SUBMISSIONS TO MINISTERIAL INQUIRY
Use of Foreign Charter vessels

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Introduction

1. We represent a number of individuals who have supported the crew of the *Oyang 75*. We have significant exposure through the crew to abuses inherent in New Zealand's fishing industry.

2. While we recognise the Ministerial Inquiry will not investigate any specific cases, we believe that the experience of the crew of the *Oyang 75* is representative of the systematic abuses that occur in New Zealand's use of foreign charter vessels ("FCVs").

3. Further, the group of supporters we represent come from a variety of relevant backgrounds, including academic, advocacy and legal professionals. From this background we offer our suggestions. Consequently, our analysis and recommendations to the Inquiry should be attributed weight.

4. In this submission, we set out:

    a. What we believe to be the main problems with the current use of FCVs; and

    b. Recommendations on how these problems may be remedied.

Continuation of FCV Use

5. We submit that New Zealand continue to use FCV to fish in its waters.

6. There are several advantages to FCV use:

    a. Foreign fishers are provided with employment;

    b. Denying FCV use may constitute unnecessary protectionism;

    c. FCVs allow smaller entities to participate in the fishing market;

    d. The current abuses inherent in the FCV system are avoidable if the industry is properly regulated.

Problems with the Current Use of FCVs

7. It is beyond dispute that New Zealand's use of FCVs falls far short of the human rights standards New Zealand guarantees those in its jurisdiction. New Zealand's human rights record has been severely tarnished by the abuses that have recently come to light. The seriousness of the problem is evident in developments overseas. In August, a South Korean NGO wrote an open letter denouncing the

abuses at the hands of Korean FCVs fishing New Zealand waters. This was signed by 19 other Korean civil society organisations. A complaint about these abuses is currently in progress before the South Korean Human Rights Commission. It is reasonable to expect that there will be further international scrutiny of the inadequate regulation of New Zealand FCV system.

8. We consider that urgent action must be taken in order to protect both foreign fishers and New Zealand's international reputation.

9. We identify four primary problems with the current system:

   a. Non-payment of wages owed to the crews of FCVs;

   b. Inadequate investigative and enforcement mechanisms to handle claims by the crews of FCVs;

   c. Inadequate deterrent mechanisms; and

   d. Inadequate welfare for crews subject to abuse.

1. Non-Payment of Crew Wages

10. Disputes over crew wages have occurred many times in recent years. The Code of Practice 2006 (COP) and the Fisheries Act 1996[1] provides that the crews of FCVs are to be paid above the New Zealand minimum wage. However, several regulatory gaps have meant that foreign charter crews have seldom received the correct amounts owing to them.

11. Crews' wages are often handled by a third party manning agent. It is common practice for the crews of FCVs to be hired by manning agents in a variety of countries. Evidence suggests that manning agents will require crews to sign oppressive contracts in order to be eligible to serve on FCVs. The terms of these contracts include:

   a. Obliging the crews to put forward excessive collateral which is later forfeited in the event of a deemed breach of the employment contract. Examples of such collateral are the deeds to houses, vehicles, important personal documents and sums of money;

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[1] Fisheries Act 2996, section 103(5).

b. Requiring the crews to pay huge penalties upon the event of a deemed breach of the employment contract; and

c. Allowing the manning agents to extract certain fees from the crew members.

12. A strong case can be put forward that the New Zealand fishing companies, which charter crews hired on these terms, are in fact using bonded labour. Again, this has begun to attract international scrutiny.[2]

13. The COP requires that the New Zealand fishing company that charters the FCV to enter an employment contract with the crew members. It is permissible under the COP for the manning agent's account to be nominated as the final recipient of crew wages.[3] Consequently, there is a remote chance that the correct amounts owing to the crew will actually end up in their hands.

14. Furthermore, current practice is that FCV crews are paid at the end of the term they serve aboard the FCV. They are often handed their payment just before they are scheduled to leave the country thereby restricting the opportunity to complain about insufficient payment.

