Submission on the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels

September 2011

Submission Prepared by

Talley's Group Ltd
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Overview of Talley’s Group Fishing Interests

Talley’s Group Ltd has been involved in the New Zealand Fishing Industry since 1936, representing a continuous involvement in New Zealand fisheries for the past 75 years.

Talley’s operate four seafood processing plants strategically sited throughout the South Island at:

- Westport
- Timaru
- Motueka
- Blenheim

The company own and operate a large fleet of both deep water factory trawlers and inshore fishing vessels:

- Amaltal Atlantis 64 meters
- Amaltal Columbia 64 meters
- Amaltal Enterprise 69 meters
- Capt M.J. Souza 68 meters
- Amaltal Explorer 66 meters
- Amaltal Apollo 43 meters
- Amaltal Mariner 37 meters

In addition to their own vessels Talley’s contracts the services of 170 independent privately owned, New Zealand fishing vessel operators.

To service the independent catching fleet the company operates fish receiving depots at numerous South Island fishing ports:

- Jackson Bay
- Greymouth
- Takaka
- Nelson
- Havelock

2 New Zealand Owned and Crewed vessels
Overview of the New Zealand Fishing Industry

In the year ended 30 September 2010 the seafood industry earned $1.49 billion in exports making it the countries fifth largest export earner.

The industry supports over 26,000 jobs in New Zealand many of them in regional areas.

Most of these valuable export receipts were generated in our regions, where companies have invested in some of the world’s most advanced fishing and processing technologies. They have also invested in skilled, technologically capable staff. This applies to every level of company operations – from those involved in marine farming and harvesting, right through to the quality and process supervisors, food technologists and process engineers.

All this means growing career opportunities in a young and vibrant industry. Because resource sustainability is assured through the Quota Management System, companies can securely invest in adding value to primary resources.

Each year the Minister of Fisheries decides the total allowable commercial catch (TACC). Fishing rights are then allocated to quota holders. Quota is defined as a proportion of the TACC so quota holders have the right to harvest a fixed percentage of the TACC each year.

The New Zealand industry pays $24 million annually to the Government for commercial fisheries management and research services. It is the most unsubsidized fishery management regime anywhere in the world and its QMS is regarded widely as the world’s best.

Given the correct operating environment the fishing industry could increase seafood exports to $2.0 billion within the next 5 years. To achieve this growth target specific ‘policies’ need to be nurtured that are conducive to that growth.

One policy that must be addressed with urgency is the presence of 2500 foreign fisherman employed just over the horizon in New Zealand waters in preference to New Zealand crewed vessels. The NZ Government can’t tax them because under international tax law, countries only have jurisdiction out to the 12 mile boundary. Nor can they enforce employment conditions as they are structured to avoid compliance with employment law’s and other New Zealand requirements.

As a result FVC’s act largely in a regulatory and compliance ‘vacuum’ which leads to undesirable exploitative practices and a distorted playing field for New Zealand crewed vessels. The ongoing presence of FCV’s in New Zealand is robbing New Zealand Inc. of substantial economic wealth and exposing our Industry to significant risk.
Overview / History of Foreign Charter Vessels (FCV’s) in New Zealand’s EEZ

Why we have them?

When reviewing the operating conditions for FCV’s it is important to review the history behind the establishment of FCV’s in New Zealand waters.

On 1st October 1977 an interim 200 mile EEZ came into being. It was to bring a whole new focus to the Seafood Industry. New Zealand now had control over the 4th largest fishing zone in the world.

Under the “law of the sea” the coastal nation had first priority of access to the fish resources within its 200 mile jurisdiction. Any fish it could not catch with its own domestic fleet had to be shared with other nations.

The concept of forming joint ventures was to increase the catch of the “Nations fleet” as the J/V’s were required to become registered New Zealand vessels. Everybody at the time agreed that it was better to have control over the J/V’s than the other option of simply assigning our surplus fish stocks to the foreign licensed fleet over which coastal nations could exert very little control.

