

COMMONWEALTH OF AUSTRALIA  
*Fisheries Management Act 1991*

**RE: WESTERN TUNA AND BILLFISH FISHERY**  
**Provisional Grant of Statutory Fishing Rights (SFR)**

STATUTORY FISHING RIGHTS ALLOCATION REVIEW PANEL

**BETWEEN:**

**GARY J KENNEDY**

**Applicant**

**AND:**

**AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY**

**Respondent**

P J BASTON (PRINCIPAL MEMBER), B M. YEOH, R.K. LISTER (MEMBERS)

12, 13 December 2007

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

**FISHERIES** — Statutory Fishing Rights Allocation Review Panel

*Evidence Act 1995*

*Fisheries Management Act 1991*

*Western Tuna and Billfish Fishery Management Plan 2005*

*Acts Interpretation Act 1901*

*Legislative Instruments Act 2003*

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**DECISION AND REASONS FOR DECISION**

**Decision**

1. The claim of Gary J Kennedy of serious misfortune under section 27 of the WTBF Plan is upheld for the periods from February 1998 to November 1998 and from July 1999 to April 2000.
2. The Respondent is to recalculate the Applicant's SFRs based on the total average catch which should be assessed by reference to all permit holders.
3. The Application is listed for 9.00 am Tuesday 9 December 2008 for the purposes of submissions as to the form of final orders.

**Reasons for Decision**

**THE PANEL**

1. The SFRA 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

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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 and substitute a decision made in regard to the provisional allocation SFRs under a plan of management.<sup>1</sup>
3. Despite having been established in 1991 there have been few substantive matters in which the Panel has been called upon to make a determination.
4. The Panel has the function of reviewing decisions as to the person or persons to whom the grant of a fishing right in a managed fishery is to be made.<sup>2</sup>
5. The decision under review is a decision contemplated by section 23(1) of the FM Act.

**BACKGROUND TO THE DECISION UNDER REVIEW**

6. By Commonwealth of Australia Gazette No. 182 of Monday 31 October 2005, the Australian Fisheries Management Authority (“the Authority”) issued a Notice of Intention to Grant Statutory Fishing rights under the *Western Tuna and Billfish Fishery Management Plan 2005* (the WTBF Plan) inviting interested and eligible persons to register for the grant of SFRs. (T4)
7. On or about 1 November 2005 the Authority wrote to Gary J. Kennedy (“Kennedy”), as holder of Permit 61322A in the Southern and Western Tuna and Billfish Fisheries advising him of, and providing him with a copy of, Commonwealth of Australia Gazette No. 182 and of the

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<sup>1</sup> *Fisheries Management Act 1991*, s150

<sup>2</sup> *Fisheries Management Act 1991*, ss142, 23(1)

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conditions for registration for the grant of SFRs under the WTBF Plan.  
(T5)

8. On or about 16 December 2005 the Authority wrote to Kennedy advising that he had been registered as an eligible person for the grant of an SFR under that Plan, of the notice of calculated weights and of his rights of review should he be dissatisfied with the decision (T6)
9. On or about 9 January 2006 Kennedy wrote to the Authority advising that he disagreed with the calculated weight on Longline Permit of WTBF Permit number 61322A, providing supporting documentation. (T7)
10. On or about 13 January 2006 Kennedy wrote to the Authority seeking to appeal the decision of the Authority on the grounds of having suffered serious misfortune under the Plan, providing supporting documentation. (T8)
11. On or about 2 August 2006 the Authority wrote to Kennedy requesting additional catch history documents. (T9)
12. On or about 14 August 2006 Kennedy wrote to the Authority providing catch verification documentation. (T10)
13. On or about 1 March 2007 the Authority wrote to Kennedy advising that there had been unforeseen delays in the grant of quota SFRs. (T11)
14. On or about 1 March 2007 the Authority also wrote to Kennedy advising of its initial assessment of Kennedy's claim for serious misfortune and providing Kennedy with an opportunity to make further submissions in support of his case before the Authority made its final decision. (T12)

