

THE LEGAL REGIME GOVERNING THE OPERATION OF FOREIGN CHARTER FISHING VESSELS IN NEW ZEALAND

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1 Introduction

On 18 August 2010, the 92 metre Korean flagged fishing vessel *Oyang 70* sunk some 700 kilometres east of Dunedin, New Zealand, with 51 crew on board. Six crewmen died; three were found dead in the water in their life-jackets and a further three remain missing, including the Captain. The surviving crew were rescued (together with the three dead men) by the crew of the New Zealand flagged fishing vessel *Amaltal Atlantis*.

The *Oyang 70* was owned by Korea's Sajo Oyang Corporation and, at 38 years old, was one of the oldest fishing vessels operating in New Zealand waters. It had recently passed its Maritime New Zealand safety inspection.

After initial uncertainty as to which entity had jurisdiction to look into the sinking, New Zealand's Transport Accident Investigation Commission ('TAIC') was appointed to investigate on behalf of the Korean flag state. The Korean Maritime Safety Tribunal agreed to TAIC's assistance on the basis that any report prepared for it would remain confidential.²

In the days following the rescue, the Indonesian crew relayed tales of poor working conditions and poor pay to their rescuers and the media.

More recently, Indonesian crew from two foreign charter vessels (the *Shin Ji* and the *Oyang 75*) have refused to return to their ships complaining of abuse, poor conditions, and poor pay.³ These events, and the associated media attention (both national and international) directed at the deepwater fishing industry in New Zealand led the Seafood Industry Council to request that the Minister of Fisheries initiate an inquiry into the operation of foreign charter vessels in New Zealand's exclusive economic zone.⁴ The Minister of Fisheries (Hon Phil Heatley) together with the Minister of Labour (Hon Kate Wilkinson) announced, on 14 July 2011, that a Ministerial Inquiry would be held to consider the issue. The terms of reference for the Inquiry were announced on 23 August 2011, and the committee is required to report back to the Ministers by 24 February 2012.⁵

Stories of this nature are not new. Employment conditions on foreign charter vessels ('FCVs') have been a problem for the New Zealand government for a number of years. The detention of the Korean flagged vessel the *Sky 75* by the Department of Labour in 2005, after 10 Indonesian fishermen walked off in protest at the living and working conditions, led to the development of a number of legislative and policy reforms designed to improve employment conditions for foreign fishers.

Two of the key reforms came about in mid-2006, after an in-depth Department of Labour Report into employment conditions in the fishing industry.⁶ As a consequence of this report, the government sought to regulate the rates of pay of foreign crew by amending s 103(5) of the *Fisheries Act 1996* (NZ) ('*Fisheries Act 1996*') to provide that the protections of the *Minimum Wage Act 1983* (NZ) ('*Minimum Wage Act 1983*') and the

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² Letter from Transport Accident Investigation Commission, 14 March 2011, *Commission Investigation into Oyang 70 Accident*.

³ Seven crew from the vessel the *Shin Ji*, berthed in Auckland, left their ship in early June 2011 and, later that month, 32 crew of the *Oyang 75* (the vessel that replaced the *Oyang 70*), berthed in Christchurch, walked off their vessel; In August 2011, The University of Auckland Business School researchers Dr. Christina Stringer and Glenn Simmons released a report depicting human rights and labour abuses of crew working on foreign-owned fishing fleets within New Zealand waters <http://www.auckland.ac.nz/uoa/home/template/news_item.jsp?cid=414934>; this report follows a series of news articles published by journalist Michael Field <<http://www.michaelfield.org/slave%20fishing.htm>>.

⁴ Letter from Peter Bodeker, Seafood Industry Council Chief Executive to Hon Phil Heatley, 14 July 2011.

⁵ The terms of reference are very broad with a particular focus, not on working conditions and labour issues on FCVs, but on assessing the practice of using of FCVs in the context of international reputation and trade access and whether the practice maximises returns from New Zealand's fisheries resources. Assessment of labour standards on board FCVs will also be addressed as a secondary matter.

⁶ Department of Labour *Employment Conditions in the Fishing Industry - Final report on foreign crew on New Zealand fishing vessels* (2 December 2004).

Wages Protection Act 1983 (NZ) (*‘Wages Protection Act 1983’*) apply to foreign fishers. The government then created a code of practice designed to regulate working conditions on FCVs. The Code of Practice on Foreign Fishing Crew (*‘the Code’*)⁷ to which the Department of Labour, the New Zealand Seafood Industry Council (on behalf of New Zealand fishing companies) and the New Zealand Fishing Industry Guild are parties, is a set of policy guidelines of Immigration New Zealand (under the umbrella of the Department of Labour) that applies to the charter arrangements between the foreign vessel owner and the New Zealand charterer.

In her 2009 paper *‘Modern Day Slavery: Employment Conditions for Foreign Fishing Crews in New Zealand Waters’*, Jennifer Devlin discussed the development of the fishing industry reforms and identified legal and practical difficulties in enforcing the Code.⁸ In particular, Devlin argued that by purporting to apply New Zealand law to foreign flagged vessels in New Zealand’s EEZ, the Code (which is simply a set of policy guidelines of Immigration New Zealand) violates international law and is *ultra vires* the authority of the *Immigration Act 2009* (NZ) to make immigration policy. As such, the Code is vulnerable to an administrative law challenge on the grounds that the executive does not have the power to make policy guidelines that have extra-territorial effect.⁹ Further, she argues that s 103(5) of the *Fisheries Act 1996* is in violation of international law as it imposes New Zealand law on foreign flagged vessels outside of New Zealand’s territorial waters.¹⁰

In addition to these legal and practical difficulties in enforcement of the Code, what is clear from reports from the crews of the *Oyang 70*, *Oyang 75* and *Shin Ji*, is that the reforms have not improved conditions for foreign fishers.¹¹ In fact, if these fishermen are to be believed, some foreign charter vessel owners appear to be paying lip service to the Code, particularly to the requirement to pay the crew the New Zealand minimum wage.

This paper seeks to build on the foundation laid by Devlin and to critically examine the legislative framework within which FCVs operate in New Zealand. The central premise of this paper is that many of the problems associated with the regulation of FCVs in New Zealand stem from a misapplication of international law of the sea, and of the underlying New Zealand legislation and policy governing the licensing and operation of such vessels. It is the writers’ view that the legislative foundation for the licensing and operation of these vessels in New Zealand does not support the commercial structures under which these vessels operate. In particular, s 103 of the *Fisheries Act 1996*, under which the vessels are licensed to operate, is poorly drafted so that, despite the intention of the section, FCVs are licensed to operate on the basis of a time charter (where the crew are employed by the owner) rather than on the basis of a demise charter arrangement (where the crew are employed by the charterer). This has led to an environment where unscrupulous operators have been able to take advantage of the absence of legislative clarity to relieve them of the responsibility for crew welfare in a bid to lower operating costs.

2 Foreign Fishing Vessels in New Zealand – A Brief History

Foreign fishing vessels have been fishing in and around New Zealand for many years. During the rise of the deepwater fishing industry in the 1960s, few New Zealand vessels were capable of exploiting the deep sea resources. In contrast, large fishing vessels from Russia, Japan, Korea, and other countries had the necessary experience in deepwater fishing around the Pacific and were permitted to fish within New Zealand’s 12 mile zone on the basis of a foreign licence regime.¹²

With the coming into effect of the United Nations Convention on the Law of the Sea (*‘UNCLOS’*),¹³ New Zealand gained sovereign rights for the purposes of *‘exploring and exploiting, conserving and managing the natural resources in its Exclusive Economic Zone’* (*‘EEZ’*) (the area of ocean out 200 nautical miles from its coast). In short, UNCLOS gave New Zealand the right to regulate fishing activities within its EEZ, and, in

⁷ Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006).

⁸ (2009) 23(1) *Australia and New Zealand Maritime Law Journal* 82.

⁹ *Ibid* 95.

¹⁰ *Ibid*.

¹¹ Christina Stringer, Glenn Simmons and Daren Coulston, *‘Labour Abuse Aboard Foreign Fishing Vessels in New Zealand’s Waters: An Institutional Territoriality and Governance Approach’* (presentation to the International CRIMT Conference Multinational Companies, Global Value Chains and Social Regulation, Montreal, Canada, 6-8 June 2011).

¹² The *Territorial Sea and Fishing Zone Act 1965* extended New Zealand’s jurisdiction from 3 to 12 miles and empowered the Ministry of Fisheries to regulate foreign vessels entering the 12 mile zone.