It would also allow NZ a transitional period to develop the skills and capacity to eventually harvest the resources in a self-sufficient manner.

J/V’s were created as short term management tools and it was never contemplated that they would remain in existence 34 years later.

When the Fisheries Amendment Bill 1996 was debated in Parliament, the issue of foreign flagged fishing vessels harvesting catch in New Zealand’s EEZ was raised and the then National party opposition argued for greater “New Zealandisation” of the fisheries, seeking full development of the resources in the interest of New Zealanders by New Zealanders. The party’s policy was that foreign fishing vessels should be tolerated only until the New Zealand fishing fleet was capable of catching the resources and using its own manpower and capital to create jobs and earn overseas funds, and pushed for amendments to the bill that reflected this policy.

Jim Bolger stated at the time:

“The long term ideal, of course is that we reach the stage where we as New Zealanders are able to catch, process and sell the total resource ourselves within the 200 mile zone.”

As such FCV’s were introduced as “stepping stones” to allow New Zealand fishing companies the opportunity to learn how to catch fish in the deeper water of the EEZ and comply with the ruling law of the sea.
They have unfortunately been used as 'sitting stones'. It doesn’t take 34 years to learn how to catch fish or build capacity.

The initiative to review the operations procedures for Foreign Charter Vessels operating in the New Zealand EEZ is long overdue as many changes have occurred in the domestic fleet capacity in the past 34 years. The domestic fleet now has the knowledge and skills required to harvest 100% of all of our fishing resources.

Without a policy foundation FCV’s no longer have a place in the New Zealand fishery.

**How much they catch today?**

Foreign charter vessels contribute approximately 40% by volume of total New Zealand fisheries landings but catch a massive 62.3% of our valuable deep water resources.

The New Zealand domestic fishing industry has been unable to realise its full potential because so much of our fish is landed in the EEZ by FCV’s, which are typically cheaper than New Zealand domestically owned and crewed vessels.

This means fewer jobs and investment in the New Zealand industry and lower returns to the country as whole.

Since the introduction of the Quota Management System in 1986 FCV’s have enjoyed an unfair operating advantage over the New Zealand domestic fleet, and advantage that continues to prevent New Zealand owners and operators make the commitment to NZ crew and NZ vessels. This un-level playing field has resulted in the continued decline in the domestic fleet both in numbers and tonnage landed.

The catch by FCV vessels operating in New Zealand waters is increasing even though many of our TACC’s have been reducing.

In the 2010 fishing year New Zealand’s total catch of the nine major deep water species by all vessels operating in our EEZ was 266,400 tonnes of which the FCV’s caught 166,015 tonnes i.e. 62.3%.

The nine main deep water fish stocks are –

- Hoki
- Squid
- White Warehou
- Southern Blue Whiting
- Jack Mackeral
- Hake
- Barracouta
- Ling
- Silver Warehou
Why they catch that much?

The un-level playing field has been created by a variety of causes but it principally stems from a disparity in the operating costs between a New Zealand crewed vessel and a foreign crewed vessel. These cost disparities include:

- Lack of controls on wages paid to foreign crew resulting in a discriminated labor market. FCVs enjoy crew remuneration cost approximately \( \frac{1}{4} \) of that paid to NZ crew.

- Variance in standards of onboard health and safety issues.

- The continued practice by IRD of choosing to ignore the collection of either income tax or ACC levies from foreign fishing crews. Most New Zealanders would be surprised to learn that the commissioner of Inland Revenue has interpreted New Zealand law so as to exempt foreign fishing crews from income tax liability.

- Restricted market access for New Zealand domestically caught fishery products vs. the tariff free or privileged market access afforded by FCV for NZ caught fish.

