



FOREIGN VESSELS AND CREWS FISHING IN NEW ZEALAND

BY MARTY LOGAN

The operation of foreign vessels and crews fishing in New Zealand waters has been a topic of hot debate. Recently *The Great New Zealand Fishing Scandal* screened on Sky TV's Documentary Channel, brought the issue to the forefront of attention. This is a controversial issue within the industry as obviously many participants charter foreign vessels and have positive views on them. Being a lawyer I do not have a view on the merits or otherwise of foreign vessels but in this article provide a brief outline of the legal framework that enables foreign vessels to fish in New Zealand waters.

It is necessary to start with a brief maritime legal history lesson. Historically, a country's legal jurisdiction only extended beyond its coast for three nautical miles (apparently the maximum range of the shore batteries) but it was eventually extended to 12 miles. This area is known as the territorial sea and a country's laws apply in the territorial sea in the same way as on land. An exclusive economic zone extending some 200 miles out to sea is a recent concept adopted into New Zealand's law, following ratification of the United Nations Conventions on the Law of the Sea (UNCLOS).

In this convention countries agreed that they would have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" out to 200 nautical miles from their coast. However the EEZ is not the same as the territorial sea and a state's ability to impose its laws in the EEZ is more limited than in the territorial sea. The UNCLOS Convention also involves concepts of "use it or lose it" whereby if a state lacks the will or capacity to sustainably utilise resources within its EEZ then it is required to give access to outsiders.

There are, in theory, several ways that foreigners can be authorised to fish in New Zealand waters, being:

- a) Fishing under a Foreign Fishing Licence granted under part 5 of the Fisheries Act, or
- b) Fishing under their own New Zealand fishing permit, or
- c) Fishing under charter to a New Zealand-based permit holder (Foreign Charter Vessels (FCVs)).

A and B are more theoretical than real. For example the Foreign Fishing License can only be granted if a resource is not being utilised by New Zealand interests (as required by UNCLOS) and I understand that no such licenses are currently issued. B is interesting in that there is no prohibition on a foreigner being granted a New Zealand Fishing permit but there are prohibitions on foreigners accessing ACE, making it commercially impractical to use a local permit in their name. Accordingly, the only method by which foreign owned vessels in reality fish in New Zealand, is under contract to a New Zealand permit holder to catch fish under authority of that permit.

Foreign owned vessels must be registered as a fishing vessel


under Section 103 of the Act in the same way as local vessels. However while registration of a local vessel is essentially automatic, a foreign vessel can only be registered with the consent of the Chief Executive of the Ministry of Fisheries. Section 103, and the Act in general, is silent on what matters the Chief Executive needs to take into account in deciding whether or not to give consent under this section.

You will often hear reference to "New Zealand-isation" of the fishing fleet whereby there is a preference for increasing the level of participation by New Zealand fishers over foreign vessels. However there is no express reference to this concept in the Act and it is difficult to see any implied policy preferences spelt out in the Act. Instead, the control of foreign participation is focused on quota and ACE. As the consent provision in relation to vessel registration has not been tested in court there is no case law to guide parties on how the consent process should be addressed.

A vessel initially can operate under their own flag State Rules as to maritime matters but once they have been here two years they are required to comply with the New Zealand survey system in the same way as a local vessel.

All fisheries reporting requirements operate through the permit holder and therefore they are essentially identical whether the vessel is foreign or local. Other than some customs requirements, there are few additional restrictions imposed on foreign vessels beyond that which apply to locals.

Generally the crew and skippers are the employees of the owner rather than the New Zealand charterer. Possibly the biggest issue in the eyes of the public here is the protection of employment opportunities for locals. Before Immigration New Zealand will grant foreign crew work visas and permits, the New Zealand Charterer Fisheries must provide evidence that there are no suitable and available New Zealand applicants on the Deep Sea Fishing Crew Employment Register. The Act provides that the Minimum Wage Act 1983 and the Wages Protection Act 1983 applies to the foreign crew. This was not the case historically and foreign crew were often being paid much less than the New Zealand minimum wage. Foreign crew are able to take wage matters to the Employment Relations Authority in New Zealand (and have done so). Under Immigration policy, foreign crew must now be paid \$2 an hour above the New Zealand minimum wage and deductions are not allowed to take the hourly rates below the minimum wage.

As may be apparent from the above, at least in theory, almost all the same rules and regulations for operating a fishing vessel apply to foreigners in the same way as locals. Indeed when it comes to crew wages the requirements are actually higher as a result of the \$2 uplift. It is, however, how these vessels operate in practice which gives both comfort to their supporters and ammunition to their detractors. 

OCEAN LAW NEW ZEALAND

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14 New St, Nelson, PO Box 921, Nelson 7040. T +64 3 548 4136. F +64 3 548 4195. Freephone 0800 Oceanlaw. Email justine.inns@oceanlaw.co.nz www.oceanlaw.co.nz