

# MODERN DAY SLAVERY: EMPLOYMENT CONDITIONS FOR FOREIGN FISHING CREWS IN NEW ZEALAND WATERS

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## 1 Introduction

On 14 September 2005, ten Indonesian fishermen scaled the Nelson Port Company security fence and fled their jobs on the Korean fishing vessel *Sky 75*. The fishermen went to the New Zealand police with horrifying stories of the abuse they had suffered while working in New Zealand waters. They were fed rotten meat and vegetables, told to 'shower' by standing on deck amid the waves, made to continue working when sick or injured and were constantly beaten and sworn at. They endured all this for wages of US\$200 per month: wages that weren't being paid.<sup>1</sup>

The case of the *Sky 75* is unusual only because the fishermen complained. More often, the abused workers return to their home countries without their stories ever coming to the attention of New Zealand authorities.

Foreign crew working on foreign-owned fishing boats in New Zealand's exclusive economic zone (EEZ) fall through regulatory gaps. They are not working in New Zealand territory so New Zealand laws do not automatically apply. However, they are participating in the exploitation of New Zealand fish stocks, an activity from which New Zealand derives considerable economic benefit. Does New Zealand have a moral obligation to protect these vulnerable workers? Does New Zealand have the legal authority to enforce New Zealand laws outside of New Zealand's territorial waters? What is it about our fishing industry that makes it a magnet for abusive practices?

The Labour government has recently made significant changes to the way working conditions for foreign fishing crews are controlled. While these changes are a welcome advance, legal and practical difficulties in enforcing the new guidelines mean there is more work to be done before New Zealand can claim a clear conscience on the matter.

This paper examines the history of attempts to regulate employment conditions on foreign vessels fishing in New Zealand waters and assesses their effectiveness. The Australian cabotage model is suggested as the way forward for New Zealand.

## 2 The New Zealand Fishing Industry

Historically, coastal states only had the right to control activities in the three nautical miles immediately adjacent to their shore. Waters further out were international waters and no state could restrict the activities of another state's vessels in international waters. This all changed with the coming into effect of the *United Nations Convention on the Law of the Sea* (UNCLOS).<sup>2</sup>

UNCLOS extends the sovereignty of coastal states out to 12 nautical miles.<sup>3</sup> More importantly for the purposes of this article, article 56 of the Convention also gives states 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources' in the area of ocean radiating 200 nautical miles from their coast.<sup>4</sup> This area is known as the exclusive economic zone (EEZ). Natural resources include, most notably, fish, so coastal states now had the right to regulate fishing activities in their EEZ.

In anticipation of the coming into effect of the new regime, New Zealand passed the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*, establishing New Zealand's EEZ.<sup>5</sup> The

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<sup>1</sup> 'The case of the *'Sky 75'* *The Maritimes* (December 2005, Maritime Union of New Zealand, Wellington, New Zealand) 18.

<sup>2</sup> Opened for signature 10 December 1982, IMO, (entered into force 16 November 1994)

<sup>3</sup> *Ibid* art 2-3.

<sup>4</sup> *Ibid* art 55-57.

<sup>5</sup> *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977* (NZ), s 9.

Fisheries Act defines New Zealand fisheries waters as including all waters in New Zealand's EEZ,<sup>6</sup> extending the fisheries management regime of the Act to all fishing within New Zealand's EEZ.

## 2.1 The Quota Management System (QMS)

New Zealand uses an individual transferable quota-based management system to control the amount of fish taken from New Zealand waters. The quota is fished by a mix of New Zealand and foreign-owned vessels.

The QMS was introduced in October 1986 for 26 fish species.<sup>7</sup> More species continue to be brought into the system.<sup>8</sup> Commercial fishers operating in New Zealand prior to the introduction of the system received an allocation of fishing quota in exchange for the removal of the fishers' previous right to fish anywhere and for any species. Known as individual transferable quota or ITQ, quota is a valuable property right. It is allocated in perpetuity and can be traded, subject to some restrictions on foreign ownership and maximum holdings.<sup>9</sup>

Each year the Minister of Fisheries decides the total allowable commercial catch (TACC), how much of each fish species can be harvested by commercial fishers each year. Fishing rights are then allocated to quota holders.<sup>10</sup> Quota is defined as a proportion of the TACC<sup>11</sup> so quota holders have the right to harvest a fixed percentage of the TACC each year.

## 2.2 Use of Foreign Charter Vessels

Large quota-holding companies have their own fishing vessels, crewed either by New Zealanders or foreign crew-members.<sup>12</sup> Even the largest companies do not exclusively use their own boats. Rather, they enter into charter agreements with foreign owned and operated vessels as needed in order to maintain flexibility in their fishing capacity.<sup>13</sup>

Smaller quota-holders cannot afford to invest in fishing vessels to fish their own quota and so charter foreign vessels to come to New Zealand and fish on their behalf.<sup>14</sup> There are estimated to be between 35 and 50 foreign charter vessels operating in New Zealand fisheries waters each season, with total crew numbers in the region of 2500.<sup>15</sup> Foreign charter vessels contribute approximately 40 per cent by volume and 20 per cent by value to total New Zealand fisheries earnings.<sup>16</sup>

Operated by the overseas owner, the foreign vessel fishes the quota and then the profits are split with the New Zealand quota-holder. The vessels are chartered complete with crew, so the New Zealand party has little involvement with those working aboard the boats. The crew members' contracts of employment are with the foreign operator.

## 3 Legal Principles Governing International Employment Contracts

New Zealand has a number of statutes designed to protect vulnerable workers from exploitation. The common law principles of conflict of laws govern whether the protective effect of these statutes extends to fishers working in the EEZ.

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<sup>6</sup> *Fisheries Act 1992*(NZ), s 2.

<sup>7</sup> Lock, Kelly and Leslie, Stefan, *New Zealand's Quota Management System: A history of the first 20 years* (Motu Economic and Public Policy Research, Wellington, 2007) 11-12.

<sup>8</sup> *Ibid* 20.

<sup>9</sup> Quin, Marguerite *The Fisheries Act 1996: Context, purpose and principles* (1997) 8 *Auckland University Law Review* 503, 519.

<sup>10</sup> Lock, above n 7, 9.

<sup>11</sup> *Ibid* 17.

<sup>12</sup> Department of Labour *Employment Conditions in the Fishing Industry – Final report on foreign crew on New Zealand fishing vessels* (2 December 2004) [11].

<sup>13</sup> *Ibid* Annex 3 [1].

<sup>14</sup> 'Opposition to Fisheries Wage Increase' *Tū Mai* (New Zealand, November 2006) 9.

<sup>15</sup> Department of Labour *Employment Conditions in the Fishing Industry – Final report on foreign crew on New Zealand fishing vessels* (2 December 2004) [30].

<sup>16</sup> Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) 4.

Where, as here, contracts have an international element, the objective proper law of the contract will be the system of law with which the contract has its closest and most real connection.<sup>17</sup> In employment situations, this will be determined by factors such as where the work takes place; where the employer is based; the residence or domicile of the employee; and the language and form of the contract.<sup>18</sup>

The contracts of employment for foreign fishing crews are typically formed offshore, between employees and employers who are both based offshore, often, though not always, in the same country. The contracts are usually in the language of the employee.

The objective proper law governing the employment of foreign fishers in New Zealand's EEZ is unlikely to be New Zealand law. Although the law of the place where the work takes place is presumptively the law of the contract under the European Union's *Convention on the Law Applicable to Contractual Obligations* (the Rome Convention)<sup>19</sup> and this is always a weighty factor even in non-Convention states such as New Zealand, the fishers are not working in New Zealand proper. They are working only in New Zealand's EEZ. All other factors—the place of formation of the contract, the home bases of employer and employee, the language and form of the contract—weigh against the already slight connection with New Zealand.