15. Wage disputes between FCV crews and New Zealand Fishing Companies are likely to continue to arise if this practice is maintained. Crews will continue to assert that the correct amounts owing have not been paid, whereas the New Zealand employers will claim that their duties have been discharged by paying manning agents.

16. Lastly, there is a danger, as with any corporate entity, that the perpetrators of wrongs can hide behind the corporate veil to avoid liability. We suggest that the directors of the New Zealand fishing company will be more likely to take responsibility for the FCV they decide to engage if the directors personally guarantee any shortfall in the crew's wages.

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[2] United States ambassador on human trafficking visited New Zealand in July to discuss the trafficking of Indonesian and Vietnamese fishermen on FCV vessels.

[3] See *Deed of Guarantee of Financial Obligations in Respect of Foreign Crew*, cl 1.1, definition of 'Wages".

Regulatory Gaps in Investigation and Enforcement

17. The obvious difficulty with remedying abuse aboard foreign fishing vessels is that abuse can easily escape detection and investigation. Several practical obstacles prevent abuse from being detected. These include:

    a. Most FCV crews do not speak English and are therefore unable to communicate their ordeals to the appropriate authorities;

    b. FCV vessels only dock in New Zealand ports for short time. Even then the crew may only leave the vessel with the permission of the ship's operators.

    c. FCV crews may not be aware of their rights under the COP.

    d. Unlike New Zealand fishers, FCV crews have no opportunities to access union representation.

18. The Code has recognised the gaps in investigation and enforcement and sought to remedy it through several inadequate measures. Section 7 of the Code provides that a New Zealand Company representative must be present for FCV turnarounds. If the crew members raise concerns or complaints, section 7 obliges the New Zealand company to undertake a full investigation. However, the New Zealand company will not be an impartial adjudicator. Rather, the company has a vested interested in the investigation. It will be keen to ensure that its public image as a responsible employer is maintained. It will want to keep its foreign charter partners onside. It will want the profits from it derives from FCVs continue to flow. In short, it is bad governance practice to entrust investigative responsibility to an entity which is in a position of conflict. In the case of the Oyang 75 crew, the New Zealand company, Southern Storm Fisheries Ltd, was in fact a subsidiary of the FCV company, the Oyang Corporation. It is conceivable that Southern Storm Fisheries Ltd would not wish to investigate alleged abuses if to do so meant condemning its parent company.

Adequate Deterrents

19. It is submitted that penalties for abuse aboard FCVs need to be more severe, in order to provide a greater deterrent .

20. Severe physical and sexual abuse has been documented aboard FCVs. However, there have been no arrests of FCV staff or any other penalties for these crimes. This is because abuse is difficult to prove. Crews also suffer from a lack of advocacy. Crews struggle to prove abuse as often their evidence is pitched against that of the FCV operators. Further, there is a lack of education among police about their responsibilities when dealing with allegations of abuse aboard FCVs.

Inadequate Welfare for Crews Subject to Abuse

21. Abuse sometimes drives crews to flee their FCV. In the event of desertion, crews face significant costs remaining in NZ and accessing justice. These should be borne in the first instance by the Department of Labour ("DOL"), then reimbursed by the NZ company (as currently required under the Code of Practice). However, in the recent cases, the DOL was slow to provide the crew with necessary welfare. These costs were instead borne by crew supporters (church groups and private individuals).

Recommendations

Non-payment of wages

22. The FCV crew's wages should be paid directly into personal bank accounts. The provision currently in the COP for crews to nominate a third party to receive the wages on the crew's behalf should be removed.

23. Wages should be paid monthly into these accounts.

24. The COP should be amended to oblige both the New Zealand fishing company and that company's directors to personally guarantee the crew's wages in the event that insufficient wages are paid.

Problems in Investigation and Enforcement

25. An impartial "third party investigator" should be present for FCV vessel turnarounds in New Zealand ports. This necessitates the creation of a new role or a significant overhaul of current "observer" system. The third party investigator could be provided by the Department of Labour and funded by levies from companies using FCVs. The third party observer's primary task should be ensuring crew welfare.

