

28 March 2013

SUBMISSION TO PRIMARY PRODUCTION SELECT COMMITTEE
FISHERIES (FOREIGN CHARTER VESSELS AND OTHER MATTERS) AMENDMENT BILL
FISHERIES INSHORE NEW ZEALAND SUBMISSION

Introduction

1. Fisheries Inshore New Zealand appreciates the opportunity to comment on the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill on behalf of the inshore fisheries sector.
2. Fisheries Inshore New Zealand has recently been established to advance the interests of quota owners in inshore finfish, pelagic and tuna fisheries. It is a nationwide organisation and has more than 120 members representing their interests in more than 240 fishstocks. Our vision is *'A healthy sustainable fishery that is internationally competitive, profitable and recognised as the preferred source for consumers of wild caught fish worldwide'* and our mission to achieve that is to provide dynamic and transparent leadership, inform decision making and actively engage with our members, officials and other stakeholders as we advocate for the increased recognition of the value of New Zealand's inshore fisheries.
3. We wish to be heard in support of this submission. The contact person for matters relating to this submission is :
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4. Fisheries Inshore New Zealand supports the objective of this Bill to promote improved management of vessel safety, employment and fisheries management matters on foreign charter vessels (FCVs). As could be expected from our vision we share the Government's objective to ensure that New Zealand's reputation as a responsible and sustainable fishing nation is maintained. We consider it crucial that New Zealand's regulatory framework and its operations give world markets confidence that New Zealand fisheries are high quality and sustainably harvested.
5. To provide certainty and encourage investment that framework must translate into measures that are effective, least cost and provide good process with recognition of natural justice principles.
6. We have considered the following in preparation of this submission:
 - the report of the Ministerial Panel of Inquiry into Foreign Charter Vessels
 - the Cabinet decisions arising from that report and accompanying Regulatory Impact Statement

- the Fisheries (Foreign Charters Vessels and other Matters) Amendment Bill (the Bill) introduced into Parliament prior to Christmas 2012 but which received its 1st hearing on 14th February 2013
- the proposed changes to the Fisheries (Commercial Fishing) regulations released in November 2012 with a closing date for submissions of 21st December but with submissions now still open to 15 July 2013
- the draft risk framework released on 11 March 2013 with a closing date for feedback of 30 April 2013.

We also base our discussion about these documents with both industry and officials.

7. We have just been informed that the Ministry for Primary Industries has posted additional information on its website on 28 March (today) and have not had the opportunity to properly consider it. We request the Committee grant us the ability to amend or supplement this submission should we consider that material raises any substantive issues we have not addressed appropriately or adequately.
8. The Bill seeks to introduce new powers for the management of foreign-owned or operated vessels and a requirement for all fishing vessels operating in New Zealand waters to be New Zealand flagged from 1 May 2016. While many of the Bill's provisions on commencement will only apply to foreign-flagged vessels, the provisions allow for the extension of the management regime for foreign-owned vessels into the New Zealand-owned fleet. Some of these changes apply across the fleet immediately, with the remainder of the full regime applying to all fishing vessels from 1 May 2016. This new regime also includes changes to observer coverage, electronic monitoring and cost recovery.

Summary

9. It is important that New Zealand's reputation as a responsible and sustainable fishing nation is protected by amending the Fisheries Act to satisfactorily deal with jurisdictional issues for foreign owned and foreign crewed vessels so that they operate under New Zealand law for all aspects of their operations.
10. Fisheries Inshore New Zealand considers there is no justification to extend the proposed changes to the vessel registration regime to New Zealand vessels nor did Cabinet agree to this in its policy decisions. Fisheries Inshore New Zealand considers that there is an adequate range of measures and options to satisfactorily manage fisheries and related activity in the Fisheries Act now. Fisheries Inshore New Zealand opposes the inclusion of these vessels in any measures taken forward.
11. With respect to foreign owned and foreign crewed vessels we recommend that consideration be given to the option of deeming those vessels to be New Zealand vessels, subject to all New Zealand law. This option would be a relatively 'clean' uncomplicated alteration to the current regime, achieving the Government's objectives with less cost to all participants.
12. We recommend that, if this not be agreed, the reported back Bill also include the ability to grant exemptions/ exceptions to the general regime to cater for :
 - specialist vessels, operations that are needed only for a short season, or
 - a development fishery needing specialist equipment and expertise to operate for sufficient time to prove the fishery.

In this case specific consent would be granted for time charters subject to the full suite of New Zealand fisheries management, health, safety and employment regimes.

13. Fisheries Inshore New Zealand considers there is no merit in providing the Chief Executive with additional powers to suspend or cancel a vessel registration based on perceived risks of a breach of fisheries management, employment or vessel safety without any right to appeal to an independent body on the substantive matters. Such measures are not transparent, breach natural justice and will only increase uncertainty in the seafood industry and decrease investment. Fisheries Inshore New Zealand opposes granting the Chief Executive these additional powers.