The objective proper law of a contract can be overridden by the parties choosing the law of a different country as the proper law. The choice may be express, or the court may be able to infer an intention that the contract be governed by a particular legal system from references in the contract to statutes or the use of legal terms specific to that system.<sup>20</sup>

Choice of law in employment situations is subject to two major limitations. The first is that the choice must be bona fide. If a system of law totally unconnected with the contract is chosen in order to gain an advantage the choice may be ignored by the courts.<sup>21</sup>

Secondly, the parties' freedom to choose a law other than the objective proper law is subject to the limitation that the choice of law cannot deprive the employee of the protection of the mandatory rules of the law that would otherwise apply.<sup>22</sup> That is, mandatory rules of the system of law that would apply if no express or implied choice had been made still apply to the contract.

In New Zealand, employment statutes such as the *Minimum Wage Act 1983* (NZ) (the Minimum Wage Act) and the *Wages Protection Act 1983* (NZ) (the Wages Protection Act) are mandatory. Parties cannot contract out of their provisions. If New Zealand law is the objective proper law of the employment contract, the protective effect of employment statutes applies regardless of any contrary choice of law.<sup>23</sup>

These limitations on choice of law do not assist foreign fishers in New Zealand's EEZ. As discussed above, the objective proper law of their contracts is unlikely to be New Zealand law. Mandatory New Zealand rules therefore do not apply and any choice of a foreign law as the governing law of the contract is unexceptionable.

A further complication for fishing crew is the issue of extra-territoriality. Even if the mandatory rules would otherwise apply, the fishers are not working in New Zealand territory. For a mandatory statute to apply to their situation, the statute must be intended to have extra-territorial effect. The Employment Court has previously held the Wages Protection Act, although mandatory, was not intended to have extra-territorial effect.<sup>24</sup> The decision has been criticised for over-emphasising the presumption against extra-territorial effect, rather than examining the policy aims behind the statute,<sup>25</sup> but there is no guarantee a court would find New Zealand employment statutes were intended to cover employment in the EEZ.

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<sup>17</sup> JHC Morris, (ed) *Dicey and Morris on the Conflict of Laws* (10<sup>th</sup> ed, 1980) vol 2, ch 28, 747.

<sup>18</sup> *Ibid* ch 29, 871.

<sup>19</sup> Lawrence Collins, (ed) *Dicey and Morris on the Conflict of Laws* (13<sup>th</sup> ed, 2000) vol 2, 1303.

<sup>20</sup> Morris, above n 17, [28], 748.

<sup>21</sup> *Ibid* 754.

<sup>22</sup> Jean-Gabriel Castel and Janet Walker, (eds) *Canadian Conflict of Laws* (5<sup>th</sup> ed) 31.8.d.

<sup>23</sup> *Clifford v Rentokil Ltd* [1995] 1 ERNZ 407 (EC), 433.

<sup>24</sup> Linda Patullo and Paul Myburgh, 'The Territorial Scope of New Zealand Employment Law: Quarter-Acre or Global Village?' (2003) 9 *New Zealand Business Law Quarterly* 281-286.

<sup>25</sup> *Ibid*.

The protective effect of New Zealand's employment statutes does not extend to fishers working in the EEZ on ordinary conflicts principles. However, concerned by conditions on the boats, the legislature has made attempts to impose New Zealand law through explicit statutory provisions.

#### 4 Fisheries Act 1996 (NZ)

During the mid 1990s a general uneasiness about conditions on foreign fishing vessels began to surface. Reports appeared in national media exposing abuse on board vessels involved in joint ventures with New Zealand companies.<sup>26</sup> National MP Nick Smith, the Member of Parliament for Tasman, pushed hard for change, resulting in the serious reforms of the *Fisheries Act 1996 (NZ)* (the Fisheries Act).<sup>27</sup>

Section 103(1) of the Act requires all vessels fishing in New Zealand fisheries waters (including the EEZ)<sup>28</sup> to be registered. Section 103(5) provides that, in the case of foreign vessels, while the vessel is in New Zealand fisheries waters the protections of the Minimum Wage Act and the Wages Protection Act apply to people working on the vessels. Section 103 overrides the common law conflicts principles that would otherwise govern the contracts.

Section 103(5)(a) deems all work-permit holders engaged on the vessel to be employees. This ensures employers cannot rely on the Employment Court decision of *Muollo v Rotaru*<sup>29</sup> which found fishers paid by a share of the catch were independent contractors and so could not rely on statutory protections given to employees.

Section 103(5)(g) gives the Employment Relations Authority and the Employment Court jurisdiction in any dispute relating to the application of the Minimum Wage and Wages Protection Acts.

Although section 103, as the first attempt to regulate to conditions and pay for foreign fishers in New Zealand waters, was a step in the right direction, difficulties with enforcement meant it made little difference in practice. Only one case, *Karelybflot AO v Udovenko*,<sup>30</sup> was brought under the Fisheries Act before changes were made by the introduction of a Code of Practice in 2006. While technically a victory for the crew, both the facts and the outcome of the case illustrate the Act's shortcomings.

##### 4.1 The *Udovenko* Case

The *Udovenko* case arose out of the forfeiture of five Russian-owned fishing vessels to the Crown in 1997. Following the forfeiture, the shipowner, Karelybflot, ordered the crew back to Russia. One hundred and one of the crew refused to leave until Karelybflot paid what they claimed to be owed in wages. The crew occupied and arrested the vessels and took their complaint to the New Zealand courts.

###### 4.1.1 High Court

The proceedings dragged out and by the time the case came before Young J in the High Court in February 1999, only eight plaintiffs remained, only six of those in New Zealand. The other 93 had settled with Karelybflot and returned home.

The case was brought in the High Court under section 4(1)(o) of the *Admiralty Act 1973 (NZ)* (the Admiralty Act), which gives the court jurisdiction to entertain '[a]ny claim by a master or member of the crew of a ship for wages'.

The relevant provision of the Fisheries Act was a transitional provision, section 332, as section 103 of the Act did not come into force until 1 October 2001. Section 332 governed the registration of foreign ships from 1997 until 2001. The wages provisions of section 332(6) are identical to those of section 103(5) and extend the Minimum Wage Act and Wages Protection Act to crew on the ships.

<sup>26</sup> Bruce Ansley, 'Cast Away' *Listener* (Wellington, New Zealand, 19 October 1996) 34; Colin Taylor 'Slav Labour' *Dominion Post* (Wellington, New Zealand, 3 February 1996).

<sup>27</sup> Colin Taylor, 'Slav Labour' *Dominion Post* (Wellington, New Zealand, 3 February 1996).

<sup>28</sup> *Fisheries Act 1996 (NZ)*, s 2.

<sup>29</sup> [1995] 2 ERNZ 414.

<sup>30</sup> *Udovenko v AO Karelybflot* [1999] HC, Christchurch, AC 90/98, (Unreported, Young J, 27 April 1999); *Udovenko v AO Karelybflot* [24 May 1999] HC, Christchurch, AD 90/98; *Karelybflot AO v Udovenko* [2000] 2 NZLR 24 (CA).

The plaintiffs appeared in person as legal aid had been withdrawn. Young J, although hampered by the lack of representation and the difficulty the plaintiffs had in presenting their case in English, delivered a ruling very sympathetic to the crew.

