

**PROCEDURAL GUIDELINES**

**FOR THE**

**STATUTORY FISHING RIGHTS**

**ALLOCATION REVIEW PANEL**

**August 2011**

# **PROCEDURAL GUIDELINES FOR THE STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL**

These guidelines have been prepared for members of the Statutory Fishing Rights Allocation Review Panel. They will assist the Panel in carrying out its functions and responsibilities.

The procedural guidelines have been prepared by the Registry with assistance from its legal advisers. They have been approved by the Principal Member, Mr Christopher Doogan AM.

The Panel reviews the provisional allocation of Statutory Fishing Rights under the *Fisheries Management Act 1991* and *Fisheries Management Regulations 1992*.

**Dated this 24 day of August 2011**

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## PART A – FUNCTION AND ROLE

### 1. OVERVIEW OF THE MANAGEMENT OF COMMONWEALTH FISHERIES

#### Functions and objectives of the Australian Fisheries Management Authority

1. The Australian Fisheries Management Authority (AFMA) is the Commonwealth statutory authority responsible for the efficient management and sustainable use of Commonwealth fisheries.

#### Legislative framework

2. AFMA was established under section 5 of the *Fisheries Administration Act 1991* (FAA). The FAA sets out AFMA's functions, powers and objectives and provides for various matters relating to its operation and internal governance. It also provides for the establishment of committees to advise the AFMA Commission, including Management Advisory Committees (MACs) (section 68).
3. There are several other legislative instruments which are administered by AFMA or which impact on AFMA's operations. These also include the *Fisheries Management Act 1991* (FMA), the *Torres Strait Fisheries Act 1984*, the *Fisheries Management Regulations 1992* and the *Environment Protection and Biodiversity Conservation Act 1999*.

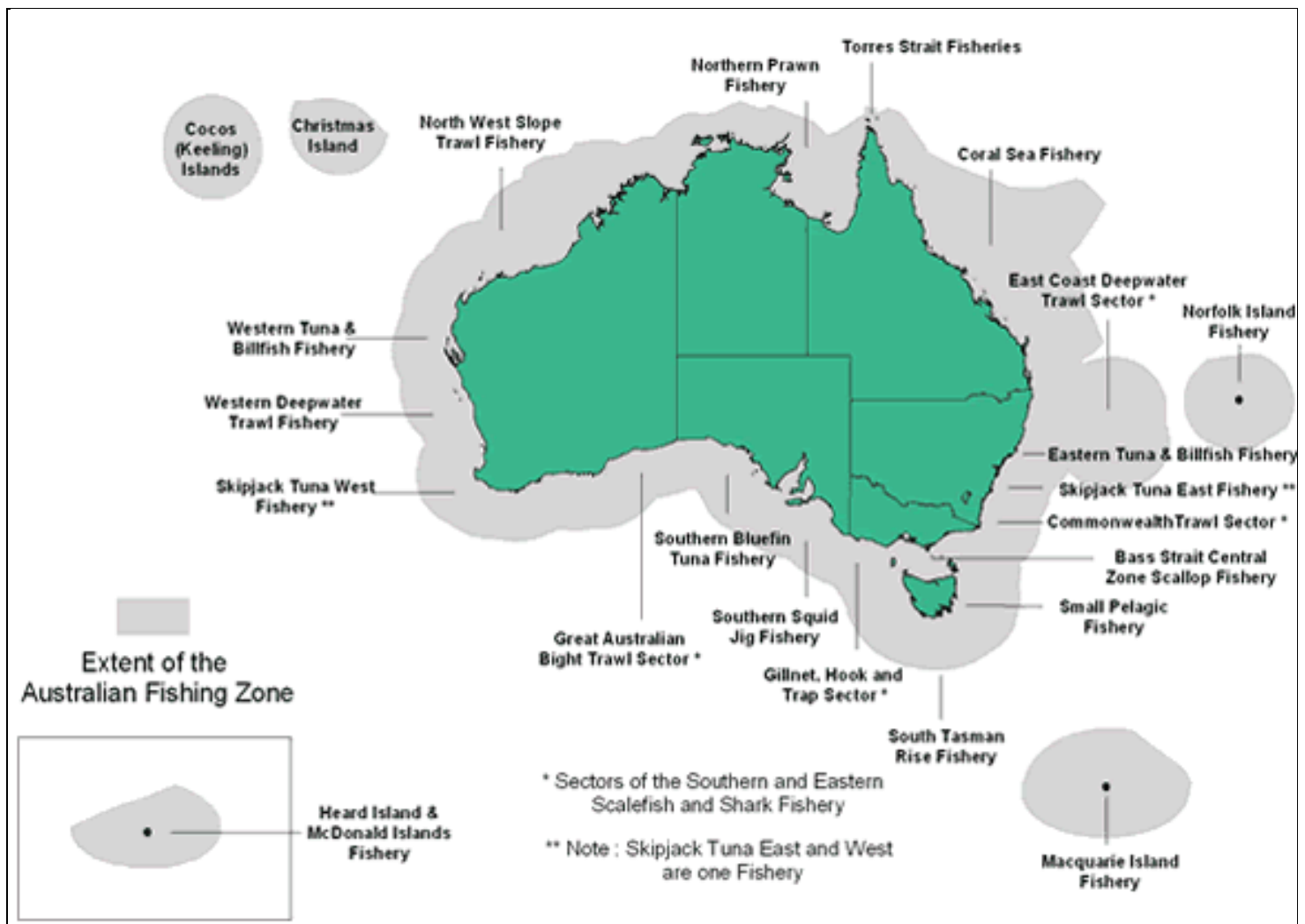
#### Policy framework

4. The comprehensive policy statement *New Directions for Commonwealth Fisheries Management in the 1990s* and the 2003 Commonwealth Fisheries Policy Review, *Looking to the Future* set the policy environment under which Commonwealth fisheries are managed. A Ministerial Direction made under section 91 of the FAA on 14 December 2005 provided further guidance to AFMA regarding how it is to manage Commonwealth fisheries. In particular, it required AFMA to accelerate its programs to end overfishing in Commonwealth fisheries, address the rebuilding of overfished stocks and minimise the impacts of fishing on the marine environment. In an initial response to this Direction, AFMA released a new policy statement entitled *Future Operating Environment for Commonwealth Fisheries* which outlined the practical implications of the Direction for AFMA.

#### Management arrangements

5. The Offshore Constitutional Settlement (OCS) is a jurisdictional arrangement between the Australian, State and/or Northern Territory (NT) governments which sets out responsibilities for offshore fisheries, mining, shipping and navigation and crimes at sea. The OCS provides for State and Territory laws to apply to the waters and resources inside three nautical miles and for Commonwealth laws to apply from three to 200 nautical miles.
6. Under the terms of these agreements, the States/NT generally manage coastal, slow moving or inshore commercial species (such as rock lobster and abalone) in the inshore areas of the Australian Fishing Zone (AFZ). They are also responsible for the majority of recreational, charter and inland fishing and aquaculture operations. AFMA generally manages commercial fisheries from three nautical miles out to the 200 nautical miles limit (although some fisheries extend to the high seas and, in some cases - by agreement with the States - to the low water mark) and deepwater or migratory species such as finfish and tuna.
7. A method for changing the OCS arrangements in relation to fisheries was established in 1979 under the *Seas and Submerged Lands Act 1973* and allows the existing jurisdictional divisions described earlier to be overridden by agreement between the Commonwealth and States. This was to provide for the holistic management of fisheries – recognising that

fisheries do not align with legal boundaries. Where no agreement is in place, the original OCS divisions apply. These provisions are reflected in section 72 of the FMA.



sets out fishery zones 1

8. AFMA manages over 20 Commonwealth fisheries. A fishery is usually defined by a combination of the species caught (one or several), the gear and/or fishing methods used, and the area of operation.
9. Some fisheries are managed jointly with other jurisdictions. Three joint authorities; the Northern Territory Joint Authority; the Western Australia Joint Authority; and the Queensland Joint Authority, were established under the FMA. The relevant state fisheries management agencies have responsibility for the day-to-day management of these fisheries which are managed under the applicable state's legislation.
10. In addition to the Joint Authorities, AFMA also provides fisheries services in conjunction with the Queensland Government Primary Industries and Fisheries in the Torres Strait fisheries on behalf of the Torres Strait Protected Zone Joint Authority under the *Torres Strait Fisheries Act 1984*.
11. AFMA provides management, advisory and compliance services and implements appropriate fisheries management arrangements in Commonwealth managed fisheries. It is

<sup>1</sup> <http://www.afma.gov.au/information/maps/afz.htm>, sourced on 23 February 2010.

responsible for licensing commercial fishing operators, monitoring their catch and ensuring they take appropriate steps to minimise their impact on the ecosystem.