¹³ *United Nations Convention on the Law of the Sea* 1833 UNTS 3 (entered into force 16 November 1994) Art 56 (*‘UNCLOS’*). *UNCLOS* lays down a comprehensive regime of law and order in the world’s oceans and seas establishing rules governing all uses of the oceans and their resources.

anticipation of the coming into effect of UNCLOS, New Zealand enacted the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977* ('TSCZEEZ Act') which established New Zealand's EEZ.¹⁴

The *Fisheries Act 1983* was then introduced to enable New Zealand to regulate fishing activities in the EEZ. In particular, this Act introduced a regional fisheries management regime and individual transferable quota ('ITQ') for deepwater fisheries. This Act was amended several times over successive years, most notably in 1986 by way of the *Fisheries Amendment Act 1986* which introduced new fisheries management rules in the form of a Quota Management System ('QMS'). The QMS limited the quantity of fish that could be caught from specific fisheries during a fishing season. Under the QMS, certain fishers who met the requirements (which were based on catch history) received an allocation of fishing quota. Each year, the Minister of Fisheries sets the Total Allowable Commercial Catch ('TACC') for each of the fish species under the QMS. The TACC dictates how much of each fish species can be harvested by commercial fishers each year. Fishing rights (quota) are then allocated to quota holders. This quota is tradable. Only New Zealanders or New Zealand-owned companies can own fishing quota in New Zealand, however, overseas investment in fishing quota is permitted with the consent of the Minister of Finance and the Minister of Fisheries under the *Overseas Investment Act 2005*. Currently, New Zealand Maori own nearly 40% of quota as a result of a Deed of Settlement with the New Zealand government reached in treaty settlements.

When the *Fisheries Amendment Bill 1986* was being debated in Parliament, the issue of foreign flagged fishing vessels harvesting catch in New Zealand's EEZ was raised. The then opposition National party argued for better 'New Zealandisation' of the fisheries, seeking full development of the resources in the interest of New Zealanders by New Zealanders.¹⁵ 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 available. They argued that Parliament should agree to a 'sunset' clause for foreign flagged vessels in the fisheries legislation – a goal of 10 years, at the end of which, New Zealand should be controlling its own 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.¹⁶ This policy is a reflection of the submissions made by New Zealand to the United Nations during the development of UNCLOS in 1972.¹⁷ These amendments were not incorporated into the *Fisheries Amendment Act 1986* which replaced the *Fisheries Act 1983*.

Despite these early misgivings about the use of foreign vessels to harvest New Zealand fish stock, the presence of FCVs in New Zealand fisheries waters grew from 1986 as many quota owners (particularly Maori) did not have the vessels capable of fishing their quota, particularly quota in the deepwater fisheries. The FCVs fished in New Zealand under a foreign licence system until the *Fisheries Act 1996* came into force.

The *Fisheries Act 1996* replaced all previous acts and brought the FCVs under a registration system as opposed to the previous licence regime. Section 103 of the Act governs the operation of the FCVs by providing that all such vessels must be registered on the Fishing Vessel Register and in terms of s 103(4) require the consent of the Chief Executive of the Ministry of Fisheries subject to the conditions that he/she sees fit to impose. As previously noted, this section also provides that the wage protections set out in the *Minimum Wage Act 1983* and the *Wages Protection Act 1983* apply to all crew on board these vessels.

Little has changed in respect of the operation of FCVs in the 15 years since the introduction of the QMS. Between 21 and 27 foreign flagged vessels are registered to operate in New Zealand waters each year. These vessels catch close to 80% of iwi-owned quota for deep water fisheries such as Hoki or Silver Warehou.¹⁸

The most common commercial arrangement under which FCVs operate is in the form of joint venture arrangement between a foreign vessel owner and a New Zealand company that has access to quota. Typically, these arrangements are characterised by the New Zealand company chartering a foreign flagged vessel on a time

¹⁴ *Territorial Sea, Continuous Zone, and Exclusive Economic Zone Act 1977* (NZ) s 9.

¹⁵ New Zealand, *Parliamentary Debates*, House of Representatives, 10 July, 1986, vol 14, 2887 (Doug Kidd).

¹⁶ New Zealand, *Parliamentary Debates*, House of Representatives, 15 July, 1986, vol 15, 3027 (Paul East). With this policy in mind, the opposition introduced a supplementary order paper with two proposed amendments to the Bill: the first amendment provided that when any additional catch is available to be tendered for, or allocated, then New Zealanders who intend to catch with New Zealand-owned boats and with New Zealanders as crew would have first priority. The second amendment was that if there were no New Zealanders who wanted to take up that additional catch, then New Zealand companies could catch it using foreign-owned fishing vessels provided that the use of charter vessels was restricted to a 10 year period until 1997.

¹⁷ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations *The Law of the Sea: Conservation and Utilisation of the Living Resources of the Exclusive Economic Zone: Legislative History of Articles 61 and 62 of the United Nations Convention on the Law of the Sea* (1995) 33-34. See section 3.1 below for a discussion of the development of UNCLOS.

¹⁸ Seafood Industry Council, *Facts about Charter Vessels in the New Zealand Seafood Industry*

<<http://www.seafoodindustry.co.nz/n1553,312.html>> at 2 June 2010. An Iwi is a Maori tribe descended from a common named ancestor or ancestors. There are over 90 Iwi in New Zealand.

charter basis, whereby the vessel is supplied fully crewed and operated by the foreign owner for a set period or particular fishing expedition. In many cases the New Zealand company will fund the costs of getting the vessel to sea. The New Zealand company is commonly referred to as the New Zealand Charter Party ('NZCP'). The foreign vessel owner or operator (the Foreign Charter Party ('FCP')) typically acts under the NZCP's instructions as to the constitution, 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 charter as the contractual basis for the joint venture, a portion of the profits from the fishing is taken by the owner.

These arrangements have been characterised as a means by which New Zealand fulfils its international obligations in terms of the management of its fisheries resource. Specifically, the Ministry of Fisheries has stated that New Zealand has chosen to comply with its obligations under *UNCLOS* by allowing that part of the allowable catch that cannot be taken by New Zealand flagged vessels to be harvested by foreign flagged vessels under charter arrangements.¹⁹ We will comment further on this aspect below.

As noted in the introduction, following several reports of abuse, unsatisfactory working and living conditions on board the vessels and poor pay in mid-2000s, s 103 of the *Fisheries Act 1996* was amended to provide that New Zealand minimum wage legislation applied to foreign fishers. The Code was then later introduced in an attempt to regulate the working conditions on board the vessels. We address the s 103 of *Fisheries Act 1996* later in this article, but a short summary of how the Code works is set out below.

2.1 The Code of Practice

The Code sets out a package of measures designed to regulate work conditions on FCVs. In particular, the Code outlines the minimum work conditions that must be met before visas to work in the EEZ will be granted to foreign crew members.²⁰ The Code also prescribes the minimum remuneration for foreign crew and the terms and conditions to be contained in their employment agreements (including a description of how to resolve employment relationship problems),²¹ and sets out employer responsibilities generally,²² and specifically in relation to keeping accurate employment records.²³

In addition to setting out minimum remuneration requirements and improved minimum living and working conditions, the Code introduced 'a new accountability framework' in respect of crew.²⁴ Under the Code, the NZCP must be a signatory to the Code to be able to allow the FCP to employ foreign crew members. An 'acceptable New Zealand party' is required to provide a Deed of Guarantee For Financial Obligations In Respect of Foreign Crew ('Deed of Guarantee') guaranteeing payment to crew in the event of default by the employer²⁵ and repayment of costs incurred by Immigration New Zealand in the event of default by the NZCP.²⁶

Under the Deed, the New Zealand Guarantor must have 'sufficient ability to meet the obligations agreed pursuant to this Deed'.²⁷ However, there is no prescribed method of assessing the ability of the Guarantor to meet the obligations agreed under the Deed of Guarantee.

The NZCP can then request an Approval in Principle to recruit foreign fishing crew ('AIP') from the Department of Labour in respect of specified periods of work on specified foreign vessels. Immigration New Zealand ('Immigration') considers the request for an AIP and the Minister of Immigration decides whether to give an AIP and, if so, for how many crew members.²⁸ An AIP then allows work visas or work permits to be granted by Immigration to foreign crew to enable them to work on those vessels.²⁹ It is noteworthy that it is the NZCP that must apply for the AIP. In other pathways for recruiting foreign workers in New Zealand, the request

¹⁹ Ministry of Fisheries, *Management measures to mitigate the risk from foreign charter vessels operating in the New Zealand EEZ* (2008), 1. See section 3.1 below.

