

Disclosed under FOI



Level 5, Childers Square, 14 Childers Street, Canberra
GPO Box 442, Canberra ACT 2601
Phone 1300 362 072, Fax 02 6276 0123
ombudsman@ombudsman.gov.au
www.ombudsman.gov.au

Our ref: 2012-300213

18 December 2012

Mr Andrew Wilkie MP
GPO Box 32
HOBART TAS 7000

Dear Mr Wilkie

I am writing to advise that we have finalised the investigation of your complaint about the Australian Fisheries Management Authority (AFMA).

In our letter of 14 September 2012, we informed you of AFMA's admission of the failure of its statutory committee to comply with s64C(4)(a) of the *Fisheries Administration Act 1991* (FA Act). Section 64C(4)(a) requires that "[u]nless the committee otherwise determines, the member must not be present during deliberation by the committee on the matter". The processes relating to a scheduled meeting of the South East Management Advisory Committee (SEMAG) on 26 March 2012 were not in accordance with legislative requirements:

- an advisory committee member of SEMAG declaring a financial conflict of interest in matters to be discussed by the committee at the meeting (and to the chair before the meeting), was not required by the chair to leave the meeting teleconference to enable other members to consider whether the conflicted member could rejoin the teleconference meeting and participate in discussions in light of the declared conflict
- the conflicted committee member was allowed by the chair to remain in the meeting and provide input into discussions about the fishing quota (but not voting on the committee's final position) to be recommended to the AFMA Commission -- the independent statutory body charged with setting the 'Total Allowable Catch' (TAC) for the relevant fishery after first having consulted with the advisory committee
- the conflict of interest consisted of the committee member's commercial interest in the Small Pelagic Fishery for which a TAC would be recommended by the committee, and a concurrent financial interest in a commercial fishing vessel procured for its capability to better exploit any fishing quota held by the member in that fishery. (Theoretically, at least, the "value" of the conflicted financial interest being one that would foreseeably and directly be influenced by the TAC set by the AFMA Commission after taking SEMAG advice.)
- omissions of the committee chair and other members (including an AFMA staff representative) to observe mandatory committee processes by moving to exclude the conflicted member from the meeting and then separately determining whether the conflicted member may be present during deliberations on the conflicted matter and take part in any decision of the committee with respect to the conflicted matter.

Other matters

We have also reviewed the administrative operations of AFMA's Small Pelagic Fishery Resource Assessment Group (SPFRAG) and its meeting of 28 February 2012.

Disclosed under FOI

SPFRAG is an expert technical panel which provides SEMAC with a 'Recommended Biological Catch' (RBC) recommendation for the Small Pelagic Fishery. The RBC represents a scientific assessment of an appropriate harvest for species living within a given fishery. SEMAC considers the RBC against a range of commercial and environmental considerations, including relevant and applicable harvest strategies endorsed by AFMA and provides a TAC recommendation on the commercial catch to the AFMA Commission for its consideration and decision.

Relevant to our investigation of your complaint was the existence of a common member of both SPFRAG and SEMAC who was also the 'conflicted committee member' noted above. This committee member attended both the SPFRAG meeting of 28 February 2012 which determined the RBC and the SEMAC meeting of 26 March 2012. The committee member declared a similar commercial conflict of interest to the SPFRAG meeting in February 2012 as was later declared to the SEMAC meeting in March 2012. The conflicted SPFRAG member did not seek approval to remain at, and participate in, group deliberations after declaring the conflict.

SEMAC meeting papers from 26 March 2012 include evidence of a dissenting view held by two SPFRAG members. Concerns expressed by the dissenting members in emails appended to the SEMAC meeting papers indicate some level of dissatisfaction with the draft SPFRAG meeting summary that was proposed to be provided to SEMAC by the SPFRAG chair. Due to the close timing between the SPFRAG and SEMAC meetings, this 'meeting summary' is effectively relied upon by SEMAC as representing the views and deliberations of the SPFRAG meeting, including its advice on the RBC for the fishery. AFMA advise that dissenting views of SPFRAG members are provided to the agency as a matter of course.

The fact that dissenting views were separately provided to SEMAC by the dissenting members themselves, and not set out in the meeting summary, indicates some deficiency in the formal communication process from SPFRAG to SEMAC. This represents a risk for AFMA and the AFMA Commission, as not having all relevant views reflected in the meeting summary has the potential to undermine the ability of SEMAC to scrutinise related advice and recommendations.

Although no approval was sought or provided by the SPFRAG meeting for the conflicted member to remain at, and participate in, group deliberations on matters such as the RBC for the Small Pelagic Fishery, different procedural rules - not established under legislation - applied to the SPFRAG meeting than applied for SEMAC. It may therefore have been open to the SPFRAG chair at the meeting of 28 February 2012 to simply note the conflict of interest in the meeting summary. However, good administrative practice and meeting procedure would have involved consideration of the conflict in light of the importance of the matters to be discussed by the group. A separate determination of the appropriateness of the conflicted member remaining in those deliberations would then be made by the members. We understand that AFMA is addressing the need for robust meeting procedures and related issues more broadly.

