

COMMONWEALTH OF AUSTRALIA
Fisheries Management Act 1991

RE: SOUTHERN AND EASTERN SCALEFISH AND SHARK FISHERY (No 2)

**Allocation of Provisional Grant of school, gummy, saw shark and elephant
fish Statutory Fishing Rights.**

STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL

BETWEEN:

TREVOR RAY GILMORE

Applicant

AND:

AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY

Respondent

P J BASTON (PRINCIPAL MEMBER), AND W EDESON (MEMBER)

11 November 2008

ADMINISTRATIVE LAW – Fisheries – Allocation of Provisional Grant of
Statutory Fishing Rights – Statutory Fishing Rights Allocation Review Panel –
Panel’s powers on review.

Evidence Act 1995

Fisheries Management Act 1991

Southern and Eastern Scalefish and Shark Fishery Management Plan 2003

(Dated 5 September 2003, Accepted 23 September 2003)

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

(Dated 1 July 2005, Accepted 12 October 2005)

Acts Interpretation Act 1901

Legislative Instruments Act 2003

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**RE: SOUTHERN AND EASTERN SCALEFISH AND SHARK FISHERY
(No 2) Allocation of Provisional Grant of school, gummy, saw shark
and elephant fish Statutory Fishing Rights.**

STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL

BETWEEN:

TREVOR RAY GILMORE

Applicant

AND:

**AUSTRALIAN FISHERIES MANAGEMENT
AUTHORITY**

Respondent

DECISION AND REASONS FOR DECISION

Decision

1. The application of the Authority to summarily dismiss the application to review the decision of 17 June 2007 is itself dismissed.
2. The Application for Review be set down for mention at 9.00 am Friday 14 November 2008.

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 FM Act”). The Panel is an independent, specialist body that conducts merit reviews of decisions of the Australian Fisheries Management Authority (“the Authority”) or a Joint Authority relating to the provisional allocation of Statutory Fishing Rights (SFRs) under a plan of management. The Panel operates separately from the Administrative Appeals Tribunal (“the AAT”).
2. The Panel has the power to affirm, vary or set aside or substitute a decision made in regard to the provisional allocation of Statutory Fishing Rights under a plan of management.
3. Despite having been established in 1991 there have been only a handful of substantive matters in which the Panel has been called upon to make a determination.
4. By various letters dated 18 June 2007 the Authority advised various eligible fishers, including Trevor Ray Gilmore (“Gilmore”), of the allocation of provisional grants of quota statutory fishing rights in respect of school, gummy, saw shark and elephant fish under the Southern and Eastern Scalefish Fishery Management Plan 2003 (“SESSF Plan”).
5. On 27 July 2007 Gilmore lodged with the Registrar of the Statutory Fishing Rights Allocation Review Panel (“the Registrar”) an Application For Review of Decision to Grant a Fishing Right.

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6. The Authority asks the Panel to summarily dismiss the Application for Review on the basis that the Panel like the Authority does not have any ability to depart from the provisions of the SESSF Plan. In this regard the Authority says that the Panel has no option other than to affirm the decision under review because:
 - (a) in making the allocation decision the decision maker correctly applied s 28(2)(j) of the applicable Management Plan;
 - (b) the Management Plan does not confer any discretion or ability to depart from the formula prescribed in s 28(2)(j) which requires a SFR to be allocated for each quota unit held by an eligible person on the snapshot date of 22 December 2006;
 - (c) Gilmore seeks to have the Panel ignore the plain meaning of the Plan but the Panel is obliged to act in accordance with the Plan and has no power to make a decision inconsistent with it.

7. Upon the application of the Authority and with the consent of Gilmore the Panel has decided to make a determination the Authority's summary dismissal application before proceeding to hear and determine the substantive issues raised in the Application for Review.

8. In order to succeed the Authority has to convince the Panel firstly, that Gilmore has no real prospect of succeeding on all or a part of his claim and secondly, that there is no need for a trial of the claim or part of the claim, then the Panel has the discretion to dismiss the Application for Review. The discretion exists to ensure that the goal of expeditious resolution of proceedings at a minimum of expense is aptly met. If there are matters in genuine dispute, of course, the matter should proceed to a full hearing, but if it is apparent on the material that the Applicant must fail, then it is

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appropriate to give summary judgment and avoid the expense of litigation which has an inevitable ending.