12. AFMA uses a range of management tools to ensure that the viability of fish stocks is protected. Catch levels are regulated by using input or output controls or a mixture of both.
13. As the name suggests, output controls limit the amount of fish that can be taken in a fishery. One method by which this may be achieved is the setting of a Total Allowable Catch (TAC) for a particular species in a given fishery for each fishing season. Each operator in a fishery is allocated a fixed share of the TAC in the form of an Individual Transferable Quota (ITQ).
14. ITQs comprise of two components. The first form is quota units. A unit is normally constant between fishing seasons and represents an operator's fixed share of the TAC for a particular species in a given fishery. The second form is seasonal kilograms. This amount is variable between fishing seasons in accordance with variations in the TAC between years and represents the actual amount of a species that a person is entitled to take in a given fishing season.
15. The ratio between a quota unit and seasonal kilograms is referred to as a conversion factor and is calculated by the division of the total number of quota units in a fishery for a given species into the actual TAC for that species in that fishery for a given season.
16. ITQs can be transferred on either a permanent basis or leased on a seasonal basis. A permanent transfer is one that entitles the transferee to hold the quota units permanently and to transfer them if he or she so wishes. A seasonal lease entitles the lessee to use the kilogram value of those quota units for one season. In the event of either type of transfer, the parties are required to complete a pro forma transfer form supplied by AFMA (now done electronically).
17. AFMA may also determine specific TACs for a quota species for particular parts of the area of the fishery.
18. Generally, the quota allocated to a Statutory Fishing Right (SFR) for each quota species for a fishing year is worked out by dividing the TAC for the species for the fishing year by the total number of quota statutory fishing rights in force for the species at the start of the fishing year.

*Example:*

*The Commonwealth Trawl Section of the Southern and Eastern Scalefish and Shark Fishery has a TAC for flathead of 2,850 tonnes for the 2009-10 fishing year. Their fixed number of flathead quota SFRs is 2,940,223. This means 1 flathead quota SFR is worth 0.963142323kg (the number of decimal places for the purpose of determining the kilogram value of a quota SFR in this case is 10). A person may hold say, 30,000 flathead quota SFRs which would allow them to catch 29.079 tonnes of flathead in that fishing year.*

19. Input controls or indirect restraints on fishing effort are also used in managing Commonwealth fisheries resources. They regulate the level of catch extracted from a fishery through limits on "inputs" to fishing, such as engine capacity, boat size, gear restrictions (for example, limits on net sizes), closed seasons and area closures. Some input controls may be used to reduce bycatch. Most input controlled fisheries usually employ a variety of management tools. The combination most appropriate to a fishery depends on its characteristics and the management objectives. Some fisheries have both input and output controls.



## Plans of management and Statutory Fishing Rights (SFRs)

### Plans of management

20. Section 17 of the FMA provides for AFMA to develop management plans for each Commonwealth fishery, where it is cost-effective to do so. These plans determine how AFMA will adjust catch levels when there are changes in the size and structure of the stock; changes in the economic and social conditions in the fishery; or other events that impact upon the biological sustainability of the stock or associated and dependent species.

21. Management plans, as opposed to other management arrangements, may provide for the management of a fishery by means of a system of SFRs (subsection 17(6)(b) of the FMA). The plans also provide for the allocation of fishing quotas through a number of different methods.

22. The plans adopt a variety of means for the allocation of quotas. Details of the plans can be found at [www.afma.gov.au](http://www.afma.gov.au).

### Statutory Fishing Rights

23. SFRs provide fishing operators with long-term, secure, tradeable rights, which are more secure than other forms of access rights.

Under section 21 of the FMA, a SFR may include a right to:

- take a particular portion of the fishing capacity that is permitted under a plan of management;
- take a particular quantity or species of fish in a specified area at a certain time or times;
- use a boat;
- use particular fishing equipment; or
- undertake some other activity related to fishing in a managed fishery.

### The grant of SFRs

24. A person may apply to AFMA to be registered as an eligible person for a grant of a fishing right (section 26 of the FMA). Under section 26(2), AFMA must register a person who satisfies the conditions for registration that are specified in the applicable plan of management. A person can request AFMA to reconsider its decision to refuse to register a person as eligible to be granted a SFR. If a person is unhappy with the outcome of that process the person can then apply, under section 165 of the FMA, to the Administrative Appeals Tribunal (AAT) for a review of AFMA's decision. The Panel has **no** role in reviewing a decision under s 26(2).

In addition to setting out the conditions that apply in determining whether a person is eligible to be registered for a grant of a fishing right, plans of management also specify the procedures that are to be used to determine the allocation of SFRs in cases where an auction has not been held and tenders have not been called (subsection 29(3) of the FMA). The number of SFRs to be granted is prescribed by the management plans. Plans of management are legislative instruments under the FMA (see *Lamason v AFMA* [2009] FCA 245 at [149]-[150]). There is no general discretion to depart from the provisions of the management plan: see *AFMA v Gilmore* [2009] FCA 1369 at [62].

An example of how SFRs are allocated under a management plan is as follows:

The Western Tuna and Billfish Fishery (WTBF) Management Plan uses a formula that takes into account the weight of catch taken by a person under previously held fishing permits over a specified period. The more fish a person caught, the greater potential entitlement to SFRs.

Like some other management plans, the WTBF Plan contains an "ameliorative provision" which is essentially designed to take into account a person's inability to catch as many fish as would otherwise have occurred, due to "serious misfortune". This allows for an alternative formula to be

applied, which takes into account a relevant disability, such as illness. In essence, instead of relying on actual catch history, in the case of the WTBF, the Plan allocates the average catch of the species in a fishery to a person over a specified period.

As this example demonstrates, AFMA (or the Joint Authority) must apply the provisions of the Plan and make findings of fact. These findings of fact will ultimately govern the number of SFRs that may be granted to an eligible person.

A grant of a fishing right in the FMA under subsection 29(3) is provisional; AFMA must notify that person (and each person registered under section 26) and give that person a statement in writing of the reasons for making the grant as well as of their right to apply to the Panel for a review (see **Role Function and Powers of the Panel**, page 11). The AAT has **no** role in reviewing a decision made under subsection 29(3) of the FMA.

Under subsection 23(3) of the FMA, AFMA cannot grant a fishing right to a person until:

- the time period by which an application for review may be made to the Panel has expired (section 143 of the FMA); or
- if an application is made to the Panel, the Panel has dealt with the application.

Under section 31 of the FMA, AFMA must grant a SFR to a person to whom the grant of the right is available if the person asks AFMA to grant the right. A decision under section 31 is reviewable by the AAT (and not the Panel).

#### Suspension and cancellation of SFRs

25. There are circumstances in which SFRs can be suspended, cancelled, cease to have effect, or cease to apply. These are provided in the FMA as follows:

- non-compliance with obligations imposed by the plan of management (subsection 22(3)(a));
- revocation of a plan of management by AFMA (subsection 20(3), subsection 22(3)(b));
- termination of an arrangement made with a State or States (subsection 75(7), subsection 22(3)(c));
- where the holder is convicted of an offence, fees or other money relating to the right is unpaid, or the right authorises the use of a boat for fishing covered by a regional organisation or arrangement and Australia is not involved in the regional organisation or arrangement to which the concession relates (section 39, subsection 22(3)(d); and
- if the holder of a fishing right surrenders it by written notice to AFMA (subsection 22(6)).