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15. On or about 7 March 2007 Kennedy wrote to the Authority seeking an extension of time to respond to the Authority's initial assessment of the claim for serious misfortune. (T13)
16. On or about 9 March 2007 the Authority wrote to Kennedy extending the date for the provision of further submissions. (T14)
17. On or about 16 March 2007 Kennedy wrote to the Authority seeking a further extension of time to respond to the Authority's initial assessment of the claim for serious misfortune. (T15)
18. On or about 21 March 2007 the Authority wrote to Kennedy extending the date for the provision of further submissions, setting out a summary of communications from the Authority relating to the serious misfortune claim and detailing the specific issues that the submission should address. (T16)
19. On or about 11 April 2007 Kennedy wrote to the Authority in reply to the initial assessment of Kennedy's claim for serious misfortune, providing further submissions in support of his case. (T17)
20. On or about 27 April 2007 the Authority wrote to Kennedy advising him of his provisional grant of SFRs under the WTBF Plan, the relevant quotas for the three species and his set history. The Authority also advised of its determination that Kennedy had not suffered a serious misfortune within the terms of section 27 of the Plan, providing reasons for the decision and advising Kennedy of his rights of review should he be dissatisfied with the decision. (T18)
21. By Notice dated 2 May 2007 the Authority advised of its decision to grant SFRs under subsection 23(2) of the *Fisheries Management Act 1991*, summarised the SFRs to be granted, and of the right of an eligible person to apply in writing to the Statutory Fishing Rights Allocation Review

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Panel for a review of the decision in accordance with section 143 of the *Fisheries Management Act 1991*. (T19)

22. By Commonwealth of Australia Special Gazette No. S83 of 3 May 2007, the Authority issued the names of those persons to whom SFRs under the WTBF Plan had been issued.
  
23. On or about 21 May 2007 Kennedy submitted “Statutory Fishing Rights Allocation Review Panel Form 2 – Application for Review of Decision to Grant a Fishing Right” dated 17 May 2007. The reasons for the application for as detailed in that form being:
  1. That the AFMA Delegate has interpreted to (sic) narrowly a reasonable meaning of “serious misfortune”. It is reasonable to assume that the definition is wider in the context of the WTBF Management plan that the examples given by AFMA.
  2. That AFMA has failed to follow reasonable proves in stating reasons in it (sic) decision that were not previously identified by AFMA as questions which should be addressed, particularly to Dr Zafir. If the process had allowed these questions to be answered, then it is reasonable to believe that a “serious misfortune” had occurred (sic).
  3. That the process followed by AFMA in communicating with me over the original appeal put me at a serious disadvantage in addressing the issues.
  
24. On or about 13 June 2007 the Authority advised Kennedy of its decision as to the number of SFRs available to Kennedy, that the Authority had not accepted Kennedy’s claim to have suffered “serious misfortune” and provided the Reasons for that decision. (T2)
  
25. The Panel accepts the above background events are agreed between the Parties.<sup>3</sup>

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<sup>3</sup> AFMA’s Statement of Facts and Contentions dated 3 August 2007 paras 1-34, Applicant’s Statement of Facts and Contentions dated 27 November 2007

## THE APPLICATION

26. Kennedy claims to have suffered a serious misfortune from February 1998 through to the commissioning of the vessel 'True Blue IV' in May 2001 within the meaning and for the purposes of section 27 of the FM Act and the WTBF Plan.<sup>4</sup>

27. Specifically, Kennedy claims<sup>5</sup>:

(i) to have suffered a serious misfortune, as defined in section 27 of the *WTBF Management Plan 2005*; and

(ii) by reason of (i) above, to be entitled to have his SFRs calculated in accordance with section 27(1) of the *WTBF Management Plan 2005*.

28. In his Statement of Facts and Contentions, as extracted below, Kennedy claims serious misfortune and a calculation error in the following form:<sup>6</sup>

### **The claim for serious misfortune**

3. During the period February 1998 to April 2000 inclusive [Kennedy] suffered from a number of medical conditions which included:

- shingles;
- chronic sinusitis;
- severe migraines;
- bilateral carpal tunnel syndrome;
- right-hand repetitive strain injury;
- severe gastritis which caused diarrhoea, vomiting, headaches and other sequelae; and
- severe anxiety.