BACKGROUND TO DECISION UNDER REVIEW:

9. On 16 November 2006 the Authority announced its decision to commence the process of granting quota Statutory Fishing Rights (SFRs) for school, gummy, saw shark and elephant fish in the Southern and Eastern Scalefish and Shark Fishery (SESSF). Operators were informed that the 'snapshot date' for the purposes of the grant would be 15 December 2006, subject to imminent amendments to the Southern and Eastern Scalefish and Shark Fishery Management Plan 2003 (the Plan).
10. Amendments to the Plan were not effected until 20 December 2006 under the Southern and Eastern Scalefish and Shark Fishery Management Plan Amendment 2006 (No.2) (T4).
11. On 21 December 2006, by notice published in the Commonwealth Special Gazette No. S233 the Authority invited interested and eligible persons to register for the grant of SFRs under the Plan (T13).
12. On 18 April 2007, Gilmore was notified in writing by the Authority that he had been registered as an eligible person for the grant of SFRs under the Plan as he had satisfied the conditions of registration, namely, that at 5:00am on Friday 22 December 2006 he held one or more units of school shark, gummy shark, elephant fish or saw shark quota units as specified in a condition on a permit and in a Quota Unit register maintained by the Authority (T15).
13. On 18 June 2007, the Authority notified Gilmore in writing of the following (T17):

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- (a) the Authority had now made a provisional grant of SFRs under paragraph 28(2)(j) of the Plan, for the species listed in items 21 to 24 of Schedule of the Plan: school shark, gummy shark, elephant fish and saw shark;
 - (b) the total number of SFRs granted for each of those species;
 - (c) the provisional grant of SFRs to the applicant, and to each other eligible person, as set out in Attachment A to the letter. Attachment A records that the applicant had been provisionally granted 4,352 gummy and 748 school shark quota SFRs.
14. On 27 June 2007, by notice published in the Commonwealth Gazette No. GN 25 the Authority listed the names of persons (including Gilmore) to whom SFRs were to be granted and a summary of those SFRs (T18).

THE PANEL'S FUNCTION

15. By s. 142 of the FM Act the Panel *"has the function of reviewing decisions mentioned in subsection 23(1)"*. That is a reference to *"a decision as to the person or persons to whom the grant of a fishing right in a managed fishery is to be made"*.
16. Division 4 of Pt 3 of the FM Act sets out the ways (some of which such as auction, tender or, ballot are alternative methods) in which a grant is to occur. They include:
- (a) notice of intention to grant under s.24;
 - (b) application for registration as an eligible person for a grant and application for a grant: s.26;
 - (c) decision as to whom a grant is to be made: being the decision mentioned in s.23(1) (determined by reference to s.29 and the Management Plan);

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- (d) notice published in the Gazette setting out the name of the person to whom the fishing rights are to be granted and a summary of the fishing rights: s.23(2); and
 - (e) grant: s 31.
17. By s 150, the Panel may, for the purpose of reviewing a decision, exercise all the powers and discretions that are conferred by the FM Act on the person who made the decision. The decision under review is the decision contemplated by s.23(1) namely the 18 June 2007 decision to allocate school shark, gummy shark, elephant fish and saw shark quota SFRs.
18. The decision as to whom the grant of fishing rights is to be made is informed and to some extent governed by s.29. Putting to one side allocation by auction, tender or ballot, s.29(3) provides that a grant of a fishing right *"is available to the person selected in accordance with the procedures specified for that purpose in the plan of management relating to the grant"*.
19. Section 31 provides that upon the request of a person to whom a grant of a fishing right is available, the Authority must grant the fishing right to that person. The Authority must decide to whom a grant is to be made (and the selection of that person must be "in accordance with the procedures specified" in the Management Plan (s.29(3)). The task of the Authority is to identify the procedures specified in the Plan and make a selection in accordance with them.
20. On review, the Panel must review the decision made under s.23(1). In light of the powers conferred by s.150 of the FM Act it is clear that a review under s.142 connotes a merits review in which the task of the Panel is to arrive at the correct or preferable decision. (*cf Drake v The Minister* (1979) 24 ALR 577) Standing as, it does in the shoes of the Authority, that entails a review of the allocation in accordance with the procedures specified in the Management Plan.

