismiss the application of Raptis Fishing Licenses Pty Ltd to review the decision of 8 November 2005 is itself dismissed.2. Directs that the Application for Review be set down for hearing commencing Monday 4 September 2006 in Brisbane.
AFMA Decision of 9 March 2006 to make a provisional allocation of statutory fishing rights to various fishers	<ol style="list-style-type: none">3. The decision of AFMA of 9 March 2006 to make a provisional allocation of statutory fishing rights to various fishers be set aside and the decision of AFMA of 4 November 2005 be substituted pending determination by the Panel of the Application for Review of the decision of AFMA of 4 November 2005.

² Revised 10 August 2006

Reasons for Decision

THE PANEL:

1. The Statutory Fishing Rights Allocation Review Panel (“the Panel”) was established under Section 124 of the *Fisheries Management Act 1991*. The Panel is an independent, specialist body that conducts merit reviews of decisions of the Australian Fisheries Management Authority (AFMA) or a Joint Authority relating to the provisional allocation of Statutory Fishing Rights (SFR’s) under a plan of management. The Panel operates separately from the Administrative Appeals Tribunal (“the AAT”).
2. The Panel has the power to affirm, vary or set aside or substitute a decision made in regard to the provisional allocation of Statutory Fishing Rights under a plan of management.
3. Despite having been established in 1991 these are the first substantive matters in which the Panel has been called upon to make a determination.
4. Alfonsino is a fishstock marketed frozen and eaten steamed, fried, broiled, boiled, microwaved and baked³. Alfonsino (*Beryx splendens*, Lowe, 1834) is a redfish caught in open waters near the bottom with a common size of 30-45cm.⁴



³ www.fishbase.com

⁴ www.frdc.com.au/species

⁵ CSIRO Marine Research

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5. By various letters dated 4 November 2005 the Australian Fisheries Management Authority (“AFMA”) advised various eligible fishers, including RAPTIS FISHING LICENCES PTY LTD (“Raptis”), of the allocation of provisional grants of quota statutory fishing rights in respect of alfonsino under the Southern and Eastern Scalefish Fishery Management Plan 2003 (“SESSF Plan”) (“the First AFMA Determination”). A notice appeared in the Gazette to the same effect on 10 November 2005.
6. On 25 November 2005 RAPTIS FISHING LICENCES PTY LTD lodged with the Registrar of the Statutory Fishing Rights Allocation Review Panel (“the Registrar”) an Application For Review of Decision to Grant a Fishing Right. In this application Raptis listed the following as being “The reasons for my application are:”⁶

The Allocation Is Contrary To The Objectives Of The Fisheries Management Act.

7. Under the 4 November 2005 allocation 5489 Alfonsino SFR’s were allotted to Raptis. A breakdown of the provisional quota statutory fishing rights allocated by the First AFMA Determination is as follows:–

NAME	PERMIT	ALFONSINO SFRS
NEVILLE P & HELEN M ROCKLIFF	15731	5206
INGRID M BRINKMAN	25577G	524
OCEAN FRESH FISHERIES PTY LTD	25618C	34840
OCEAN FRESH FISHERIES PTY LTD	26053B	691110
GAZAK HOLDINGS PTY LTD	25810B	2669
LORJONA PTY LTD	26780F	18628
RAPTIS FISHING LICENCES PTY LTD	26792F	5489

⁶ Form 2 – Application For Review of Decision To Grant A Fishing Right

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8. By letter dated 9 March 2006 AFMA advised Raptis that it had reviewed the allocation of provisional grants of quota statutory fishing rights in respect of alfonsino under the Southern and Eastern Scalefish Fishery Management Plan 2003 (“SESSF Plan”) (“the Second AFMA Determination”) and determined to allocate NIL SFR’s to Raptis. A notice appeared in the Gazette to same effect on 15 March 2006. A breakdown of the provisional quota statutory fishing rights allocated by the Second AFMA Determination is as follows:–

NAME	PERMIT	ALFONSINO SFRS
NEVILLE P & HELEN M ROCKLIFF	15731	5206
INGRID M BRINKMAN	25577G	524
OCEAN FRESH FISHERIES PTY LTD	25618C	34840
OCEAN FRESH FISHERIES PTY LTD	26053B	691110
GAZAK HOLDINGS PTY LTD	25810B	2669
LORJONA PTY LTD	26780F	18628
RAPTIS FISHING LICENCES PTY LTD	26792F	0

9. On 24 March 2006 the Panel sat in Melbourne and heard oral argument in respect of a number of issues. At this time AFMA, Raptis, Ocean Fresh and Lorjona Pty Ltd were represented before the Panel. The Panel was informed of the Second AFMA Determination. At this stage Raptis advised the Panel that it sought to review the Second AFMA Determination. Directions were made for the progress of the review of the First and Second Determination on the basis that they be heard together. In accordance with these and subsequent directions AFMA, Raptis and Ocean Fresh lodged written submissions. The Panel received the last of these submissions on 22 June 2006.
10. On 6 April 2006 Raptis lodged with the Registrar an Application For Review of the Second AFMA Determination.
11. As it was entitled to do Ocean Fresh has elected to participate in these proceedings before the Panel. Ocean Fresh contends that-

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- i. Raptis is out of time to review the decision of AFMA to make a provisional Grant of Statutory Fishing Rights;
 - ii. The Second Determination of AFMA is correct and Raptis's entitlement to a Provisional Grant of Statutory Fishing Rights for Alfonsio is NIL; and
 - iii. The Panel does not have jurisdiction to determine the validity of the SESSF Plan.
12. AFMA asks the Panel to dismiss the first Raptis Application for Review on the basis that the Panel does have any jurisdiction to determine the validity of the SESSF Plan. AFMA contends that the Panel has jurisdiction to consider the Raptis complaints about the Second AFMA Determination.
13. The Panel has decided to make a determination in relation to these issues before proceeding to hear and determine the substantive issues raised in the Applications for Review.