- The employers of foreign crew have managed to escape their social or legal responsibilities associated with the employment of New Zealand citizens.
  - FCV’s do not have to meet normal ERA protections
  - FCV’s do not incur Holiday Act costs
  - FCV’s have virtually nil OSH standards
  - FCV’s crew pay no Income Tax or ACC Levies

As a result of the significant cost distortions above operators are incentivized to utilize FCV over and above NZ crewed vessels.

There is an increasing tendency for New Zealand vessel owners to sell their domestic fleet capacity and replace their capacity requirements with FCVs because of the cost advantages over New Zealand crewed vessels.

For the past several Hoki seasons the situation has arisen whereby New Zealand fishermen and their vessels were tied to the wharves whilst foreign vessels were still operating in the Hoki fishery.

The need for change

Today the rationale for FCVs to operate in New Zealand no longer exists – it expired close to 30 years ago.

Today New Zealand as a nation bears unacceptably high social costs from the lack of economic value captured and the high unemployment costs associated with FCV’s.
Much greater economic value can be captured from what is a nationally significant resource, by addressing the FCV issue and replacing that capacity with New Zealand owned vessels.

Today there are insufficient controls on entering the New Zealand fishing industry when utilizing FCV's. The current operating environment can correctly be described as the 'Wild West'. Consider:

a) Confirmed access to the resource (Quota or ACE) prior to going fishing is not required by FCV’s.

b) Ownership of a vessel is not required. Chartering of FCV’s is a cheaper option because of the disparity in operating conditions and costs which leads to an acceleration of FCV’s not their phasing out.

c) The employment of New Zealand citizens is not required. It is current practice to engage 100% foreign nationals on FCV’s.

d) Ownership of shore based fish processing plants is not required. Most of the catch from FCVs is processed in China utilizing ‘slave labour’ and then resold into the world markets as Produce of New Zealand. This product is sold in direct competition to seafood caught by New Zealanders and processed by New Zealanders.

For the New Zealand fishing industry to have a long term economic future a much higher degree of control needs to be placed on the activities of the foreign charter fleet.

The reality is many of the unscrupulous FCV operators are using a business model that doesn’t require access to capital, confirmed access to catching entitlements, ownership of processing factories or ownership of fishing craft to play havoc in the fishery and thereby wreck both the resource and the viability and future of the New Zealand fishermen.

Currently all one needs is an office, a secretary, a tough lawyer and you are in the fishing business. This is a ridiculous situation that must be rectified by the outcomes from this current review.
Difference between a “Time Charter” Agreement and a “Demise Charter” Agreement

Much of the problem lies in the way in which operators are structuring the engagement of these FCVs.

Most charter vessels operating in the New Zealand fisheries are engaged on what is known as a time charter. Under the provisions of a time charter the crew of the vessel are always employees of the owner of the vessel not the New Zealand charterer.

FCVs arrive in New Zealand fully crewed, and the New Zealand company as the charterer apply to the NZIS (New Zealand Immigration Service) for work permits on behalf of the vessel owner. The New Zealand charterer does not select the crew and does not pay the crew. Even though a vessel maybe Korean owned all of the crew with the exception of the captain and maybe a few officers are engaged from third world countries at third world wage rates. (Indonesian, Philippino’s and Myanmar (Burma).

By utilizing the structure of time charter operators are able to escape the social welfare and the tax costs associated with the employment of New Zealand citizens such as:

- No Holiday Act or General ERA Protection (eg: process, leave entitlements)
- No OSH requirements
- No ACC
- No PAYE
- Restricted MSA involvement
- Remuneration abuse

The New Zealand Company is commonly referred to as the New Zealand Charter Party (NZCP). The Foreign vessel owner typically acts under the NZCP’s instructions as to the location and quantity of catch, but retains full possession and control of the vessel and its crew including the employment of the crew. Using the time charter as the contractual basis for the joint venture allow the NZCP to absolve its self of any liability to the crew and any obligation to comply with NZ employment laws.