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THE SESSF MANAGEMENT PLAN

21. Section 27 of the Plan specifies the conditions for registration for grants of the various types of SFRs specified in the Plan.

22. Subsection 27(5) of the Plan provides that a person satisfies the conditions for registration as an eligible person for a grant of a quota SFR for a quota species mentioned in items 21 to 24 of Schedule 2 to the Plan - namely, school shark, gummy shark, elephant shark or saw fish - if, immediately before the end of the notice period, the person was authorised to take a number of quota units of that species in the Fishery. The Authority specified the notice period as being 5:00AM on Friday 22 December 2006.

23. Section 28(2)(j) of the Plan provides:
 - (1) This section applies to a person who is registered as an eligible person for grant of a SFR.
 - (2) AFMA must make a provisional grant to a person as follows:
.....
 - (j) if the person is registered as an eligible person for the grant of a quota SFR if the person is registered as an eligible person for the grant of a quota SFR species for each quota unit of that species the person was authorised to take in the fishery in accordance with a permit held by the person Immediately before the end of the notice period.

THE AUTHORITY'S POSITION

THE PANEL CANNOT GRANT THE RELIEF SOUGHT

24. The Authority contends that:
 - Gilmore was registered under ss.27(5) as eligible for a grant of school and gummy shark quota SFRs but was not eligible for the grant in respect of any other species. Gilmore met the eligibility

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criteria for registration because immediately before the end of the notice period (i.e. 5:00am 22 December 2006) he was authorised to take a number of school and gummy shark quota in the fishery. Under the terms of s.143(1) of the FM Act, the Panel is constrained to dealing only with applications made by a person registered under s.26 of the FM Act. The review is therefore restricted to the Authority's decision to grant school and gummy shark SFRs to Gilmore.

- Under paragraph 28(2)(j) of the Plan, as a registered eligible person, Gilmore is entitled to 1 quota SFR for each quota unit of the species he was authorised to take in the Fishery immediately before the end of the notice period.
- In effect Gilmore seeks to have the Panel ignore s.28(2)(j) in his circumstances. However, the Plan does not contain any discretion to be exercised by the Authority about how these SFRs are to be allocated. There are no 'serious misfortune' or 'exceptional circumstance' provisions in relation to the grant of these quota SFRs under the Plan. In other words, there is no formula to be applied that requires calculation, and no other consideration to take into account.
- In calculating the number of quota SFRs to which Gilmore is entitled, the sole criterion the Authority could consider was the number of quota units for a species the Authority was authorised to take in the fishery in accordance with a fishing permit held by him immediately before the end of the notice period. Section 28(2)(j) of the Plan provides for a direct one for one transfer of one quota SFR for one unit of quota held at 22 December 2006. There is no discretion involved.
- Gilmore sought to review his 2001 quota allocation in the AAT. The AAT handed down its decision on 27 September 2005 (T10). Gilmore primarily disputed the methodology used to ascertain his verified catch history for school and gummy shark over the years 1994 to 1997. Prior to the AAT hearing, the

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Authority conceded that there had been a miscalculation of Gilmore's catch history. The AAT varied the decision to reflect this miscalculation. The Authority adjusted Gilmore's quota allocation accordingly.

- Gilmore surrendered a permit as part of the buy back scheme (T1/10 and para 88 of Re: Fischer). He gave evidence before Downes J by telephone in Re Fischer. He contended that the Release he had executed on surrender of his permit prevented the Authority from reducing his quota allocation. He also argued that he should be allocated quota on the basis that his surrendered permit had a market value. This was not accepted by the AAT. Gilmore did not appeal the AAT decision.
- Gilmore now seeks to reventilate these contentions before the Panel. There is no discretion in the Plan to allow the grant of school and/or gummy shark SFRs other than on quota holdings as at 22 December 2006. This application is therefore totally misconceived.