The Panel does not have a role in reviewing the suspension or cancellation of SFRs.

#### Register of Statutory Fishing Rights

26. The Register of SFRs is established under section 44 of the FMA. The Register documents individual or total SFR amounts owned and held, as well as any third party interest(s) registered in respect of those SFRs. AFMA must register all SFRs granted (section 45 of the FMA).

27. Where a fishing right is created, assigned, transferred, transmitted or extinguished the dealing must be registered (section 46 of the FMA). Where a fishing right is suspended, cancelled or ceases to have effect, a note must be made on the Register (section 50 of the FMA).

28. The Register is available for inspection by any person and can be accessed at <http://www.afma.gov.au/information/publications/fishery/registers/default.htm>.

## **2. OVERVIEW OF THE STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL**

### **Purpose**

1. The Panel was established in 1991 by section 124 of the FMA. Its purpose is to provide an independent forum limited to reviewing the provisional allocation of SFRs granted by AFMA (or a Joint Authority managed under Commonwealth law) under subsection 29(3) of the FMA.
2. The Panel was designed to assess the relative merits of each Applicant's case against the objectives of the applicable management plan. In this way, the Panel was envisaged as a forum which would be able to review decisions on the allocation of fishing rights, having regard to the wider impact of those decisions on the fishery and other fishers in the fishery.

### **Constitution of Panel**

3. For the purposes of a particular review, the Panel is to be constituted by:
  - the Principal Member; and
  - two members selected by the Principal Member (section 129 of the FMA).
4. If the Panel has commenced or completed a review of a decision but has not finally determined the matter and one of the members (other than the Principal Member) constituted for the purposes of the review has:
  - ceased to be a member; or
  - ceased to be available for the purposes of hearing an application for review (whether because of a conflict of interest or otherwise);

the hearing and determination, or the determination of the review is to be completed by the Panel constituted by the two remaining members (section 130 of the FMA).

5. Should the Principal Member:
  - be absent from duty; or
  - be unable to perform the duties of the office of Principal Member; or cease to be available for the purpose of hearing or determining one or more applications for review (whether because of a conflict of interest or otherwise);

the Minister may appoint an Acting Principal Member (section 128 of the FMA).

6. In the event that an Acting Principal Member is appointed and is unable to hear or continue to hear an application for review (whether because of a conflict of interest or otherwise), the review should be adjourned to be re-heard when:
  - the Principal Member is available; or
  - a new Acting Principal Member is appointed (from the time the former Acting Principal Member ceases to be Acting Principal Member).

### **Conflict of interest and bias**

7. Each Panel member must consider whether there is any reason why he or she should decline to participate in the Panel if, for example, there is a conflict of interest.
8. In particular, Panel members should consider the nature and extent of any personal, pecuniary or business interests that could conflict with the proper performance of the member's functions in relation to the review (section 134 of the FMA).

9. Panel members should bring any potential conflicts to the Principal Member's attention. The Principal Member must consider whether a conflict exists, and, so determine whether that member shall take part, or continue to take part in the review. If the Principal Member determines that the member should not take part, or not continue to take part in the review, the Principal Member must:

- direct the member accordingly; or
- in any other case - the Principal Member must disclose the member's interest to all the parties to the proceedings (section 134 of the FMA).

10. Where the Principal Member discloses a member's interests to all the parties to the proceedings, the member must not, *except with the consent of all the parties*, take part in the review or exercise any powers in relation to the review (section 134 of the FMA).

An Acting Principal Member may be appointed by the Minister for a period (in accordance with section 128 of the FMA).

### **Dealing with a challenge to the appointment of Panel members to hear an application**

11. Administrative law principals apply to Panel hearings. As such, a party is at liberty to make an application to the Panel or the Principal Member to have a Panel member disqualified from hearing a particular application because of actual/perceived bias (see for example, the AAT's decision of *Re Fault and Repatriation Commission* (1992) 27 ALD 355).

## **3. ROLE, FUNCTION AND POWERS OF THE PANEL**

### **Role and function**

1. The sole function of the Panel is to review decisions made by AFMA (or a Joint Authority) under subsection 29(3) of the FMA relating to the provisional grant of SFRs.

2. In exercising this review function, the Panel "stands in the shoes" of the original decision-maker. As noted above, the applicable management plan determines the factors that are to be taken into account in determining an application for review of a decision to grant a SFR. Like AFMA, the Panel has no general discretion to depart from the procedures set out in the management plan: see *AFMA v Gilmore* [2009] FCA 1369.

3. Under subsection 150(2) of the FMA, the Panel may:

- affirm the decision;
- vary the decision; or
- set the decision aside and substitute a new decision.

The decision of the Panel is taken to be a decision of AFMA, or the Joint Authority managed under Commonwealth law, as the case may be (subsection 150(3) of the FMA).

### **A comparison of the role of the Panel and the AAT**

#### Similarities between the roles of the Panel and the AAT

4. The functions of the Panel and the AAT are similar to the extent that both bodies review administrative decisions and can make fresh decisions.

5. In exercising its powers, the Panel and the AAT have all of the powers and may exercise all of the discretions conferred on the person who made the original decision (subsection 150(1) of the FMA). The Panel's task is to make "the correct and preferable" decision. Like AFMA, the Panel

is required to allocate SFRs in accordance with the process provided in the applicable management plan.

#### The principal differences between the roles of the Panel and the AAT

6. The Panel was primarily established because the Government felt that the AAT was not suited to considering appeals affecting the interests of multiple parties, such as those affected by fisheries allocation decisions. The Government considered that the AAT is suited to reviewing decisions which only affect the appellant. Fisheries allocation decisions affect not only the appellant but also each other participant in the fishery and the biological and economic status of the fishery.

7. The Panel has a jurisdiction limited to the review of decisions made under only one section of the FMA, namely decisions made under subsection 29(3). The AAT, however, has a much broader jurisdiction to review decisions under a range of sections. This is conferred by section 165 of the FMA and enables the AAT to review the following decisions of AFMA:

- subsection 4(2), 4(3), 22(5) or 26(2);
- section 31 (other than a decision following an auction, tender or ballot);
- subsection 31B(1)(b);
- section 31C;
- subsection 31F(7);
- section 32 or 33;
- subsection 34(9), 38(1), (2) or (3);
- section 39;
- subsection 40(5) or (8); or
- section 91.

Whilst the separate statutory frameworks that apply to the Panel and the AAT are similar, there are some important differences. For example, unlike the AAT, the Panel has no express power to:

- remit an application to the original decision-maker for reconsideration (subsection 150(2));
- execute consent orders without proceeding to review the decision;
- dismiss an application that the panel considers to be frivolous or vexatious; or
- conduct a review "on the papers" (without proceeding to conduct an oral hearing).

#### **Power to reallocate SFRs**

8. The Panel's task upon review is to apply the relevant sections of the management plan as to how SFRs are to be distributed or allocated to eligible persons.
9. A decision taken to alter the SFRs allocated to one party will impact each of the other parties. For example, in some management plans (eg. the ETBF), a *fixed* quantity of SFRs are to be distributed amongst eligible persons. In those plans where the number of SFRs that are allocated are fixed, an adjustment to the applicant's entitlement will necessarily adjust the entitlement of the other parties.
10. Similarly, if the Panel considers, when conducting its review of a particular decision, that AFMA had, in purported application of the relevant management plan, incorrectly granted an SFR to a party (whether or not that party is the applicant in the proceeding), this will impact on the applicant and each of the other parties in a proceeding. In that circumstance, the Panel can correct that error by correctly applying the plan. Of course, the Panel should

ensure, prior to correcting that error that the person affected by the decision is afforded an opportunity to comment.

11. The Panel must, when making its decision, apply the procedures set out in the relevant Management Plan. The Panel cannot *arbitrarily* adjust or allocate SFRs amongst eligible persons.