The better alternative that does not allow the extent and scope for abuse of foreign crew is to have the FCVs all engaged on demise charter. A demise charter is also known as a “bare boat charter”.

The central features of a demise charter were described by Evans LJ in his judgment in The Giuseppe di Vittorio as one where.

“.....the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting - a lease, or demise, in real property terms - of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a ‘bareboat’ lease or hire arrangement". (emphasis added)
A core characteristic of a demise charter is that possession and control of the vessel has passed from the owners to the demise charterers, which in the NZ context would be the New Zealand Charter party.

By reason of that possession and control of the vessel the NZ party is prima facie responsible for employing the crew and that engagement and employment would be subject to ordinary New Zealand employment laws.

Under a demise charter, the charterer becomes, for the duration of the charter, the de facto “owner” of the vessels and the master and crew act under their orders, and through them they have possession and control of the ship. In contrast, time charter arrangements are, in essence, contracts for the provision of services, including the use of the chartered ship under which the charterer directs the vessel where to go but the possession and control of the vessel remain with the owner and it is the owner who is the employer of the master and crew. A time charter is akin to the hire of a taxi, where a person may direct the taxi driver where to go, but does not employ the taxi driver and has no control over that driver or the vehicle.

**Possible breach of existing law**

Arguably the current structure of time chartering does not strictly comply with the s103 of the Fisheries Act all FCV’s operating in New Zealand waters should operate on the basis of a ‘demise charter’.

In order to comply with the requirements of the section, it is the FCP, not the NZCP, that must apply for consent to the registration of the vessel under section 103(2) of the Fisheries Act 1996. Notwithstanding this requirement, in practice, the application for registration is made by the NZCP itself or as ‘agent’ for the FCP and the Chief Executive registers the vessel in the name of the NZCP. This practice of consenting to the registration of vessels on the New Zealand fishing register on the basis of a time charter by the FCP to the NZCP is contrary to the spirit and intent of section 103 of the Fisheries Act 1996. The practice of time chartering FCV’s casts significant doubt on the legal nexus between the owner of the vessel and their obligations under the Fisheries Act 1996 because the entity that has possession and control of the vessel (i.e. the FCP) is not the registered ‘operator’ for the purposes of the Act.

If ‘effect’ is given to the intention of the Act by only allowing FCV’s that are on demise charter to a New Zealand operator to be registered the obligations imposed by the Fisheries Act would then be imposed on the entity that has day to day possession and control of the boat. The New Zealand demise charterer would have the possession and control of the vessel and would be the employer of the crew, with the result that the full scope of New Zealand law would apply to the crew and the operation of the vessel. This would allow New Zealand entities that lack the capital to invest in a large fishing vessel, the opportunity to demise charter, as opposed to purchase, a vessel.

**Conclusion**

Regardless of the legal argument the law as it stands is either unenforced or deficient as it is not interpreted in the way set out above.
An amendment or clarification would ensure the New Zealand charterer had to comply with all laws (including those covering employment, tax, safe ship management, and sustainable fisheries). In particular, given that the crew would be employed in New Zealand, the full range of New Zealand employment and wage protection legislation would apply to crew on board the vessels and the New Zealand *demise* charterer, as employer, would be required to deduct PAYE, and withhold ACC levies. This would ensure that crew would have better living and working conditions and clear remedies under the Employment Relations Act 2000, the Minimum Wage Act 1983 and the Wages Protection Act 1983.

Our submission is that all vessel charters in New Zealand must be structured via *demise charter* only. *Time charter* should be prohibited.

Chartering in this way would still allow these quota holders or companies without vessels (or the finance to acquire one) the ability to charter a vessel and go fishing. They would simply have to do so on the same basis as New Zealand vessel owners – under the full blanket of New Zealand law.

The vessel below was chartered into New Zealand on a demise charter and crewed with 100% New Zealand crew.

