



Human Rights  
Commission  
*Te Kāhui Tika Tangata*

11 October 2011

Jenny Wood  
MAF  
PO Box 1020  
Wellington 6140

Dear Ms Wood,

### **MINISTERIAL INQUIRY INTO FOREIGN CHARTER VESSELS**

1. The Human Rights Commission (the Commission) appreciates the opportunity to make this submission to the Ministerial Inquiry.
2. The Inquiry's objectives include protecting New Zealand's international reputation and ensuring that acceptable and equitable New Zealand labour standards (including the provision of a safe working environment) apply on all foreign owned and flagged vessels chartered by New Zealand companies working within the Exclusive Economic Zone (EEZ). It is also considering the applicability of New Zealand's legislative regime and can make recommendations on an appropriate legal framework including options for monitoring and enforcing any recommended legislative and policy settings.
3. The Commission believes that human rights are critical to the objectives of this Inquiry. New Zealand has developed an international reputation as a leader in developing human rights norms, introducing policy to support their implementation and in daily practice. It has a duty to lead the protection, fulfilment and respect of human rights because it is right and because that is what New Zealand has always done.
4. The challenges of ensuring that moral, ethical, legal, social and economic rights are adhered to in the use and operation of foreign charter vessels (FCVs) in the EEZ should not be underestimated, but this Inquiry has the opportunity to demonstrate human rights leadership on an issue that involves serious ongoing human rights violations relating to foreign fishing crews.
5. Ensuring acceptable and equitable New Zealand labour standards (including safe working environments) on all fishing vessels operating within New Zealand's EEZ requires not just a commitment to rigorous legislative and policy frameworks but greater accountability in terms of active enforcement, international awareness of New Zealand's position, and better educational safeguards.

6. Under the long title to the Human Rights Act 1993 (HRA) the Commission has the role of protecting human rights in New Zealand in “accordance with the United Nations Covenants and Conventions on Human Rights”. The human rights framework is based on the principles found in the Universal Declaration of Human Rights and includes rights such as the right to security of the person<sup>1</sup> and the right not to be subjected to degrading treatment or punishment<sup>2</sup>.
7. A number of the Articles in the Universal Declaration are directly applicable to this Inquiry. Particularly, Article 23 which (inter alia) states that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; the right without discrimination to equal pay for equal work and to just and favourable remuneration to ensure an existence worthy of human dignity. Article 24 states that everyone has the right to rest and leisure and reasonable working hours while Article 25 states that everyone has the right to a reasonable standard of living.
8. The human rights regime also includes the standards set by the International Labour Organisation (the ILO), regional arrangements and international humanitarian law.
9. The Commission notes that New Zealand and two of the countries that have a stake in this Inquiry (Japan and Korea) are members of the OECD. The OECD has developed Guidelines for Multinational Enterprises. Signatory countries have a National Contact Point at country level, which New Zealand has established. The 2011 review and update of the guidelines, a process that both the Commission and the New Zealand Government were involved in, makes explicit reference to both human rights and employment standards. They include how business enterprises - including those owning and operating FVCs and the fishing industry generally - should work within the framework of internationally recognised human rights and labour standards. This applies to both supply chain and business relationship issues.
10. The Commission has both a domestic and international interest in this Inquiry. It has discussed human rights abuses of foreign fishing crews through its regional and international connections with members of the National Human Rights Commission of Korea, the Indonesian National Commission on Human Rights and the Chair of the ASEAN Intergovernmental Human Rights Commission at the recent Annual Conference of the Asia Pacific Forum in Bangkok. These organisations have received a copy of this submission and have given an undertaking to monitor the outcomes of the Inquiry. They also made some suggestions which have been included in the submission.