To the extent that the dissenting views of the two SPFRAG members were made available to the SEMAC meeting in March and were also conveyed to the AFMA Commission, any direct detriment that may have arisen from an allegedly-incomplete meeting summary has been effectively overcome. It should be noted that some conflicting evidence was encountered in the course of our investigation as to whether the dissenting views were actually expressed at the SPFRAG meeting in February or represented later reflections by the dissenting members on the matters discussed. For our purposes, this was not an issue that required further assessment. The introduction of audio recordings of SPFRAG meetings by AFMA may prevent this issue arising in future.

As a result of this investigation, AFMA has reminded its advisory groups and committees of the correct procedures in relation to handling conflict of interest and reflecting dissenting opinions in meeting summaries. Following our further discussions with AFMA, the agency has provided more detailed particulars of its remedial actions to date. In our view, the responses by AFMA have been both necessary and appropriate in the circumstances.

Disclosed under FOI

Validity of the 'Total Allowable Catch' decision

We have considered the related administrative issue that you raised of the validity of the TAC set by the AFMA Commission for the Small Pelagic Fishery in circumstances where a breach of the FA Act has been admitted by AFMA.

The AFMA Commission is an independent entity composed of individuals appointed by the Minister for Agriculture, Fisheries and Forestry. The Commission exercises decision-making powers under the *Fisheries Management Act 1991* (FM Act) and the FA Act. One of these decision-making powers is the setting of the TAC applicable to the Small Pelagic Fishery.

The TAC decision is required to be made after the Commission consults with the fishing industry and other stakeholders and in accordance with AFMA's legislative objectives. The TAC is given legal effect as a statutory instrument made by AFMA in accordance with a resolution of the Commission under the FM Act and the *Small Pelagic Fishery Management Plan 2009*. The instrument is recorded on the Federal Register of Legislative Instruments and the TAC takes effect under law from the day after it is registered.

Under the legislation, the Commission could validly exercise its powers to set the TAC for a fishery at a level that differs from its advisory committee's recommendation. Accordingly, it does not necessarily follow that errors in the SEMAC process operate to invalidate the TAC setting decision by the Commission.

Review of fisheries legislation

We note the terms of reference for the review of fisheries legislation by David Borthwick AO PSM. To the extent that we have formed relevant views on the statutory regime underpinning AFMA's advisory committee system as a result of our investigation, these views have been advised to the legislation review by the Commonwealth Ombudsman, Colin Neave, in accordance with the review's terms of reference. Accordingly, it is not appropriate for our office to make further comment on these matters.

Conclusion of investigation

As a result of our investigation, AFMA has undertaken a range of remedial and corrective steps to address substantive issues arising from your complaint. A list of the actions to date is provided at [Attachment 1](#).

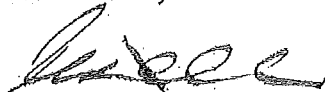
In an effort to further ensure that AFMA and the AFMA Commission are aware of the issues identified in the course of our investigation, I am providing a copy of this letter to the Chief Executive Officer of AFMA, Dr James Findlay, for his information.

Noting the above and the continuance of the Borthwick Review in accordance with its terms of reference, I now propose to finalise our investigation of your complaint.

If you have any questions regarding this letter, please contact me on 02 6276 0107.

Thank you for bringing your concerns to our attention.

Yours sincerely



Rodney Lee Walsh
Senior Assistant Ombudsman

cc Dr James Findlay, CEO - AFMA

Disclosed under FOI

Attachment 1

AFMA actions to date

In response to the Commonwealth Ombudsman investigation of a complaint regarding the administrative actions of AFMA advisory committees culminating in the setting of a TAC for the Small Pelagic Fishery 2012, the following voluntary actions have been advised to our office as having been undertaken by AFMA:

Dissenting views of SPFRAG members

AFMA has committed internal resources in redress by:

- offering third party review of members' concerns relating to the meeting record of 28 February 2012
- working with the SPFRAG Chair and a member holding a dissenting view of the meeting outcomes to reach agreement on the minutes
- making audio recordings mandatory for all future SPFRAG meetings
- agreeing outcomes on an overhead projector at future SPFRAG meetings for clarity of all attending the meetings

Improved governance of the Small Pelagic Fishery

AFMA has:

- reminded Management Advisory Committee's (MAC) and Resource Advisory Group (RAG) chairs about the processes for declaring conflicts of interest
- adopted improved processes for MAC and RAG meetings by writing to all MAC and RAG chairs regarding a new standard for finalising minutes within 4 weeks of the meeting and having these posted on the AFMA website no later than 6 weeks after the meeting
- informally invited a noted public critic of the Small Pelagic Fishery science to discuss concerns about the analysis in the Nelra Report at an SPFRAG meeting
- posted a frequently asked questions page on the AFMA website, as well as relevant scientific articles
- participated in various interviews to explain the management of the SPF as well as writing numerous briefings and letters and taking phone calls from concerned citizens
- participated in an independently chaired Working Party in an advisory capacity to discuss the concerns held by the recreational and environmental sectors
- SPFRAG agreed on a process for monitoring any effects of localised depletion, while retaining confidentiality, via a "heat map" display to be presented to SPFRAG for assessment if large trawlers were to fish in the fishery