Young J found the wage books kept by Karelrybflot, although signed by the crew, were not a true account of the hours worked. He held they merely reflected the hours of work outlined in the contract of employment. Comparison with the bridge and engine logs showed marked discrepancies.<sup>31</sup> His Honour therefore ignored the wage books, and looking to the contract of employment, concluded the men were to be paid by the day. He applied the Minimum Wage Act per day minimum and awarded wages on that basis.<sup>32</sup>

Young J then went on to award damages for Karelrybflot's failure to pay wages owed. He found the wish to litigate in New Zealand was reasonable<sup>33</sup> and it was reasonable for the crew to remain in New Zealand for the litigation.<sup>34</sup> Staying in New Zealand had caused significant hardship for the men, who were subsisting on charity after Karelrybflot stopped delivering food to the vessels. Families back in the Ukraine had also suffered from the lack of income.<sup>35</sup>

Young J awarded six months' wages as compensation. He did not award wages up to the date of judgment as he found the men had failed to prosecute their case promptly.<sup>36</sup>

Young J's interim judgment was confirmed by him on 24 May 1999, after allowing Karelrybflot to make submissions on the damages point.<sup>37</sup>

#### 4.1.2 Court of Appeal

Karelrybflot appealed to the Court of Appeal. A five-judge bench confirmed the High Court's jurisdiction over the wages claims and confirmed the application of the Minimum Wage Act to the dispute. However, they slashed the wages awards and overturned Young J on the question of damages.

The Court of Appeal construed the contract of employment as providing for payment by the hour, not per day. They then, presumably on the basis the proper law of the contract was Russian law, referred to a provision of the Russian Labour Code requiring seamen to be paid for at least a 40-hour week.<sup>38</sup> They combined this 40-hour week minimum with the New Zealand minimum hourly wage (at that time \$7) to arrive at a minimum payment of \$280 per week.<sup>39</sup>

The Court made conservative estimates of the number of hours actually worked and calculated this at the hourly rate specified in the contract of employment. The resulting awards were considerably lower than the awards in the High Court. As the totals for the period averaged more than \$280 per week, the Court considered both Russian and New Zealand requirements to have been fulfilled.<sup>40</sup>

It is surprising the Court did not award payment for the minimum 40-hour week at the contract hourly rate, rather than the considerably lower New Zealand minimum wage. That they did not do so reflects the generally parsimonious attitude of the Court in the case.

On the damages issue, the Court had this to say:<sup>41</sup>

It is, in our opinion, a very serious step for a Court by the making of a damages award to affirm actions of the kind which the respondents chose to take. It seems to us that they elected to remain in New Zealand,

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<sup>31</sup> *Udovenko v AO Karelrybflot* [1999] HC, Christchurch, AC 90/98, (Unreported, Young J, 27 April 1999), 30, 37.

<sup>32</sup> *Ibid* 35-36.

<sup>33</sup> *Ibid* 41.

<sup>34</sup> This finding was confirmed by His Honour's decision to strike out for want of prosecution in the New Zealand court the claims of the two plaintiffs who had returned to Russia. (*Udovenko v AO Karelrybflot* [1999] HC, Christchurch, AC 90/98, (Unreported, Young J, 24 May 1999), 32).

<sup>35</sup> *Udovenko v AO Karelrybflot* [1999] HC, Christchurch, AC 90/98, (Unreported, Young J, 27 April 1999), 15.

<sup>36</sup> *Ibid* 41.

<sup>37</sup> *Udovenko v AO Karelrybflot* [24 May 1999] HC, Christchurch, AD 90/98.

<sup>38</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) [51].

<sup>39</sup> *Ibid* [53].

<sup>40</sup> *Ibid* [54-60].

<sup>41</sup> *Ibid* [66].

where they knew they could not enter into employment, instead of accepting repatriation (at no cost to them), after which they might well have been able to obtain alternative employment either with Karelrybflot or another fishing company. By remaining in New Zealand they have brought upon themselves an avoidable loss of income for the period after the expiry of their contracts with Karelrybflot.

The Court found Young J had erred in awarding damages for Karelrybflot's failure to pay the wages owed to the seamen and overturned the awards.

So while the Court found the crew were entitled to payments of wages which had not been made, the *Udovenko* case was ultimately a pyrrhic victory. After two years in New Zealand, subsisting on charity in an attempt to get justice, only 6 of the original 101 plaintiffs received anything at all from the courts. And those six received grudging payments of less than \$10,000 each, leaving them severely out of pocket after their New Zealand sojourn. The outcome was unlikely to encourage further litigation in the New Zealand by other crews short-changed on their wages. As the crew in the *Udovenko* case found out, bringing an action against an employer under section 103, however well-founded, did not necessarily mean crew ended up better off.

## 4.2 Enforcement Problems

In addition to the problems illustrated by the *Udovenko* case—the double bookkeeping by employers, the difficult interface with foreign law, the drawn out and expensive process of bring a claim and the ungenerous attitude of the Court of Appeal—more serious problems were stopping cases reaching the courts at all.

As illustrated by the fact that only one case was brought in a ten-year period, problems were rarely reported to authorities. Most foreign fishers do not speak English. They were unlikely to be aware of their rights under New Zealand statutes. Many fear retaliation, either abuse by their employers or black-listing by the industry as a whole.<sup>42</sup> There are reports of threats being made to the families of crew members who laid complaints.<sup>43</sup>

Further, fishing vessels are in port for only a short time. It is difficult for non-English speakers, unfamiliar with New Zealand, to obtain assistance before the vessel sails out of jurisdiction. The operator of the vessel has a high degree of control over the movements of persons on the vessel and has the ability to restrict their contact with the outside world. The Maritime Union even reports hearing of cases where private security guards are posted to stop crew coming ashore.<sup>44</sup>

The inadequacy of the Fisheries Act provisions was increasingly apparent.

## 5 Reform Attempts

The problems with the section 103 regulatory regime have resulted in two reform attempts in recent years. The first, a statutory reform, failed; the second, a soft law approach, has had a limited degree of success.

### 5.1 Foreign Fishing Crew Wages and Repatriation Bond Bill 2000

During the several years spent pursuing their wages claim in the New Zealand courts, the crew members involved in the *Udovenko* litigation were stranded in New Zealand with no money and were reliant on support from the government and the community. Public concern over the situation led to Labour MP Graham Kelly introducing the Foreign Fishing Crew Wages and Repatriation Bond Bill 2000 into Parliament.<sup>45</sup>

The Bill proposed the establishment of a fund that would cover the wages and cost of return travel for crew members of foreign fishing vessels if their employer became unable to pay the crew.<sup>46</sup> The fund

<sup>42</sup> International Transport Workers' Federation *Out of Sight, Out of Mind: seafarers, fishers and human rights* (June 2006) 26.

<sup>43</sup> Jennifer Devlin, Interview with Les Wells, Maritime Union Lyttelton Branch, (telephone, 5 August 2008).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Foreign Fishing Crew Wages and Repatriation Bond Bill 2000*, Explanatory Note, Myburgh, Paul 'Shipping Law' (2003) *New Zealand Law Review* 287, 290.

<sup>46</sup> *Foreign Fishing Crew Wages and Repatriation Bond Bill 2000* (No 42-1) cl 3.

was to be raised by requiring foreign vessels upon registration to either pay a sum equivalent to the minimum wage for each crew member for the time the vessel was licensed to fish in New Zealand, plus the cost of airfares, or to prove the vessel owner was insured for the equivalent amount.<sup>47</sup>

Unsurprisingly, fishing interests opposed the Bill, claiming the costs would have a significant downsizing effect on the industry.<sup>48</sup> The Select Committee agreed with their concerns and opted to address the issue through voluntary initiatives. The initiatives consisted largely of distributing employment rights pamphlets to foreign crew members.<sup>49</sup>

A truncated version of the Bill was eventually passed, but the only remaining provision related solely to crew claims of an interest in vessels forfeited to the Crown.<sup>50</sup>

## 5.2 The 2006 Code of Practice

A further attempt at reform of the industry was made in 2006 as a result of a Department of Labour report on employment conditions in the fishing industry.