A sister ship to the ‘Amaltal Columbia’ (pictured page 3) is right now operating in New Zealand on demise charter with all kiwi crew.
National Economic Benefits Associated with the Utilization of Domestic
New Zealand Crewed Vessels

There are enormous economic benefits that accrue to New Zealand from the operation of
domestically crewed vessels. These economic benefits accrue from contributions to
Government such as

- PAYE – crew tax deductions
- ACC – earners levy deductions
- Income Tax

And directly to the crew employed in the form of wages paid to New Zealand domiciled
crew. Additionally there are large indirect economic impacts (eg: R&M, provisions)
spent in local communities from the presence of New Zealand crewed vessels that
‘multiply’ throughout the economy.

The use of FCV’s in the New Zealand fishing industry has many significant negative
economic, social and environmental impacts on New Zealand and the New Zealand tax
payer.

i) Taxation / Wage Losses

To illustrate the national benefit accruing with the use of domestically crewed vessels we
outline the crew earnings of the Amaltal Columbia.

Amaltal Columbia – 12 Months Earnings to 12/09/11

<table>
<thead>
<tr>
<th>Position</th>
<th>Earnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Captain</td>
<td>$246,945.04</td>
</tr>
<tr>
<td>1st Mate</td>
<td>$152,557.16</td>
</tr>
<tr>
<td>2nd Mate</td>
<td>$115,789.76</td>
</tr>
<tr>
<td>Bosun</td>
<td>$109,753.35</td>
</tr>
<tr>
<td>Chief Engineer</td>
<td>$148,167.02</td>
</tr>
<tr>
<td>2nd Engineer Mec4</td>
<td>$116,887.32</td>
</tr>
<tr>
<td>2nd Engineer Mec6</td>
<td>$110,850.88</td>
</tr>
<tr>
<td>Baader Engineer</td>
<td>$121,277.45</td>
</tr>
<tr>
<td>Factory Manager</td>
<td>$121,277.45</td>
</tr>
<tr>
<td>Leading Hand</td>
<td>$91,095.28</td>
</tr>
<tr>
<td>Cook</td>
<td>$91,095.28</td>
</tr>
<tr>
<td>Galley Assistant</td>
<td>$54,327.91</td>
</tr>
<tr>
<td>Senior</td>
<td>$90,546.51</td>
</tr>
<tr>
<td>A Grade</td>
<td>$82,315.01</td>
</tr>
<tr>
<td>B Grade</td>
<td>$68,595.84</td>
</tr>
<tr>
<td>C Grade</td>
<td>$58,169.28</td>
</tr>
<tr>
<td>Trainee Grade</td>
<td>$49,389.02</td>
</tr>
</tbody>
</table>

- Total crew of 60.
• Annual wages paid $6.08 million.

• The Amalal Columbia provides full time employment for 60 crew, including 36 crew employed on a 2 trips on with 1 trip off rotational employment basis and 24 senior crew engaged on a trip on trip off rotational basis. The “Columbia” requires 36 ‘at sea’ crew per voyage with 24 crew at home on rotational shore leave. (All crew are paid full earnings whilst on rotational shore leave).

This method of crewing enables the vessel to spend 320 days per annum at sea. The rotational shore leave ensures a high degree of social acceptability for fishermen required to spend extensive periods away from their families.

• The annual wage cost for the 60 crew amounts to $6.08 million and contributes to Government directly:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>PAYE paid by crew</td>
<td>$1,272,491</td>
</tr>
<tr>
<td>ACC Earner Levy</td>
<td>$381,000</td>
</tr>
<tr>
<td>Total</td>
<td>$1,653,491</td>
</tr>
</tbody>
</table>

By extrapolating the NZ$1.6 million across the 27 similar sized FCV’s operating in the NZEEZ as at September 2011 it reveals that the net loss to the New Zealand Government from just PAYE and ACC levies is $43.2 million per annum.