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### **Calculation error**

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<sup>4</sup> Applicant's Final Submissions dated 8 February 2008

<sup>5</sup> Applicant's Statement of Facts and Contentions dated 27 November 2007, para 3

<sup>6</sup> Applicant's Statement of Facts and Contentions dated 27 November 2007, para 12

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12. The following weights for broadbill were overlooked by AFMA in calculating the SFRs available to [Kennedy] under his permit:

- (i) 20 kilograms of broadbill ... erroneously entered in the incorrect column of the Australian Pelagic Longline Daily Fishing Log – AL05 dated 14 September 2005; and
- (ii) 280 kilograms of broadbill recorded in the State Catch Record dated 4 May 1998;
- (iii) a further 60 kilograms of broadbill was omitted by AFMA in determining the availability of SFRs under the permit – it is assumed this was a simple calculation error by AFMA.

29. Kennedy claims that the Authority has disregarded the contextual construction of section 27 (ts120/22-32) in its assertion that the evidence does not establish the facts necessary to activate the section.<sup>7</sup>

30. Kennedy claims that, in the event that his appeal is upheld, he should be granted “a further hearing, or, at least, written submissions between the parties with a view to agreeing the level of total fixed weight for the period”.<sup>8</sup>

**Applicant’s material before the Panel**

31. In addition to the exhibits and materials provided to the Panel during the hearing of 12-13 December 2007, the following documentation has been produced by Kennedy for consideration by the Panel:

- Kennedy’s Statement of Facts and Contentions of 27 November 2007 (the substituted statement of facts and contentions);
- Kennedy’s Outline of Submissions in Support of Application for Review of Decision to Grant a Statutory Fishing Right of 12 December 2007;

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<sup>7</sup> Applicant’s Final Submissions dated 8 February 2008, para 5

<sup>8</sup> Applicant’s outline of submissions in support of application for review of decision to grant a statutory fishing right dated 12 December 2007, para 6

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- Kennedy's Supplementary Submissions of 20 December 2007;
- Kennedy's Final Submissions of 8 February 2008.

**THE AUTHORITY'S POSITION**

32. The Authority, "put simply... contends that [Kennedy] was able to fish or derive income from his permit, except for the period between April and October 1998, and ... the reason he did not do so derived from his decision not to fish and not to lease his permit. His failure was due to a series of decisions made by him rather than serious misfortune... [and that] he did not adduce evidence to the contrary".<sup>9</sup>

33. The Authority, in its Statement of Facts and Contentions<sup>10</sup>, claims:

(36) The evidence so far presented does not establish that the above conditions, either individually or by their combined effect, prevented the Applicant from engaging in fishing under his permit for a period of three months or more.

(37) During the period February 1998 to May 1998, and July 1999, the Applicant engaged in fishing under a licence issued by the Western Australia Department of Fisheries.

(38) During the period June to August 1998, the Applicant engaged in extensive interstate travel (in search of a larger vessel).

(39) In July 1999 for an unspecified period the Applicant travelled to New Zealand to purchase the vessel 'Mandy J'.

(40) The Applicant made three trips to Japan, for unspecified periods, between April and June 2000.

(41) It is submitted that the Applicant was not prevented from arranging for another person to fish under the authority of his permit during any period or periods he was unable himself to fish by reason of any of the above conditions.

(42) In applying the formula in section 26 of the [WTBF] Plan, AFMA correctly calculated the weight of Broadbill Swordfish caught by the Applicant in determining his best 2 years' catches.

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<sup>9</sup> Respondent's response of 29 January 2008 to Kennedy's Supplementary Submissions, p2

<sup>10</sup> *AFMA's Statement of Facts and Contentions* dated 3 August 2007, para 36ff

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**Authority's material before the Panel**

34. In addition to the exhibits and materials provided to the Panel during the hearing of 12-13 December 2007, the following documentation has been produced by the Respondent for consideration by the Panel:

- the Authority's Statement of Facts and Contentions of 3 August 2007;
- the Respondent's Outline of Oral Submissions of 13 December 2007;
- the Authority's response of 29 January 2008 to Kennedy's Supplementary Submissions.

35. The Authority contends that<sup>11</sup>:

(44) In order to avail himself of s27 of the Plan the Applicant must show that he suffered serious misfortune for a continuous period of at least 3 months and that during that period he was prevented from fishing or arranging for someone else to fish under the permit.