The status of the Second AFMA Determination

14. Of direct relevance as to how the Panel deals with the issues arising out of the Second AFMA Decision is a determination of the status of the Second AFMA Determination, or put another way, was AFMA entitled to make this decision when the First AFMA Determination was still the subject of review before the Panel.
15. The parties were asked to consider this issue in written submissions. After receipt of submissions on this issue the Principal Member drew the attention of AFMA, Raptis and Ocean Fresh to various decisions of the AAT and made directions for the provision of further submissions on this point.
16. The former Principal Member of the Panel, Mr R K Todd, sitting as he then was, a Senior Member of the AAT, in *Re Bloomfield and Sub-Collector of Customs, ACT*⁷ considered the effect of the purported variation of a decision

⁷ (1981) 4 ALD 204

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after an application for review had been lodged with the AAT and found that the decision maker had no power to vary a decision whilst the decision was before the AAT. In reaching this view Senior Member Todd had regard to the following passage the High Court said *Re v Moodie & Ors; Ex parte Mithen*⁸:-

“With regard to submissions that the Tribunal should have made a consent order either varying or setting aside the decision of the authorised person, and itself allow the applicant’s application for assistance under the Act, the proceedings before the Tribunal were not a contest between the authorised person and the applicant. They were an appeal from the decision of the authorised person, an appeal by way of re-hearing. We think it clear that in light of ss 10, 22 and 23 an authorized person becomes functus officio once he has forwarded the request for review under s 23 to the chairman of the Tribunal together with all the records and other relevant papers. At that stage there is no further function under the Act for the authorised person to perform. . . . Once the review had been instituted then it is only the Tribunal itself that had any function to perform or any powers to exercise under the Act. . . . “

17. In *Sarina*⁹ Senior Member Todd said:

“the prima facie position is that in the absence of some particular provision in the relevant legislation it is not open to a decision-maker to alter or otherwise tamper with a decision once it has become the subject of an application for review by this Tribunal.”

18. This approach was considered and adopted by Deputy President Forgie in *Jonsson*¹⁰, *Lavery*¹¹ and again in *Radar Investments*¹².

19. The *Fisheries Management Act 1991* does not contain any provision allowing AFMA to alter or otherwise tamper with a decision once it had become the subject of an application for review. Once a decision is before the Panel AFMA does not have power to amend or revoke the decision the subject of review.

20. The Panel determines that the decision of AFMA of 9 March 2006 to make a provisional allocation of statutory fishing rights to various fishers be set aside

⁸ (1977) 17 ALR 219

⁹ *Sarina and Secretary, Department of Social Security* (1988) 14 ALD 437

¹⁰ *Jonsson and Marine Council* (1990) 11 AAR 439

¹¹ *Lavery v Registrar, Supreme Court of Qld* AAT 10620A 4 March 1996

¹² *Radar Investments P/L v Health Insurance Com* [2204] AATA 166

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and the decision of AFMA of 4 November 2005 be substituted pending determination by the Panel of the Application for Review of the decision of AFMA of 4 November 2005.

The Panel's power to consider the validity of the SESSF Plan

21. Determination of this issue as a threshold issue proceeds on the assumption that Raptis is entirely successful in establishing that the SESSF Plan is contrary to the objectives of the *Fisheries Management Act 1991*. Put another way¹³, “*is [The Panel] entitled to treat delegated legislation [being the SESSF Plan or an operative provision thereof] as invalid where it is satisfied, on proper grounds*”¹⁴ there is reason to do so.
22. AFMA and Ocean Fresh contend that the Panel has no statutory power to make orders or give directions that would have the effect of requiring AFMA to amend the SESSF Plan on the basis that the SESSF Plan is invalid for some particular reason.
23. There is no doubt that the SESSF Plan¹⁵ and the Amendment¹⁶ are legislative instruments pursuant to section 5 of the *Legislative Instruments Act 2003* and must be regarded by AFMA and the Panel in the same way it would have regard to subordinate legislation.¹⁷
24. The Panel has no greater powers than AFMA and is subject to any statutory limitations, including the SESSF Plan, which applies to AFMA.¹⁸ At the heart of AFMA's argument is the submission that AFMA is bound by the SESSF Plan even in circumstances where the Plan is *ultra vires* the *Fisheries Management*

¹³ For reasons which will be apparent upon consideration of these reasons

¹⁴ see *Saitta Pty Ltd & Anor v Commonwealth of Australia & Others* [2000] FCA 1546, (2000) 106 FCR 554

¹⁵ SESSF Plan registered in the Federal Register of Legislative Instruments on 25 November 2005

¹⁶ Amendment registered in the Federal Register of Legislative Instruments on 21 October 2005