26. The third party investigators should be responsible for interviewing the foreign crews without the presence of the FCV owners. A translator speaking the crew's language should also be present. Any allegation of abuse should be investigated and remedied to the fullest extent possible, including police investigation and referral to legal representation. The investigator would therefore play a critical role in helping the crews access justice. He or she will be responsible for ensuring complaints are referred to the police, as discussed below. The service would be funded by levies from NZ companies using FCVs, and should be considered a 'running cost' to ensure adequate labour standards. These levies can be justified as part of a 'user pays' system. Those companies who receive the benefits from FCV labour should bear the running cost of ensuring adequate labour standards.

27. Given the vulnerability of migrant workers, they should be given every protection possible. When crew members sign their NZ contract, they should be given:

    a. A summarised list of their rights in their own language, including contact details for assistance;

    b. An outline of the grievance process;

    c. An optional union membership and contact details; and

    d. When interviewed by the third party investigator, they should be given contact details of appropriate NGOs and welfare agencies.

28. However, regardless of any subsequent union or NGO involvement, the third party investigator's duty to ensure complaints are laid with New Zealand police, must not be delegated.

Adequate Deterrents

29. As mentioned above, we recommend that greater and more effective penalties should be imposed to deter abuse aboard FCVs. We recommend:

    a. The third party investigator should play a central role in facilitating access to justice. The third party investigator should notify the relevant authorities and instigate a formal investigation.

b. New Zealand police and authorities should be educated about the abuse risk of abuse in the industry, and their responsibility to investigate allegations.

c. When formal complaints are laid, penalties should be more severe. Stringent measures are justified owing to the compelling social interest and frequency and severity of abuse aboard FCVs. We recommend:

i. The FCV's right to fish New Zealand waters should be revoked pending the outcome of the investigation.

ii. If abuse is proven, the New Zealand company forfeits its right to use FCVs in the future for a five year period. The DOL should refuse to grant visas for FCV crews in this period.

iii. The DOL should also deny visa applications to FCV companies with histories of abuse complaints made against them.

Adequate Welfare

30. In the event of desertion, the DOL should provide the necessary welfare to accommodate and maintain the crew, which in turn is recovered from the New Zealand fishing company. This provision already exists in the COP[4] but, given the difficulties experienced by deserting crews in the past, we suggest that the DOL change its practice to become more proactive in ensuring crew welfare. For example, it was some weeks before DOL agreed to cover the maintenance and accommodation costs for the crew of the *Oyang 75* after the fishermen fled from the vessel.

31. In order to facilitate the speedy provision of welfare, the NZ company should be obliged to lodge a bond with the DOL to be used as a "Crew Welfare Fund" – similar to that proposed in the *Foreign Fishing Crew Wages Repatriation Bond Bill 2000*. The DOL would have access to this fund to accommodate and maintain crews that have deserted. This bond should be considered a sign of good faith that the NZ company will indemnify any costs incurred by the DOL. This bond

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[4] *Deed of Guarantee of Financial Obligations in Respect of Foreign Crew*, cl 7.

should also be a first port of call to settle employment disputes. This measure is warranted because of the vulnerability of migrant workers, high frequency of non-payment of wages, and in recognition of crews' immediate needs should they desert.

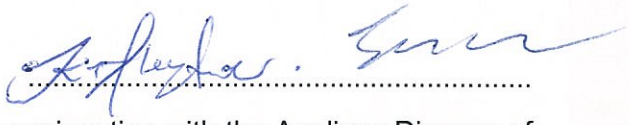
Conclusion

32. It is imperative that NZ maintain its reputation as a first world developed country that offers humanitarian working conditions. We support the continuation of the FCV regime. However, there needs to be a clear recognition of the current failures in the system.

33. We recommend the stringent reforms set out in these submissions. They are necessary to ensure that New Zealand meet its obligations to protect those in its jurisdiction from abuse and horrendous employment conditions. These measures are also necessary to ensure that New Zealand fishing product is not tarnished by accusations of an abusive industry.

34. We wish to speak to these written submissions at the Christchurch hearing.

DATED this 6th day of October 2011.



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