The Department of Labour conducted an investigation into the industry in December 2004. Although the focus of the inquiry was conditions on New Zealand vessels employing foreign crew,<sup>51</sup> the investigators realised there were real areas of concern over the use of overseas-owned contract vessels operating in New Zealand waters.<sup>52</sup>

The report itself primarily discusses issues relating to the timing of wage payments for both New Zealand and foreign crew members on New Zealand ships and whether these payments were Minimum Wage Act compliant.<sup>53</sup>

Annex Three of the report, heavily censored in the version released to the public,<sup>54</sup> reported confidential interviews with crew on foreign vessels. Concerns raised included: pay as low as \$US140 per month with heavy deductions taking actual pay even lower; serious physical and mental abuse; working hours of 12 hours or more per day; denial of access to passports or fisherman's books; no washing or laundry facilities; no provision for differing religious or cultural needs; poor food and no food at all when fishing was poor.<sup>55</sup>

The report revealed the Fisheries Act section 103 was woefully inadequate. Problems with enforcement and lack of reporting meant operators of foreign charter vessels in New Zealand waters were able to flout the Act's requirements with impunity. Further, the Act did not address the non-financial problems of abuse and poor working conditions.

The public release of the report, in May 2005 resulted in a number of questions in Parliament, with National, United Future, New Zealand First and the Greens all exhorting the government to take action.<sup>56</sup>

The Labour government's response was to announce a review of the process by which visas allowing foreigners to work in the EEZ were granted.<sup>57</sup> In October 2006, the review resulted in the introduction by the Department of Labour of a new Code of Practice on Foreign Fishing Crew.

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<sup>47</sup> Ibid cl 6.

<sup>48</sup> *Foreign Fishing Crew Wages and Repatriation Bond Bill 2000*, report of the Primary Production Committee, 3.

<sup>49</sup> Paul Myburgh, 'Shipping Law' (2003) *New Zealand Law Review* 287, 290-291; Foreign Fishing Crew Wages and Repatriation Bond Bill 2000, report of the Primary Production Committee, 3-4.

<sup>50</sup> *Fisheries (Foreign Fishing Crew) Amendment Act 2002* s 3.

<sup>51</sup> Department of Labour *Employment Conditions in the Fishing Industry – Final report on foreign crew on New Zealand fishing vessels* (2 December 2004) [1].

<sup>52</sup> Ibid [10].

<sup>53</sup> The Employment Court subsequently found that the payments were lawful in a test case brought as a result of the report (*Sealord Group Ltd v New Zealand Fishing Industry Guild Inc* [2005] 1 ERNZ 535).

<sup>54</sup> Email from Andrew McCormick, Department of Labour, to Jennifer Devlin, 25 July 2008. *Release of Report into 'Employment Conditions in the Fishing Industry' – List of material withheld from report and grounds for withholding*.

<sup>55</sup> Department of Labour *Employment Conditions in the Fishing Industry – Final report on foreign crew on New Zealand fishing vessels* (2 December 2004) Annex 3.

<sup>56</sup> New Zealand, *Parliamentary Debates*, House of Representatives, (17 May 2005) 20573; New Zealand, *Parliamentary Debates*, House of Representatives, (18 May 2005) 20656.

<sup>57</sup> David Cunliffe, 'Government to Tighten Foreign Fishing Approvals' (Media Release, 16 December 2005).

## 6 Regulation under the Code of Practice

The Code of Practice outlines the minimum work conditions that must be met before visas to work in the EEZ will be granted to foreign crew members. In addition to setting out minimum remuneration and conditions, the Code ‘introduces a new accountability framework’.<sup>58</sup>

All New Zealand parties to foreign fishing vessel charter arrangements are required to be signatories to the Code. The New Zealand charter partner can then request an Approval in Principle from the Department of Labour to allow the foreign charter partner to employ foreign crew members. An Approval in Principle will only be granted if the Department is satisfied the Code of Practice will be adhered to and that the charter partners have a history of compliance with the Code.<sup>59</sup> If an Approval in Principle is not granted, the foreign crew will not receive visas to work in New Zealand waters.

### 6.1 Substantive Requirements

The Code addresses three, not always entirely complementary, objectives: tackling concern over employment conditions; protecting New Zealand jobs by raising remuneration levels for foreign crew; and reducing the immigration risk posed by deserting crew.

#### 6.1.1 Employment Conditions

Several sections of the Code relate to crew welfare. Section 14 puts responsibility on the New Zealand charter partner for ensuring facilities and provisions on board the vessels are of an acceptable standard. A non-exclusive list of basic requirements is provided as an example. While far from generous, (food is required to be merely ‘adequate’ in quantity and type), the list does address many of the concerns raised by the Department of Labour report. It requires clean, dry, accommodation and bedding and adequate washing facilities and medical provisions.

Section 7 requires the New Zealand company to have a representative present at the vessel for turnarounds and for that representative to be accessible to crew members. Responsibility is placed on the New Zealand company for ensuring crew have access to basic services and any serious complaints are passed on to the New Zealand Fishing Industry Guild. Section 1 of the Code requires the New Zealand company to ensure that the employer, the foreign charter partner, fully investigates any complaints raised, regardless of their perceived severity.

Under section 4, the New Zealand company must ensure crew members are provided with a Department of Labour information sheet in their own language, which outlines the basic rights of crew members under New Zealand law. Ten different foreign-language versions of the information sheet are available on the Immigration New Zealand website.<sup>60</sup> This is in many ways the most significant provision of the Code. All other rights for crew members are without effect if the crew are not aware of them and do not know how to enforce them. It is interesting that a voluntary initiative by the fishing industry, accepted during negotiations over the Foreign Fishing Crew Wages and Repatriation Bond Bill 2000, has become a mandatory requirement under the Code of Practice.

#### 6.1.2 Remuneration

The Code makes two changes to remuneration packages: a higher hourly wage and stricter controls on deductions from pay.

##### 6.1.2.1 Wage Levels

One of the most controversial aspects of the new Code is the requirement it imposes for foreign crew to be paid at an hourly rate higher than the New Zealand minimum wage. The Code requires payment at the minimum wage plus \$1.25 per hour from 1 January 2007, increasing to the minimum wage plus

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<sup>58</sup>Immigration New Zealand *Fact Sheet – Crew of chartered foreign fishing vessels – New standards* (20 October 2006).

<sup>59</sup> *Ibid.*

<sup>60</sup> The languages are: Chinese Simplified; Chinese Traditional; Indonesian; Japanese; Korean; Polish; Samoan; Tagalog; Ukrainian; and Vietnamese (at 22 July 2008).



\$2.00 per hour by 1 January 2009. Crew are to be paid for actual hours worked, subject to a minimum of 42 hours per week.<sup>61</sup> The requirement for payment above the minimum wage was introduced in order to bring remuneration to a level more comparable with the remuneration of New Zealand crew.<sup>62</sup>

This requirement caused a great deal of concern to the fishing industry, to the point where the Code explicitly acknowledges industry participants have not agreed to the increased remuneration requirement, but is being imposed regardless and 'compliance is nonetheless important'.<sup>63</sup>

The motivation for including the increased pay in the Code of Practice was not concern over the plight of foreign fishers, but rather a concern to protect New Zealand jobs.<sup>64</sup> New Zealand workers are not prepared to work on fishing boats for minimum wage and 'immigration policy requires all temporary migrant workers in New Zealand are paid market rates for their work'.<sup>65</sup> New Zealand minimum wage is considerably higher than what most foreign fishers could earn in their home countries and, while the extra is no doubt welcome, there was no pressure from foreign crew for an increase in the minimum requirement. The concern for foreign crew is getting paid their legal entitlements.