Application of Bill to vessels other than foreign owned and foreign crewed

14. The New Zealand domestic fleet already operates under all aspects of New Zealand law. For each part of the regulatory framework there are specialist agencies to appropriately administer those regimes.
15. When considering the proposed amendments (and related proposals noted above), Fisheries Inshore New Zealand expects that, in line with best practice, any amendments to legislation being proposed to deal with a problem must be effective in dealing with that problem but without any regulatory creep and within the accepted regime of natural justice in New Zealand. This is particularly important to the seafood sector – we must have clarity, objectivity and transparency in the regulatory framework in order to have the certainty to invest if we are to assist New Zealand to double the value of primary sector exports by 2025.
16. The Bill purports to be about FCVs – as such we expect it would address decisions made by Government about FCVs. We accept that, in light of the Review Panel’s report and the need to protect New Zealand’s reputation, amendments must be made to bring FCVs fully under New Zealand law including as it applies to fisheries, employment (including health and safety) and vessel safety when operating with the New Zealand Exclusive Economic Zone.
17. The effect of the Government’s decision to require all vessels fishing in New Zealand waters from May 2016 to fly the New Zealand flag means that from that time there is no jurisdictional doubt that every vessel will be subject to all aspects of New Zealand law. We expected the proposed amendments would have that effect (as well as dealing with transitional matters for those vessels in the interim).
18. An extensive process has been underway to look at the issues associated with FCVs – and the documentation noted in paragraph 6 deals with these. However the material does not substantively deal with changes to Fisheries Act or fisheries management as it applies to vessels other than foreign owned and foreign crewed vessels. Those papers reveal no exploration of any deficiencies in our system of fisheries management and the performance of New Zealand vessels. To our knowledge there has been no policy process that defines problems and examines options for addressing those problems. The regulatory impact statement and Cabinet decisions did not address the performance of New Zealand vessels. There was no consultation with the domestic seafood sector prior to the Bill being introduced that indicated there needed to be changes that would affect all fishing vessels in New Zealand.
19. However the measures proposed in this Bill (and the associated proposed secondary regulation and operating framework) will apply to all vessels (foreign owned and foreign crewed as well as domestic vessels) – some immediately, and others from May 2016. The Bill vastly exceeds the scope approved by Cabinet. We consider this extension breaches the Government’s own guidelines for regulation.
20. There has not been adequate analysis to justify the extension of this regime to domestic vessels and the scope of the changes will increase uncertainty for the entire industry. This can only

hamper development and stifle growth and investment. This will not assist growth in export earnings.

21. We consider that the Bill should undergo significant re-drafting so that it provides a set of measures that just address the policy decisions by the Government on foreign charter vessels.
22. We strongly oppose any provisions of the Bill applying to other than foreign owned and foreign crewed vessels and request that the unjustified extension of the provisions to the New Zealand domestic fleet not be proceeded with.
23. Fisheries Inshore New Zealand considers that if there are concerns that broader changes are needed to adequately manage our fisheries, a suitable policy development process should be initiated with the full industry. Unlike the changes proposed in the Bill, the outcome of that process should complement our existing approach to risk management and enforcement, be fair and transparent, and consistent with the principles of natural justice.
24. We consider the Fisheries Act should not be altered to extend to vessel safety or employment matters for domestic vessels. Parliament has already enacted separate laws that set the criteria and processes to ensure compliance and fair treatment for these matters and there is no case for extending the gambit or scope of fisheries management to include these matters for domestic vessels. Where changes are needed to any of those regimes there is a recognised process that should be undertaken. There is no justification for any extension as proposed in the Bill for vessels fully operating under New Zealand law.

Application of Bill to Foreign owned and foreign crewed vessels

Application of all New Zealand laws

25. Fisheries Inshore New Zealand will not address the detail of Government's FCV decisions about the need for all vessels to flag to New Zealand by May 2016. We note however that it seems to us that officials failed to adequately assess another option that would bring these vessels under full New Zealand law, namely the option of deeming those vessels to be New Zealand vessels subject to all New Zealand law. That approach would overcome the jurisdictional problems with the current law and appears possible within the United Nations Convention on the Law of the Sea. To some extent this is similar to the approach used by Australia. This option should be considered, as it would be a relatively 'clean' uncomplicated alteration to the current regime, achieving the Government's objectives with less cost to all participants. Such an approach would not require vessels to surrender their own flag and could leave in place all financing arrangements with vessels, noted by officials to be a significant impediment for some vessels to flag under New Zealand.
26. In the event that the proposal above is not accepted and the regime for FCVs is as per the Bill, we recommend an exceptions policy be included for:
 - specialist vessels and operations that are needed only for a short season, or
 - a development fishery needing specialist equipment and expertise to operate for sufficient time - related to the nature of the fishery - to prove the fishery.