MR. GILMORE'S POSITION

25. In his statement of facts and contentions of 10 November 2007 Gilmore stated his position on this basis:

My application for review can be broken down into two entirely separate issues:

Issue 1

In October 2004 I received a letter from AFMA (signed by Margot Sachse), see attachment (1).

I agreed to this letter which allocated T.R. Gilmore
2004 Units
4545 Gummy and 797 School

AFMA informed me at the snap-shot date for SFR's, my unit holdings were 4352 Gummy and 748 School.

Approximately one week (late July) after I had submitted my appeal to the review panel, I received a phone call from Margot Sachse (AFMA) to tell me there was a mistake in my snap-shot allocation. I replied that I was sorry but I had already submitted my request for a review.

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I rang Margot Sachse (AFMA) on Monday 5th November, to inquire if this part of my request for review could be sorted out outside the Panel. The answer was – sorry, but no, it should now go through the Panel process.

Conclusion: Probably a simple transfer of figures error somewhere. Easily corrected by Review Panel, to reflect what was agreed to in the letter dated 21 October 2004:

4545 Units Gummy
797 Units School

An addition of 193 Units Gummy and 49 Units School to the snap-shot figures.

Issue 2

This is a far more complex issue which involves the stripping of 16% of my initial unit allocation after a court case (Fischer v AFMA).

When surrendering my authority to the buy back in 2001, I was assured that it would not impact the allocation of school or gummy shark quota to myself, whether quota was issued as units, on catch history, number of nets, or authorities.

At that stage it had not been decided how quota was to be determined. When I signed the agreements in 2001, I believed I only relinquished the rights to future quota allocation of all species *except* School and Gummy shark.

Firstly, on 6/2/2001 (Attachment (2) Application to surrender Permits – last paragraph:

“I further acknowledge that my having held permits in the Southern Shark Fishery and South East Non Trawl Fishery, or the catch history associated with such permits, will not be a consideration in any allocation of quota decisions apart from decisions in relation to the grant of quota for school & gummy shark.

Secondly, on 6/2/2001 SSFIDP Deed of release (copy attached – marked attachment (3)

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‘The recipient shall not at any time after . . . rely in any way on catch history associated with the Commonwealth S.S.F. permit or Commonwealth South East Non Trawl Fishery Permit as gear access rights formerly held by the Recipient other than for the purpose of being granted School and Gummy Shark ITQ’s’

“ other than for the purpose of being granted School and Gummy shark ITQ's in relation to the Commonwealth SSF Permit and State Shark Authorisation formerly held by the Recipient.’

Surely the Deed of Release I signed – Attachment (3) is a legally binding document, not only on myself but also on AFMA. Clearly the intent is that the restructure buy out was not to have any influence on the allocation of quota for School and Gummy shark, whichever way it was to be allocated.

See attachment (4), Southern Shark Fishing Working Group – Issues Paper. Clearly the Terms of Reference for the Restructure were to come up with a structure system:

1. Before quotas were introduced.
2. That did not impede or assist fishermen’s quota allocation.

See Attachment B of AFMA’s evidence – page 24 No 67 – middle paragraph:

“they gave up their fishing permits, but retained the right to allocation of quota”

AFMA’s argument is that I surrendered my permit to buy back, and so lost any right to allocation to the permit. If the Fischer was 100% successful using their rationale, I would have lost all my quota unit allocations. They fail to take into account that permit holders who did not surrender their permits, still retained that valuable asset. Recent history shows *how* valuable – several surrendered for over \$100,000, to believe, in excess of one million dollars.

All I am asking for is to be treated with fairness, with particular emphasis to the actual intent of the buy back (Southern Shark Industry Development Program).

By my best reckoning my provisional allocation of the SFR’s should be:

5429 gummy
951 school

T. R. GILMORE

26. The Authority accepted the position contended by Gilmore that following Mr Gilmore’s AAT matter the Authority was obliged to make adjustments to his quota entitlements. The Authority also

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concedes that it wrote to Gilmore on 21 October 2004 and informed him of his recalculated quota and advised him that the Authority records would be adjusted accordingly. The Authority conceded that for some reason this adjustment did not occur and the 18 June 2007 allocation was made on inaccurate information.