### **Background to the Inquiry**

11. The Inquiry is the result of public concern at the labour conditions on Foreign Charter Vessels (FCV) operating in New Zealand waters. The vessels are owned by foreign

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<sup>1</sup> Article 3, UDHR

<sup>2</sup> Article 5, UDHR

companies and operate under joint venture agreements with New Zealand businesses<sup>3</sup>. There are currently 26 FCVs flagged to four countries: South Korea, Ukraine, Japan and Dominica.

12. The international legal framework governing this area includes the UN Convention on the Law of the Sea (UNCLOS), the ILO Convention concerning decent working conditions, safety and social protection in the fishing sector (ILO Convention No. 188) and the Torremolinos International Convention for the Safety of Fishing Vessels (the Torremolinos Protocol).<sup>4</sup> The UN Convention on the Rights of All Migrant Workers and Their Families (the Migrant Workers Convention) may also be relevant in some situations.
13. The applicable domestic legislation is the Fisheries Act 1996 (the Act) and any Regulations made under it. To operate in New Zealand waters, FCVs must be registered under section 103 of the Act. Section 103(5) provides that the wage protections in the Minimum Wage Act 1983 and the Wages Protection Act 1983 apply to the terms and conditions of employment on FCVs. The Employment Relations Authority and the Employment Court have jurisdiction to deal with disputes arising under these Acts but the rights of crews on FVCs are often undermined by the manning agents responsible for hiring the crews (who may not necessarily come from the flag State) in countries such as Indonesia<sup>5</sup>.
14. Crew members of an FCV need to hold a temporary entry class visa issued under the Immigration Act 2009. A Code of Practice (the Code) has been developed by the Department of Labour, the Fishing Industry Guild and the Seafood Industry Council to “assist in achieving the highest level of compliance in relation to immigration requirements and applicable laws of New Zealand”.<sup>6</sup> To obtain immigration visas for a foreign fishing crew, the New Zealand government has made it mandatory to sign the Code.<sup>7</sup>
15. The purpose underlying the visa requirements is the protection of the employment prospects of New Zealanders. As with the Recognised Seasonal Employer scheme (RSE), a New Zealand company seeking to enter a joint venture must satisfy the Department of Labour that there are no (or insufficient) suitably qualified and experienced New Zealanders available to perform the work.
16. The Code has been enforced principally through education and assisting the commercial sector to comply. In practice, this has proved ineffective. The question,

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<sup>3</sup> Typically the joint venture is between a foreign vessel owner and a New Zealand company that has access to a quota. The vessels are owned and operated by overseas companies and come complete with crew. The crew members’ contracts of employment are with the foreign owner.

<sup>4</sup> The Torremolinos Protocol will only come into effect when it has been ratified by 15 States with at least 14,000 vessels of 24 metres and over. 17 States have ratified the Protocol but they don’t have the requisite fleet numbers.

<sup>5</sup> Stinger C, Simmons G & Coulston, D *Not in New Zealand’s waters, surely? Labour and human rights abuses aboard foreign fishing vessels*, Working Paper: New Zealand Asia Institute, University of Auckland (2011) at 9

<sup>6</sup> Department of Labour, the Fishing Industry Guild and the Seafood Industry Council, *Code of Practice* (2006) (the Code) at p.4

<sup>7</sup> Although the Fishing Industry claims to recognise the importance of complying with the Code, it has yet to agree with the minimum levels of remuneration: Code at 4

therefore, is whether it is possible to amend the relevant legislation to improve labour conditions for crews on board the FVCs and maintain New Zealand's reputation as a promoter and champion of human rights by promoting the ratification of certain relevant international instruments.