(a) While Dr Zafir considered that some of the medical conditions for which he treated the Applicant during the period 1998 to 2000 "made fishing impossible at times", there is no evidence that any of those conditions (either individually or by their combined effect) for a period of more than 3 months prevented the Applicant:

(b) obtaining income from fishing under the holder's permit; and

(c) arranging another way for fishing to be carried out under the permit.

(45) The evidence ... demonstrates that despite the Applicant's medical conditions, he was able to maintain his commercial fishing operations over the relevant period.

**ISSUES OF LAW FOR DETERMINATION**

36. Kennedy claims that the Panel "is to deal with the appeal as a matter of merits, such that it stands in the shoes of the decision-maker... and is a hearing *de novo* where all issues are considered afresh."<sup>12</sup>

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<sup>11</sup> *AFMA's Statement of Facts and Contentions* dated 3 August 2007, para 44ff

<sup>12</sup> Applicant's outline of submissions in support of application for review of decision to grant a statutory fishing right dated 12 December 2007, para 7

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37. The Rule in *Browne v Dunn*. Kennedy claims that the cross-examination of Dr Zafir was not in appropriate form and that the Respondent's submission that the doctor's evidence should be rejected should fail (*see ts124/21-37*).<sup>13</sup>
38. The Respondent submits that there is no merit in Kennedy's submissions regarding the Rule in *Browne v Dunn*, that Dr Zafir was directly challenged in his oral evidence about this matter (*ts43and 45*) and was given ample opportunities to explain the discrepancies between his evidence in chief and his medical records and reports of 30 July and 11 July 2007 (*ts26/7-14, 28/22-24, 30/11 - 31/20, 32/22 - 36/5, 41/14 - 42/29, 45/14-18, 46/18 - 47/26*).
39. The Panel considers that Dr Zafir gave evidence of matters of fact in relation to the times and circumstances surrounding Kennedy's presentation to him at his surgery and expressed a medical opinion as to Kennedy's nature and extent of Kennedy's state of health. The Panel accepts that in this context the Respondent raised with Dr Zafir the circumstances the Authority wished to challenge giving Dr. Zafir and the Kennedy in re-examination ample opportunity to deal with the contended discrepancies.
40. Burden of proof / evidentiary onus. Kennedy submits that the failure to call any medically qualified witness to express an opinion contrary to those expressed by Dr Zafir reflects a failure to discharge the evidentiary onus that rested upon it and supports the conclusion that the evidence of Dr Zafir should be accepted in its entirety.<sup>14</sup> (*see ts125/20-23 & 127/5-9*)

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<sup>13</sup> Applicant's Supplementary Submissions, dated 20 December 2007 p2

<sup>14</sup> Applicant's Supplementary Submissions, dated 20 December 2007 p2

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41. The Respondent submits that there is no onus on it to adduce independent medical evidence, and that to do so would have offered no assistance to the determination of the application.<sup>15</sup>
42. The Respondent submits that the reports of Dr Zafir (including those in response to direct questions put to him by Middletons) clearly identified discrete periods of illness that, in his oral evidence, he sought to extend over the entire period. The Respondent submits that this is inconsistent with the clinical notes, with his own reports and with the history given to him and that the Panel should not accept Dr Zafir's account to the extent that it is inconsistent with his clinical notes and his reports.<sup>16</sup>
43. Kennedy submits that there is no inconsistency in Dr Zafir's evidence, rather that he expands on various matters dealt with in a perfunctory manner in his reports (*ts 43/10-14 and 47/7-10*) and submits that the evidence should be considered in its entirety.
44. Chain of Causation. Kennedy claims that the events and circumstances that can be broadly summarised as his medical condition, the failure of his partnership with Mr Greaves and his efforts to secure an alternative vessel should "be considered in a continuum" and that "the causal chain, which links all of these events together, commenced in February 1998 with the onset of [his] illness, and did not conclude until... May 2001".<sup>17</sup>
45. Kennedy submits that causation is a question of fact to be answered by reference to common sense and experience and one into which