¹⁷ *Secretary, Department of Primary Industries & Energy v Collins* (1992) 26 ALD 265; *Lattitude Fisheries Pty Ltd & Ors v Minister for Primary Industries and Energy and Anor* (1992) 110 ALR 209

¹⁸ *Re: Callaghan and DFRDB Authority* (1978) 1 ALD 227 (AAT); *Re: Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 (AAT); *Re: Babinda Co-operative Sugar Milling Association Limited and Australian Industrial Research & Development Incentive Board* (1980) 2 ALD 851 (AAT)

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Act 1991 and that the Panel would not embark upon an examination of the validity of a Management Plan as, like the original decision maker (AFMA), it is bound to apply the provisions of a Management Plan and cannot, for example, substitute a different formula than that provided for in a Management Plan or decline to make a provisional allocation of Statutory Fishing Rights.

25. Raptis contends that “*AFMA can and must determine when a provision of the management plan is inconsistent with a provision of the Act and has no effect*”¹⁹ and by reason invites the Panel to do so in this case.

26. During the course of argument on this point on 24 March 2006 counsel for AFMA was invited to consider the following question:

If AFMA had put together a Plan of Management and then someone looked at it or it was called for and it suddenly realised not to have met the objectives in the legislation, does AFMA have to accede to the Plan until it is repealed or varied ?

27. On 31 March 2006 AFMA provided written submissions dealing with this issue which stated, in part:-

2. *AFMA’s submission in answer is: yes, AFMA and its delegates are obliged to act in accordance with a plan of management*²⁰. *However, in the circumstances suggested it will be necessary to use other powers under the Fisheries Management Act 1991 (Cth) (“FM Act”).*

Three preliminary issues

3. *First, the hypothesised situation . . . is highly unlikely. Management Plans, apart from having to be determined in accordance with a long and complicated procedure under the FM Act itself, . . . These plans may take years to formulate and have approved. What is more likely, AFMA accepts, is that a particular provision within a management plan might be discovered to not be authorised by the FM Act.*

4. *Further, there are two important characterisations in the question which need to be properly understood:*

- a. What a failure to meet legislative objectives in s 3 refers to, and what its consequences are; and*
- b. What “have to” means.*

Compliance with legislative objectives

¹⁹ Raptis submissions paragraph 18

²⁰ Ss 22(1), 17(10)

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5. *Section 3 of the FM Act requires AFMA, in performing its functions, to “pursue” specified objectives. This would include, of course, the function in s 17 of determining a management plan. However, the statutory regime imposes no higher burden such as “achieving” or “meeting” the specified legislative objectives. For a provision of a management plan to be invalid, a court would have to conclude that the provision was not authorised by the FM Act. In the context of the obligation in s 3 of the FM Act to pursue certain specified objectives, the scope for such a conclusion will be much smaller than the submissions of Raptis and Lorjona have tended to suggest.*

“Have to”

6. *The answer given in paragraph 2 is subject to what the words “have to” really mean. Unless and until set aside, a Plan of Management has the force of law and forms part of the law the Panel has to apply: Collins. The Panel has no merits review function in respect of the desirability or appropriateness of the content of a Management Plan. Not being constituted in accordance with Chapter III of the Constitution, it can have no judicial review function. Its function, and its powers, is to review a decision about the allocation of statutory fishing rights in a “managed fishery” which, under s4 of the FM Act means a fishery to which a plan of management relates.*
7. *Thus if the question asked “have to” means “cannot exercise its powers or perform its functions contrary to”, then, as AFMA has submitted, the answer is “yes”. If “have to” means, “can do nothing but continue to implement a provision of the Management Plan it believes to be invalid”, the answer maybe “no”.*

AFMA’s powers under the FM Act

8. *The qualification expressed in paragraph 6 must be made because there are powers available to AFMA to revisit, or suspend, the operation of a management plan, or parts of it, or fishing carried out under it.*
9. *First, there is the power to amend or revoke a Plan²¹. However, the processes in ss 17, 18 and 19 apply to such amendment or revocation: s 20(5), including the consultation process, receipt of Ministerial approval, gazettal and tabling in parliament.*
10. *Second, under the s43 AFMA may make a temporary order to deal with emergencies or other circumstances requiring urgent action. This could include provision for the interim management of a fishery pending amendment of a management plan.*
11. *Third, the Plan itself incorporates a power to give directions that can interfere with fishing activities.²² Depending on the nature of the alleged invalidity, this power may well remain available to AFMA even if another part of the management plan needs to be amended.*
12. *None of the powers referred to are available to the Panel: none of them are powers which arise in the exercise of its review function of a*

²¹ S 20(1) and s20(3) of the FM Act

²² S 56 of the Plan, and see s 17(5A)(a)

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decision about the grant of a statutory fishing right. They are powers unrelated to the decision to grant a statutory fishing right, but rather related to the general management of a fishery.