²⁰ Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) cl 14.

²¹ *Ibid* cl 15, appendix 9.

²² *Ibid* cl 1. While this clause lists the employer's responsibilities, it is the New Zealand company that is responsible for monitoring the employer's performance and ensuring compliance.

²³ *Ibid* cl 8.

²⁴ Immigration New Zealand *Fact Sheet – Crew of chartered foreign fishing vessels – New standards* (20 October 2006).

²⁵ Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) appendix 10, 'Deed of Guarantee of Financial Obligations in Respect of Foreign Crew', s 6.

²⁶ *Ibid* s 7.

²⁷ *Ibid* s 1.1.

²⁸ Immigration New Zealand *Operational Manual*, Section WJ2.1 General Process.

²⁹ Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) 'Definitions and interpretation'.

for an AIP is made by the employer. Here, however, the NZCP is not the employer of the crew but must, nevertheless, apply for the AIP.

The general objective of the policy underlying work visas is that employment opportunities for New Zealand citizens and residents should be protected. This general objective applies to requests for AIPs.³⁰ Accordingly, as part of the approval process, the NZCP must satisfy Immigration that there are no (or insufficient) suitably qualified and experienced New Zealand citizens or residents available to crew the foreign vessel.³¹ Specifically, the NZCP must provide evidence that there are no suitable and available New Zealand applicants on the Deep Sea Fishing Crew Employment Register ('Register').³² This Register provides a database of people seeking work on deep sea fishing vessels within New Zealand waters and is available for fishing companies wanting to place qualified and experienced local crew on vessels. The Register is operated by a private company which places advertisements in newspapers and online on a quarterly basis seeking registrations by New Zealand fishers. These advertisements do not reference specific jobs but are published to encourage New Zealand fishers looking for work to register their details on the Register.³³ The Register is not audited to assess its effectiveness and it is not clear whether any New Zealander has been employed on FCVs from the Register.

3 Legislative Basis for the Use of FCVs: *UNCLOS* and the *Fisheries Act 1996*

It is an unusual feature of New Zealand that the government would permit foreign-owned and crewed vessels to catch fish in New Zealand waters. Most developed international fisheries require vessels operating in their EEZs to fly the flag of that country.³⁴ In this section, we will outline the legal basis that underpins their permitted use, firstly from an international law of the sea perspective and then from the perspective of New Zealand domestic fisheries law.

3.1 *UNCLOS*

UNCLOS codified the concept of an extended exclusive economic zone and laid down a framework of rules governing all uses of the oceans and their resources. In doing so, *UNCLOS* gave coastal States, including New Zealand, the right to manage and exploit fisheries in its EEZ. The concept of an EEZ and how coastal States might exercise their rights over their EEZs were heavily debated issues for the committees and working groups that preceded the final treaty.

Historically, the concept of an extended exclusive economic zone for economic purposes has its roots in the Truman proclamations on the continental shelf and coastal fisheries of 1945 and the national claims by a number of Latin American nations during the late 1940s.³⁵ The concept was further elaborated by a number of developing countries during the 1960s and 1970s.³⁶ These countries considered that the regime of the high seas benefitted only developed countries given that only they had the technology to engage in distant water fishing activities. At the same time, developing countries were often incapable of exploiting the resources in nearby coastal waters let alone in distant waters. Developing countries began to extend their territorial seas up to 200 miles in an effort to compensate for their technologically disadvantaged position. This gave rise to concern among developed maritime nations that extensions of sovereignty would impact negatively on traditional freedoms of navigation and overflight. The EEZ concept was put forward as a compromise solution to these conflicting concerns.³⁷ As the concept gained traction, the major distant water fishing nations began to make alternative proposals, encouraging a system of preferential rights, rather than sovereignty, and curbing the powers of the coastal state through conservation principles.³⁸

In light of the issues surrounding the exercise of sovereignty over the deep seas, the UN General Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the

³⁰ Immigration New Zealand *Operational Manual*, Section WJ3.1(a): 'Requests for approval in principle for FCFV crew members'.

³¹ *Ibid* section WJ3.1(a)-(d): 'Requests for approval in principle for FCFV crew members'.

³² *Ibid* section WJ3.1.1(a).

³³ The New Zealand Deepsea Fishing Crew Employment Register registration form.

³⁴ See for example the United States, Russia, South Africa, Namibia, and EU nations.

³⁵ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *The Law of the Sea: Conservation and Utilisation of the Living Resources of the Exclusive Economic Zone: Legislative History of Articles 61 and 62 of the United Nations Convention on the Law of the Sea* (1995); Nandan, S, N, *The Exclusive Economic Zone: A Historical Perspective*, Food and Agriculture Organization of the United Nations, Fisheries and Aquaculture Department <<http://www.fao.org/docrep/s5280T/s5280t0p.htm>> 3-5.

³⁶ Nandan, S, N, *The Exclusive Economic Zone: A Historical Perspective*, Food and Agriculture Organization of the United Nations: Fisheries and Aquaculture Department <<http://www.fao.org/docrep/s5280T/s5280t0p.htm>>, 12.

³⁷ *Ibid* 9.

³⁸ *Ibid* 12.

Limits of National Jurisdiction ('the Sea-Bed Committee') to study various aspects of the problem and to suggest practical resolutions. The General Assembly also decided, in 1970, to convene a new UN Conference on the Law of the Sea to prepare a single comprehensive treaty governing ocean space. Various nations submitted documents to the Sea-Bed Committee in 1972 and 1973 advancing resource management schemes based on the principles of optimum utilisation, maximum sustainable yield and allowable catch.³⁹ A number of nations presented draft articles proposing a system of stock allocation in which fish stocks not utilised by a coastal State could be taken by other states.⁴⁰ New Zealand and Australia submitted a combined working paper on principles for a fisheries regime. These principles provided that the coastal State would reserve to itself that portion of the allowable catch, up to 100%, that it can harvest, but it would allow foreign vessels to take the surplus. Where the coastal State intends to allocate itself 100% of the allowable catch of a species:

it shall enter into consultations with any other State...which is able to demonstrate that its vessels have carried on fishing in the fishery resources zone on a substantial scale for a period of not less than [ten] years with a view to...negotiating special arrangements with the other State under which the latter's vessels would be 'phased out' of the fishery" with a default phasing out period of five years.⁴¹

The submissions and draft articles submitted by many States including New Zealand included provisions for preferential rights to resources in the EEZ on the basis that the coastal State could reserve to itself a portion of the allowable catch for these resources corresponding to harvesting capacity.⁴² In 1974, the second session of the Third United Nations Conference on the Law of the Sea was convened in Caracas. This session was devoted to consideration of the concept of the EEZ and coastal States' preferential rights over the resources beyond the territorial sea. Many delegations, including New Zealand, presented their views. The New Zealand representative said that most States had seemed to come to terms with the idea of a 200-mile zone in which fish stocks would be managed, conserved and harvested by the coastal State. Similarly, most coastal States seemed willing to accept the obligation to allow foreign fishers to enter the 200 mile zone on reasonable terms and conditions to harvest the balance of the allowable catch not harvested by local industry.⁴³

The current provisions in *UNCLOS* on conservation and management of living resources can be traced to the Third United Nations Conference on the Law of the Sea in 1974.⁴⁴ Coastal States have sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the EEZ (article 56), however they must develop proper conservation and management measures to ensure the resource is not endangered by over-fishing (article 61). Article 62 further obliges coastal States to promote the objective of optimum utilisation of the living resources.

From the legislative history, it is apparent that the concept of the EEZ is a reflection of the balance between the major fishing nations seeking to protect their economic interests and the coastal States seeking to establish their sovereign rights. This uneasy balance is particularly evident in the provisions of article 62:

Article 62

Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

³⁹ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *The Law of the Sea: Conservation and Utilisation of the Living Resources of the Exclusive Economic Zone: Legislative History of Articles 61 and 62 of the United Nations Convention on the Law of the Sea* (1995).

⁴⁰ For example, the USSR presented draft articles governing a proposed allocation of stocks providing that that part of the fish stocks not taken by a coastal State could be taken by other States. The draft fisheries articles presented by the United States of America included proposals for coastal states to allow access to other states to that portion of the resources not fully utilised by its vessels on the basis of specific priorities, namely: states that have traditionally fished for a resource; other States in the region, particularly land-locked States; and all States, without discrimination among them; Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, above n 39, 19-20, 30.