### **The Jurisdiction of the Panel**

12. The Panel's jurisdiction is conferred by section 142 of the FMA. Section 142 provides that the function of the Panel is to review decisions "mentioned" in section 23(1) of the FMA. Section 23(1) refers to decisions made under section 29(3) of the FMA. Therefore, the Panel only has jurisdiction to review decisions made under section 29(3).

Section 143 sets out how an application is to be made to the Panel. A person who is dissatisfied with a decision reviewable under section 142 and was registered under section 26 in relation to the grant of a fishing right to which the decision relates, may apply to the Panel for a review of the decision. The application must:

- be brought within 14 days after notification of the decision by AFMA (or the Joint Authority);
- be in writing;
- specify the decision which is sought to be reviewed; and
- include details of the reasons why the review is sought.

The Panel loses its jurisdiction to review a decision under section 29(3) once AFMA has exercised its final power to grant under section 31 of the FMA.

13. If the lack of information in the application for review makes it difficult to determine whether the Panel has jurisdiction to consider the application, the applicant should be invited to clarify their application.

In cases where the Panel considers that it has no jurisdiction to review a decision (or the lack of information in the application for review makes it difficult to determine whether the Panel has jurisdiction to consider the application), the Panel should write to the applicant:

- stating that, under section 142 of the FMA, the Panel's jurisdiction is limited to reviewing decisions made under section 29(3) of the FMA;
- expressing the view that it appears that the Panel does not have jurisdiction to consider the application; and
- inviting the applicant to explain why the Panel does have jurisdiction to consider the application. If the applicant is unable to demonstrate that the Panel has jurisdiction, the Panel should write to the applicant stating that it has determined that it does not have jurisdiction to consider the application.

The panel does not need to conduct an oral hearing and does not need an express statutory power to "dismiss" an application that it does not have power to review.

14. Where the Panel does have jurisdiction to consider an application, the Principal Member can only "dismiss" an application without proceeding to a final hearing in accordance with section 152 of the FMA. The power to dismiss in section 152 only arises when the Principal Member is satisfied that the Applicant for review does not intend to proceed with the application.

## Frivolous or vexation applications

15. Unlike other tribunals, the Panel has no express power to dismiss frivolous or vexatious applications for review. In other jurisdictions, an application may risk being dismissed as frivolous or vexatious if it is so untenable that it cannot possibly succeed, or if no purpose would be achieved by continuing with the application. Subject to section 152 of the FMA, the Panel must consider, and make a decision on, each and every application that it has jurisdiction to determine. Section 152 confers a power on the Panel to dismiss an application where the Principal Member is satisfied that the person does not intend to proceed with the application. When the matter is so dismissed, the application is taken to be withdrawn (subsection 152(2)).

## Dealing with 'exceptional circumstances'

16. An Applicant may wish to argue that, by reason of certain events, such as illness, serious misfortune, administrative error etc. his or her circumstances were exceptional and that but for illness or misfortune, he or she would have been entitled to a greater number of SFRs under the relevant management plan.
17. The Panel, in reviewing a decision of AFMA or a Joint Authority, must apply the same criteria as AFMA or the Joint Authority must first have applied. This means that where a management plan contains certain criteria for the grant of SFRs, such as "exceptional circumstances" tests, those criteria may be taken into account and applied by the Panel in reviewing its decision. Where a plan of management contains no such criteria to allow AFMA or the Joint Authority to take into account any exceptional circumstances, the Panel is not permitted to have regard to "exceptional circumstances" put forward by the person seeking review by the Panel.
18. In considering whether "exceptional circumstances" exist, the Panel must have regard to:
  - the definition of "exceptional circumstances", or a similar term, contained in the relevant management plan;
  - the facts and circumstances submitted by the Applicant fall within the meaning of "exceptional circumstances"; and
  - whether those facts and circumstances fall within the test of "exceptional circumstances" as provided for in the relevant management plan.
19. The Panel is obliged to take into account relevant evidence and submissions of the Applicant regarding such matters.
20. The Panel must exercise its discretion and decide for itself whether, in all the circumstances, a person falls within the exceptional circumstances criteria contained in the relevant management plan (see *Kennedy v AFMA* [2009] FCA 1485 for a recent judicial consideration of the "serious misfortune" test).
21. In the past, the AAT had been asked to apply "exceptional circumstances" tests in the context of fisheries management legislation. The most helpful decision is *Kiely and Australian Fisheries Management Authority, Re* (2002) 68 ALD 617 ('the *Kiely case*') which considers *Glendon Lane Pty Ltd & Australian Fisheries Management Authority, Re* (1994) 36 ALD 376. In the *Kiely case*, the AAT was asked to review a quota allocation by reason of what was asserted to be 'exceptional circumstances'. The opportunity to vary the quota allocation to fishing operators by reason of 'exceptional circumstances' became the policy of AFMA. The policy itself was not binding upon the AAT, but it was found to be persuasive by reason of its reflection of the will of Government. It was a policy that affected all relevant fishing operators and the AAT stated that 'principles of fairness and good management dictate that there should be consistency in the application of policy'.

22. In applying a test of “exceptional circumstances”, there are also some guiding principles of statutory interpretation which are important to bear in mind. Some relevant principles include the following:
- in applying the ‘exceptional circumstances’ test, regard is to be had to the purpose or object of the fisheries management legislation and relevant management plan (section 15AA of the *Acts Interpretation Act 1901*) and a construction that would promote the purpose or object underlying the legislation and relevant management plan (whether that purpose or object is expressly stated in the Act or not), is to be preferred to a construction that would not promote that purpose or object;
  - if general words are used, they will be given their plain and ordinary meaning unless the contrary intention can be demonstrated having regard to the fisheries management legislation and relevant management plan; and
  - section 15AB of the *Acts Interpretation Act 1901* sets out rules as to the use of parliamentary and extrinsic materials in the interpretation of statutes and delegated legislation. Regard may be had to any explanatory memorandum or any relevant report of a committee of parliament before the provision was enacted.
23. There may be other relevant legal assumptions that apply in the particular circumstances of an Applicant seeking to rely upon an 'exceptional circumstances' test. Legal advice may be sought if there is any uncertainty.

## **4. THE DECISION**

### **The law of precedent**

1. The Panel is not bound to follow its earlier decisions or that of the AAT, but it is bound to follow relevant Court decisions. However, good practice recognises the desirability of uniform decision making. Generally, the Panel will follow earlier decisions unless it is satisfied that the earlier decision is manifestly wrong or that the case can be distinguished because the facts are not sufficiently similar.

### **Power to dismiss application**

2. The Principal Member may only dismiss an application where a person makes an application to the Panel for review of a decision and the Principal Member is satisfied, either having communicated with the person or having made reasonable attempts to contact the person and having failed to do so, that the person does not intend to proceed with the application (subsection 152(1) of the FMA).
3. If the Principal Member dismisses an application under subsection 152(1), the application is taken to have been withdrawn at the time when the application is dismissed (subsection 152(2) of the FMA).

### **Panel decision following hearing**

4. The Panel shall make its decision by majority and may:
  - affirm the decision;
  - vary the decision; or
  - set the decision aside and substitute a new decision (subsection 150(2)(c) of the FMA).
5. Where the Panel makes its decision in relation to an application for review, the Panel is to prepare a written statement:



- setting out the decision of the Panel on the review; and
  - setting out the reasons for the decision (subsection 160(1) of the FMA).
6. The Panel must give each party to the proceeding a copy of the statement as soon as practicable after the decision concerned is made. It would be appropriate to enclose the statement with a covering letter outlining the right to appeal to the Federal Court of Australia on a question of law in accordance with section 161 of the FMA.
  7. The decision made by the Panel takes effect when the Applicant is notified of the decision under subsection 160(2) of the FMA.

## 5. REVIEW OF DECISION MAKING

1. The FMA provides fishers with various avenues to review administrative decisions made by AFMA. These include requesting AFMA reconsider a decision, or appealing to the AAT, Federal Court or the Panel to review the decision. Which option is chosen will depend on the section of the FMA under which the decision was made.

