

COMMONWEALTH OF AUSTRALIA  
*Fisheries Management Act 1991*

**STATUTORY FISHING RIGHTS  
ALLOCATION REVIEW PANEL**

No. ETBF2007/05-01  
No. ETBF2007/03-01  
No. ETBF2007/02-01  
No. ETBF2007/06-01  
No. ETBF2007/07-01

**RE: EASTERN TUNA AND BILLFISH FISHERY MANAGEMENT PLAN 2005**

**HELEN AND CHESTER MALIN  
F & B COSTA and F & M PUGLISI  
LAMASON TRADING PTY LTD  
ROBERT L LAMASON  
ROBERT LAMASON and ANN LAMASON**

STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL

P J BASTON (PRINCIPAL MEMBER), R LISTER, W EDESON AND R CLAXTON (MEMBERS)

**ADMINISTRATIVE LAW** – Fisheries – Allocation of Provisional Grant of Statutory Fishing Rights.

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STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL

P J BASTON (PRINCIPAL MEMBER)

R LISTER, W EDESON AND R CLAXTON (MEMBERS)

**DATE: 24 February 2009**

**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 the decisions of the Australian Fisheries Management Authority ("the Authority") 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").

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2. The Panel has the power to affirm, vary, set aside or substitute a decision made in regard to the provisional allocation of Statutory Fishing Rights under a plan of management.
3. By various letters dated 15 August 2007, the Australian Fisheries Management Authority ("the Authority") advised various eligible fishers, including **Helen and Chester Malin** ("Malin"), **F & B Costa and F & M Puglisi** ("Puglisi"), **Lamason Trading Pty Limited, Robert L Lamason**, and **Robert Lamason and Ann Lamason** ("Lamason") of the allocation of provisional grants of quota statutory fishing rights in respect of the Eastern Tuna and Billfish Fishery Management Plan 2005 ("ETBF"). A notice appeared in the Gazette to the same effect on 11 May 2007.

**The Lamason Review Application**

4. **Lamason Trading Pty Limited, Robert L Lamason and Robert Lamason and Ann Lamason** ("Lamason") have lodged with the Panel Applications for Review of Decision to Grant a Fishing Right. In these applications Lamason listed the following as being "The reasons for my applications are:"

**(a) Lamason Trading Pty Ltd**

**Permit No. 25283C & D**

*The Application is contrary to the objectives of the Fisheries Management Act.*

*The Applicant reserves the right to provide further submissions to support and supplement the above reason after it has obtained further information relevant thereto under FOI to AFMA and the AAP.*

**(b) Robert L Lamason**

**Permit No. 459369C & D, 402202C & B, 401431B & A and 61298C & D**

*With regard to the Provisional SFR grant:*

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*The allocation is contrary to the objectives of the Fisheries Management Act.*

*The Applicant reserves the right to provide further submissions to support and supplement the above reason after it has obtained further information relevant thereto under Freedom of Information to AFMA and the AAP.*

**(c) Robert Lamason and Ann Lamason**  
**Permit No. 300009D & C**

*With regard to the Provisional SFR grant:*

*The allocation is contrary to the objectives of the Fisheries Management Act.*

*The Applicant reserves the right to provide further submissions to support and supplement the above reason after it has obtained further information relevant thereto under Freedom of Information to AFMA and the AAP.*

5. On 11 February 2008 the following directions were made:

**Directions dated 11 February 2008**

1. *On or before 4.00pm 15 February 2008 the Applicants and Respondent conduct a preliminary conference.*
2. *On or before 4.00pm 22 February 2008 the Applicants file and serve particulars upon which it wishes to rely.*
3. *On or before 4.00pm 29 February 2008 the Respondent file and serve answers to particulars in reply to the Applicant's particulars provided.*
4. *The matter to be adjourned for further directions before the Panel on 13 March 2008 at 8.30am (AEST) to set a hearing date.*

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6. On 22 February 2008 the Applicants filed with the Registry Particulars of Grounds of Application for Review.
7. On 29 February 2008 the Respondent filed with the Registry Particulars of the Authority's Response.
8. On 13 March 2008 a Telephone Directions was held and the following directions made:

Directions dated 13 March 2008

1. *On or before 4.00pm 25 March 2008 the Respondent and Applicants to agree upon Directions by Consent and file with the Registry.*
  2. *The matter to be adjourned for further directions before the Panel on 3 April 2008 at 9.00am (AEST).*
  3. *The matter to be listed for hearing commencing on 22 April 2008 in Brisbane.*
9. On 2 April 2008 Bottoms English Lawyers, the solicitors for Lamason advised the Panel that they had issued proceedings in the Federal Court challenging the validity of the ETBF.
  10. On 3 April 2008 the following directions were made:

Directions dated 3 April 2008

1. *This matter to be adjourned for mention at the conclusion of the Helen and Chester Malin, and F&B Costa and F&M Puglisi hearings set down for 22 April 2008.*

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11. Subsequently the Malin and Puglisi hearings were re-scheduled to commence on 6 May 2008.
12. On 6 May 2008 the Panel further adjourned the directions hearing to a date to be fixed to allow the parties to consider the further conduct of the Lamason matters.
13. On 13 May 2008, Mr Duffy, junior counsel for Lamason sought to have the Lamason matters adjourned to a date to be fixed to be brought on after the Lamason Federal Court proceedings had been determined. The Authority sought that the Panel dismiss all the Lamason Applications. Directions were made as follows:

Directions dated 13 May 2008

1. *On or before 4.00pm 21 May 2008 the Respondent file and serve Submissions in support of Orders dated 12 May 2008.*
  2. *On or before 4.00pm 29 May 2008 the Applicants file and serve Submissions in reply.*
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14. The Authority maintains that the Panel should exercise the power in s152 of the *Fisheries Management Act 1991* to dismiss the Lamason Applications on the basis that Lamason did not intend to proceed with the Applications before the Panel.
  15. At this point Lamason requested that the Panel proceed to hear the Applications notwithstanding that the existence of the Federal Court proceedings.
  16. On 6 June 2008 the Authority responded to the Lamason submission. The Authority contends that there are many operators whose commercial interests are adversely affected by the delay in these proceedings and that it suits the Applicants in a commercial sense to be able to fish under the current permit. The Respondent also stated the Applicants consciously elected to pursue a particular

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course, and now want to completely alter that course to avoid a forensic consequence in the Federal Court and to continue to be able to fish under the current permit system for as long as possible.

17. On 30 June 2008 the following directions were made:

Directions dated 30 June 2008

1. *On or before 4.00pm 10 July 2008 the Applicant to file and serve Contentions together with particulars.*
  2. *On or before 4.00pm 10 July 2008 the Applicants to file and serve draft Directions for 14 July 2008.*
  3. *The matter to be adjourned for further directions before the Panel on 14 July 2008 at 9.00am (AEST).*
18. At the 14 July 2008 Directions hearing the Panel was informed by counsel for Lamason that Lamason had no issues other than the validity of the Plan to be determined by the Panel. The Lamason position being that the Panel ought not determine the Lamason Applications until the Federal Court had determined the matter.
19. Shortly after the 14 July 2008 Directions hearing the Panel was provided with copies of various Orders and Directions made by Spender J in the Federal Court at Brisbane.
20. On 11 September 2008 the following directions were made:

Directions dated 11 September 2008

1. *The matter for mention set down for 12 September 2008 is vacated.*

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2. *The Parties, on or before 4pm 18 September 2008, provide by letter to the Registrar, advice as to the current status of the Federal Court proceedings and likely conclusion date.*
3. *The Parties are invited to make short submissions, on or before 4pm 18 September 2008, as to the power of the Panel to summarily dismiss the application, where the Panel is of the view that there is no utility in a hearing whilst the Federal Court proceedings are still unresolved.*
21. On 19 September 2008 Lamason advised the Panel that the Federal Court proceeding had been listed for hearing commencing 14 November 2008. Lamason repeated the earlier submission that the Lamason Application ought not be dismissed but be adjourned pending resolution of the Federal Court proceedings.
22. The Authority on 19 September 2008 sought the dismissal of the Lamason Application.
23. The proceedings in the Federal Court proceeded to hearing before Spender J on 14 November 2008. Justice Spender reserved his decision and the Panel has not been advised as to when it may be delivered.
24. The Panel sees no utility in setting the Lamason matters down for hearing. It would not assist the Authority, Lamason or other fishers to have a hearing before the Panel when the same controversy is before the Federal Court.
25. Further, the Federal Court proceedings are well advanced. Justice Spender is seized of the Lamason challenge to the ETBF. It is not the case that Lamason has failed to prosecute the Application. A dismissal of the Lamason Applications at this stage would most likely result in an Application by Lamason to the Federal Court.
26. Moreover, the term of Principal Member of the Panel expires on 24 February 2009. A failure of the Panel to hand down a decision prior to that event would



almost certainly result in a need for the entire matter to be re-opened. Given this unusual factor together with the fact that the Federal Court proceedings are well advanced and that the Authority estimates it would take some months to proceed to determine and issue SFR's, these factors tip the balance in favour of the Panel dismissing the Lamason proceedings. The Panel notes also that Lamason has not sought at any stage to elaborate on the substance of its objections to the ETBF.