13. *Therefore, it is not an unreasonable or untenable factual circumstance, when the legislative scheme of the FM Act as a whole is considered, that a given management plan – if advice was received and accepted that a provision of it was not authorised by the FM Act – could remain in force but the apparently invalid aspect of it could be rendered temporarily ineffective by the exercise of other powers under the FM Act until an amendment was undertaken.*

28. In submissions in response, dated 7 April 2006, Raptis contend :-

1. *If a provision of a management plan is inconsistent with the objectives of the Fisheries Management Act 1991 (Cth) (“the Act”), it has no effect: s17(9). AFMA does not have to accede to the plan, insofar as it is ineffective.*
2. *AFMA cannot act inconsistently with the objectives of the Act: ss3, 17(5A), 19(9).*
3. *A provision of a management plan may be inconsistent with the Act, regardless of whether there has been a Court declaration (contrary to AFMA’s response, paragraph 5).*
4. *It follows that AFMA does not have to acceded to a provision of a management plan which is inconsistent with the Act.*
5. *The Panel has all the powers that were available to AFMA when it made the allocation decision, so that it stands in AFMA’s shoes: Re Control Investments (cf paragraphs 9 to 12 of AFMA’s Response). In particular, the Panel has the power to determine that:*
 - 5.1 *the allocation formula in the management plan is inconsistent with the Act;*
 - 5.2 *accordingly, it is ineffective: s17(9);*
 - 5.3 *the formula being ineffective, it cannot be used to allocate SFR’s;*
 - 5.4 *the formula must be amended to be consistent with the objectives of the Act.*
6. *The Panel has the power to set aside AFMA’s decision, on the basis that the formula is ineffective, and may substitute its own decision: s150. The Panel, having heard the evidence regarding economic efficiency, may determine what method of allocation is consistent with the objectives of the Act. In doing so:*
 - 6.1 *the Panel may hear from other interested parties (consistent with the policy materials which disclosed that the purpose of the Panel was to deal with decisions which could affect several parties); or*
 - 6.2 *the Panel may give some direction to AFMA regarding a formula that would be consistent with the Act and*

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remit the matter to AFMA to conduct the consultation process under s.20.

7 *In any event, even if the Panel does not have the power to amend the management plan, it can determine that the formula is ineffective and, on that basis, it can set aside AFMA's decision: ss 17(9), 150*

29. There is no doubt that the Panel is not a court and does not exercise the judicial power of the Commonwealth and cannot declare any act of a statutory body void, or conclusively determine the validity of legislation.
30. The Administrative Decisions Tribunal (NSW) considered this issue²³ where the Tribunal was asked to consider the validity of subordinate legislation. The Tribunal stated:

[I]n light of Lawlor's case²⁴, the AAT has been prepared to inquire into such questions as conformity with the requirements of natural justice, want of jurisdiction and taking into account irrelevant considerations . . . Another example would be the need to prove the possession of valid delegation where the administrator's decision is made by a delegate. But this preparedness on the part of the Commonwealth Administrative Appeals Tribunal is subject possibly to two exceptions. A merits review tribunal may not be competent to examine a question as to the constitutional validity of a statute . . . Because of the nature of the Commonwealth Constitution such a question has a greater potential to arise in the setting of a Commonwealth tribunal than is the case in a State tribunal. The other possible exception relates to the question presently under consideration, the validity of subordinate legislation.

*. . . Like the administrator making the primary decision, a review tribunal must satisfy itself that it is seized of a matter over which it has jurisdiction. In instances where the decision is made have regard to criteria contained in subordinate legislation, the tribunal would (like an administrator) ordinarily proceed on the basis that the subordinate legislation has been regularly made and is intra vires the governing statute. I agree with the general view expressed in *Re Costello*²⁵ that there would need to be "most compelling grounds" for treating subordinate legislation as invalid. *Re Jonnson*²⁶ does, I consider, represent such a case, where the*

²³ *Doyle v Commissioner of Police* [1999] NSWADT 84

²⁴ *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167; affirmed *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338; 24 ALR 307; 2 ALD 1

²⁵ *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934

²⁶ *Re Jonnson and Marine Council [No2]* (1990) 12 AAR 323

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regulation, contrary to the governing statute, did not illuminate but instead sought to prevent the exercise of discretion by the primary decision-maker. As noted by Hall, op cit at 46, the High Court's decision in Re Toohey²⁷ lends support to the view that there may be circumstances in which an administrative tribunal or inquiry should satisfy itself as to the validity of subordinate legislation before determining that it is bound by it... My conclusion is that this Tribunal should only proceed to examine closely the validity of subordinate legislation where a compelling case can be demonstrated by the applicant rather than one that is merely arguable. Re Jonnson and Re Toohey provide useful analogies in seeking to define that boundary. This Tribunal should not become the forum for the pursuit of objections that are merely arguable. These should be left to judicial review proceedings.

31. In *Laws of Australia* the authors state²⁸:

...
However, there is no limit upon the Tribunal's jurisdiction²⁹ which prevents it from deciding constitutional questions.