27. Notwithstanding these concessions the Authority contended that¹:

“20. As at the end of the ‘notice period defined in s.28(3) of the Plan (22 December 2006) the number of school and gummy shark units specified as a condition on the Applicant’s permit and registered on the SESSF Quota Unit Register was 748 units of school and 4,352 units of gummy shark.

21. As stated in AFMA’s Statement of Facts and Contentions dated 1 November 2007:

- (a) fishing in the shark fishery was regulated by permits issued under s.32 of the FM Act. Such permits were annual and permitted the taking of fish during the currency of the permit and subject to its conditions.
- (b) from 2001 quota holdings were set by the imposition of conditions under the FM Act; and
- (c) during the currency of a permit quota holdings could vary through both the internal review and the Tribunal appeal process and, because they were subject to such review, were to some extent uncertain.

22. Any translation from permits to SFRs based on quota holdings required a certain date to be identified as the relevant translation date. The identification of a number of units as at a particular date ensured that an accurate and definite quota holding could be employed as the basis for the translation.

23. The Plan does not allow for any variation from the position existing at the end of the notice period and does not confer any discretion on AFMA or the Panel to alter or ameliorate any consequences that might result from applying the snapshot date in a particular case.

24. The date of 22 December 2006 was chosen because it was late in the permit cycle and it was expected that all Tribunal reviews would have been completed and the allocation of each permit settled.

¹ Amended Statement of Facts and Contentions of AFMA dated 23 November 2007

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25. The Plan, in s.25, picks up each person's holding at the end of the notice period as an historical and immutable fact. Fairness was ensured because each holder had enjoyed the ability to challenge the 2006 allocation decision in the AAT. Further, all of the permit holders had been notified of, and allowed to participate in *Re Fischer*. The Applicant had participated in that proceeding but had not raised the issue he now seeks to have determined by the Panel."

THE AUTHORITY'S CHANGE OF POSITION

28. During the course of oral argument on what Gilmore has identified as his Issue 1 the Authority conceded that to continue to rely upon Gilmore's incorrect register and permit details in circumstances where the error occurred through no fault of Gilmore but by administrative error with the Authority was unreasonable.
29. The Panel considers the concession by the Authority to be entirely appropriate. The Register and Permit did not in fact truly reflect Gilmore's true position. Regardless of when the Authority became aware of this fact it would be unreasonable not to correct the record and any decision, including the decision under review, that flowed from action taken upon the flawed Register and Permit.
30. By letter of 17 December 2007 the Authority's lawyers advised the Panel in the following terms:

"We refer to the application for review brought by Mr Gilmore.

As indicated at the hearing, AFMA accepts that as at 22 December 2006 the Register of Unit holdings kept by AFMA contained an error that arose from a data entry problem. The Register does not reflect accurately the decision to allocate ITQ's to Mr Gilmore.

To rectify this technical error, AFMA has reissued the Register as at 22 December 2006 to reflect the true position. We enclose a corrected extract of the Register.

To give effect to the Register, we invite the Panel under s.150 of the *Fisheries Management Act* to set aside the decision under

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review in so far as it relates to Mr Gilmore and substitute an allocation of SFR's of 4,545 units of gummy shark and 797 units of school shark.

This does not in any way impact on the main argument advances by Mr Gilmore in relation to the surrender of his permit. AFMA maintains its submission in that respect.

Yours faithfully

Ann Dornau
Special Counsel
Deacons

31. In due course the Panel will make orders giving effect to this aspect of the review.

DISCUSSION

32. There is no doubt that the SESSF Plan² and the Amendment³ are legislative instruments pursuant to section 5 of the *Legislative Instruments Act 2003* and must be regarded by AFMA and the Panel in the same way it would have regard to subordinate legislation.⁴
33. The Panel has no greater powers than the Authority and is subject to any statutory limitations, including the SESSF Plan, which applies to the Authority.⁵ At the heart of the Authority's argument is the submission that the Authority is bound by the SESSF Plan and is bound to apply the provisions of a Management Plan strictly and cannot, for example, substitute a different formula than that