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<sup>15</sup> Respondent's Response to Supplementary Submissions, dated 29 January 2008, p2

<sup>16</sup> Respondent's Response to Supplementary Submissions, dated 29 January 2008, p2

<sup>17</sup> Applicant's outline of submissions in support of application for review of decision to grant a statutory fishing right dated 12 December 2007, para 22

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considerations of policy and valued judgements necessarily enter and that the “but for” test is not a definitive test of causation.<sup>18</sup>

46. The Authority submits that the submissions relating to the chain of causation are of no assistance to the Panel as Kennedy’s health had no effect on the decision to end the partnership with Mr Greaves (*ts101/10*). Whilst there is some merit in this argument it ignores the circumstances that Kennedy found himself in or to use the language of the Kennedy it lacks context. The Panel accepts this proposition.
47. The Form of Order/ Statutory Construction.<sup>19</sup> Kennedy submits that he should be heard on the matter of the method of calculation, should the Panel accept that section 27 applies, and contends that the total average catch should be assessed by reference to *active* permit holders.<sup>20</sup>
48. The Respondent submits that the Panel must decide to whom the grant is to be made and how many SFRs are to be granted. The Respondent submits that, should the Panel determine that section 27 applies, Kennedy must be given the average catch of the fleet for that period or periods (that being the total take of the fleet divided by the number of licence holders).<sup>21</sup>

#### **THE DECISION BEFORE THE PANEL**

49. Section 27 of the *WTBF Management Plan 2005* states:

- (1) If:
  - (a) an eligible person holds a sequence of permits; and

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<sup>18</sup> Applicant’s Supplementary submissions dated 20 December 2007

<sup>19</sup> Applicant’s Supplementary Submissions, dated 20 December 2007 p2

<sup>20</sup> Applicant’s Final Submissions dated 8 February 2008, para 18-19

<sup>21</sup> Respondent’s response to Supplementary Submissions dated 29 January 2008, p3

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(b) but for this section, fewer SFRs would be available to the eligible person under section 25 or 26 because of a serious misfortune suffered, during the relevant period, by the eligible person or a previous holder of a fishing permit in the sequence; AFMA may:

(c) in calculating the number of SFRs to be available to the eligible person under section 25 or 26, as the case requires, calculate the best 2 years' catches of a species of fish under the sequence of permits by using, for the period of the serious misfortune, the average catch of the species in the fishery under all sequences of that kind (old longline or old minor line, as the case may be) during that period; and

(d) in calculating the number of SFRs to be available to the eligible person under section 26, calculate the best 2 years' sets for the relevant sequence of permits for Step 1 of the definition of SH in subsection 26 (3), by using, for the period of the serious misfortune, the average number of times a longline was set in the fishery under all sequences of old longline permits during that period.

50. The issue before the Panel is whether Kennedy suffered a serious misfortune within the definition of section 27 of the *WTBF Management Plan 2005*.

51. Section 27(2) of the *WTBF Management Plan 2005* states that serious misfortune for the holder of an old longline permit or old minor line permit:

...means a misfortune that, for more than 3 months, prevented the holder:

(a) obtaining income from fishing under the holder's permit; and

(b) arranging another way for fishing to be carried out under the permit;

for example, the loss of, or serious damage to, the boat that was nominated for the permit, or a serious illness of, or injury to, the holder.

52. The issues before the Panel therefore are:

- Did Kennedy suffer a misfortune?
- Did the misfortune prevent Kennedy from obtaining income from fishing under the holder's permit and arranging another way for fishing to be carried out under the permit?

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- Did the misfortune prevent Kennedy from fishing under the holder's permit and arranging another way for fishing to be carried out under the permit for more than three months?
- If so, what is the method of calculation of the SFRs?

53. Misfortune is not defined in the *WTBF Management Plan 2005* so must be interpreted in accordance with its ordinary and natural meaning. The Authority relied on the definition in the Macquarie Dictionary (Fourth Edition) defining misfortune as "*ill or adverse fortune, ill luck*".<sup>22</sup>

54. The Concise Oxford English Dictionary and the Compact Oxford English Dictionary both define misfortune as "*bad luck*", "*an unfortunate event*".