### Scope for review

2. A person affected by the actions of a person or body exercising power under a law made by the Parliament may challenge that action under the branch of law known as administrative law. Broadly speaking, the scope for challenge applies to the Panel in the same way as it applies to the actions of any other administrator acting under Commonwealth legislation.
3. The two potential avenues of challenge of which the Panel needs to be aware are:
  - an application to the Federal Court of Australia, asking it to exercise its jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act); and
  - a complaint to the Commonwealth Ombudsman, seeking an investigation into administrative action.

### Judicial review

4. Under the ADJR Act, the Federal Court has jurisdiction to review the legality of the Panel's action. The grounds of review which the Federal Court may entertain are set out in the ADJR Act and include the following:
  - the decision concerned was not authorised by the particular Act;
  - the decision involved an error of law (for example, because the decision maker misapplied the statute under which the decision was made);
  - a breach of the rules of procedural fairness (often referred to as 'natural justice') occurred in connection with the making of the decision;
  - procedures that were required by law to be observed in connection with making the decision were not observed;
  - irrelevant considerations were taken into account in making the decision or there was a failure to take relevant considerations into account; or
  - the exercise of power by the decision maker was so unreasonable that no reasonable person could have so exercised it.
5. Under the ADJR Act, the Federal Court has jurisdiction to review a 'decision' and 'conduct' leading to the making of a decision (sections 5 and 6). It may also review a failure to make a decision (section 7).

6. A 'decision' is made when the Panel makes its decision. Case law suggests that the Panel's proceedings leading to the decision are reviewable under the ADJR Act as conduct leading to the making of a decision. This was reinforced by the decision handed down by the High Court in the case of *Griffith University v Tang* (2005) 213 ALR 724. In that case, the High Court held that the determination of whether a decision is 'made under an enactment' involves two criteria: first the decision must be expressly or impliedly required or authorised by the enactment, and secondly, the decision must itself confer, alter or otherwise affect existing or new legal rights or obligations derived from the general law or statute.
7. The effect of the decision in that case is to limit those decisions which can be reviewed by the Federal Court to those which are expressly or impliedly required or authorised by a relevant enactment. A decision made by the Panel in relation to an application for review is a decision under an enactment.
8. The remedies a Court may grant in judicial review include:
  - granting an injunction to stay proceedings;
  - setting a particular decision aside; and
  - declaring the rights of parties.
9. A Court will uphold the Panel's decision if it considers the decision was legally sound.

### **Effect of judicial review application on Panel proceedings**

10. It is not appropriate for the Panel to suspend its proceedings merely because the Applicant brings an application to the Federal Court. The Panel should continue its work until such time, if ever, as the Court otherwise orders.

### **Ombudsman**

11. The Ombudsman may investigate complaints of maladministration in relation to actions or decisions made about Australian Government departments' and authorities' to see if they are wrong, unjust, unlawful, discriminatory or just plain unfair. The Ombudsman may also recommend procedural change or other remedies for those affected by defective administration, and may act to improve public administration generally.
12. If the Ombudsman concludes that action taken by AFMA or the Panel was contrary to the law or was unreasonable or oppressive, it could recommend that some action be taken to rectify the problem.
13. The Ombudsman conducts investigations in private and operates in a relatively informal way. Complainants may make use of the Ombudsman's services free of charge.

### **Federal Court**

14. An appeal of the Panel's decision may be made to the Federal Court but only on a question of law (section 161 of the FMA) and only by a party to the proceeding before the Panel.
15. In contrast to the remedies available from the Ombudsman, who only makes recommendations, the Federal Court has the power to uphold or set aside the decision, or refer the decision back to the Panel to be reconsidered according to law.

## PART B – PROCEDURAL GUIDELINES

### 6. PANEL PROCEDURES

#### Application for review

1. In accordance with section 143 of the FMA, a person whom:
  - is dissatisfied with a decision which is reviewable under section 142 of the FMA; and
  - was registered under section 26 of the FMA in relation to the grant of a fishing right to which the decision relates;may, within 14 days after being notified by AFMA or by the Joint Authority of the decision, by written notice apply to the Panel for review of the decision (in accordance with Form 2 *Application for Review of Decision to Grant a Fishing Right* at **Appendix A**).
2. An application for review should include details of:
  - the decision in respect of which the review is sought; and
  - the reasons why the review is sought.
3. Each member of the Panel constituted for the purposes of a review must carefully read and consider the application for review.
4. The Panel must be satisfied that it has jurisdiction to review the application. At the very least, in accordance with subsection 143(1) of the FMA, the Panel must be satisfied that:
  - there has been a decision made by AFMA or a Joint Authority;
  - the decision is reviewable under section 142 of the FMA; and
  - the Applicant was registered under section 26 of the FMA in relation to the grant of a fishing right to which the decision relates.
5. Where the Panel is not satisfied that it has jurisdiction to review the application, the Panel should write to the applicant indicating a tentative view that it does not appear to have jurisdiction to determine the application and invite the Applicant to explain why the Panel does have jurisdiction to consider the application.
6. The Panel may elect to conduct an oral hearing on the issue of jurisdiction.
7. If the Applicant is unable to demonstrate that the Panel has jurisdiction, the Panel should advise the applicant that it has determined that it does not have jurisdiction to consider the application.

#### Applicant may withdraw application

8. An Applicant for review of a decision may withdraw the application at any time (subsection 151(1) of the FMA).
9. A withdrawal may be made by sending or delivering written notice of withdrawal to the Panel (subsection 151(2) of the FMA).

## Notification obligations

### Parties to the hearing

10. All persons registered under section 26 of the FMA in relation to the grant of a type of fishing right to which the decision relates must be notified of an application for review and automatically become parties to that application. A party is **not** required to file an appearance and a failure to do so does not affect the Panel's statutory obligation to:
  - give notice to each party of the making of an application (144(1)(b));
  - notify each party of the date fixed for the hearing of the application (145(2)); and
  - provide each party with a copy of the written statement prepared in accordance with section 160 (the reasons for the Panel's decision).

### Notice given to the parties

11. The Principal Member must, as soon as practicable, give written notice to AFMA or the Joint Authority, whichever made the decision, of the making of the application, in accordance with Form 3 *Notification Under Subsection 144(1) of an Application for Review of a Decision to Grant a Fishing Right* at **Appendix B** (subsection 144(1)(a) of the FMA). He/she must also give written notice to each other person who is registered under section 26 of the FMA in relation to the grant of a fishing right to which the decision relates. The notification is made using Form 8 *Notice to Persons Registered Under Section 26 of an Application for Review of a Decision to Grant a Fishing Right* at **Appendix C** (subsection 144(1)(b) of the FMA) (see section 'Procedure for dealing with multiple parties').
12. AFMA or the Joint Authority (whichever body made the decision) will provide the Panel with a list of persons who were registered under section 26 of the FMA in relation to the grant of a fishing right to which the decision relates. The Panel is under no obligation to notify any person other than those who were registered by AFMA under section 26 of the FMA in relation to the grant of a fishing right.
13. In accordance with subsection 144(3) of the FMA, a person, including AFMA or a Joint Authority, to whom a notice of the application is given in accordance with Forms 3 and 4 set out in **Appendix B** and **Appendix C** respectively, is a party to the proceeding before the Panel.
14. Persons who are registered under section 26 of the FMA in relation to the grant of a fishing right to which the decision under review relates, should be invited to provide an address for service and should be advised to notify the Registrar of the Panel of any changes in address for service, to ensure those persons are afforded procedural fairness in relation to the conduct of the review (refer to Form 4 at **Appendix C**).

### Notice given to AFMA or a Joint Authority

15. When AFMA or a Joint Authority is notified of an application for review, in accordance with subsection 144(2) of the FMA, within 14 days of being so notified, give to the Principal Member a copy of:
  - the reasons for the decision; and
  - each other document or part of a document that is in the possession or control of AFMA or the Joint Authority and is considered by it to be relevant to the

review of the decision, including, if required by the Panel, documents relating to the general state of the fishery to which the decision under review relates.