In these cases, vessels should be able to be granted consent to fish as time charters subject to the full suite of New Zealand fisheries management, health, safety and employment regimes. Without this exception economic opportunities will likely be lost as it would be impossible to arrange short term flagging to New Zealand for specialist boats in a cost effective manner. To do this we would expect amendments to allow the CE to grant approval for time charters that meet the criteria above with any approval requiring such vessels to be subject to the full suite of New Zealand fisheries management, health, safety and employment regimes.

Suspension and cancellation of registration

27. Notwithstanding our strong recommendation that the Bill be redrafted and restricted to measures for FCVs, there are particular provisions in the Bill that require comment as the measures for the FCV regime could be seen to create a precedent for other vessels.
28. The Bill proposes to provide the Chief Executive (CE) with the ability to suspend or cancel registration of a vessel based on risk. We do not consider that this is either necessary or sensible. The proposal is not complementary to our current system of risk management and enforcement and does not require decisions to be made in a manner that is fair and transparent, or consistent with the principles of natural justice.
29. The Fisheries Act and associated regulations allow the choice of a wide range of services and measures that the Ministry for Primary Industries may provide, purchase or use. These offer the Ministry a multitude of options to manage fisheries and any associated issues. We do not consider that there are gaps in the set of tools available.
30. Critically we do not consider that it would be acceptable to manage fisheries on the basis of perceptions. The Ministry has the ability to gain information from a wide range of sources and has extensive systems to test any information for veracity. We consider that this is a necessary discipline. The penalty regime in the Act is based on achieving high compliance. We agree with that. It recognises that, given the importance of the integrity of the system, where there are (by the nature of the activities) low chances of detection, there need to be very high consequences for those who do not comply. The prospect of being convicted of an offence should send strong signals to all participants. The level of penalties set out in the Act including forfeiture of proceeds, assets and equipment provide those strong signals.
31. The crucial aspect here is the need to achieve high levels of compliance. The Ministry has stated that this is more important than increasing its level of successful prosecutions because, for the same investment of resources, greater compliance success can be achieved across a wider range of actors. We applaud this. The Ministry has adopted the VADE (Volunteer, Assist, Direct, Enforce) approach to better ensure compliance. This is a graduated approach to encourage compliance, beginning with sharing of information on how standards and conditions might be met – but ensuring that serious non-compliance is backed up with enforcement measures.
32. As we understand it the VADE approach has, as its primary response, fisheries officers volunteering advice to fishers and other participants in the industry so that in a particular situation a better understanding of what is needed is conveyed. The next level of response is to advise participants what is required. The third level is to direct what must be done and the final level is enforcement through prosecutions. In all these levels it is made clear to participants what must be done, to what standard, and in what time frame. It is also evidence based so there is objectivity and transparency in administration. At the ultimate level of enforcement there is also the ability to contest the clarity of standards and evidence of behaviour against those standards through an impartial independent judicial system. If the relevant party is convicted of a serious offence then, in addition to other penalties, their vessel registration can also be cancelled.
33. We consider that this regime is sufficient. While considerations of risk to fisheries management can drive the type of investigations undertaken, in the end the resultant actions depend on objective evidence and transparency. This provides clarity and certainty – if a fishing company invests in the range of measures needed to ensure it achieves the appropriate standards of compliance, it should be free to pursue its business.

34. This is very different to the measures proposed in the Bill. Those provisions would allow the CE to suspend and cancel vessel registration based on his or her opinion that a *risk* of a breach of fisheries management, employment including health and safety or vessel safety laws and regulations *might* occur, rather than evidence that it has occurred. This means you may lose your ability to operate not because you have transgressed, but because you might transgress in the future.
35. While the Ministry must notify the grounds for the CE's belief and the actions the operator is required to undertake or cease to lift the suspension, there is no requirement that the CE provide the evidence for the grounds for the suspension.
36. There is also no independent appeal of the substance of the CE's decision to suspend registration of a vessel. Any appeal is back to the CE - who made the initial decision. The only avenue for appeal is by way of judicial review to the High Court. This will be expensive and can only consider whether due process was followed.
37. While the suspension must be for a fixed period, no time limitations are set and there is an ability to extend it based on the same or any other grounds. While suspended the vessel must be treated as not being registered and it will be an offence if the operator uses the vessel for fishing.
38. The combined effects of these measures could be to effectively cancel the vessel's registration in a manner that we consider operates outside New Zealand's principles of natural justice. We oppose the CE being provided with this power.