⁴¹ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, above n 39, 32-34.

⁴² For example, the draft articles submitted by Canada, India, Kenya and Sri Lanka, Afghanistan, Austria, Belgium, Bolivia, Nepal and Singapore. See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, above n 39, 46-47.

⁴³ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, above n 39, 77.

⁴⁴ In particular, to the 'Main Trends' paper (which summarised the main proposals submitted by interested states in the form of draft articles) presented to the committee, the work of the Evensen Group and the Group of 77, and the Single Negotiating Text (SNT) that came out of the Informal Consultative Group of the Whole on the Economic Zone; the wording of the SNT on the EEZ is almost identical to that contained in *UNCLOS* (see Nandan, above n 36, 18-19).

3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

The overall purpose of article 62 is to promote the objective of optimum utilisation of the living resources.⁴⁵ To achieve this objective, the coastal State must assess the allowable catch and determine its own capacity to harvest the resources. If it does not have the capacity to harvest the entire allowable catch, it must give other States access to the surplus through agreements or other arrangements.⁴⁶ This requirement to give other States access is fettered by the condition that the coastal State has regard to geographically disadvantaged and land-locked States. The obligation to permit access is further fettered by the requirement to take into account the matters listed in article 62(3), in particular, ‘the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests’.

As noted previously, article 62 of *UNCLOS* is the provision relied upon in support of the operation of FCVs in New Zealand.⁴⁷ New Zealand companies claim that they do not have the capacity to harvest all of the total allowable catch and therefore, they need to use FCVs.⁴⁸ However, this approach seems at odds with the purpose and intent of article 62. It is clear from the discussion above that the purpose of the article is to apportion that part of the total allowable catch that cannot be harvested using domestic capacity to foreign States.

In other jurisdictions, including South Africa, Namibia, Mozambique, and the Cook Islands, access arrangements are usually negotiated by the States concerned, not by individual companies. Typically, through bilateral negotiations between States, access is negotiated for a limited number of vessels on restrictive terms. This is not the case in New Zealand. While historically, New Zealand has had a number of access agreements in place, currently New Zealand’s only state access agreement in force is between the United States of America and Pacific Island nations.⁴⁹ Instead of state-to-state agreements, foreign companies with vessels flagged in multiple jurisdictions secure access to New Zealand’s fishery through commercial arrangements with New Zealand fishing companies. This practice is at odds with the article 62 and international practice.

Under the current charter arrangements, it is the New Zealand company, rather than the foreign state, that is effectively harvesting the fish stock. It is a feature of these charter arrangements that the New Zealand charter partner retains to itself title in the fish products harvested, and indeed is accountable to the Ministry of Fisheries for ensuring that the catches are acquitted against Annual Catch Entitlement (‘ACE’), generated from quota, that cannot be owned or held by foreign states or foreign nationals. In other words, under these arrangements, there is no ‘surplus’ of allowable catch given that 100% of the total allowable catch is harvested for and on behalf of New Zealand companies.

It is noteworthy that Part 5 of the *Fisheries Act 1996* provides the Minister of Fisheries with a mechanism to apportion part of the Total Allowable Commercial Catch, described as ‘foreign allowable catch’, to foreign vessels.⁵⁰ This Part directly addresses New Zealand’s obligations under Part V of *UNCLOS* so that if there is surplus allowable catch, New Zealand is obliged to allow other States access to that surplus. Specifically, ss 81-83 provide that the Minister of Fisheries must determine the foreign allowable catch for a fishstock and may apportion that foreign allowable catch to other states. Operators wishing to take advantage of the foreign allowable catch must then apply for a licence. There is currently no foreign allowable catch allocated to foreign states or vessels under Part 5 of the Act. Instead, s 103 of the Act permits access by FCVs on the basis of charter arrangements, thus avoiding the state access arrangements required by *UNCLOS*.

New Zealand’s international obligations are cited as reasons for the continued operation of FCVs in New Zealand under the current regime.⁵¹ If article 62 can be relied on in this way, then, in addition to its obligations under article 62(2), New Zealand must also take into account ‘the significance of the living resources of the area

⁴⁵ *UNCLOS* art 62(1).

⁴⁶ *UNCLOS* art 62(2).

⁴⁷ Ministry of Fisheries, above n 19.

⁴⁸ Stuart, G, Sealord Chief Executive, ‘If the foreign charter vessels weren't here, we'd probably just leave the fish in the sea because we don't have the boats or the people to be able catch them’ quoted in Josh Reich, ‘Overseas Crews Hit Tax’, Nelson Mail (Nelson, New Zealand), 25 January 2010 <<http://www.stuff.co.nz/nelson-mail/news/3259787/Overseas-crews-hit-tax-ndash-group>>.

⁴⁹ Multilateral Treaty on Fisheries between Certain Pacific Island Parties and the United States of America, entered into force on 9 December 1988. Under this access agreement, vessels flagged to the United States may fish skipjack tuna in parts of New Zealand’s EEZ.

⁵⁰ *Fisheries Act 1996* (NZ), s 81-88.

⁵¹ Ministry of Fisheries, above n 19.

to the economy of the coastal State concerned and its other national interests' when giving other states access to its EEZ.⁵² A number of further aspects can be highlighted:

Firstly, the export of fish and fish products in the fifth largest export earner in New Zealand and, as such, it is clearly of strategic significance to New Zealand's economy. However, the use of FCVs deprives New Zealand fishers of jobs both on and off shore.⁵³ Annually some 2 500 foreign fishers are employed on the foreign charter fleet. Meanwhile, 154 000 New Zealanders are registered job seekers with Work and Income New Zealand.⁵⁴ Furthermore, while New Zealand companies that engage FCVs argue that use of such vessels creates jobs on land in New Zealand for those processing product received from the charter vessels,⁵⁵ the reality is that catches of these vessels are increasingly being processed offshore (in China, Korea and elsewhere) and there is little or no value added in New Zealand.⁵⁶

As noted earlier, Maori own nearly 40% of all quota and frequently use FCVs to catch it. The Minister of Fisheries, Hon Phil Heatley, when addressing the Maui National Fisheries Conference in May 2011, highlighted the problem of using foreign vessels to catch iwi-owned quota. He identified the tension between the economic imperatives and the social impact of the use of FCVs. While charter vessels help to keep the return to quota holders high, there is a large number of unemployed Maori and so many question why there are Maori unemployed when there is such a lucrative industry available.⁵⁷

In addition to the employment aspect, foreign owned vessels feature in multiple significant Ministry of Fisheries prosecutions for offences against the *Fisheries Act 1996*. Recently, a Japanese company was prosecuted (together with the New Zealand charterer) and ordered to pay \$4.2 million for misreporting catches using the practice of trucking.⁵⁸ A similar prosecution took place in 2008 when employees of two Korean foreign-flagged, fishing vessels were fined a total of \$360,000 and ordered to forfeit their vessels to the Crown, after being caught trucking more than 700 tonnes of Ling.⁵⁹ In 2009, three Polish crew were prosecuted for dumping.⁶⁰

Secondly, New Zealand must take into account the significance of the living resources of its EEZ to its other national interests. Offending by foreign fishing vessels not only affects the economy as noted above, but it is also a drain on the resources that New Zealand is required to protect under its international obligations set out in Part V of *UNCLOS*. New Zealand claims its fisheries management to be 'world class'.⁶¹ However, this type of offending, together with the high profile media reports of poor working and living conditions on board FCVs,⁶² is a poor reflection on New Zealand's management of its fisheries. This fact was recognised by the Seafood Council of New Zealand when it called for an inquiry into of the use of FCVs.⁶³ Accordingly, beyond a purely commercial argument for the use of FCVs, it is difficult to see how such arrangements are in New Zealand's national interest.

3.2 Fisheries Act 1996

As noted earlier, prior to the introduction of this 1996 Act, foreign vessels were granted access to New Zealand's EEZ on the basis of a licence system. With the introduction of the *Fisheries Act 1996*, such vessels were required to be registered under s 103 with the Ministry of Fisheries. Upon registration, they obtained a 'right' to fish in New Zealand fisheries waters. *UNCLOS* is incorporated into the *Fisheries Act 1996* generally

⁵² *UNCLOS* art 62(3).

⁵³ Daren Coulston, 'Industry Out-sourced', *Gisborne Herald Bulletin* (Gisborne New Zealand), 11 March 2010, 4; NZ Fishing – Keep it K-iwi campaign <www.nzfishing.net.nz>.