### Procedures for dealing with multiple parties

16. Proceedings before the Panel can potentially involve many hundreds of parties. This is because of the notice provisions contained in subsection 144(1) of the FMA (see **Notification of Obligations**, page 19). A person to whom a notice is given under subsection 144(1) of the FMA is a party to the proceeding without the party being required to do anything more (section 144(3) of the FMA).
17. In some applications, it will be necessary for the Panel to review the whole allocation of SFRs to which the appeal decision relates. In order to afford procedural fairness to all of the parties to the application, it is important to ensure the person(s) registered under section 26 of the FMA in relation to the grant of a fishing right to which the decision relates (**parties**), receives the notice set out in Form 8 *Notice to Persons Registered Under Section 26 of an Application for Review of a Decision to Grant a Fishing Right* at **Appendix C**. The Panel Registry should send the notice and any subsequent notices by certified mail or hand delivered by courier with a receipt or confirmation of delivery.
18. The large number of possible parties has the potential to create practical difficulties for the Panel. The FMA states the Panel must:
  - notify each party of an application (144(1)(b));
  - notify each party of the date fixed for the hearing of the application (145(2)); and
  - provide each party with a copy of the written statement prepared in accordance with section 160 (the reasons for the Panel's decision).

Notwithstanding the above legislative requirements, there are some steps that the Panel may consider taking to reduce the administrative burden created by the large number of parties. These include:

- using audio conferencing facilities to enable the participation of multiple parties;
- asking the persons registered under section 26 of the FMA to consider nominating a single representative to represent them in the proceedings;
- asking the persons notified to indicate whether they wish to be provided with a copy of the evidence and submissions made by the Applicant and the original decision maker or whether they would be content to simply be notified of the outcome of the application (see Form 7 Notice of Appearance at Appendix D); and/or
- carefully explaining the nature of the review function performed by the Panel and indicating what will happen if the person does not actively participate in the proceedings.

Where the Panel does not have jurisdiction to consider an application, it is not an application made in accordance with section 143 of the FMA. Therefore the Panel does not need to notify the other "parties" of the "application", fix a date for substantive hearing, or provide a written statement under section 160 of the FMA as would usually occur.

### Notice of appearance

19. The *Notice of Appearance* form is at **Appendix D**. A *Notice of Appearance* is not prescribed by the legislation but is an option available to a party to the review. A

party who is notified of an application for review and wishes to actively participate in the application may file a *Notice of Appearance* with the Registrar and include details of an address for service.

20. This form provides the party with option to indicate the level of involvement the first option to indicate that they “do not intend to participate in any hearing before the Panel and do not wish to be kept informed about the hearing of the application” but they would however “like to receive a copy of the Panel's decision”. This document makes it clear to recipients that they do not have to actively participate in the review although parties will receive notification of the date, time and place of the hearing irrespective of the response provided on the *Notice of Appearance* form.
21. The party may indicate on the *Notice of Appearance* form the extent to which he or she wishes to be involved in the hearing, for example:
  - whether they intend to participate in the hearing. If so, the Notice of Appearance should list each member and an address for service;
  - whether the individual or group intends to make written submissions only or oral and written submissions (in the event that an oral hearing is held); or
  - if they do not wish to actively participate in the proceedings by making written or oral submissions, whether they wish to have their interest in the proceedings noted and receive the Panel decision and its reasons in accordance with section 160 of the FMA.
22. Persons other than those who enter an appearance should be treated as persons who wish to participate fully in the hearing, because there is no legislative requirement for parties to lodge the *Notice of Appearance* at **Appendix D**.

### **Directions hearing**

23. The legislation permits (but does not require) the Panel to conduct a directions hearing. Where the application for review involves multiple parties, a directions hearing may be convened to outline the procedure to be followed at or in connection with the hearing of an application (subsection 147(2) of the FMA) and ensure that all parties are ready to proceed to hearing.
24. A directions hearing is a short hearing to make directions about the next steps in a review. At a directions hearing, the Panel may seek to:
  - identify and assess the factual and legal issues in dispute;
  - discuss with the parties what the next steps may be, including the time frame for filing any written submissions;
  - order the filing and service of expert reports by a specified date; or
  - make an order about the next steps and what must be done to prepare for this.
25. A directions hearing would usually take place before the hearing of an application commences in order to give parties an opportunity to ask any questions about the Panel hearing or the process to be followed in determining the application. If necessary, a directions hearing may also take place when the hearing has commenced. This can be done through a teleconference involving the Applicant and Members.
26. The Principal Member or a member authorised by the Principal Member may give directions as to the procedure to be followed (subsections 147(2)(a) and (b) of the FMA). A direction may be varied or revoked at any time by any member empowered to give such a direction (subsection 147(3) of the FMA).

## Oral or paper hearings

27. Whilst there is no express statutory power to conduct a hearing "on the papers" (as exists in other merits review schemes) the Panel may nonetheless consider whether it is appropriate to do so, taking into account the issues raised in the application and the views expressed by the parties. The Panel may elect to conduct a directions hearing to canvass this issue with the parties.

Usually, a 'paper hearing' refers to a process where the parties agree to dispense with an oral hearing and make submissions in writing only. However, it is possible to use both papers and an oral hearing. For instance, the papers could be used to settle a preliminary matter before the full oral hearing. The Panel may at its discretion accept from a person, instead of oral evidence, a written statement verified by a statutory declaration (section 146(5) of the FMA).

28. The decision to proceed with an oral or written hearing should take into account a number of factors:
- where there are no facts in dispute, only narrow legal issues - an oral hearing may not be required;
  - if there are facts in dispute, there may not be a need for sworn or affirmed oral evidence. This will depend on the nature of the facts in dispute. An alternative to oral evidence is the use of a written statement verified by statutory declaration. However, if a witness provides written evidence affirmed by statutory declaration, procedural fairness may require another party to the proceeding to be afforded the opportunity to cross examine that witness.
  - if credibility is at issue, or if personal information that is required to determine the application is not obtainable through documentary evidence, then an oral hearing may be necessary; or
  - whether the parties consent to a hearing on the papers.

If the Panel does decide to hear the matter "on the papers" without conducting an oral hearing, it should say so in its notice to the parties fixing the time, date and place for the hearing eg. "The Panel will determine the application 'on the papers'. Any submission that the parties wish to make to the Panel must be made in writing (only) and received by the Panel prior to *a date the Principal Member has stipulated*'.

29. Where an oral hearing is conducted, section 149 of the FMA provides that oral evidence is to be taken in public, unless the Panel is satisfied that it is in the public interest to direct that particular oral evidence, or oral evidence for the purposes of a particular review, is to be taken in private (issues relating to dealing with confidential information is discussed on page 24).
30. The Panel may also give directions about the persons who may be present when oral evidence is given (subsection 149(3) of the FMA).
31. It is general practice to hold any face-to-face hearings in a capital city.

## Notice of hearing

### Corresponding with the Applicant and other parties about the hearing of the review

32. Form 4 the *Notification Under Subsection 145 (2) of the Date, Time and Place of a Hearing of an Application for Review of a Decision to Grant a Fishing Permit* (**Appendix E**) is prescribed by the FMA. This is used to advise all parties (including the Applicant) about the hearing. The letter accompanying this form should outline

the potential consequences for the Applicant or another party of failing to appear at, or make a submission relevant to the hearing.

33. A timetable of the parties wishing to be heard and details of their witnesses may be prepared and circulated prior to the commencement of any substantive hearing.

## **Producing documents and summoning witnesses**

### Notice to produce documents

34. The Panel may require the Applicant or any other person the Panel believes to have documents; in possession, custody or control of, or be able to obtain; that are relevant to the matters referred to the Panel, to produce documents to the Panel (subsection 146(2) of the FMA). The form of notice requiring documents to be produced under subsections 146(2)(a) or 146(2)(b) of the FMA is at Form 5 *Summons Under Subsection 146(2) to Appear Before the Statutory Fishing Rights Allocation Review Panel (Appendix F)*.
35. The Panel may require production of documents specified either by description (for example, 'all logbooks in relation to a specified kind of fish in a specified area of water for June') or by content (for example, 'any documents recording a kind of fishing activity in a specified area of water'). The Panel may also ask for relevant information when questioning a witness or an Applicant during a hearing.
36. If a person intentionally refuses or fails to comply with a notice under section 146 of the FMA, that person may be guilty of an offence under section 159 of the FMA and the Principal Member should be advised so relevant action may be taken. The action could include notifying the Director of Public Prosecutions of the contravention of section 159 of the FMA with a penalty of imprisonment for 6 months.