Bearing in mind the Department of Labour report found crew worked 84 hours per week while at sea,<sup>66</sup> the requirement of payment for a minimum of 42 hours per week leaves plenty of scope for abuse by unscrupulous operators. The practice of double bookkeeping, seen in the *Udovenko* case, is likely to continue.

### 6.1.2.2 Deductions

The Code forbids pay deductions that take wages below the minimum pay specified in the Code.<sup>67</sup> The Code requires deductions to be listed in the employment agreement with amounts, dates and procedures for all deductions itemised. Supporting documentation must be retained for audit purposes.<sup>68</sup>

The need for the provision can be seen by the crew contract in the *Udovenko* case, which allowed for wage deductions not only for food<sup>69</sup> and work clothes,<sup>70</sup> but also for any losses incurred by the employer due to 'poor quality of fish production'<sup>71</sup> or 'careless attitude of crew members'.<sup>72</sup> The contract provided the maximum deduction for food 'must not exceed the daily wage'.<sup>73</sup> Such contracts were clearly contrary to the intent of section 103 of the Fisheries Act, which was crew receive the minimum wage for their work.

### 6.1.3 Desertion Risk

The greater part of the new Code relates to management of the risk of desertion by foreign crew. The New Zealand charter partner is required to notify the Department of Labour of the arrival, departure and, if applicable, desertion of any foreign fishing crew member.<sup>74</sup>

The New Zealand partner is also required to implement measures to reduce the risk of desertion while the ship is in port, including implementing a shore leave policy. Although the Code contains an acknowledgment crew are entitled to shore leave and 'it is not the intent of this section to prevent Fishers from being able to take shore leave',<sup>75</sup> this requirement may result in further restrictions being

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<sup>61</sup> Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) s 15, Appendix 9.

<sup>62</sup> David Cunliffe, 'New Rules for Foreign Charter Fishing Crews' (Media Release, 9 October 2006) <<http://www.beehive.govt.nz/node/27337>> at 25 August 2008.

<sup>63</sup> Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) 4.

<sup>64</sup> (2006) 634 New Zealand Parliamentary Debates 5538 (10 October 2006).

<sup>65</sup> Ruth Dyson, Minister of Labour, (2006) 634 New Zealand Parliamentary Debates 5538 (10 October 2006).

<sup>66</sup> Department of Labour *Employment Conditions in the Fishing Industry – Final report on foreign crew on New Zealand fishing vessels* (2 December 2004) Annex 3, [1].

<sup>67</sup> Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) Appendix 9, [10].

<sup>68</sup> *Ibid* [11].

<sup>69</sup> Translation of crew contract, appended to *Udovenko v AO Karelybflot* [1999] HC, Christchurch, AC 90/98, (Unreported, Young J, 27 April 1999), s 9.

<sup>70</sup> *Ibid* s 10.

<sup>71</sup> *Ibid* s 12.

<sup>72</sup> *Ibid* s 11.

<sup>73</sup> *Ibid* s 9.

<sup>74</sup> Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) ss 3, 9, 10, 11.

<sup>75</sup> *Ibid* s 6.

placed on shore leave for fishers. If too many fishers desert, it may jeopardise future visa approvals for ventures in which the New Zealand partner has an interest. The company may well be tempted to apply a very strict shore leave policy as a result.

Shore leave is acknowledged to be crucial to the mental health and wellbeing of seafarers who are confined to a vessel, interacting with a small group of people, for long periods while at sea.<sup>76</sup> The introduction of special visa requirements for seafarers on shore leave in the United States and Australia has caused a lot of concern among seafarer groups.<sup>77</sup> They fear that restrictions on shore leave in New Zealand ports may have a detrimental impact on the wellbeing of foreign fishers.

## 6.2 Procedural Requirements

In addition to the substantive obligations imposed by the Code, two significant procedural requirements are introduced to aid its enforcement.

### 6.2.1 Guarantee by New Zealand Party

The first of these enforcement provisions is a requirement the New Zealand charter party enter into a Deed of Guarantee of Financial Obligations in Respect of Foreign Crew. This Deed requires the New Zealand party to reimburse the Department of Labour for any costs incurred in accommodating, maintaining and repatriating crew.<sup>78</sup> It also gives crew the right to enforce wages claims against the New Zealand party if they cannot enforce them against the foreign employer.<sup>79</sup>

The Deed of Guarantee makes the New Zealand party liable to the crew only with regard to wages claims. There is no liability for breaches of any other employment condition. Liability for wages claims can only be enforced against the New Zealand party if the crew first take action in New Zealand against their employer and the employer either: refuses to submit to the jurisdiction or cannot be served; or fails to obey orders made by the New Zealand institutions.<sup>80</sup> The rights of the crew to take action against the New Zealand party will lapse if notice of demand is not given to the New Zealand party within 90 days of the crew member ceasing to be employed on the vessel

This very short limitation period, together with the requirement crew pursue the foreign employer first, means a New Zealand party is unlikely ever to be held accountable under the Deed. The *Udovenko* case brought by the crew against their employer took more than two years to wind through the New Zealand courts. Although the Code stipulates dispute resolution through the perhaps speedier Employment Relations Authority and Employment Court,<sup>81</sup> it is difficult to conceive of a situation where all avenues will have been exhausted within a three month period. The Deed of Guarantee is likely to prove to be more show than substance.

### 6.2.2 Dispute Resolution

The Code requires employment contracts to contain a dispute resolution procedure involving the Labour Inspectorate, the Mediation Service and then the Employment Relations Authority and Employment Court. If resolution is not achieved and if the claim concerns wages, the crew can then pursue the New Zealand charter partner through the Department of Labour and the District Court.<sup>82</sup>

The Code contains no expectation New Zealand law should apply to the employment agreements. There is only a requirement the applicable law be specified in the agreement.<sup>83</sup>

There is a question mark over whether the dispute resolution stipulations override the right of crew to take a case to the High Court in its Admiralty jurisdiction. Bringing an Admiralty proceeding

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<sup>76</sup> International Transport Workers' Federation *Out of Sight, Out of Mind: seafarers, fishers and human rights* (June 2006) 34.

<sup>77</sup> *Ibid* 33-34.

<sup>78</sup> 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 7.

<sup>79</sup> *Ibid* s 4.

<sup>80</sup> *Ibid* s 4.2.

<sup>81</sup> Department of Labour *Code of Practice on Foreign Fishing Crew* (19 October 2006) Appendix 9, 'Foreign Charter Vessels Crew Employment Agreements Standard Principles', s 18.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid* s 19.

potentially allows the court to declare the plaintiffs not only have an in personam remedy but also have a maritime lien over the vessels on which they worked. It may therefore be of significant advantage to plaintiffs to bring High Court proceedings rather than take a dispute to the Employment Relations Authority.