⁵⁴ As at June 2011, New Zealand Statistics, <www.stats.govt.nz> at 6 September 2011.

⁵⁵ Sanford, Submission No 65 to the Primary Production Select Committee on the Fisheries Bill 1994, 52.

⁵⁶ Christina Stringer, Glenn Simmons, and Eugene Rees, 'Shifting Post Production Patterns: Exploring Changes in New Zealand's Seafood Processing Industry', *New Zealand Geographer*, forthcoming.

⁵⁷ Bill Moore, 'Foreign Crew 'Maori Issue'' *Nelson Mail* (Nelson, New Zealand), 24 May 2011.

⁵⁸ 'Group fined \$4m for illegal fishing' *Nelson Mail* (Nelson, New Zealand), 15 March 2011, 4. 'Trucking' means catching fish in one quota management area and declaring it to be caught in another.

⁵⁹ Ministry of Fisheries, 'Fish Trucking Results in Vessel Forfeiture' (Press Release, 17 October 2008) <<http://www.fish.govt.nz/en-nz/Press/Press+Releases+2008/October08/Fish+trucking+results+in+vessel+forfeiture.htm>> at 8 April 2011.

⁶⁰ Ministry of Fisheries, 'Heavy Sentencing Sends Clear Message to Commercial Fishers' (Press Release, 17 March 2009) <<http://www.fish.govt.nz/en-nz/Press/Press+Releases+2009/March09/Heavy+sentencing+sends+clear+message+to+commercial+fishers.htm>> at 8 April 2011.

⁶¹ Ministry of Fisheries, 'Statement of Intent 2009-2014', 2 <<http://www.fish.govt.nz/en-nz/Publications/Statements+of+Intent/SOI-2009-2014/default.htm?&MSHiC=65001&L=10&W=statement+of+intent+2009%20&Pre=%3Cspan%20class%3d%27SearchHighlight%27%3E&Post=%3Cspan%3E>>.

⁶² See for example Michael Field, 'Slavery at Sea' *Sunday Star-Times* (New Zealand), 3 April 2011, 1; Michael Field, 'Rescued Fishing Crew Left 'Starving'', *Sunday Star-Times* (New Zealand), 10 April 2011, 7.

⁶³ Seafood Industry Council, 'Calls for Government Inquiry into Use of Foreign Owned Fishing Vessels' (Press Release, 14 July 2011).

through s 5(a)⁶⁴, and more specifically in Part 5 of the *Fisheries Act 1996* (ss 81-88). As discussed, this part directly addresses New Zealand's obligation under article 62 of *UNCLOS*. Section 103 of the *Fisheries Act 1996*, on the other hand, provides an alternative route for foreign fishing nations that wish to gain access to New Zealand fishing grounds. This route does not require any State-to-State access agreement; just a charter agreement between companies.

3.2.1 Section 103 of the *Fisheries Act 1996*

Most FCVs that are currently registered under s 103 of the *Fisheries Act 1996* are time-chartered to New Zealand based operators; however the scheme of the *Fisheries Act 1996* contemplates that such vessels will operate on the basis of a demise charter. A brief analysis of the distinction between the two types of charter arrangement is appropriate here before discussing the significance of the distinction in respect of the application of s 103 of *Fisheries Act 1996*.

The central features of a demise charter (also known as a bareboat charter)⁶⁵ were described by Evans LJ in his judgment in *The Giuseppe di Vittorio*:⁶⁶

What then is the demise charter? Its hallmarks, as it seems to me, are that 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.

From the above, it is apparent that a core characteristic of a demise charter is that possession and control of the vessel has passed from the owners to the demise charterers. One of the tests of possession and control of a vessel is to determine who employs the master and crew. Under a demise charter, the charterer becomes, for the duration of the charter, the de facto 'owner' (sometimes referred to as the 'disponent owner') of the vessel and the master and crew act under their orders, and through them they have possession and control of the ship.⁶⁷ In contrast, time charter arrangements are, in essence, contracts for the provision of services, including the use of the chartered ship.⁶⁸ Under time charter arrangements, 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, therefore, 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.

Section 103 of the *Fisheries Act 1996* provides for the registration of all fishing vessels, including FCVs, engaged in commercial fishing in New Zealand waters. An unusual feature of this section is that it permits the registration of foreign flagged vessels on the New Zealand fishing vessel register, without the requirement for the vessel to be owned or flagged in New Zealand.

The relevant parts of s 103 of the *Fisheries Act 1996* are reproduced below:

103 Fishing vessels must be registered

(1) No person shall use a fishing vessel, or any tender of that fishing vessel, to take fish, aquatic life, or seaweed for sale, in New Zealand fisheries waters, unless—

(a) The vessel is registered in the Fishing Vessel Register as a fishing vessel; and

(b) That person is named in that register as an operator of, or a notified user in relation to, that vessel; and

(c) That person complies with all conditions of registration (if any) and any conditions of any consent of the chief executive given under subsection (4) of this section.

(2) Every application to register a fishing vessel shall—

(a) Be made by the operator of that fishing vessel; and

(b) Be made to the [chief executive] in the approved form and be accompanied by the prescribed fee (if any); and

⁶⁴ *Fisheries Act 1996* (NZ), s5(a) provides that the *Fisheries Act* is to be interpreted in a manner that is consistent with New Zealand's international obligations relating to fishing.

⁶⁵ The terms are often used interchangeably.

⁶⁶ *The Giuseppe di Vittorio* [1998] 1 Lloyd's Rep 136,156.

⁶⁷ Mark Davies, *Bareboat Charters* (Lloyd's of London Press, 2nd Ed, 2005), 1.

⁶⁸ *Ibid.*

- (c) *In the case of a vessel that requires the consent of the chief executive under subsection (4) of this section to be registered, specify the name and address of a person (other than an overseas person) to be the authorised agent (for the purpose of this Act and the purposes specified in subsection (5) of this section) of the person from whom the operator has, by virtue of a lease, a sublease, a charter, a subcharter, or otherwise, for the time being obtained possession and control of the vessel; and*
- (d) *Be supported by such evidence as may be specified in the approved form.*
- (3)
- (4) *No vessel owned or operated by an overseas person [(other than an overseas person who has obtained consent under the overseas investment fishing provisions or is exempt from the requirement for that consent)] shall be registered under this section unless the chief executive has consented, either generally or particularly, to the registration of the vessel or vessels owned or operated by that person; and any consent under this subsection may be granted subject to such conditions as the chief executive thinks fit to impose.*
- (5) *If the chief executive consents under subsection (4) of this section to the registration of any vessel, [or if a vessel is owned or operated by an [an { sic ?} overseas person who has obtained consent under the overseas investment fishing provisions or is exempt from the requirement for that consent],] the following provisions apply while the vessel is in New Zealand fisheries waters:*
- (a) *For the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983, and such provisions of any other enactments as are necessary to give full effect to those Acts, a person engaged or employed to do work on the vessel who holds a work permit under the Immigration Act 1987 shall be deemed to be an employee:*
- (b) *For the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983, and such provisions of any other enactments as are necessary to give full effect to those Acts, the employer of a person referred to in paragraph (a) of this subsection shall be deemed to be,—*
- (i) *If the operator of the vessel is the employer or contractor of those persons, the operator;*
- (ii) *In any other case, the person from whom the operator has, by virtue of a lease, a sublease, a charter, a subcharter, or otherwise, for the time being obtained possession and control of the vessel.*
- (c) *For the purpose of determining whether the payment to any person engaged or employed to do work on any such vessel meets the requirements of the Minimum Wage Act 1983, the hours of work of, the payments received by, and the entitlements to payment of that person shall be assessed in relation to the whole of each period of such engagement or employment in New Zealand fisheries waters:*
- (d) *Labour Inspectors within the meaning of the [Employment Relations Act 2000] may exercise their powers under that Act and under the enactments referred to in paragraph (a) of this subsection within New Zealand fisheries waters in respect of any person deemed to be an employee or employer by virtue of paragraph (a) or paragraph (b) of this subsection:*
- (e) *If the operator of any vessel is not the employer by virtue of paragraph (b) of this subsection, then, notwithstanding any responsibility that may rest with the employer, the authorised agent referred to in subsection (2)(c) of this section shall be responsible under the enactments referred to in paragraph (a) of this subsection for providing any information and records to any Labour Inspector exercising powers under those Acts:*
- (f) *The authorised agent referred to in subsection (2)(c) of this section may be served with any documents requiring service under any of the enactments referred to in paragraph (a) of this subsection, and such service shall be deemed to be service on the employer:*
- (g) *The [Employment Relations Authority] and the Employment Court may exercise jurisdiction in respect of any employment relationship that arises by virtue of paragraph (a) or paragraph (b) of this subsection as if it were a lawful employment relationship subject to New Zealand law.*

It is clear from the wording of the section that the ‘operator’ of the fishing vessel must register the vessel to enable it to take fish and other aquatic life for sale in New Zealand fisheries waters.⁶⁹

The term ‘operator’ is defined in the *Fisheries Act 1996* to mean: ‘in relation to a vessel, the person who, by virtue of ownership, a lease, a sublease, a charter, a subcharter, or otherwise, for the time being has lawful possession and control of the vessel’.⁷⁰

The key statutory language in this definition is the phrase ‘possession and control’; it is a phrase that is commonly used when describing a demise charter. In the extract from the *The Giuseppe di Vittorio* quoted above, the central characteristic of a demise charter is that the charterer has ‘possession and control’ of the vessel. It is this person (who has possession and control) that must apply to the Chief Executive on the

⁶⁹ *Fisheries Act 1996* (NZ) s103(2).