### **The international framework and New Zealand's protection and promotion of human rights**

17. The enforcement of international law in situations such as this is problematic as jurisdiction resides with the flag State of the vessel involved. While the international treaties contain valuable standards, they can only be enforced if a State has ratified the treaty concerned. It follows that if a State with jurisdiction over a vessel has not ratified an international Convention then it cannot be enforced against that State.
18. As we noted in our introduction, New Zealand has an enviable human rights reputation.<sup>8</sup> It played a significant role in developing the Universal Declaration of Human Rights and is a signatory to most of the major Conventions. However, it has not ratified ILO No.188 and the Migrant Workers Convention and, while it has ratified UNCLOS, UNCLOS is less about the conditions on board the vessels than the rights and responsibilities of States to utilise marine resources in a sustainable manner.
19. UNCLOS reinforces the concept of flag State jurisdiction. A flag State controls the administrative, technical and social matters of ships flying its flag.<sup>9</sup> This includes labour conditions. Art.58(3) requires States to "have due regard to the rights and duties of the coastal State and [to] comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part". Art. 62(4) also suggests that nationals of other States fishing in an EEZ should comply with terms and conditions established in the laws and regulations of the Coastal State.
20. While these provisions may imply that it is possible to impose New Zealand law on vessels operating in the EEZ (and the UN Office of Legal Affairs advised New Zealand in 2007 that it could regulate the activities of FCVs in its waters<sup>10</sup>) some legal practitioners argue that to do so is *ultra vires* the powers of the Executive.<sup>11</sup>
21. Convention No.188 is the instrument developed by the ILO to ensure that people employed in the fishing industry have decent conditions of work on board fishing

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<sup>8</sup> In the context of this submission the Commission is commenting on New Zealand's human rights reputation. While we realise that reputational issues may arise in connection with Part V of UNCLOS, particularly the protection of sustainable resources and how New Zealand manages its fisheries, we do not have the expertise to comment on such issues.

<sup>9</sup> Article 49.1 UNCLOS

<sup>10</sup> Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations. The advice suggested that it would be permissible under Art.62(4) as it provides a non-exhaustive list of examples.

<sup>11</sup> See, for example, Dawson, P. & Hunt, R. *The Legal Regime Governing the Operation of FCVs in New Zealand* (2011) accessed 5 October 2011 and Devlin, J. *Modern Day Slavery: Employment Conditions for Foreign Fishing Crews in New Zealand Waters* Australia and New Zealand Maritime Law Journal, Vol.23, No.1 (2009)

vessels.<sup>12</sup> ILO No.188 is a comparatively recent addition to the international labour conventions. New Zealand has not ratified it despite professing support of the ILO's efforts to promote core labour standards.<sup>13</sup> While the Convention could address some of the problems that led to this Inquiry, the same constraints relating to jurisdiction on FCVs apply. This will also be the case with the Migrant Workers Convention which is designed to improve the situation of migrant workers and their families by building on existing human rights standards.<sup>14</sup>

22. One way, however, in which New Zealand could consolidate and retain its international reputation would be by encouraging - or even requiring - New Zealand companies involved in joint ventures in the fishing industry to adopt *The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (the Ruggie Principles).
23. The Ruggie Principles were adopted by the UN General Assembly earlier this year. The Principles, which apply to the whole supply chain, are designed to ensure that companies do not violate human rights in the course of business transactions and provide redress when infringements occur. There are three parts to the Ruggie Principles. The first is the duty of the State to protect against abuse by third parties - which includes businesses - by adopting appropriate policies, regulations and adjudication. The second is the responsibility of business to respect human rights, to avoid infringing the rights of others and to address any adverse impacts, while the third is ensuring victims have greater access to an effective remedy.<sup>15</sup>
24. While the Principles are not legally binding in the same way as a treaty, they establish standards of behaviour with which States are expected to conform. Ruggie himself sees them as providing "a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer term developments".<sup>16</sup> In other words they anticipate incremental progression towards the elimination of human rights abuses by business concerns and the State.
25. Although States per se are not responsible for the human rights abuses of private actors, they may be held to have breached their human rights obligations if they fail to take appropriate steps to prevent, investigate or punish such abuse.<sup>17</sup>

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<sup>12</sup> There are other ILO Conventions that deal with seafarers' rights that New Zealand has ratified but they explicitly exclude ships engaged in fishing.