55. The Merian-Webster Online Dictionary references misfortune as follows:

*"1a: an event or conjunction of events that causes an unfortunate or distressing result: bad luck <by misfortune he fell into bad company> <had the misfortune to break his leg> b: an unhappy situation <always ready to help people in misfortune>*

*2: a distressing or unfortunate incident or event <misfortunes never come singly>*

*synonyms misfortune, mischance, adversity, mishap mean adverse fortune or an instance of this. misfortune may apply to either the incident or conjunction of events that is the cause of an unhappy change of fortune or to the ensuing state of distress <never lost hope even in the depths of misfortune>. mischance applies especially to a situation involving no more than slight inconvenience or minor annoyance <took the wrong road by mischance>. adversity applies to a state of grave or persistent misfortune <had never experienced great*

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<sup>22</sup> See T18 p4 referring to AFMA letter to Applicant of 1 March 2007

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*adversity>. mishap applies to an often trivial instance of bad luck <the usual mishaps of a family vacation>*

56. These definitions being in no way contradictory will be the meaning attributed to the word for the purpose of the Panel's determinations.

**DISCUSSION**

**Did the misfortune prevent Kennedy from obtaining income from fishing under the holder's permit?**

57. The Panel found Kennedy to be an honest and reliable witness and a person who gave a full, frank and truthful account of those facts surrounding this review to the Panel.
58. Dr. Zafir was and still is Kennedy's local GP. There is no doubt that treating health professionals such as Dr. Zafir, when expressing opinion before tribunals such as the Panel often take on the role of an advocate for their patient. The Panel observed Dr. Zafir to take on such a role for Kennedy. The Panel however is satisfied that Dr. Zafir's evidence is reliable and supportive of a finding of serious misfortune based upon illness alone.
59. The Authority further refines the definition of serious misfortune to require that there be "bad luck or unforeseen circumstances outside of the control of the permit holder; not lack of planning or result of unfortunate or ill advised investment decisions."<sup>23</sup> The additional words do not assist the Panel in determining Kennedy's claim.

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<sup>23</sup> Respondent's Outline of Oral Submissions dated 13 December 2007, para 3(b)

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60. The Authority submits that the definition of serious misfortune is such that there “must be *no* income during the period, [with] variations in income addressed in best 2 out of 5” [emphasis added]<sup>24</sup>
61. The Panel considers such arbitrary constraints upon the *serious misfortune* provisions of the *WTBF Management Plan 2005* place an unwarranted and unnecessary constraint upon the decision maker. The relevant provisions of the Plan have to be considered having regard there ordinary and natural meaning.
62. The Authority submits that the illnesses were in two distinct periods, February to November 1998 and July 1999 to April 2000 and that Kennedy’s “fishing operations did not get up and running till May 2001”.<sup>25</sup> There is considerable merit in such an analysis. Depending on the Panel’s view of the evidence of Kennedy and his witnesses it may be a determinative factor.
63. Dr Zafir oral evidence can be found at: *(ts17/22-19/27, 20/18-28, 29/8-11, 50/25-51.5, 51/15-28, 52/7-13)*
64. The Authority has provided no evidence to the contrary of that of Dr Zafir in relation to Kennedy’s medical condition for the period. The Panel does not place any weight on this factor. It would be hard to imagine the Authority being in a position to adduce any relevant evidence in this regard.

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<sup>24</sup> Respondent’s Outline of Oral Submissions dated 13 December 2007, para 3(c)

<sup>25</sup> Respondent’s Outline of Oral Submissions dated 13 December 2007, para 4