⁷⁰ *Fisheries Act 1996* (NZ) s2.

prescribed form for registration of the vessel. Thus, as a departure point, the application for registration should only be made by either an owner or demise charterer of the vessel. This would be consistent with the intention of the legislation to impose obligations upon the party who has control over the vessel and against whom the protective measures set out in the legislation can be effectively enforced.

Section 103(2)(c) of the *Fisheries Act 1996* sets out additional registration requirements that apply to foreign owned or operated vessels (that have consent to be registered under subsection 4). In such cases, the application must specify the name and address of a New Zealand person to be the authorised agent of the person from whom the operator has, by virtue of a lease, a sublease, a charter, a sub-charter, or otherwise, for the time being obtained 'possession and control' of the vessel. The section requires the appointment of this agent for the purposes of s 103(5). It is this subsection that contains the provisions of the *Minimum Wage Act 1983* and *Wages Protection Act 1983*. Whilst there is reference to a lease, a sublease, a charter, and a sub-charter, no time or voyage charter can vest the element of possession and control in the operator – only a demise charter achieves this end.

It is apparent, therefore, that the section limits the class of person able to apply for the registration of a foreign vessel on the New Zealand fishing register for the purposes of undertaking commercial fishing in New Zealand waters to either the owner of the vessel or demise charterer of that vessel. As we have discussed previously, foreign fishing vessels operate in New Zealand on a time charter basis and, therefore, by definition, the NZCP does not have possession and control of the vessel. Put differently, for the purposes of s 103(5) of the *Fisheries Act 1996*, the NZCP is not, and cannot be, the 'operator' as contemplated by that section given that it does not have lawful possession or control of the vessel in the same way as it would under the terms of a demise charter.⁷¹ At best, the NZCP can only be the agent of the operator as contemplated in s 103(2)(c).

As a result, 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 s 103(2). 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.⁷² 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, in the writers' view, contrary to the spirit and intent of s 103 of the *Fisheries Act 1996*. In particular, the lack of clarity in the wording of s 103(2) and the practise of time-chartering FCVs 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. In contrast, if effect is given to the intention of the section by only allowing FCVs that are on demise charter to a New Zealand operator to be registered, the obligations imposed by the Act would then be imposed on the entity that has day-to-day possession and control of the vessel.

As we discuss in section 2.1 above, a similar situation occurs with the AIP process, where the NZCP must request an AIP to recruit foreign crew, even though it is not the employer of the crew.

3.2.2 Section 103(5) of the *Fisheries Act 1996*

Section 103(5) was amended in an attempt to regulate the conditions and pay for foreign fishers while they are in New Zealand fisheries waters. It provides that the *Minimum Wage Act 1983* and the *Wages Protection Act 1983* apply to persons engaged to work on FCVs. It also gives the Employment Relations Authority and the Employment Court jurisdiction in any dispute relating to the application of the wage protection legislation.⁷³

⁷¹ A recent decision in the District Court in Nelson highlights the definitional problems associated with the terms 'operator' and 'owner', specifically in the context of foreign charter vessels. In *Nelson City Council v Southern Storm Fishing (2000) Ltd* (DC Nelson 19 April 2010) involved a dispute as to whether or not Southern Storm (the NZCP) was the owner of the vessel at the time it discharged light oil into Nelson Harbour in contravention of the *Resource Management Act 1991* ('RMA'). At the time of the discharge the vessel was time chartered from Sajo Oyang Corporation ('the FCP') to Southern Storm Fishing (2000) Ltd. The term 'owner' as defined in s 2 of the RMA, has the same meaning as in s222(2) of the *Maritime Transport Act 1991* ('MTA') and includes any charterer, manager, or operator of the ship. Southern Storm argued that because of the time-charter arrangement between it and the vessel owner, and given that it did not have control of the vessel, it was not the 'owner' for the purposes of the RMA, and therefore was not liable for the discharge under the RMA. This argument was rejected by the Court which held that Southern Storm was the owner of the vessel as a consequence of the operation of s2 RMA and s 222(2)(a)(iii) MTA. Thus for the purposes of the RMA the NZCP was deemed to be the owner of the vessel, notwithstanding the absence of the element of possession and control. The finding of the District Court in respect of ownership of the vessel for the purposes of the RMA was upheld on appeal in the High Court.

⁷² Ministry of Fisheries, *Quota Management System; Foreign Charter Vessels* (17 July 2009) <<http://fs.fish.govt.nz/Page.aspx?pk=81&tk=249>> at 23 March 2011.

⁷³ *Fisheries Act 1996* (NZ) s 103(5)(g).

Specifically, subsection 5(a) deems all work-permit holders engaged on the vessel to be employees, and subsection 5(b) deems the employer of such persons to be either the operator of the vessel (ie. the owner or demise charterer) or the person from whom the operator has, by virtue of a lease, a sublease a charter, a subcharter, or otherwise, for the time being obtained possession and control of the vessel (ie. a demise charterer or sub-demise charterer).

Thus, on analysis of the clumsy wording of the section, in respect of the requirements for registration under subsection 2, subsection 5 contemplates two types of employers, namely either:

- (a) the owner of the vessel; or
- (b) the demise charterer or sub-demise charterer.

On the same rationale as that applying to subsection 2, s 103(5) does not capture the NZCP where the FCV is time chartered to the NZCP.

In our analysis we have assumed that the purpose of s 103 is to allow foreign flagged vessels to be registered in New Zealand on the basis of a demise charter with a New Zealand based operator. However, one interpretation of the clumsy wording of s 103(2) suggests that there may not have to be local charter connection for a foreign vessel to obtain the Chief Executive's consent to be registered. By way of example, if a Korean vessel owner has demise chartered his vessel to a Russian company, either entity may apply to have the vessel registered in New Zealand provided they specify a New Zealand agent. Neither the Korean owner nor the Russian company would be able to catch fish in New Zealand's EEZ, however, unless they obtained approval from the Overseas Investment Office.⁷⁴ This interpretation is contrary to the spirit and intent of the *Fisheries Act 1996* and we will highlight some of the tensions that may arise from this interpretation.

4 Problems Arising from the Application of the *Fisheries Act 1996* and Code of Practice

As discussed, the statutory language of s 103 of the *Fisheries Act 1996* contemplates a legal regime in which FCVs are demise chartered. Section 8 of the *Ship Registration Act 1992* ('*Ship Registration Act*') specifically contemplates the demise chartering of foreign vessels which would give meaning and content to s 103(5).⁷⁵ However, the practice of time chartering these vessels results in the strained interpretation of the section which in turn leads to the unusual situation that New Zealand law is extended to apply to the employment relationships of foreign nationals aboard foreign vessels.

As mentioned earlier, the Code tries to remedy these problems through a series of guidelines. However, the party that is the actual or deemed employer of the crew (i.e. the owner of the vessel) is not a signatory or party to the Code. Accordingly, in order to provide the crew with a local remedy, the crew have to seek recourse against the NZCP through the Deed of Guarantee.

The requirement under the Code that the NZCP enter into the Deed of Guarantee creates an additional complication with regards to the employment of foreign crew. It provides them with a New Zealand party to pursue in respect of wage claims in the event that their employer (the FCP) is in default. On its face, the Deed of Guarantee looks to afford additional protection, at least in terms of wage claims, to foreign crew. However, the practical difficulties faced by the crew in terms of enforcement mean that the Deed of Guarantee is, in this respect, ineffective.