<sup>13</sup> New Zealand Ministry of Foreign Affairs and Trade, *New Zealand Handbook on International Human Rights* (2008) at 37

<sup>14</sup> New Zealand has not ratified the Migrant Workers Convention and is unlikely to do so in the near future as it considers that it could undermine endeavours to deter illegal migration by providing rights and entitlements to migrant workers who are unlawfully present in the country (ibid. at 54). The Commission itself has consistently advocated for ratification of the Convention.

<sup>15</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: *The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 at para 6.

<sup>16</sup> Ibid. Para 13

<sup>17</sup> Ibid. at 1(A)(2)

26. The Commission considers that the Government should convey to those involved in the fishing business that the Ruggie Principles will be expected to inform any joint ventures with New Zealand companies. This would go some way to ensuring that the human rights of employees on FCVs are respected and would send a strong message to joint venture partners in other countries that New Zealand is committed to promoting and protecting human rights.
27. Consideration should also be given to New Zealand ratifying ILO Convention 188. While we recognise that this would not necessarily impact on the immediate situation of workers on FCVs, it would signal New Zealand's support for the international labour standards.

### **Domestic legal situation**

28. The domestic situation is addressed principally through the Fisheries Act 1996 of which section 103 was specifically amended to provide protection for the foreign crews of FCVs. The Act is supplemented by the Code. The Code, which was described on its introduction as "a new accountability framework",<sup>18</sup> outlines the minimum work conditions that must be satisfied before visas are granted under the Immigration Act 2009. It sets out employer responsibilities generally and obliges employers to keep accurate records<sup>19</sup>.
29. While the legislation and the Code may seem to provide a solution to the exploitation of people working on FCVs, in practice the protection has proved relatively ineffective even though compliance can be audited by the Department of Labour at least once every three years. As commentators have observed, "crew records, such as time sheets, are easily manipulated, and crews are not always aware of, or able to, exercise, their rights"<sup>20</sup>. It would be useful for the Inquiry to ascertain what auditing has been undertaken since the Code was introduced and request an evaluation of its impact. Compliance might also be strengthened by requiring a specific reference to international human right standards in the joint venture contracts. Off-shore manning agents should be required to ensure minimum human rights standards are met.
30. There are also problems in enforcing a regime that seeks to apply New Zealand law to what, for the most part, are foreign flagged vessels operating outside our territorial waters and, as we noted earlier, it is arguable that the Code (and possibly s.103 itself) is open to challenge on the grounds that the Executive does not have the power to make policy guidelines that have extra-territorial effect.<sup>21</sup>
31. Australia has avoided similar problems by only permitting the allowable quota to be fished by Australian vessels. As a result of Art.92 of UNCLOS, Australian law (including labour law) applies to all aspects of the operation. While it has been

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<sup>18</sup> Immigration New Zealand, *Fact Sheet – Crew of chartered foreign fishing vessels: New standards* (2006)

<sup>19</sup> We note in passing that the Code does not appear to have been consistently updated. For example, the minimum wage requirements in Appendix 2 are updated to 2010 which is supplemented by an explanatory note that refers to the minimum wage in 2006.

<sup>20</sup> Dawson, P. & Hunt, R. (supra) fn 8 at 13

<sup>21</sup> Devlin (supra) fn. 8 at 95

suggested that a similar system could be introduced in New Zealand this could create a monopoly in favour of larger local fishing companies and side line Maori - who have a share of the quota under the Treaty of Waitangi (Fisheries Claims) Settlements Act 1992 - and who could demand that existing Treaty settlements are reopened having “the potential to set back race-relations”.<sup>22</sup>

32. Presumably this inquiry signals the intention to continue allowing joint ventures of this nature to operate in New Zealand’s EEZ. If this is to be the case then there needs to be some legislative change to ensure that there is no recurrence of the type of situation that provoked this inquiry.