The jurisdictional point was brought at Court of Appeal level in the *Udovenko* case. The defendants argued that as section 10(2) of the Minimum Wage Act provided that all proceedings under the Act must be commenced in the Employment Tribunal, the applicable employment institution at the time, the High Court therefore had no jurisdiction to hear the plaintiffs' claim.<sup>84</sup> The Court of Appeal rejected this argument, holding that the specialised jurisdiction conferred by section 4(1)(o) of the Admiralty Act was not affected by the employment statutes. They found it would contravene the policy behind the protective employment legislation if the benefits of bringing in rem proceedings in Admiralty were precluded.<sup>85</sup>

The decision of the Court of Appeal on jurisdiction has been criticised as 'not supported by any close reasoning or application of the rules relating to implied repeal by subsequent statutes',<sup>86</sup> and may well be open to challenge. Further, the contracts in the *Udovenko* case, although expressly contemplating recourse to the Russian Labour Court, did not require disputes be heard in that court.<sup>87</sup>

It is arguable the imposition of a contractual requirement for the employment disputes of foreign fishers to be heard in the employment institutions will shut out the ancient seafarers' right to have a wages dispute heard in an Admiralty court.

### 6.3 Response

The introduction of the Code has received a mixed response. The International Transport Workers' Federation considered it would raise standards in the industry and clamp down on rogue operations.<sup>88</sup> The Maritime Union, while welcoming it as a symbolic step, remains sceptical as to its efficacy.<sup>89</sup> Some industry participants have welcomed the Code, saying foreign charter vessels should eventually be phased out altogether.<sup>90</sup> Maori fishing interests, on the other hand have been outspoken in their opposition to the Code.

The *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (NZ) provides for 20 per cent of quota for any species brought into the QMS after 1992 to go to Maori. In addition, Maori were allocated 10 per cent of species introduced earlier and received funding for a 50 per cent stake in Sealord Group Ltd.<sup>91</sup> This settlement makes Maori major players in the fishing industry.

Following the introduction of the Code, Maori Party co-leader Tariana Turia asked in Parliament:<sup>92</sup>

Would the Minister [of Immigration] agree that the real concern for the minimum wages being paid to foreign fishing crews has more to do with undermining the Maori fisheries industry and assisting the Talleys family [a prominent New Zealand fishing company] to achieve cheap quotas and control of Maori fisheries because of that family's relationship with politicians?

The theme was pursued by the Party's other leader, Dr Pita Sharples, who asked the Labour Minister to respond to statements from Maori interests that the proposals would 'threaten Sealord's viability'<sup>93</sup> and would 'have a disproportionate effect on Maori-owned fisheries quota'.<sup>94</sup>

<sup>84</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) [44].

<sup>85</sup> *Ibid* [45].

<sup>86</sup> Bernard Robertson, 'Karelrybflot v Udovenko' [2000] *Employment Law Bulletin* 33, 34.

<sup>87</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) [67].

<sup>88</sup> 'Overseas crew decision shows New Zealand on right course, says ITF' *The Maritimes* (March 2007), Maritime Union of New Zealand, Wellington, New Zealand 13.

<sup>89</sup> Jennifer Devlin, Interview with Les Wells, Maritime Union Lyttelton Branch, (telephone, 5 August 2008).

<sup>90</sup> Talley's Fisheries director, Andrew Talley, in Tim Hunter 'Fishing: Higher pay would sink iwi interests' *The Sunday Star Times* (Wellington, New Zealand, 1 October 2006) D1.

<sup>91</sup> *Brookers Fisheries Law* (Brookers Online, Fisheries Database, University of Auckland Library) at 6 August 2008, [7].

<sup>92</sup> New Zealand, *Parliamentary Debate*, House of Representatives, (19 October 2006), 5944 (Tariana Turia).

<sup>93</sup> New Zealand, *Parliamentary Debate*, House of Representatives, (10 October 2006), 5538 (Dr Pita Sharples).

<sup>94</sup> *Ibid*.

Ngapuhi chief executive Teresa Tepania-Ashton threatened that Ngapuhi would look to renegotiate Treaty settlements if the Code was implemented. Ngapuhi claimed the Code of Practice changes would threaten the basic principles of sustainable value and industry participation on which Treaty settlements were reached.<sup>95</sup> This was backed up by Aotearoa Fisheries chief executive Robin Hapi who claimed the plan would undermine iwi and have a devastating effect on their ability to develop their fisheries assets.<sup>96</sup>

#### 6.4 The 'Aleksandr Ksenofonotov' Case

So far, the only case heard since the Code came into effect is the 2007 case of *DV Ryboproduckt Limited v The 49 crew of the MFV 'Aleksandr Ksenofonotov'*.<sup>97</sup> The case was hailed by the International Transport Workers' Federation as indicating rights of overseas crews were being taken seriously and poor practices in the industry were on the way out.<sup>98</sup>

The case was brought in the Employment Relations Authority by the shipowner, after the crew of the 'Aleksandr Ksenofonotov' refused to leave the vessel at the end of their contract. The crew, Ukrainian nationals, were disputing the company's calculation of crew wages.

The occupation of the vessel was a canny move, providing a strong incentive to the shipowner to resolve the case quickly.<sup>99</sup> The dispute arose on 18 November 2006 and the Authority made its determination a mere two and a half months later on 30 January 2007. The result was a victory for the crew.

The Authority Member, James Crichton, found he had jurisdiction under section 103(5)(g) of the Fisheries Act to resolve the dispute.<sup>100</sup> He also found, contrary to the understanding of both parties, that the 2006 Code of Practice did not apply to the case, as the contracts had been entered into in May 2006, prior to the Code's coming into effect.<sup>101</sup>

The Code was mainly of significance in relation to the dispute procedures. The parties, believing themselves obliged by the Code to attend mediation, had reached agreement at mediation on some issues. The Authority found that as the mediations were entered into 'voluntarily and in good faith', nothing turned on the fact that the parties were not actually bound to a particular dispute resolution process.<sup>102</sup>

The voluntariness of the attendance at mediation seems questionable, as the Authority found the parties relied upon the 2006 Code in referring the dispute to mediation.<sup>103</sup> The Authority was understandably reluctant to reopen issues settled at mediation so perhaps can be forgiven for fudging the issue.

The major outstanding issue for resolution by the Authority was deductions from the crew's wages. The company was asserting a right to deduct the cost of airfares, meals and lodging from the crew's wages. They relied on a provision in the employment agreement stating 'the ship owner retains his right to deduct' the expenses.

The Authority held entry into a contract containing a provision giving a right to deduct did not amount to the written consent to deductions required by section 5 of the Wages Protection Act.<sup>104</sup> The Wages Protection Act applied to the agreement by virtue of section 103(5)(a) of the Fisheries Act. The

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<sup>95</sup> 'Opposition to Fisheries Wage Increase' *Tū Mai* (New Zealand, November 2006) 9.

<sup>96</sup> Tim Hunter, 'Fishing: Higher pay would sink iwi interests' *The Sunday Star Times* (Wellington, New Zealand), 1 October 2006) D1.

<sup>97</sup> *DV Ryboproduckt Limited v The 49 crew of the MFV 'Aleksandr Ksenofonotov'* [2007] Employment Relations Authority, CA10/07, 5072931 (Unreported, James Crichton, 30 January 2007).

<sup>98</sup> 'Overseas crew decision shows New Zealand on right course, says ITF' *The Maritimes* (March 2007), Maritime Union of New Zealand, Wellington, New Zealand 13.

<sup>99</sup> The occupation of the vessels by the crew in the *Udovenko* case did not have the same 'hurry on' effect, as the vessels had been forfeited to the Crown and couldn't be used by the company at the time.

<sup>100</sup> *DV Ryboproduckt Limited v The 49 crew of the MFV 'Aleksandr Ksenofonotov'* [2007] Employment Relations Authority, CA10/07, 5072931 (Unreported, James Crichton, 30 January 2007), [28].

<sup>101</sup> *Ibid* [29].