27. For these reasons, the Panel upholds the Authority's application to dismiss the Lamason Applications.

#### **HELEN AND CHESTER MALIN**

28. The Malin Application was heard by the Panel on 6 May 2008. Mr. Niall appeared for the Authority and Mr. Sinclair for Malin. Prior to the hearing directions were made for the delivery of particulars and written outlines of argument. Both parties complied with these directions and at the commencement of the hearing had supplied to the Panel a Statement of Agreed Facts. Together these documents concisely set out the nature and scope of the dispute between the Authority and Malin.
29. In addition to these documents the Authority relied upon a statement from Trent Alan Timmiss, an employee of the Authority and the then current Manager of the Eastern Tuna and Billfish Fishery. Mr. Chester Malin and Mr Timmiss gave oral evidence and were cross-examined before the Panel.
30. It was accepted by the Authority and Malin that the resolution of the Malin Application rested upon an interpretation of the management plan. The Panel agrees with this analysis.
31. The first issue raised at the hearing was the extent to which the Panel could have regard to the Allocation Advisory Panel Reports which were Attachments L and M to the statement of Mr Timmiss. The Panel agrees with the Authority that it is

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entitled to have regard to the Allocation Advisory Panel Reports in determining this Application.

32. Mr. Timmiss deals with the manner the Authority determined the Malin's eligibility for the grant of longline SFR's under the ETBF at paragraphs 47 to 57 of his statement. At paragraphs 58 and following Mr. Timmiss sets out how the Authority dealt with the Malin's serious misfortune claim. Malin challenges the interpretation of the ETBF adopted by the decision maker in determining eligibility for the grant of longline SFR's under the ETBF and in rejecting the Malin's serious misfortune claim.
33. Further, the Panel accepts the contentions of the Authority that:-
1. The Malin's Permit was correctly classified as Northern Inshore for the purposes of applying the Table in s32 of the Management Plan; and
  2. The Permit was correctly classified as inactive because:
    - i. S30(1)(b)(i) did not apply because the permit was not one described in items 17 to 21;
    - ii. S30(1)(b)(ii) does not take into account SBT caught in waters west of meridian 141; and
    - iii. S30(3) the "serious misfortune" provision does not accommodate the Applicant's circumstances.
34. As the issue is one of construction it must be resolved by reference to the language used, but read in its context.<sup>1</sup> Regard must be had to the history of the Plan and the object the language was intended to achieve.<sup>2</sup>
35. Having regard to the words used, and their legal and historical context, it is appropriate to give them a meaning that will give effect to any purpose of the

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<sup>1</sup> The Management Plan is determined under s17 of the *Fisheries Management Act*. The Management Plan is a legislative instrument: ss4(1) and 5(1) of the *Legislative Instruments Act* 2003(LIA). The *Acts Interpretation Act* 1901 applies to the interpretation of the Plan s13 of the LIA.

<sup>2</sup> see *Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297. See also s15AA of the *Acts Interpretation Act* 1901 (Cth).

legislation that can be deduced from the context.<sup>3</sup> An important part of the context in which the Plan is to be construed is revealed by the Allocation Advisory Panels Reports.

36. The Authority contends that:-

- a) by a combination of ss31 and 32, SFR's are to be allocated by reference to the category of the old long line permit or permit package. The category of permit is the description of the permit in the first occurring item in the table in s32 that applies to the permit or package.
- b) By s31(2) the description of the permit consists of two elements:
  - i. The area of the fishery to which the permit applied set out in column 2 to the table in s32; and
  - ii. The activity level set out in column 3.
- c) In order to determine to which area of the fishery the permit applied it is necessary to have regard to the terms of the relevant permit. The permits identify the area of waters to which the permit is subject by title and by coordinates.
- d) In the case of the permits at issue, the area of waters to which the permits relate are titled Northern Inshore and Southern Inshore North. The coordinates reflect those areas as described in the Regulations.

37. Using this approach the Authority contends that the permits were correctly classified as Northern Inshore. For the purpose of applying s32, Northern Inshore is the relevant item first appearing in the table. The Panel agrees with the approach adopted by the Authority.

38. The Authority argues that Clause 30(1)(b)(i) does not apply to the permit because it is not a permit described in items 17 to 21 in the table to s32. The Authority says that the history and context in which those paragraphs were enacted is found in the AAP Report at pages 24 and 29:

- It was designed to provide protection to a limited class of 4 operators who would, but for the special provision, fall within classes 17 to 21.