### Dealing with confidential information

37. Section 149 of the FMA provides that oral evidence is to be taken in public, unless the Panel is satisfied that it is in the public interest to direct that particular oral evidence, or oral evidence for the purposes of a particular review, is to be taken in private.
38. Where the Panel is satisfied that it is in the public interest to do so, the Panel may, by order:
- direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present (section 149 of the FMA);
  - give directions prohibiting or restricting the publication of the names and addresses of witnesses appearing before the Panel (section 155 of the FMA);
  - give directions prohibiting or restricting the publication of evidence given before the Panel, whether in public or in private, or of matters contained in documents lodged with the Panel or received in evidence by the Panel; or
  - give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Panel, or of the contents of a document lodged with the Panel or received in evidence by the Panel, in relation to the proceeding.
39. In considering whether the hearing of a proceeding should be held in private; or whether publication, or disclosure to some or all of the parties, of evidence given before the Panel, or of a matter contained in a document lodged with the Panel or



received in evidence by the Panel, should be prohibited or restricted, the Panel should pay due regard to:

- the public policy desirability of proceedings before the Panel being held in public;
- the public policy desirability of making available to all the parties evidence given before the Panel and the contents of documents lodged with the Panel or received in evidence by the Panel; and
- any reasons given to the Panel as to why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted in whole or in part.

40. A party may apply for a confidentiality order at any stage during the hearing of the application by the Panel.
41. As soon as a request for a confidentiality order is made, the Panel's file should be handled with extreme care to make sure that the information covered by the request remains confidential until the Panel decides whether or not to make a confidentiality order.
42. All staff handling the Panel documents must be aware of their obligations and be particularly careful where confidentiality orders are made. If a request for a confidentiality order relates to documents, those documents should be placed in an envelope and marked 'confidentiality order sought' and the envelope should be sealed, signed and dated. The documents can then be stored on the file or in a safe and the file should be marked on the outside with 'confidentiality order sought' in large, red letters. Panel members dealing with the application will need access to the documents when dealing with any aspect of the application.
43. There are a number of sanctions which can be imposed on people who breach the confidentiality and privacy provisions in a number of Acts. These are summarised in the following table:

<b>Action</b>	<b>Cause</b>	<b>Sanction</b>
Civil action	breach of confidence	damages, injunction
<i>Privacy Act 1988</i>	unauthorised disclosure of information	injunction
<i>Crimes Act 1914</i> section 70	unauthorised disclosure of information by Commonwealth officers	imprisonment for up to 2 years

44. When a confidentiality order for documents is refused by the Panel, the documents are returned to the file and the parties may have access to the documents.

Civil action for breach of confidence

45. An Applicant or another person affected by a breach of confidence could take civil action for breach of confidence against the Commonwealth, or a Panel or staff member personally, if unauthorised use is made of any confidential information that is relied upon for the purposes of the hearing.
46. The civil action could seek damages from the person sued and/or an injunction (for example, to prevent further disclosure or use).

### Privacy Act

47. The *Privacy Act 1988* applies to Commonwealth agencies including the Panel.
48. It imposes obligations concerning the storage, use and disclosure of any personal information.
49. Generally, personal information must:
  - only be solicited for authorised uses;
  - be stored securely;
  - only be used for the purposes for which it was collected; and
  - must not be passed on without authority.

### Crimes Act

50. It is an offence, under section 70 of the *Crimes Act 1914*, for current and former Commonwealth officers to disclose, without authority, confidential information or documents gained in the course of their duties (penalty up to 2 years imprisonment).
51. Panel members would be Commonwealth officers for this purpose.

### Summoning of witnesses by the Panel

52. The Panel can summon a person to:
  - appear at a hearing to give evidence; and
  - produce any documents which are referred to in the summons.
53. Form 5 *Summons Under Subsection 146(2) to Appear Before the Statutory Fishing Rights Allocation Review Panel (Appendix F)* is prescribed by the Fisheries Management Regulations 1992.
54. A person served with a summons to appear at a hearing must not, without reasonable excuse, fail to appear at the hearing.
55. A person summoned is required to attend each day of the hearing. The Principal Member should formally excuse such a person from further attendance once the Panel and the Applicant have finished questioning that person.
56. If a person summoned to attend refuses or fails to comply with the summons, that person may be guilty of an offence under section 156 of the FMA and the Principal Member should be advised so relevant action may be taken. The action could include notifying the Director of Public Prosecutions of the contravention of section 156 with a penalty of up to 30 penalty units.
57. If the Applicant or other party wants to introduce an expert, the Panel should require the Applicant or other party to obtain and serve a written report from that expert.
58. The Panel may at its discretion accept from a person, instead of oral evidence, a written statement verified by statutory declaration (subsection 146(5) of the FMA).

### Fees for persons summoned to give evidence

59. A person (other than a party to a proceeding) who is summoned to appear before the Panel to give evidence is entitled to be paid, in respect of his or her appearance as a witness, fees and allowances for expenses incurred in relation to the appearance.

60. Where a party to a proceeding notifies the Panel that they want the Panel to hear evidence from a person (who is not a party to the review), the fees and allowances of the person summoned to give evidence are to be paid by that party. In any other case, the fees are to be paid by AFMA (section 158 of the FMA).
61. The fees and allowances which are payable to a person who is summoned to give evidence before the Panel are to be determined by the Panel or by the Principal Member, in accordance with the schedule of fees which is currently applicable under the Administrative Appeals Tribunal Regulations in relation to an appearance under the *Administrative Appeals Tribunal Act 1975* (section 158 and the FMA and regulation 28 the Fisheries Management Regulations 1992).

#### Schedule of witness fees and allowances for expenses

62. A person summoned to appear as a witness before the Panel because of his or her professional, scientific or other special skill or knowledge must be paid:

- if the person is remunerated in his or her occupation by wages, salary or fees — an amount equal to the amount of wages, salary or fees not paid to the person because of his or her attendance for that purpose; and
- in any other case — an amount of not less than \$95, or more than \$475, for each day on which he or she attends.

63. A person summoned to appear as a witness, other than a witness referred to in paragraph 64, before the Panel must be paid:

- if the person is remunerated in his or her occupation by wages, salary or fees — an amount equal to the amount of wages, salary or fees not paid to the person because of his or her attendance for that purpose; and
- in any other case — an amount of not less than \$54, or more than \$89, for each day on which he or she attends.

64. A person summoned to appear as a witness before the Panel must be paid a reasonable amount for:

- transport between the usual place of residence of the person and the place that he or she attends for that purpose; and
- if he or she is required to be absent overnight from his or her usual place of residence — meals and accommodation.

## 7. AT THE HEARING

### General

1. The Panel's consideration is limited to the decision under review specified in the Applicant's application for review.
2. The Panel may for the purposes of reviewing a decision, exercise all the powers and discretions that are conferred by the Act on the person or persons who made the decision which is the subject to the application for review (section 150(1) of the FMA).
3. The procedure for conducting a Panel hearing is, subject to any legislative requirements, within the discretion of the Panel (subsection 147(1)(a) of the FMA).
4. The hearing is to be conducted with as little formality and technicality, and as quickly as the requirements of the Act and a proper consideration of the matter before the Panel permit (subsection 147(1)(b) of the FMA).
5. However, nothing in the legislation indicates that the Parliament intended to place the Panel in a position to operate outside the ordinary legal framework for making administrative decisions.

### Opening statement

6. The Principal Member or a member authorised by the Principal Member may make an opening statement. The form of such statement may vary depending on whether the Applicant appears or is represented by a lawyer or other representative, but may take the following form:

the Principal Member:

- introduces the Panel Members;
- **clarifies the role of any person accompanying the Applicant;**
- asks each participant in the hearing to announce their appearances;
- states the issues which appear to be before the Panel, having regard to the application for review;
- outlines the format of the hearing;
- sets out any 'ground rules' for conducting the hearing; and
- asks whether the Applicant or any other party has any initial questions.