<sup>102</sup> *Ibid* [31].

<sup>103</sup> *Ibid* [29].

<sup>104</sup> *Ibid* [49-50].

Authority held explicit formal consent both to deductions being made and to the quantum of the deductions was necessary.<sup>105</sup>

The Authority did not need to rule on the hours crew had worked and the record keeping relating to those hours as the parties had settled these issues in mediation.<sup>106</sup>

The general tenor of the Authority's decision shows a very pro-crew stance, with the Wages Protection Act applied very strictly. The Authority's rulings on deductions conform to the spirit of the 2006 Code of Practice provisions relating to deductions, despite the Code not applying to the dispute in question.

## 6.5 Evaluation

The Code of Practice in many ways is a major advance for foreign crew. The shifting of accountability onto a New Zealand party will make enforcement considerably easier. Although the 90 day limitation period means New Zealand companies are unlikely to be held financially responsible for breaches, the immigration requirement to demonstrate a history of adherence to the Code before future visas are granted will encourage New Zealand parties to take greater responsibility for the actions of their foreign partners.

The requirement New Zealand party representatives be present for vessel turnarounds will hopefully promote reporting by crew members of abuse. Language barriers are likely to remain an issue, but the provision of information sheets in their own language will inform crew of how to seek help.

The clear restrictions on deductions from pay close a loophole widely exploited under the section 103 regime.

Requiring disputes to be settled in the quicker, cheaper and more sympathetic arena of the Employment Relations Authority rather than in the High Court has many benefits for crew. The potential removal of the right of recourse to the Admiralty courts and the *in rem* jurisdiction is, however, an unfortunate side effect. Commentator Bernard Robertson has suggested that the exclusivity of the employment institutions jurisdictions should be abolished.<sup>107</sup> If this reform was introduced to the Code, would allow crew to file in the High Court where that would be to their advantage.

The potential for restriction of shore leave for fishers under the Code anti-desertion provisions is of considerable concern. The situation must be closely monitored to ensure fishers retain access to shore leave.

The Code's focus on the resolution of issues through mediation also perturbs some commentators. In the 2006 case of the *Malakhov Kurgan*, the Ukrainian crew contacted the International Transport Workers' Federation in New Zealand about their lack of pay.<sup>108</sup> Some of the crew returned home, others accepted a deal mediated through the Department of Labour, while an intransigent few remained on the vessel on a hunger strike before resolving their dispute with their employers. While mediation settlements are confidential, the Maritime Union expressed concerns the deal mediated through the Department of Labour had resulted in payments of less than minimum wage.<sup>109</sup>

The Union also reports hearing stories of mediated agreements not being performed, or, where the money is paid, enforcers meeting the planes of returning crew members in their home countries and extracting the money from them again.<sup>110</sup>

The legal status of the Code of Practice is not high. It is not an Act of Parliament but is simply part of the policy guidelines of Immigration New Zealand. As such it is not legally binding. There is no statutory duty on immigration officers to apply policy when making decisions on work permits under

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<sup>105</sup> Ibid [51].

<sup>106</sup> Ibid [57-59].

<sup>107</sup> Robertson, above n 85, 34.

<sup>108</sup> 'Hunger Strike on the Malakhov Kurgan' *The Maritimes* (July 2006), Maritime Union of New Zealand, Wellington, New Zealand 16.

<sup>109</sup> Ibid.

<sup>110</sup> Jennifer Devlin, Interview with Les Wells, Maritime Union Lyttelton Branch, (telephone, 5 August 2008).

the Immigration Act 1987.<sup>111</sup> The Court of Appeal has said while temporary permit policy, including work permit policy like the Code, is ‘a helpful guide, it could not entirely supplant the broad statutory discretion involved’.<sup>112</sup>

The Code is potentially also open to an administrative law challenge on the grounds the executive does not have the power to make policy guidelines that have extra-territorial effect.

## 7 Vires and Extra-territoriality

Whether New Zealand has the jurisdiction at international law to impose such provisions is far from certain. Article 92 of UNCLOS restates the customary international law position that, save in exceptional cases, only flag states have jurisdiction over their own vessels on the high seas. Article 58 provides the freedom of the high seas extends to the EEZs of other states, except where limited by the Convention itself or by other international rules. In order to regulate employment conditions on foreign vessels in the EEZ, New Zealand needs to point to some rule of international law allowing it to do so.

### 7.1 United Nation’s Law of the Sea Convention (UNCLOS)

UNCLOS article 56 gives states ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources’ in their EEZ. Does this provision give New Zealand jurisdiction to impose New Zealand employment law on foreign fishing vessels, on the basis this is part of the management of natural resources? It is suggested this is an unacceptable extension of the natural meaning of the article 56 wording.

Article 21(2), referring to coastal states’ power to make regulations governing vessels in its territorial sea, explicitly states such regulations may not relate to ‘the design, construction, manning or equipment of foreign ships’. The only exception is if those regulations give effect to generally accepted international rules or standards. As coastal states’ rights in the EEZ are more restricted than in the territorial sea it would be an odd result if article 56 allowed the making of regulations in the EEZ that are forbidden in the territorial sea.

### 7.2 Other International Treaties

New Zealand is not party to any other international treaties giving it jurisdiction over employment conditions on foreign vessels fishing in the EEZ.

Although New Zealand has ratified some United Nation’s International Labour Organization (ILO) treaties in the area of seafarers’ rights,<sup>113</sup> these treaties specifically exclude fishers. Although not yet ratified by New Zealand, the Maritime Labour Convention 2006, intended as a rationalisation of all maritime labour standards, is an example.<sup>114</sup> Seafarer is defined in the treaty as a person working on board a ship to which the Convention applies,<sup>115</sup> and ships engaged in fishing are excluded from the application of the Convention.<sup>116</sup>

Neither New Zealand, nor any other state, has ratified the *Work in Fishing Convention 2007*,<sup>117</sup> intended to update and expand the current Conventions relating to the fishing industry.<sup>118</sup> Even if New Zealand were to ratify the Convention, it gives only very limited port state powers over vessels flying foreign flags. Article 43 allows the port state only to take measures necessary to rectify any conditions on board clearly hazardous to safety or health. New Zealand has not ratified any of the *Work in Fishing Convention 2007*’s predecessor conventions.<sup>119</sup>

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<sup>111</sup> *Immigration Act 1987*(NZ), s 13C(1).

<sup>112</sup> *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA), 550.

<sup>113</sup> ILOLEX Database of International Labour Standards, New Zealand, <<http://www.ilo.org/ilolex/english/newratframeE.htm>> at 25 August 2008.

<sup>114</sup> *Maritime Labour Convention 2006*, opened for signature 7 February 2006, (not yet in force), preamble.

<sup>115</sup> *Ibid* Art II (1)(f).

<sup>116</sup> *Ibid* Art II (4).

<sup>117</sup> ILOLEX Database of International Labour Standards, *C188 Work in Fishing Convention* <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C188>> at 25 August 2008.

<sup>118</sup> *Work in Fishing Convention 2007*, opened for signature 14 June 2007 (not yet in force), preamble.

<sup>119</sup> ILOLEX Database of International Labour Standards, New Zealand, <<http://www.ilo.org/ilolex/english/newratframeE.htm>> at 25 August 2008.

### 7.3 Customary International Law

At customary international law, there are five possible bases for the assertion of jurisdiction by a state: territorial jurisdiction; nationality (of the wrongdoer); passive personality (nationality of the victim); protective personality (where national interests are threatened); and universality (serious crimes contrary to international law).<sup>120</sup> None of these traditional bases for jurisdiction fit the situation of fishers working in the EEZ. As the parties involved are not New Zealand citizens; the activities take place outside of and do not threaten New Zealand territory; and do not involve international crimes, New Zealand cannot rely on recognised international law bases for extending their jurisdiction.