An economist would be able to inform the Committee of the added benefits accruing to the national economy when the crews ‘after tax’ income is filtered throughout the community. The Nation also gains from the direct employment of New Zealanders in this fashion by removing the significant welfare costs associated with creating 2500 new jobs in a valuable NZ resource.

The tax framework under which FCV’s operate discriminates against New Zealand fishermen in favour of the foreign owned operations, resulting in loss of employment and contracts for New Zealand fishers and income for regional communities. The New Zealand taxpayer picks up the shortfall.

In the writers opinion “it is the first duty of all politicians to create an environment where people can find meaningful employment”. Without such jobs available many of our young people will join the exodus to Australia or be destined to a job serving lattés to Chinese tourists.

ii) ACC Losses

The current policy regarding the applicability of ACC to FVCs is ludicrous. Currently the New Zealand tax payer is required to fund accident insurance of a foreign crew member whilst operating within the NZEEZ even though they and their employer have escaped the payment of ACC levies entirely.

Foreign crews aboard FCV’s are covered by ACC although they contribute nothing.
iii) **Offshore Processing**

Much of the fish caught by the FCV’s bypass New Zealand processing facilities and further New Zealand jobs, by delivering catch directly to foreign markets and foreign processing plants in Thailand and China.

Much of the FCV catch is exported in an unprocessed state to factories in China and Bangkok for contract processing into fillets and portions which is then sold into the United States or EU as “Product of New Zealand”. These products are sold in competition with fish caught by New Zealanders and processed by New Zealanders. Thousands of tons of fish are channeled through this pathway and processed in factories like this:

![Image of fish processing factory](image.jpg)

This mode of operation reduces the opportunity for New Zealand to add value to a primary resource, reducing job opportunities, minimizing the industries investment in skills, technology and capacity, and reducing the fishing industries contribution to New Zealand’s GDP.

iv) **New Zealand’s Reputation Risk**

There are several areas stemming from the current practice of FCVs that puts New Zealand at international reputational and trade risk.

The *Produce of New Zealand* brand is put at risk by being applied to fish products which are processed either aboard foreign ships in NZ that operate outside our normal food security checks or in foreign countries utilizing slave labor rates over which New Zealand has no control.
The brand equity in *Produce of New Zealand* is one of this Country’s most valuable and treasured assets yet it is put at risk daily with the operation of FVCs. The potential damage to New Zealand Food Inc. from this practice is immeasurable.

Furthermore the current practice combined with the complicit endorsement of slave like conditions and employment terms is a large risk to New Zealand’s reputation internationally.

The sustainable management of commercial fish stocks is one of the areas in which New Zealand is judged internationally by global environmental and Governmental interests. Our ability to sell depends on it. Those environmental credentials and our Government integrity is put at risk along with our 100% Pure New Zealand branding from the current practice.

v) **Fishing Offences by FCV’s**

The Ministry of Fisheries Compliance division also spends millions of dollars each year monitoring the poor compliance record of FCV’s including:

- Over catching
- Trucking (misreporting catch areas)
- Deliberately falsifying returns
- Illegal discarding
- Deemed value defaults

FCV’s account for:

1) 90% of all seabird strikes
2) 70% of all deep water fisheries offences
3) 100% of ship desertions

The cost to Government of ensuring compliance, and the cost of constant reviews by government to address non-compliance amongst the FCV fleet places an ever increasing burden on the New Zealand taxpayer.

The Quota Management System (QMS) is a management framework which finely balances sustainability and utilisation values. Breaches of the QMS no matter how minor can have a negative impact on fish species, and therefore the viability of the fishing industry.

FCV’s have been identified by the Minister of Fisheries as a threat to the integrity of the Quota Management System. FCV’s are involved in a disproportionate number of violations of fishing regulations. This in part is due the difficulties inherent in monitoring FCV’s, their lack of care for the sustainability of New Zealand fishery resources and the fact that offshore and charter structures are easily “wound up” to avoid the penalties of illegal fishing.