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65. The Authority submits that Kennedy “did not own a boat large enough to fish in the WTBF [and] rather than invest in his own boat he went into partnership with Mr Greaves”.<sup>26</sup>
66. Kennedy submits that there was a legitimate and credible explanation for not buying his own vessel at the end of 1997 (*ts45.17-46.4*).
67. The Authority submits that the reasons why Kennedy was not fishing between 1997 and May 2001 is that he was not interested in undertaking other fishing (*transcript 37,38 for this*); that his health affects but does not prevent fishing (*see income from WA/Cth concession during the period*); that the end of the trial with Mr Greaves was not resultant of Kennedy’s poor health (*ts 101/10*); that the reason he was not fishing in the various periods was resultant of his having no boat (Jan- Jul 1999 *ts41/13, 46/7 and ts54/24*), then a boat that cannot meet survey (Jul 99), his decision not to purchase a boat (the *Flying Fish IV ts107/10*).<sup>27</sup>
68. Kennedy submits that there was a legitimate and credible explanation for not purchasing this vessel (*ts123/12-18, 135/1-9*).
69. The Authority submits that section 27 does not apply to Kennedy from January 1999 because the reason he was not fishing was resultant of a lack of planning or a result of unfortunate or ill advised investment decisions. Specifically, the reasons being the dissolution of the partnership resulting in Kennedy not having a boat in which to fish, the mistake of buying *Mandy J (ts120,121)* and not *Flying Fish IV*, that “Dr Zafir says [Kennedy was] better by November 1998” and that there were no claims of illness

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<sup>26</sup> Respondent’s Outline of Oral Submissions dated 13 December 2007, para 5

<sup>27</sup> Respondent’s Outline of Oral Submissions dated 13 December 2007, para 6

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between January and July 1999 in the initial claim, that the reason for giving nil returns is “looking for a new boat”.<sup>28</sup>

70. Kennedy submits that “all of [Kennedy’s] actions and decisions between 1997 and 2001 need to be considered as part of an ongoing course of conduct and without the benefit of hindsight”.<sup>29</sup>
71. Kennedy submits that the vessel *Mandy J* was sold shortly after its purchase due to ongoing illness. *(ts121/14-24)*
72. The Panel accepts that the Authority has not assessed Kennedy’s claim having regard to the whole of the relevant circumstances and as part of ongoing chain of events that Kennedy found himself between 1997 and 2001.
73. The Panel also acknowledges that it is very easy, with the benefit of hindsight, to bring into question actions and decisions made by a fisher some seven to ten years ago. This is particularly the case when the need to keep accurate records for the relevant period was not clearly apparent at the time and where the significance of actions and the importance of particular circumstances could not have been know at the time.
74. There is no doubt that a fisher such as Kennedy is at a severe disadvantage in presenting a serious misfortune case under the *WTBF Management Plan 2005* and having regard to the nature of the circumstances in which he found himself between 1997 and 2001.

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<sup>28</sup> Respondent’s Outline of Oral Submissions dated 13 December 2007, para 7

<sup>29</sup> Applicant’s Final Submissions dated 8 February 2008, para 4

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**Did the misfortune prevent Kennedy from arranging another way for fishing to be carried out under the permit?**

75. The Authority submits that the definition of serious misfortune is such that there is a requirement “to show [that he] could not get someone else to use or operate [the] permit”.<sup>30</sup>
76. The Authority submits that section 27 does not apply to Kennedy from January 1999 because he made no attempt to lease the permit because he was not interested in a short term lease, that the permits were “sought after” though Kennedy did not want a long term lease as he wanted to use the permit himself, and that his explanation that no one approached him would not meet s27 (*ts 61/22*).
77. Kennedy submits that in relation to this topic his actions should not be judged with the benefit of hindsight and that the Panel should take into account the uncertainty surrounding Kennedy’s illness and his genuine desire to return to fishing (*ts60.6*)
78. Kennedy rejected the proposition that “quite a considerable proportion of active permits had been leased” (*ts58/19-23*) and submitted that there was no substantiation of the proposition by the Authority.
79. The Authority did not lead any evidence challenging Kennedy’s assertion regarding the lack of interest in short term leases. (*see ts28/20-29.8*)
80. The Panel accepts Kennedy’s argument. The approach of the Authority is too restrictive and unreasonable in these circumstances. The assessment of Kennedy’s actions should take into account the uncertainty surrounding Kennedy’s illness and his genuine desire to return to fishing.

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<sup>30</sup> Respondent’s Outline of Oral Submissions dated 13 December 2007, para 3(c)

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**Did the misfortune prevent Kennedy from fishing under the holder's permit and arranging another way for fishing to be carried out under the permit for more than three months?**

81. Kennedy claims to have suffered a serious misfortune from February 1998 to May 2001.
82. The Respondent claims that there were discrete periods of illness, being February to November 1998 and July 1999 to April 2000. There is much in this submission.
83. The Panel finds that, on the whole of the evidence, Kennedy has established a serious misfortune claim for period from February 1998 to November 1998 and from July 1999 to April 2000.