However, in answering such questions, the Tribunal can only form an opinion as to the answer for the purpose of moulding its own conduct to accord with the law. It cannot provide a definitive answer, as that would demand an exercise of judicial power which the Tribunal does not possess.³⁰

In Australia, administrative bodies are reluctant to decide the constitutional validity of statutes. However, this reluctance is less marked in the case of delegated legislation, which a tribunal may treat as invalid, at least where "the most compelling grounds" exist.³¹

32. In *Saitta*³² Weinberg J., in the Federal Court of Australia, stated at pg 575:

"The AAT is able to decide questions of law arising in proceedings before it – Administrative Appeals Tribunal Act 1975 (Cth), s 42. Accordingly, if the AAT thinks it necessary to consider, as part of the process of reconsideration of the first and second sanctions decisions, the validity of the 1998 and 1999 Principles, it may do so. Although it cannot exercise judicial power, and may not be entitled to grant the

²⁷ *Re Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 [56 ALJR 164; 38 ALR 439]

²⁸ *Laws of Australia*, Law Book, Vol 19 Government at 19.7 [21]

²⁹ A reference to the AAT

³⁰ *Re Adams and The Tax Agents' Board* (1976) 12 ALR 239 (AAT), Brennan J at 245

³¹ *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 (AAT); *Re Jonnson and Marine Council [No 2]* (1990) 12 AAR 323 (AAT), the Tribunal at 335-41

³² *Saitta Pty Ltd & Anor v Commonwealth of Australia & Others* [2000] FCA 1546, (2000) 106 FCR 554

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declaratory relief which is specifically sought in the proceeding before this Court, the AAT can arrive at a conclusion as to whether or not the steps preceding the making of the sanctions decisions were lawful, and whether or not various provisions of the Act were contravened – Re Adams and Tax Agents’ Board (1976) 12 ALR 239 at 245 per Brennan J. The AAT is entitled to treat delegated legislation as invalid where it is satisfied, on proper grounds, that this is so – Re Costello and Secretary, Department of Transport (1979) 2 ALD 934 and Re Jonsson and Marine Council (No 2) (1990) 12 AAR 323 at 335 – 341.

Counsel for AFMA urge the Panel to disregard the views of Weinberg J on the basis that they were *obita*. The opinion of His Honour at pg 575 loomed large in his consideration of whether there was a viable alternative remedy available to the applicant. Whilst it may be open to argue these remarks are not binding on the Panel they are nonetheless of significant persuasive effect.

33. Whilst decisions of the Administrative Appeals Tribunal may not be binding upon the Panel they represent a significant body of jurisprudence of direct relevance. The Panels own research reveals that the approach adopted in *Jonsson*³³ has been followed and applied without adverse comment by the AAT since it was first delivered.³⁴ None of these cases were referred to by any of the parties in oral argument or in written submissions provided to the Panel.

34. In *Lawlor*³⁵ at pg 317 Bowen CJ said:-

[I]n my opinion an applicant to the Tribunal has standing and the Tribunal has jurisdiction provided there is a decision in fact and provided further that the decision purports to have been made in exercise of powers conferred by an enactment whether or not as a matter of law it was validly made and whether or not action on the basis there was power to make the decision was right or wrong.

It may be that the nature of the legal question raised will be such that the Tribunal, although it has jurisdiction, may consider it proper that the applicant should first approach a court for decision of the question. It may, in its discretion, decide to defer hearing the

³³ *Jonsson and Marine Council (No2)*(1990) 12 AAR 323

³⁴ *Pioneer Electronics Australia Pty Ltd and Chief Executive of Customs* [1999] AATA 483 at para 11; *Makbool and Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 985 (22 October 2002) at para 43; *Lavery v Registrar, Supreme Court of Queensland* [1996] AAT 10620B at paras 27 and following; *McWilliam and Civil Aviation Safety Authority* [2005] AATA 1148 at para 53; *Reine and Secretary, Department of Family and Community Services* [2005] 435

³⁵ *Collector or Customs (NSW) v Brian Lawlor Automotive Pty Ltd* FCA 1979 24 ALR 307

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application until this is done. An appeal involving a constitutional question might well be such a case. However, this would not be because the Tribunal lacked jurisdiction.

In the present case the applicant established the necessary elements that there was a decision in fact and it purported to be under an enactment or in exercise of powers conferred by an enactment, so the applicant had standing and the Tribunal had jurisdiction. When the applicant asserted the decision was legally invalid due to absence of power, he was mistaken in describing this as a “Jurisdictional point”. The Tribunal had jurisdiction and was entitled to determine the legal question before it.

35. At pg 335 Smithers J said:-

. . . If administrative decisions are to be subjected to review in the course of good government exclusion from review of decisions made without power would remove from review those decisions most in need of review. . . . It is a short step to infer that the overriding purpose of the Act is to promote good government by those carrying out the actual practical task of administering Acts of Parliament and making decisions incidental to that task.

It is important to observe that the Tribunal is not constituted as a body to review decisions according to the principles of judicial review. In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government.

36. Applying the principles expressed by the Full Court of the Federal Court (Bowen CJ, Smithers J) in *Lawlor* the Panel clearly is entitled to treat the SESSF Plan or an operative provision thereof as invalid where it is satisfied, on proper grounds, there is reason to do so. It does not follow that the Panel, have determined a management plan invalid, would be entitled to amend the Plan or alter an operative provision in the Plan such as a formula. If, in any given case, it seemed there were proper grounds to treat an operative portion of a Plan invalid the appropriate course for the Panel to adopt would be to set aside the decision based upon the Plan with directions so as AFMA can exercise other powers available to it under the *Fisheries Management Act 1991*.

37. The Panel determines that the application to summarily dismiss the application of Raptis Fisheries Pty Ltd to review the decision of 8 November 2005 is itself

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dismissed and directs that the Application for Review be set down for hearing commencing Monday 4 September 2006 in Brisbane.