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<sup>3</sup> McHugh J in *Newcastle City Council V GIO General Ltd* (1997) 191 CLR 85 at 112 *Network Ten Pty Limited V TCN Channel Nine Pty Limited* [2004] HCA 14; (2004) 205 ALR 1.

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- It was intended that those operators, and not others, would get the benefit and rather than have a relative price of 0.03 would be given a relative price of 0.13.
  - The clause only applies where the first occurring item relevant to the permit is within items 17 to 21 in the table.
  - The clause has no application to permits that are described in any higher item in the table. As the permits at issue are first described within item 8 or 9 cl 30(1)(b)(i) has no application.
39. The Panel agrees with the interpretation adopted by the Authority as to the non-application of Clause 30(1)(b)(i) to the Malin permit.
40. Mr Timmiss gave unchallenged evidence that less than 30 tonnes of fish were caught under the permit in the waters east of meridian 141°. Malin seeks to rely on Southern Blue Fin Tuna caught in the waters off South Australia. The Authority argues that this is not permissible:
- The catch history element adopted on the Plan only applies to waters that now comprise the relevant fishery being the ETBF; and
  - That conclusion follows from both the language and context of the Management Plan.
41. The Panel agrees with the Authority. As the Authority points out:
- First, as the heading to column 2 to the table in s32 makes clear, the focus of the permit is the “area of fishery” to which the old longline permit applied. The fishery is defined to be the “Eastern and Tuna Billfish Fishery.” Its waters extend eastward from 141°. Thus the old long line permit, and the catch taken under it, are relevant to the extent that they concern the area of the fishery.
  - Secondly, the context supports that approach:
    - a) the Plan provides SFR’s relevant to the fishery and allocation reflects existing positions (judged by relative price value) in those waters; and
    - b) catch taken west of 141° is associated with the WTBF permit.

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- 42. The Authority correctly points out that the approach advocated by Malin entails double counting because the catch history could be used for both the ETBF and the WTBF.
- 43. Turning now to the serious misfortune claim the Authority correctly contend that the Malins need to establish serious misfortune and that the permits were inactive because of one of the matters in s30(4)(a) to (c) of the Plan.
- 44. The Panel accepts the position of the Authority that the decision to purchase the permit and build a boat does not constitute a serious misfortune nor were the Applicants prevented from attaching the permit to another boat.
- 45. For these reasons the Panel agrees with the determination of the Authority and dismisses the Malin Application.

**F & B COSTA and F & M PUGLISI**

- 46. When Puglisi came before the Panel for hearing on 6 May 2008 the Authority informed the Panel that in the course of preparation for the hearing it became apparent to the Authority that it had made a mistake in the categorisation of the permits held by Puglisi.
- 47. The Authority and Puglisi informed the Panel that they had agreed that the Panel should make consent orders to set aside the decision of the Authority and substitute a different decision that reflects the correct characterisation of the Puglisi permit.
- 48. The Panel was provided with Draft Consent Orders, a Statement of Agreed Facts and an Explanatory Note to the draft orders. The Panel was informed that each of these documents had been made available to the other operators in the fishery.

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49. The Panel then heard submissions from the Authority as to why it ought make orders in accordance with the Draft Consent Orders. Having considered the submissions of the Authority, the Statement of Agreed Facts and an Explanatory Note to the draft orders the Panel is satisfied that it is appropriate to make the Orders proposed and consented to by the Authority and Puglisi.

	<b>SFRARP Decision:</b>
1.	That the Application dated 5 December 2007 (ETBF2007/05-01 – Helen and Chester Malin) be dismissed.
2.	That the Applications dated 24 September 2007 (ETBF2007/02-01 – Lamason Trading Pty Ltd), 24 November 2007 (ETBF2007/07-01 – Robert and Ann Lamason) and 24 November 2007 (ETBF2007/06-01 – Robert L Lamason) be dismissed.
3.	According to the Consent Orders filed in ETBF2007/03-01 (F&B Costa and F&M Puglisi – Exhibit 5) AFMA’s decision of 9 November 2007 to make a provisional allocation of Statutory Fishing Rights ( <b>SFRs</b> ) to various fishers under the Eastern Tuna and Billfish Fishery Management Plan 2005 to be set aside and the grant of SFRs is to be made in accordance with the Schedule attached and marked “ <b>Attachment A</b> ”.

I certify that the forty-nine preceding paragraphs are a true copy of the reasons for decision herein of the Panel (P J Baston (Principal Member), R Lister, W Edeson and R Claxton (Members)).



P. J. Baston  
Principal Member  
**24 February 2009**