**SFR Calculation Method**

84. The calculation method, to the extent it is under challenge, depends upon an interpretation of the plan:
- (d) in calculating the number of SFRs to be available to the eligible person under section 26, calculate the best 2 years' sets for the relevant sequence of permits for Step 1 of the definition of SH in subsection 26 (3), by using, for the period of the serious misfortune, the average number of times a longline was set in the fishery under all sequences of old longline permits during that period.
85. The Panel considers the interpretation asserted by the Authority to be correct. The expression "all sequences of old longline permits" to be reference to all sequences and not limited to those under which fishing activity took place in the relevant period.

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86. The Panel will allow the Authority and Kennedy seven (7) days to consider these reasons and for the Authority to calculate the SFRs to which Kennedy is entitled.

I certify that the preceding 86 paragraphs are a true copy of the reasons for decision herein of the Panel Mr. P J Baston (Principal Member), and Mr R.K. Lister (Member)

P. J. Baston  
Principal Member  
1 December 2008

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**SCHEDULE OF EVENTS IN WTBF APPLICATIONS FOR REVIEW**

Date	Party	Details
<i>May 2007</i>		
14/05/07	Ship Agencies Australia Pty Ltd	Application for Review of Decision
15/05/07	Vinci Holdings Pty Ltd	Application for Review of Decision
15/05/07	Jetopay Pty Ltd	Application for Review of Decision
17/05/07	Gary J Kennedy Pty Ltd	Application for Review of Decision
<i>June 2007</i>		
15/06/07	Principal Member	<b>Directions</b>
15/06/07	Principal Member	Directions made
<i>July 2007</i>		
09/07/07	Principal Member	<b>Directions Hearing</b>
09/07/07	Principal Member	Directions made
09/07/07	Ship Agencies Australia Pty Ltd	Statement of Facts and Contentions
19/07/07	Gary J Kennedy Pty Ltd	Statement of Facts and Contentions
25/07/07	Jetopay Pty Ltd	Statement of Fact and Contentions
27/07/07	Ship Agencies Australia Pty Ltd	Further particulars
<i>August 2007</i>		
03/08/07	AFMA	Statement of Facts and Contentions (Gary J Kennedy Pty Ltd)
09/08/07	AFMA	Statement of Facts and Contentions (Vinci Holdings Pty Ltd)
10/08/07	Principal Member	<b>Directions Hearing</b>
10/08/07	Principal Member	Directions made
17/08/07	AFMA	Statement of Facts and Contentions (Jetopay Pty Ltd)

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24/08/07	Ship Agencies Australia Pty Ltd	Withdrawal of Application for Review of Decision
24/08/07	Vinci Holdings Pty Ltd	Withdrawal of Application for Review of Decision
27/08/07	Ms Simpson	Telephone Conference
<b>September 2007</b>		
14/09/07	Principal Member	<b>Directions Hearing</b>
14/09/07	Principal Member	Directions made
19/09/09	AFMA	Request to vacate hearing in October due to lack of evidence being filed by Middletons on behalf of Gary J Kennedy Pty Ltd (was due 07/09/07)
<b>October 2007</b>		
16/10/07	Principal Member	<b>Directions Hearing</b>
16/10/07	Principal Member	Directions made
<b>November 2007</b>		
14/11/07	Trysh Stone	Statement filed on behalf of AFMA
27/11/07	Gary J Kennedy Pty Ltd	Statement of Facts and Contentions
<b>December 2007</b>		
10/12/07	AFMA	Submissions
12/12/07	Panel	<b>Hearing</b>
13/12/07	Panel	<b>Hearing</b>
13/12/07	AFMA	Outline of Oral Submissions
20/12/07	Gary J Kennedy Pty Ltd	Supplementary Submissions
<b>January 2008</b>		
29/01/08	AFMA	Submissions in respect to Applicant's Supplementary Submissions
<b>February 2008</b>		
08/02/08	Gary J Kennedy Pty Ltd	Applicant's Final Submissions