Is Raptis Out of time

38. Section 143(1) of the *Fisheries Management Act 1991* provides for an application for review to be made to the Panel by written notice “within 14 days after being notified by AFMA” of the decision.

39. Section 147(1) of the *Fisheries Management Act 1991* provides that:-

(1) In a proceeding before the Panel:

- (a) the procedure of the Panel is, subject to this Act and the regulations, within the discretion of the Panel; and
- (b) the proceeding is to be conducted with a little formality and technicality, and as quickly, as the requirements of this Act and a proper consideration of the matter before the Panel permit; and
- (c) the Panel is not bound by rules of evidence but may inform itself on any matter in any way it thinks appropriate.

40. The Dictionary to the *Evidence Act 1995* defines “*Australian Court*”, for the purposes of the Act, to include a person or body authorised by an Australian law to hear, receive and examine evidence. Section 5 of the *Evidence Act 1995* extends the operation of certain provisions of the Act, including Section 163, to an Australian Court.

41. Section 146(1) of the *Fisheries Management Act 1991* provides:-

146 (1) For the purposes of the review of a decision, the Panel may:
(a) take evidence on oath or affirmation;

The Panel is clearly a body authorised by an Australian law to hear, receive and examine evidence and, contrary to submissions of AFMA, is one in respect of which Section 163 of the *Evidence Act 1995* applies.

42. Section 163 of the *Evidence Act 1995* provides:-

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163 (1) A letter from a Commonwealth agency addressed to a person at a specified address is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) to have been sent by prepaid post to that address on the **fifth** business day after the date (if any) that, because of its placement on the letter or otherwise, purports to be the date on which the letter was prepared.

(2) In this section:

“**business day**” means a day that is not:

- (a) a Saturday or a Sunday; or
- (b) a public holiday or bank holiday in the place in which the letter was prepared.

“**letter**” means any form of written communication that is directed to a particular person or address, and includes:

- (a) any standard postal article within the meaning of the *Australian Postal Corporation Act 1989*; and
- (b) any envelope, packet, parcel, container or wrapper containing such a communication; and
- (c) any unenclosed written communication that is directed to a particular person or address.

The effect of Section 163 of the *Evidence Act 1995*, in respect of the 4 November 2005 and 9 March 2006 letters from AFMA to Raptis, is it is presumed that they would have been posted from Canberra on Friday 11 November, 2005 and Thursday 16 March 2006 respectively.

43. The combined effect of the definition of “*Commonwealth record*” and Sections 5 and 182(1) of the *Evidence Act 1995* is to bring into play Section 160 of the *Evidence Act 1995*. Relevantly, section 160 establishes a presumption that AFMA letters 4 November 2005 and 9 March 2006 letters to Raptis are presumed to have been received on Thursday 17 November 2005 and Wednesday 22 March 2006 respectively, being the fourth business day³⁶ after having been posted.
44. Section 36(1) of the *Acts Interpretation Act 1901* provides that where in an Act any period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.

³⁶ *Evidence Act 1995* section 160(3)

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45. The result is to set time for lodging an application for review as required by Section 143(1) of the *Fisheries Management Act 1991*, on the basis of the AFMA letters to Raptis of 4 November 2005 and 9 March 2006 at Thursday 1 December 2005 and Wednesday 5 April 2006 respectively.
46. The Application For Review of Decision to Grant a Fishing Right Gazetted on 10 November 2005 lodged by Raptis on 25 November 2006 was made within the time limited by section 143(1) of the *Fisheries Management Act 1991*. Given this Raptis has standing to argue before the Panel not only for an allotment in excess of the First AFMA Determination but also issues associated with the review of the Second AFMA Determination.
47. If this approach is wrong and to the extent necessary the Panel determines that notwithstanding any non compliance with the provisions of section 143(1) of the *Fisheries Management Act 1991* by Raptis or any other fisher the Panel has power to determine the Applications for Review of the First and Second AFMA Determinations.
48. Whilst section 143(1) of the *Fisheries Management Act 1991* provides for an application for review to be made to the Panel by written notice “within 14 days after being notified by AFMA” of the decision it does not follow that a fisher cannot institute a valid application for review to the Panel after the 14 day period has elapsed.
49. Unlike the *Administrative Appeals Act 1975* there is no provision in the *Fisheries Management Act 1991*³⁷ that expressly gives the Panel power to extend time for the provision of written notice as provided for in section 143(1).
50. The Panel accepts the submission of AFMA’s counsel, Ms Mortimer, that in the absence of such a provision the Panel has to ask whether it was Parliament’s intention that the Panel have no jurisdiction over an application made after the 14 day period set out in section 143(1) had expired. That follows from the

³⁷ Section 29(7) of the *Administrative Appeals Act 1975*

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majority judgement of the High Court in *Project Blue Sky Inc and Others v Australian Broadcasting Commission*³⁸ (McHugh, Gummow, Kirby and Hayne JJ, Brennan CJ dissenting). Although dissenting, Brennan CJ summarised the current position when he said:

"... A provision may require the repository or some other person to do or to refrain from doing something (sometimes within a period prescribed by the statute) before the power is exercised but non-compliance with the provision does not invalidate a purported exercise of the power (Osborne v The Commonwealth (1911) [12 CLR 321](#) at 336-337; Buchanan v The Commonwealth (1913) [16 CLR 315](#) at 329): the provision does not condition the existence of the power (See, eg, Clayton v Heffron (1960) [105 CLR 214](#) at 246-248; Simpson v Attorney-General (NZ) [1955] NZLR 271; Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286; [1995] 1 All ER 367). Such a provision has often been called directory, in contradistinction to mandatory, because it simply directs the doing of a particular act (sometimes within a prescribed period) without invalidating an exercise of power when the act is not done or not done within the prescribed period. The description of provisions as either mandatory or directory provides no test by which the consequences of non-compliance can be determined; rather, the consequences must be determined before a provision can be described as either mandatory or directory." (page 374)

51. Brennan CJ had distinguished this type of provision from two other types of provision, which he compared in the following passage:

"A provision which directs the manner of the exercise of a power is quite different from a provision which prescribes an act or the occurrence of an event as a condition on the power - that is, a provision which denies the availability of the power unless the prescribed act is done or the prescribed event occurs. In one case, power is available for exercise by the repository but the power available is no wider than the direction as to the manner of its exercise permits; in the other case, no power is available for exercise by the repository unless the condition is satisfied (See, eg, Spicer v Holt [1977] AC 987). A provision which prescribes such a condition has traditionally been described as mandatory because non-compliance is attended with invalidity. A purported exercise of a power when a condition has not been satisfied is not a valid exercise of the power." (page 373)

52. This approach is consistent with that adopted by the majority when they said:

³⁸ [\[1998\] HCA 28, 194 CLR 355](#)

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"In our opinion, the Court of Appeal of New South Wales was correct in Tasker v Fullwood ([1978] 1 NSWLR 20 at 23-24. See also Victoria v The Commonwealth and Connor (1975) [134 CLR 81](#) at 161-162, per Gibbs J.) in criticising the continued use of the "elusive distinction between directory and mandatory requirements" (Australian Capital Television Pty Ltd v Minister for Transport and Communications (1989) 86 ALR 119 at 146 per Gummow J.) and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning (McRae v Coulton (1986) 7 NSWLR 644 at 661; Australian Capital Television (1989) 86 ALR 119 at 147). That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales (Hatton v Beaumont [1977] 2 NSWLR 211 at 213, 226; Attorney-General (NSW); Ex Rel Franklins Stores Pty Ltd v Lizelle Pty Ltd [1977] 2 NSWLR 955 at 965; Tasker v Fullwood [1978] 1 NSWLR 20 at 24; National Mutual Fire Insurance Co Ltd v Commonwealth of Australia [1981] 1 NSWLR 400 at 408; TVW Enterprises Ltd v Duffy (No 3) (1985) 8 FCR 93 at 102; 62 ALR 63 at 71; McRae v Coulton (1986) 7 NSWLR 644 at 661 and see Australian Broadcasting Corporation v Redmore Pty Ltd (1989) [166 CLR 454](#) at 457-460; Yates Security Services Pty Ltd v Keating (1990) 25 FCR 1 at 24-26; 98 ALR 68 at 90-92. See also two recent decisions of the Court of Appeal of the Supreme Court of the Northern Territory: Johnston v Paspaley Pearls Pty Ltd (1996) 110 NTR 1 at 5; Collins Radio Constructions Inc v Day (1997) [116 NTR 14](#) at 17; and Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286 at 1294, 1296; [1995] 1 All ER 367 at 375, 377). In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute" (Tasker v Fullwood [1978] 1 NSWLR 20 at 24)." (pages 390-391)

53. Applying these principles to section 143(1) of the *Fisheries Management Act 1991* the Panel must have regard to the language of Part 8 of the *Fisheries Management Act 1991* and to the scope and purpose of the *Fisheries Management Act 1991*.

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54. The Panel accepts Ms Mortimer's submissions, on behalf of AFMA, that section 143(1) was not intended to deprive the Panel of jurisdiction to deal with the substantive merits of an application for review made after the 14th day from notification.
55. In particular the Panel adopts paragraphs 10 and 11 of Ms Mortimer's submissions on this issue of 19 June 2006:

"The Legislative Context

- 10 *In the present legislative context, the following features should be considered:*
- (a) *The place of the tribunal as a merits review body within an administrative continuum. The Panel does not function as a court. Time limits imposed by the scheme on the Panel should be viewed in the same manner as time limits imposed by the scheme on AFMA, or the absence of any time limits. For example, s 29(4) speaks of AFMA notifying a person that a grant of a SFR is available "as soon as practicable" rather than within a specified number of days. The Panel process, as a part of this continuum, should be considered to have similar flexibility.*
 - (b) *There are some steps in the SFR grant process which the scheme makes very clear give no room to discretion or non compliance: for example s 26(2). Either a person meets the preconditions for registration or the person does not and if the person does, then the scheme imposes an obligation on AFMA to register that person.*
 - (c) *It is important to understand that what the Panel is reviewing is the selection of persons in accordance with the provisions of the SESSF Management Plan (s 28(2)). In other words, it is reviewing the outcome for which s 29(3) provides – to whom is a SFR "available" by reason of selection in accordance with the procedures set out in the management plan? The actual grant² – pursuant to a request made under s 31 – is reviewable by the AAT (see s 165(1) and is not able to be made until any SFRARP process is completed: see s 23(3). That is allocation of SFR's between persons across the whole fishery is the focus of the Panel's review is made clear in the extrinsic material introducing FM Act, to which the Panel has already been referred in previous submissions. The function is a broad one, occurring in the middle of a three stage process (registration, selection/allocation and grant) and although there are times provided for at various stages of the entire process, its length and complicated nature tend against the suggestion that the time limit in s 143(1) is jurisdictional.*
 - (d) *The scheme is dealing with the allocation of important entitlements, which are given a level of security by the legislation*