### **A human rights approach to policy and legislation**

33. A human rights approach emphasises policy and legislation that is linked with the international human rights norms, ensures participation, accountability, empowerment and non-discrimination and balances the human rights of all those involved, favouring the most vulnerable in the case of a conflict.
34. The legislative regime and the Code in particular, satisfy several of these criteria. For example, on its introduction the Code was described as providing a new accountability framework designed to improve conditions of work of foreign crew. It reinforces this by providing that vessels can be inspected to ensure compliance relating to employment conditions and access to the ERA jurisdiction in case of disputes (i.e. transparency and empowerment). The Code also reflects concern with the most vulnerable group involved – the foreign crew.<sup>23</sup>
35. The Commission considers that if it were possible to overcome the extra-territorial issues and ensure genuine enforcement of the Code – including providing information on their rights and entitlements to the crews of foreign fishing vessels in their own language - then the legislative regime would go a considerable way towards ensuring acceptable and equitable labour standards.
36. Some legal practitioners who are more familiar with this area of law have suggested a solution could simply be to transfer responsibility for the crew of a foreign owned vessel to the New Zealand charter party and require vessels to be registered in New Zealand under the Ship Registration Act as a pre-condition of being able to fish in New Zealand waters.<sup>24</sup> As they note:

*This ...would place a greater onus on the New Zealand charterer to ensure that all laws (including those covering employment, tax, safe ship management and sustainable fisheries) are complied with. In particular, given that the crew would be employed in New Zealand, the full range of employment and wage protection legislation would apply to crews on board the vessels. [It] would ensure that crew would have better living and working conditions and clear remedies under the*

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<sup>22</sup> *ibid.* at 98

<sup>23</sup> *Supra* fn 15

<sup>24</sup> Dawson, P & Hunt, R *The Legal Regime Governing the Operation of FCVs in New Zealand* (2011) (*supra*) fn 8 at 16

*Employment Relations Act 2000, the Minimum Wage Act 1983 and the Wages Protection Act 1983.*

37. This would allow meaningful enforcement of the Code and be more consistent with a human rights approach. The Commission therefore recommends that consideration is given to changing the relevant legislation so that an obligation is imposed on those contracting with foreign companies to ensure minimum standards are met.

### **Commission recommendations**

38. The Commission strongly endorses the purpose of the Inquiry. It is imperative for New Zealand's own human rights reputation, and for the human rights of the crews, that acceptable and fair labour standards and human rights generally such as the right to security of the person and the right not be subjected to degrading treatment or punishment are mandatory on FVCs.
39. Although there have been changes over the years to improve the situation of crews working on foreign vessels, recent events indicate that they have not been as effective as they might have been and human rights abuses have occurred. The Commission therefore recommends:
- amending the appropriate legislation to ensure that New Zealand law applies to the conditions of employment on vessels owned and operated by foreign companies in New Zealand's EEZ;
  - vigorous enforcement of the Code of Practice including providing crew with timely and up to date information on their rights and entitlements in their own language;
  - a full evaluation of the auditing process related to the Code of Practice is tabled at the Inquiry;
  - promotion of the Ruggie Principles, or they are made a requirement when entering into arrangements with foreign owned businesses;
  - engagement between the New Zealand government and the governments of the relevant flag States to ensure that future contracts make explicit reference to human rights standards;
  - ratification of ILO Convention No.188; and
  - further consideration is given to ratification of the Migrant Workers Convention.
40. In addition to these recommendations the Indonesian Human Rights Commission suggested to the New Zealand Human Rights Commission that the New Zealand Government could usefully initiate a discussion with the other State parties about the role played by manning agents in the exploitation of workers on FVCs.



The Commission would be pleased to offer its expertise in human rights to the Inquiry should it be of use.

Yours sincerely

A handwritten signature in black ink that reads "Judy McGregor". The signature is written in a cursive, flowing style.

Dr Judy McGregor  
HUMAN RIGHTS COMMISSIONER