### Adviser to the Applicant and other parties

7. The Applicant is entitled to be represented at the hearing by another person (section 148 of the FMA).
8. If the Applicant, or his or her representative, makes a submission on a point of law, the Principal Member may deal with the submission by either accepting it or rejecting it, stating brief reasons for the ruling, or may defer the giving of such reasons.
9. If the submission is rejected, the Principal Member or any other member authorised by the Principal Member should briefly state why.
10. It may sometimes be appropriate to take the point of law on notice for a later ruling after further consideration.

11. The Applicant is responsible for payment of any and all fees and expenses associated with the appearance of a lawyer or other adviser accompanying the Applicant.

### **Exhibits**

12. All material placed before the Panel should be given an exhibit number. This will help identify the material throughout the hearing and in any subsequent Federal Court appeal.
13. All exhibits should be handed to the Registrar for safe keeping during the Panel's consideration and kept by the Registrar for at least 28 days after the Applicant and other parties are notified of the Panel decision in accordance with section 160 of the FMA. Following the expiration of the 28 day appeal period the Applicant and other parties should be advised to make arrangements to collect their documents.
14. The Applicant and other parties should be permitted to inspect the exhibits at all reasonable times.

### **Order of questioning witnesses**

15. Where an Applicant or other party appears in person, the Principal Member may assist the leading of evidence by asking non-leading questions on their behalf in the first instance, but may also ask both leading and non-leading questions after any witness has been cross-examined on behalf of any party to the proceedings other than the party who has called the witness.
16. Subject to the directions of the Principal Member, witnesses may be cross-examined on behalf of the parties to the proceedings other than by the party who has called the witness.
17. At the conclusion of the hearing of the evidence, the Panel may invite the parties to make written submissions as to the findings of fact and the conclusions of law that the parties contend should be made and reached by the Panel.
18. The Panel may also invite the parties to the proceedings to make such submissions partly orally and partly in writing, and may give directions as to the time within which written submissions, including submissions in reply, shall be lodged.

### **Oath or affirmation**

19. The Registrar, Deputy Registrar or any other person authorised by the Principal Member will administer the oath or affirmation to each person (including the Applicant) giving evidence at the hearing (section 146 of the FMA). The AAT requires that before their proceedings, a witness must take an oath or affirmation that the answers he or she will give to questions asked will be true.

### ***Questioning the Applicant or other parties***

20. Questioning the Applicant or other parties should be conducted in a non-aggressive orderly manner.
21. Questions asked of witnesses by parties appearing in person, by representatives and by members of the Panel should always be framed respectfully and courteously.
22. Under the Principal Member's guidance and overall control of the proceedings, Panel members may take an active questioning role. As a general rule, the parties will be afforded the first opportunity to examine/cross examine witnesses prior to Panel Members asking questions on issues under examination.

23. Questions should be short and to the point so that the Applicant or other party is able to give a specific answer.
24. Questions should avoid double negatives and multiple questions.
25. All questions must be relevant to the issues before the Panel. In cases of doubt, the Panel may decide to take evidence subject to assessments of relevance (see section **Legal Rights and Obligations**, page 30 for further information).

### **Questioning witnesses - key points**

26. The objective when a Panel is questioning any witness (including the Applicant) is to elicit oral evidence relevant to the issues being considered.

27. This may include evidence of facts directly relating to the Application (such as a witness' own actions or observations), an expert witness' opinion on a situation, or evidence which throws light on the credibility of any witness (thus helping the Panel assess any conflicting evidence).

To this end, it helps if Panel members:

- are well prepared and understand the relevant areas of questioning;
  - use formal names and titles to avoid familiarity and to get a clear record in the transcript;
  - maintain a calm, detached and objective approach;
  - ask easy questions first (for example, name, address, occupation, etc) to help a witness relax and concentrate;
  - ask precise questions - each question should address only a single item in simple words;
  - bring witnesses politely, but firmly, back to the question if necessary;
  - do not otherwise interrupt - an interruption may enable a witness to avoid an answer or suggest the Panel has a closed mind;
  - repeat the question if it is not answered or the answer is unclear;
  - ask supplementary questions to resolve any uncertainty; and
  - each have before them a copy of any document, diagram or photograph that a party or witness will be questioned about.
- Additionally, the Panel should not :
- ask long questions - it is better to break them up than have the witness unable to remember the detail;
  - ask complex questions, for example, double negative or multi-part questions - the witness may be confused and/or fail to answer all parts;
  - interrupt unless the witness has clearly strayed into irrelevant material;
  - use leading questions (questions which suggest an answer) unless the subject is not in issue (for example, name, address);
  - be drawn into debate with witnesses - it is their evidence and not that of the Panel; or
  - be aggressive - this may seem like bias and will be recorded on the transcript.

## ***Evidence***

28. The Panel may, subject to complying with procedural fairness obligations, inform itself in whatever way it thinks fit. It is not bound by the rules of evidence (subsection 147(1)(c) of the FMA). This means that the Panel can accept evidence which would not be accepted in a court. As such, the Panel is not bound to reject certain types of evidence, for example, hearsay evidence.
29. The Panel should, however, be careful about the weight it gives certain evidence. For example, the Panel should give more weight to 'first hand' evidence over 'second hand' (or hearsay) evidence. This is especially so if the evidence is crucial to an issue before the Panel.
30. The Panel may also decline to receive evidence that it considers not to be relevant. If the evidence is not extensive, it may be more convenient to receive the evidence without prejudice to the right to reject that evidence on the ground of relevance at a later stage.
31. Oral evidence will usually be given in public. However, where the Panel is satisfied that it is in the public interest to do so, it may direct that particular oral evidence, or oral evidence for the purposes of a particular review, is to be taken in private (subsection 149 (2) and(3) of the FMA). This may occur in matters involving public security or intimate personal or commercial in confidence information such as financial matters relating to or more of the parties.
32. The Panel may also give directions as to the persons who may be present when oral evidence is given. In circumstances where an Applicant or other party to the hearing seeks to have evidence heard in private, written applications should be sought from the party outlining the reasons in support of having the evidence heard in private at the earliest opportunity to avoid any delay during the hearing.

## **Witnesses**

33. Refer to previous information in section **Producing documents and summoning witnesses** page 23, regarding the summoning of witnesses and payments due to them.

## **Adjournments**

34. Adjournments are usually taken to seek advice, review progress or consult amongst other members of the Panel.
35. The Principal Member should also allow short adjournments if a witness is distressed, needs to take advice, or to consider their position.

## **Record of hearing**

36. The standard practice has been to record the hearings and have them transcribed. This is not required by legislation.

## **8. LEGAL RIGHTS AND OBLIGATIONS**

### ***Objections***

1. If objections arise, they will usually be on the grounds of relevance.
2. The Principal Member should:
  - note and rule promptly, if possible; and
  - adjourn to discuss or take advice, if necessary.
3. The Principal Member can always undertake to rule later but in the meantime receive the evidence subject to the objection and then to proceed with the hearing.

### **Contempt**

4. It is an offence for a person to obstruct or hinder a member of the Panel in the performance of Panel functions or disrupt a Panel hearing.
5. It is likely that these provisions will at least protect Panel Members from physical obstruction, hindrance or disruption. Whether they will protect them from oral obstruction, hindrance or disruption (for example, refusal to stop speaking or refusal to give responsive or meaningful answers) will depend on the particular circumstances.
6. A person who obstructs or hinders a member of the Panel, or who disrupts a Panel hearing, should be asked to desist and be warned that legal action will be taken if they do not. Such legal action may include referral of the person to police for possible prosecution. Accordingly, details of the obstructive hindering or disruptive behaviour, of warnings, and of any responses should be carefully recorded at the time.



## 9. CONTACT DETAILS AND USEFUL INFORMATION

Principal Member: Mr Christopher Doogan AM

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