Under the Deed of Guarantee, the crew is required to address the issue of under-payment with their employer first, by recourse to the New Zealand employment institutions.⁷⁶ However, there is no provision in the Deed of Guarantee (or in the Code of Practice) that requires the employer to submit to the jurisdiction of the New Zealand Courts. While, under the terms of the employment agreement governing the employment of the crew, the employer may have agreed to the jurisdiction, the employer is not a signatory to the Deed of Guarantee. In the event that the employer either refuses to submit to the jurisdiction, or fails to honour any order made, the

⁷⁴ Foreign investment in fishing quota is, for the purposes of the *Overseas Investment Act 2005*, an overseas investment in New Zealand. Accordingly, any such overseas investment must have consent of the Minister of Finance and Minister of Fisheries (Sections 56-57J *Fisheries Act 1996*).

⁷⁵ Section 8(1)(b) of the *Ship Registration Act 1992* provides that ships on demise charter to New Zealand-based operators are entitled to be registered on Part A of the New Zealand Register of Ships.

⁷⁶ Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) Appendix 10, 'Deed of Guarantee of Financial Obligations in Respect of Foreign Crew', s 4.1.

crew are then entitled to make demand on the Guarantor.⁷⁷ This demand must be made within 90 days of the crew member ceasing to be employed on the vessel.⁷⁸ Such a short limitation period is a significant hurdle for crew in circumstances where they must pursue their employer, which may be from a different jurisdiction, first.

Where the employer has refused to submit to the jurisdiction, the crew are then required to enter into mediation with the Guarantor and, if no resolution is reached, proceed to arbitration. Where the employer has submitted to the jurisdiction, but fails to obey any lawful order, the crew may make demand on the Guarantor to pay the outstanding amounts within 14 days of the demand.⁷⁹ However, given that there is no requirement to provide a fund to support the guarantee, in circumstances where the Guarantor has insufficient funds to fulfil their obligations under the Code, the Deed of Guarantee will present cold comfort. In addition, if the vessel owner chooses not to submit to the jurisdiction of the New Zealand courts, crew would experience considerable difficulty in enforcing their claim against the vessel if it departs New Zealand. These problems are exacerbated where crew have no resources and are required to work through interpreters.

These problems of enforcement in respect of wage claims are replicated in respect of other employment problems such as working and living conditions and the treatment of crew on board the vessels. In these circumstances, the crew have to navigate through a number of procedural hurdles in order to pursue an employment relationship problem. In particular, they must first raise any problems with the Captain then the employer. Most crew on board these vessels lack education and are poorly resourced. Many do not have a copy of their New Zealand employment agreement on board the vessel to consult when confronted with an issue relating to their work. Even assuming that the crew are aware of their rights under the employment agreement, the procedural hurdles present too great an obstacle for foreign crew.

While s 103(5) of the *Fisheries Act 1996* together with the Code, and its associated documents, represent a 'package solution' to the problems in respect of employment terms and conditions of crew on FCVs, it is clear from recent events, that they are not working effectively. As an awkward mix of legislation and policy the 'package solution' creates problems in terms of enforcement. In particular, the Code of Practice relies on the honesty and integrity of the NZCP and the FCP. While there are some checks, in the form of audits performed by the Department of Labour, crew records, such as time-sheets, are easily manipulated, and crew are not always aware of, or able to, exercise their rights.

5 Other Legislative and Policy Frameworks Affected by FCVs

In addition to the employment related problems, there are a number of other problems and tensions, both legislative and non-legislative, which are created as a consequence of the unique way in which many FCVs operate in New Zealand. In this next section we highlight two pieces of taxation-related legislation that could, as a matter of interpretation, apply to the employers and crew on FCVs, which would have the effect of bringing the vessels into New Zealand's tax net. We also touch on the problems that arise in respect of the application and enforcement of New Zealand maritime laws on FCVs.

5.1 Accident Compensation Act 2001

The *Accident Compensation Act 2001* ('ACC Act') governs a 'no-fault' comprehensive regime covering personal injury which is administered by the Accident Compensation Corporation ('ACC'). This regime covers all New Zealand residents as well as visitors to New Zealand who are injured in an accident in New Zealand.⁸⁰ New Zealand residents are also covered for personal injury that is suffered outside of New Zealand.⁸¹

The ACC is funded by levies on income of everyone in the paid workforce in New Zealand, as well as by levies on petrol and vehicle licensing fees. The Corporation also receives Government funding. For employees, an earner's levy is deducted from gross pay along with PAYE tax while self-employed people receive invoices from ACC. If there is no underlying liability for income tax then ACC levies are not payable. ACC distributes the money collected into one of five ACC Accounts, each account covering a specific group of injuries (for

⁷⁷ *Ibid* s 4.2.

⁷⁸ *Ibid* s 10.3.

⁷⁹ *Ibid* s 6.2.

⁸⁰ *Accident Compensation Act 2001* (NZ) s 20.

⁸¹ *Accident Compensation Act 2001* (NZ) s 22.

example there is a Work Account (for claims for work-related injuries) an Earner's Account (for those in the paid workforce), and a Non-Earner's Account (for those not working, for example children and the elderly).⁸²

Section 16 of the ACC Act defines 'New Zealand' to include the area out to 12 nautical miles. It also provides that a person remains in New Zealand when he or she embarks on a plane or a ship to travel from one place in New Zealand to another place in New Zealand and does not go beyond 300 nautical miles from any point in New Zealand.⁸³ Section 23, however, expressly excludes cover for persons not ordinarily resident in New Zealand who suffer personal injury while travelling to, around and from New Zealand. Specifically, the section provides:

23 Cover for personal injury suffered by persons not ordinarily in New Zealand; exclusions while travelling to, around, and from New Zealand.

- (i) A person not ordinarily resident in New Zealand does not have cover for a personal injury if he or she suffers it while he or she –
 - (a) Is onboard a ship or aircraft or other means of conveyance described in subsection (2); or
 - (b) Is embarking or disembarking from any such ship or aircraft or conveyance.

- (ii) Subsection (i)(a) relates to the ship, aircraft, or conveyance on which the person –
 - (a) Comes to New Zealand; or
 - (b) Leaves New Zealand; or
 - (c) Comes to New Zealand, is carried and accommodated in the course of visiting New Zealand, and leaves New Zealand.

- (iii) For the purposes of subsection (1)(b), -
 - (a) Embarking begins as soon as a person is on a gangway, airbridge or other thing attached to or laid against a ship, aircraft, or other conveyance and available for use in embarking;
 - (b) Disembarking finishes as soon as a person has left any gangway, airbridge, or other thing attached to or laid against a ship, aircraft, or other conveyance and available for use in disembarking.

It is apparent that s 23 was drafted to cover transient visitors to New Zealand, whether they are passengers of cruise ships or alternatively visiting yachts or super yachts intending to stay for short periods of time. Such visitors are expressly excluded from cover under the ACC Act while aboard these vessels by virtue of s 23.

It is unlikely that the average crew member on a foreign charter vessel would be considered ordinarily resident in New Zealand for the purposes of accessing cover under the ACC Act.⁸⁴ Furthermore, they are not working for a New Zealand employer and, accordingly, ACC levies are not deducted from their pay. However, such workers are not expressly excluded from cover under the ACC Act.

Whilst not always the case, the majority of charter vessel operations will fly in the various crew from countries such as Indonesia, Korea, the Philippines, and Burma. After landing in New Zealand, the crew will be transported to the vessel on which they will commence work. In short, the crew members do not come to, travel around, or leave New Zealand on the same vessel. Accordingly, the exclusion set out in s 23 for non-residents does not apply to foreign fishers who are injured while on board a fishing vessel that is within the 300 nautical mile limit prescribed by s 16(3). As a result, it would appear that crew members employed by a foreign company to work on foreign charter vessels in New Zealand are eligible for ACC cover for personal injury suffered on board those vessels. This seems unusual considering that neither the crew member nor the employer pays PAYE or ACC contributions or levies. Given the above, any cover for personal injury would be administered from the Non-Earners Account which is funded from general taxation. In other words, the New Zealand taxpayer funds the cost of the cover for any injured crew member.

5.2 Income Tax Act 2007

New Zealand bases its taxing jurisdiction on the internationally accepted principle that a country can tax its residents on worldwide income, but may only tax non-residents on income derived from sources within that

⁸² Accident Compensation Corporation, *How We're Funded* <<http://www.acc.co.nz/about-acc/overview-of-acc/how-were-funded/index.htm>> at 16 March 2011.