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which fishing permits are not given (see, for example, Part 3, Div 4A – SFR options) and the scheme contemplates that a management system may be set out procedures for allocation. Thus, the allocation process may not be straightforward and may incorporate a high degree of discretionary decision making. That being the case, and particularly given the importance and security of the rights, it is difficult to see why Parliament would have intended that the Panel could review the allocation of SFR’s across a fishery where an application was made on the 14th day after notification, but not the 15th.

(e) Nothing in the provisions concerning the Panel’s process suggest that it must conduct itself with a high degree of urgency which would be reflective of a mandatory, non extendable 14 day time limit. Other provisions speak in terms of “as soon as practicable” (s144); adjournment (s146(1)(b)), an absence of formality and quickness in the same way as the AAT is directed in its statute to observe those directions. There is not, for example, any provision requiring the Panel to make a decision within a certain period of time. This might be expected to be present if the 14 day time limit were as inflexible as Ocean Fresh suggests. As it is, the Panel might take many months properly to determine an application, so it is difficult to see why exceeding the 14 day application period should be fatal to the Panel’s jurisdiction.

11 *Consistently with McHugh J’s observations in Woods v Bate, s 143(1) is a provision whose purpose is to give a direction about the time in which an application should be made, rather than to invalidate an application made after that period. The draconian consequences of such a construction are not supported by the context of this scheme, the administrative nature of the Panel, nor the nature of the rights the scheme seeks to confer and allocate. “*

56. For the reasons given the Panel:

Decision the Subject of Review:	SFRARP Decision:
AFMA Decision of 4 November 2005 to make a provisional allocation of statutory fishing rights to various fishers	<p>1. The application to summarily dismiss the application of Raptis Fishing Licences Pty Ltd to review the decision of 8 November 2005 is itself dismissed.</p> <p>2. Directs that the Application for Review be set down for hearing commencing Monday 4 September 2006 in Brisbane.</p>

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<p>AFMA Decision of 9 March 2006 to make a provisional allocation of statutory fishing rights to various fishers</p>	<p>3. The decision of AFMA of 9 March 2006 to make a provisional allocation of statutory fishing rights to various fishers be set aside and the decision of AFMA of 4 November 2005 be substituted pending determination by the Panel of the Application for Review of the decision of AFMA of 4 November 2005.</p>
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I certify that the fifty-six preceding paragraphs are a true copy of the reasons for decision herein of the Panel (P J Baston (Principle Member), B M Yeoh and W Edeson (Members))

P. J. Baston
Principal Member
10 August 2006

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Date	Party	Details
November 2005		
22/11/05	Lorjona	Application for Review of Decision
25/11/05	Raptis	Application for Review of Decision
December 2005		
21/12/05	AFMA	Reasons for Decision – Lorjona and Raptis
January 2006		
16/01/06	Panel	Directions Hearing
16/01/06	Panel	Directions made
February 2006		
03/02/06	AFMA	Preliminary Submissions
17/02/06	Ocean Fresh	Submission
20/02/06	Raptis	Preliminary Submissions
March 2006		
3/03/06	Lorjona	Preliminary Submissions
09/03/06	AFMA	Revised Provisional Allocation of SFRs
10/03/06	Ocean Fresh	Response to Preliminary Submissions
14/03/06	AFMA	Reply Submissions
22/03/06	Panel	Directions Hearing
24/03/06	Panel	Hearing in Melbourne
24/03/06	Panel	Orders made
31/03/06	AFMA	AFMA Response to Panel Query
April 2006		

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03/04/06	Gazak	Application for Review of Decision
06/04/06	Raptis	Application for Review of Decision
06/04/06	Raptis	Statement of Facts and Contentions
07/04/06	Raptis	Raptis Response to AFMA's Submission re Panel Query
12/04/06	Lorjona	Withdrawal of Application for Review of Decision
12/04/06	AFMA	Response to Raptis Statement of Facts and Contentions
24/04/06	Ocean Fresh	Submissions on the Jurisdiction of the Panel
27/04/06	Panel	Mediation between Raptis and AFMA (Ocean Fresh present)
27/04/06	Panel	Orders recommended by mediators but not formally made
May 2006		
15/05/06	AFMA	Reasons for Decision – Raptis and Gazak
24/05/06	AFMA/Raptis	Statement of Agreed Facts
June 2006		
05/06/06	Panel	Orders made
09/06/06	Panel	Directions Hearing
09/06/06	Panel	Revised Orders agreed to during hearing but not formally made
15/06/06	AFMA	Submissions
15/06/06	Ocean Fresh	Submissions on Time Limits and Notification
19/06/06	AFMA	Submissions re s143 (1)
23/06/06	Ocean Fresh	Submissions in Reply on Time Limits and Notification
27/06/06	Gazak	Withdrawal of Application for Review of Decision
August 2006		
03/08/06	Panel	Orders Made
07/08/06	AFMA	Submissions