² SESSF Plan registered in the Federal Register of Legislative Instruments on 25 November 2005

³ Amendment registered in the Federal Register of Legislative Instruments on 21 October 2005

⁴ *Secretary, Department of Primary Industries & Energy v Collins* (1992) 26 ALD 265; *Lattitude Fisheries Pty Ltd & Ors v Minister for Primary Industries and Energy and Anor* (1992) 110 ALR 209

⁵ *Re: Callaghan and DFRDB Authority* (1978) 1 ALD 227 (AAT); *Re: Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 (AAT); *Re: Babinda Co-operative Sugar Milling Association Limited and Australian Industrial Research & Development Incentive Board* (1980) 2 ALD 851 (AAT)

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provided for in a Management Plan or decline to make a provisional allocation of Statutory Fishing Rights.

34. Gilmore appeared before the Panel self-represented. He did not present his case as being based upon any particular legal basis. Rather, he placed the primary facts supporting his contention that he ought to have been regarded as an ITQ holder on 22 December 2006 based on the Agreement that he had entered into with the Commonwealth in 2001 as part of a buy-back scheme.
35. In this regard the Panel notes that in determining the issues raised by Horst Fischer and Graham Tapley, Justice Downes, sitting as a President of the AAT observed⁶:

“[88] Trevor Gilmore took part in the buy-back. Under the Fischer and Tapley proposal he would not be entitled to any quota because he no longer has a permit. Persons who took part in the buy-back were informed they would be entitled to quota. The quota allocation under review will give persons such Mr Gilmore an entitlement to quota although less than under the Jenkinson Panel scheme. The system under review seems to me to be appropriate for persons who took part in the buy-back.”

36. As to what Gilmore termed Issue 2, in order for the Panel to summarily dismiss his review the Panel would have to find that he has no real prospect of succeeding. Gilmore’s claim does not fall within that category. If he establishes that:-
- he ought to have been regarded as an ITQ holder for the purposes of allocation of SFRs in respect of the permits the subject of the buy-back scheme entered into by him with the Commonwealth in 2001; and
 - the Authority ought to have included him or treated him as though he was on the Register for that purpose
- he has an arguable case for the relief the subject of his application.

⁶ *Re Fischer[2005] AATA 936*

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37. The application of the Authority to summarily dismiss the application to review the decision of 17 June 2007 is itself dismissed.
38. The Application for Review be set down for mention at 9.00 am Friday 14 November 2008.

I certify that the preceding paragraphs are a true copy of the reasons for decision herein of the Panel (P J Baston (Principal Member)), and W Edeson (Member)



P. J. Baston
Principal Member
11 November 2008

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SCHEDULE OF EVENTS IN SESSF APPLICATIONS FOR REVIEW

Date	Party	Details
<i>June 2007</i>		
21/06/07	Bevis	Application for Review of Decision
28/06/07	Puglisi & Charissa	Application for Review of Decision
<i>July 2007</i>		
15/07/07	Bell	Application for Review of Decision
19/07/07	Gilmore	Application for Review of Decision
<i>October 2007</i>		
19/10/07	Principal Member	Directions Hearing
19/10/07	Principal Member	Directions made
<i>November 2007</i>		
01/11/07	AFMA	Statement of Facts and Contentions (Gilmore)
01/11/07	AFMA	Statement of Facts and Contentions (Bevis)
02/11/07	AFMA	Statement of Facts and Contentions (Bell)
02/11/07	AFMA	Statement of Facts and Contentions (Puglisi & Charissa)
07/11/07	Puglisi & Charissa	Withdrawal of Application for Review of Decision
09/11/07	Bevis	Withdrawal of Application for Review of Decision
12/11/07	Gilmore	Statement of Facts and Contentions
15/11/07	Bell	Withdrawal of Application for Review of Decision
23/11/07	AFMA	Respondent's Amended Statement of Facts and Contentions
26/11/07	Principal Member	Directions Hearing
26/11/07	Principal Member	Directions made
<i>December 2007</i>		
10/12/07	Panel	Hearing in Adelaide