⁸³ *Accident Compensation Act 2001* (NZ) s 16(3).

⁸⁴ *Accident Compensation Act 2001* (NZ) s 17.

country.⁸⁵ Non-resident workers will be taxed under s YD4(4) of the *Income Tax Act 2007* on salaries and wages ‘earned in New Zealand’. Accordingly, whether or not the income of non-resident fishers is earned in New Zealand hinges on how ‘New Zealand’ is defined for tax purposes.⁸⁶

The *Income Tax Act 2007* sYA1 defines ‘New Zealand’ in the following way:

New Zealand includes—

- (a) the continental shelf;
- (b) the water and the air space above any part of the continental shelf that is beyond New Zealand’s territorial sea, as defined in section 3 of the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*, if and to the extent to which—
 - (i) any exploration or exploitation in relation to the part, or any natural resource of the part, is or may be undertaken; and
 - (ii) the exploration or exploitation, or any related matter, involves, or would involve any activity on, in, or in relation to the water or air space

In short, the definition of New Zealand for tax purposes includes the continental shelf and the water above any part of the continental shelf:

[t]hat is beyond New Zealand’s territorial seaif any ... exploitation in relation to the part or any natural resource of the part is ... undertaken and the...exploitation involves any activity on, in or in relation to the water ...

Paragraph (b) of the definition, is complex and difficult to follow. In part because of this complexity, there are competing interpretations. On one hand, it can be argued that the definition requires a nexus between the part of the continental shelf and the use of the water above it. Thus, harvesting sea creatures attached to the shelf is captured by the definition, but water in which a vessel harvests ‘mobile fish’ above the shelf is not part of NZ.⁸⁷ On the other hand, it is conceivable that the definition is wide enough to include activities taking place in the water and air space above the part of the continental shelf. Regardless of the competing interpretations, IRD is of the view that paragraph (b) only extends to fishing that relates to harvesting creatures of the seabed or its subsoil. Accordingly, it has consistently held that New Zealand’s Inland Revenue Commissioner does not have the jurisdiction to tax foreign fishers.

However, as a matter of language, the definition is sufficiently wide in expression to ‘include’ fishing in the waters of the EEZ above the part of the continental shelf. Accordingly, it is possible for New Zealand to take account of foreign fishers in its tax regime.

In light of our review of the *ACC Act* above, and the scope of the definition of New Zealand in the *Income Tax Act 2007*, there is justification for the Inland Revenue Commissioner to take the view that it does have jurisdiction to tax income earned by foreign fishers in New Zealand fisheries waters.

5.3 *Maritime Transport Act 1994*

In New Zealand, the broad principles of maritime law are set out in the *Maritime Transport Act 1994* (‘MTA’). The detailed technical standards and procedures that put into effect these principles are set out in the Maritime Rules. Historically, FCVs operating in New Zealand fisheries waters were not required to meet New Zealand maritime safety standards and were assessed by the classification society of the relevant flag state. However, there is significant variety in the rules and standards of inspection between classification societies and flag states. As a result of concerns relating to the condition and safety of FCVs, the Maritime Rules were amended so that the safety regime set out in Maritime Rule 21 applied to all foreign fishing vessels registered under s 103 of the *Fisheries Act 1996*.⁸⁸

Notwithstanding Rule 21, the foreign vessel is still subject to the requirements of the relevant flag state. As a result, there are two parallel safety regimes that apply to the condition and operation of FCVs in New Zealand waters. This creates uncertainty as it is not clear, where the maritime regulation of the vessel’s flag state has a more permissive requirement in regard to a particular aspect of maritime safety than the Maritime Rules, which regime should be enforced.

⁸⁵ Letter to Hon Mark Gosche, Chair of Transport and Industrial Relations Committee setting out the response to matters raised with the Committee by Talleys Fisheries on 14 February 2008, during submissions on the immigration Bill, undated, 3.

⁸⁶ *Ibid.*

⁸⁷ Garth Harris et al, *Income Tax in New Zealand* (Thompson Brookers, 2004), chapter 16.4, 744.

⁸⁸ *Maritime Rules* (NZ), r 21.10(2), r 21.9(2).

Further, where an accident or casualty occurs on a vessel within the 12 nautical mile jurisdiction of the *MTA*, it is difficult to determine the extent to which the *MTA* (and its attendant Rules) will apply and override the provisions of the law of the flag State. Unfortunately, it is beyond the scope of this article to examine the potential conflict of law issues that may arise in such circumstances.

In addition to the question of which safety regime applies to foreign flagged vessels, there is also an issue with the ability of Maritime New Zealand ('MNZ') to investigate major maritime incidents beyond 12 nautical miles. More specifically, despite a foreign charter vessel being registered under s103 of the *Fisheries Act 1996* as a New Zealand fishing vessel, MNZ does not have the authority to investigate incidents that occur within New Zealand's EEZ, but beyond 12 nautical miles. Such incidents include the sinking of the *Oyang 70* in August 2010. In that case, the Korean Maritime Authority appointed TAIC to investigate the sinking on its behalf. The report prepared by TAIC will not be released publicly due to a confidentiality clause in the agreement with the Korean Maritime Authority.

6. Suggested Legislative Change

The legal tensions that arise from the misapplication of the law can be addressed by transferring the responsibility for the crew from the foreign vessel owner to the NZCP and requiring the vessels to be registered in New Zealand under the *Ship Registration Act*. This can be achieved firstly, through an amendment to s 103 of the *Fisheries Act 1996* requiring all FCVs to be fully demise chartered by the NZCP, and secondly through a requirement that the vessels be registered in New Zealand under the *Ship Registration Act* as a pre-condition for receiving a permit to fish.

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.

This proposed amendment 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 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*.

Given that an amendment to the *Fisheries Act 1996* may be acceptable as a longer term solution to the problem, in the interim, an amendment to the policy of the Ministry of Fisheries could achieve the same end. Given that the consent of the Chief Executive of the Ministry of Fisheries is required before a foreign-owned vessel may be registered to catch fish in New Zealand fisheries waters under s 103(4) of the *Fisheries Act 1996*, a policy amendment making this consent conditional on the vessels being properly demise-chartered by New Zealand operators would ensure the objective of the suggested legislative amendment is met in the short-term.

The consent to the registration of vessel under s 103(4) of the *Fisheries Act 1996* should also be made conditional on the vessels being registered in New Zealand under the *Ship Registration Act*. This would remove the dissonances in regard to the safety and manning of these vessels, and allow MNZ clear pathways to enforcing the provisions of the *MTA* and its attendant Rules on the operation of these vessels. As noted previously, the *Ship Registration Act* already allows the registration of foreign vessels under demise charter.⁸⁹

Given the significant impact that the proposed changes would have on those companies that operate these vessels on the basis of time charters, it may be appropriate for these changes to be phased in, in the manner originally signalled by the National Party in 1986 where it was suggested that Parliament should agree a 'sunset' clause for the operation of foreign flagged vessels within the New Zealand EEZ.

7 Conclusion

⁸⁹ Above n 76.

FCVs have been operating in New Zealand's EEZ for over 30 years. Prior to the introduction of the QMS in 1986, access by these vessels to NZ waters was derived from article 62 of *UNCLOS*. Since the introduction of the QMS and the enactment of the *Fisheries Act 1996*, the basis upon which these vessels continue to operate has shifted from the original *UNCLOS* driven basis for access (for which provision is made in ss 81-88 of the *Fisheries Act 1996*) to a 'right' of access through the consent provisions of s 103 of the *Fisheries Act 1996*. These arrangements require no state-to-state agreement and represent a clear departure from the original *UNCLOS* basis for access.

Section 103 is no model of legislative clarity and despite amendments to the section and the introduction of the Code of Practice, there continue to be consistent reports of FCVs failing to comply with its provisions. In the writers' view, s 103 should be interpreted so that possession and control of the vessels (and employment of the crew) remains with the NZCP. To suggest otherwise causes significant dissonances with several New Zealand statutes and leads to contrived outcomes that remove protections for foreign fishers and result in losses to the New Zealand fiscus. To be consistent with the spirit and intent of s 103(5) of the *Fisheries Act 1996*, the vessels should be demise chartered, not time chartered, by New Zealand companies and, to this end, clarity can be achieved by a minor amendment to the *Fisheries Act 1996*, or a change to the Ministry of Fisheries policy in respect of foreign vessel registration.