Section 103(5) of the Fisheries Act and the Code of Practice, by purporting to impose New Zealand law outside of New Zealand's territory, are in contravention of international law.

### 7.4 Effect of Lack of Jurisdiction

There is a common law presumption Parliament does not intend to legislate in conflict with international law. Courts may rely on that presumption to read down statutory provisions that would otherwise contravene international law.

In the case of *Sellers v Maritime Safety Inspector*<sup>121</sup> the Court of Appeal found the Director of Maritime Safety did not have the power to impose New Zealand rules on the equipment to be carried by foreign ships on the high seas. This was despite a clear statutory provision giving the Director the power to make guidelines covering the safety equipment to be carried by vessels departing New Zealand.<sup>122</sup> The Court held in regard to foreign vessels the Director was only entitled to ensure the vessel complied with accepted international standards.<sup>123</sup> The statute did not empower him to impose additional requirements known only to New Zealand domestic law. The Director's guidelines were therefore ultra vires the empowering provision and were struck down.

The power to make immigration policy, including the Code of Practice, is given by section 13A of the *Immigration Act 1987* (NZ) (Immigration Act). Unlike in the *Sellers* case, where the statute contained a reference to vessels departing New Zealand, there is nothing in the section to indicate that Parliament intended to authorise the making of guidelines that would have extra-territorial effect. The section refers simply to the making of policy relating to the rules or criteria under which eligibility for the issue of visas is to be determined. To read the section as giving power only to make regulations that would have effect within New Zealand territory would not deprive the section of its effect and would be an uncontroversial interpretation.

The Code is very vulnerable to an administrative law challenge. By purporting to apply New Zealand law to foreign flagged vessels in the EEZ, the Code violates international law and is ultra vires the Immigration Act section 13A authority to make immigration policy.

If the Code of Practice is ultra vires, what of section 103 of the Fisheries Act? Unfortunately the international law dimension was not argued in the *Udovenko* case so the Court of Appeal did not have the opportunity to make a ruling on the issue. As a statutory provision rather than mere guidelines made by the executive, section 103 is a much clearer statement of parliamentary intent. The provision specifically applies 'while [registered foreign fishing vessels] are in New Zealand fisheries waters'.<sup>124</sup> Although in violation of international law in that it imposes New Zealand law on foreign flagged vessels outside of New Zealand's territory, the provision cannot be read down in conformity with international law. For a court to strike the provision down would mean going further even than *Sellers*, an already contentious decision, in overriding parliamentary sovereignty.

So while the Code of Practice may not survive a challenge in court, the statutory regime of the Fisheries Act will probably stand. But as revealed by the Department of Labour report into conditions

<sup>120</sup> Rebecca MM Wallace, *International Law* (4<sup>th</sup> ed, 2002) 109.

<sup>121</sup> [1999] 2 NZLR 44 (CA).

<sup>122</sup> *Maritime Transport Act 1994* (NZ), s 21(1)(b) and (c).

<sup>123</sup> *Sellers v Director of Maritime Safety* [1999] 2 NZLR 44 (CA), 61.

<sup>124</sup> *Fisheries Act 1996* (NZ), s 103(5).

in the industry, without the Code of Practice as a gloss on its provisions, the Act itself is wholly inadequate to address the problems of the industry.

## 8 The Australian Approach

One solution to the problem of employment conditions in the EEZ is the approach taken by Australia. Australian quota is fished by Australian vessels only, meaning that by virtue of article 92 of UNCLOS, Australian law applies to all aspects of the operation.

Fishing permits and Statutory Fishing Rights (SFRs) under the Australian Fisheries Management Act 1991 specify use of a particular fishing vessel,<sup>125</sup> and that vessel must be an Australian boat.<sup>126</sup> 'Australian boat' is very strictly defined in the Act as an Australian-built boat, based in Australia, and wholly owned by an Australian resident or Australian company.<sup>127</sup> Foreign-owned boats qualify as 'Australian' if they are registered in Australia and not under demise charter.<sup>128</sup> There is provision for other boats to be declared 'Australian' if the Australian Fisheries Management Authority is satisfied they will be sufficiently controlled by Australian interests and the nature of the boat's operation in the Australian Fishing Zone justifies such a declaration.<sup>129</sup>

Foreign fishing licences can be assigned to non-Australian boats,<sup>130</sup> but this regime is strictly controlled. The Australian Fisheries Management Authority has not issued any foreign fishing licences in recent years.<sup>131</sup>

The reservation of all fishing to Australian vessels only means Australia has the right to enforce Australian labour regulations in their fisheries waters. The level of abuse and exploitation seen in the New Zealand industry is absent from Australian fishing.

## 9 Conclusion

The Fisheries Act regulation of employment in the EEZ was woefully inadequate. Problems were almost never reported, and when cases were brought, the rights of crew were not effectively upheld.

Although not perfect, the Code of Practice represents a considerable advance and has the potential to be enormously beneficial for foreign crew members. Its efficacy, however, depends on its enforceability and the legal and practical difficulties of enforcing the Code are considerable.

Intimidation and threats against families of crew, together with language barriers and difficulties of access to New Zealand support institutions mean abuses of fishing crew are likely to remain under-reported. We can expect to see serious improvement in industry conditions only if Immigration New Zealand actively investigates the history of Code compliance of New Zealand charter partners and refuses visas where there have been breaches of the Code. It is doubtful whether this will happen in practice. Lack of the resources to proactively investigate conditions on the vessels is likely to mean the Code is enforced only where complaints are made by crew.

There is also a real chance the Code will not survive an administrative law challenge if cases are brought under its provisions. If Immigration New Zealand does refuse to issue visas on the ground the Code has not been adhered to, the decision may well be overturned.

Applying the Australian model in New Zealand is an attractive option, though politically fraught. The Maori fisheries settlements dominate discussion of fishing in New Zealand. Maori quota-holders are often not in a position to invest in the necessary infrastructure to fish their own quota. Industry insiders

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<sup>125</sup> *Fisheries Management Act 1991* (Cth), s 21, s 32.

<sup>126</sup> *Statutory Fishing Rights and permits* Australian Fisheries Management Authority <<http://www.afma.gov.au/industry/licensing/permits/default.htm>> at 10 August 2008.

<sup>127</sup> *Fisheries Management Act 1991* (Cth), s 4.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid* s 4(2).

<sup>130</sup> *Ibid* s 34.

<sup>131</sup> *Australian Fisheries Management Authority Annual Reports* 2000-01, 120; 2001-02, 150; 2002-03, 152; 2003-04, 202; 2004-05, 109; 2005-06, 84; 2006-07, 122. Reports available at <<http://www.afma.gov.au/information/publications/corporate/annual/default.htm>> at 10 August 2008.



claim New Zealand has enough capacity to harvest its own catch,<sup>132</sup> but requiring quota to be fished by New Zealand boats would decrease the value of the quota, at least in the short term. It would greatly reduce competition and would give a monopoly to larger New Zealand fishing companies already in possession of their own fleets.

Introducing an Australian-type model to the New Zealand situation could lead Maori to demand Treaty settlements be reopened and has the potential to set back race-relations. On the other hand, given the legal and practical difficulties stymieing any attempts to regulate conditions on foreign boats, is New Zealand prepared to countenance the exploitation of vulnerable workers in pursuit of profits for New Zealand fishing interests?

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<sup>132</sup> Hunter, above n 95, D1.