

Q&As – Government Decision to Require Reflagging of Foreign-owned Fishing Vessels

What additional decisions has the Government made in response to the Ministerial Inquiry since its initial announcement in March 2012?

In addition to accepting in full recommendations 1 to 6 of the Ministerial Inquiry report, the Government has decided as a key decision to require all FCVs to be flagged as New Zealand ships (“reflagging”), and as part of this operators will have to move to demise charter arrangements. The reason for this is that the Government wants to ensure that a New Zealand operator has possession and control of the vessel.

What does “possession and control” mean?

The Government considers that possession and control means that the New Zealand operator chartering the vessel would be responsible for:

- Health and safety on board the vessel;
- All environmental impacts of the vessel as a result of the actions of the master or crew (e.g. damage caused by vessel accidents, oil spills);
- Employment conditions – payment of crew, work conditions;
- Ship safety standards in accordance with New Zealand requirements;
- Adherence with fisheries laws and regulations.

Some of these responsibilities sit with the New Zealand operator under existing time charter arrangements so would not change under reflagging.

In order to maintain flexibility and minimise the impact on industry where possible, the Government does not intend to intervene or control normal business practices such as management of ACE catch plans, responsibility for insurance and maintenance costs and other leasing arrangements within charter agreements.

The Ministry for Primary Industries will engage further with industry on practical implementation issues.

What is reflagging?

Under the United Nations Law of the Sea Convention 1982 (UNCLOS), ships, including fishing vessels, are required to fly the flag of the country in which they are registered (the ‘flag State’). They may change flags provided there is a genuine link between the vessel and the flag State and the vessel satisfies any conditions set by the flag State.

An FCV flagged to New Zealand would be deemed to be a New Zealand ship and would fall fully under New Zealand sovereignty and therefore be subject to the same legislative and regulatory requirements and enforcement provisions as a domestically owned and flagged vessel.

What is a demise charter?

According to the Ship Registration Act 1992, only fishing vessels chartered on a demise basis may be flagged to New Zealand. Under a demise charter (also referred to as a ‘bareboat charter’), only the vessel (including plant and fishing gear) is chartered.

A demise charter arrangement means that the New Zealand operator has possession and control of the vessel while it is fishing in New Zealand waters, including employment of the crew. For example, if the vessel broke New Zealand rules or regulations for crew employment conditions, the New Zealand operator would be responsible, not the foreign owner of the vessel.

What are the benefits of reflagging?

Reflagging is the cleanest, most comprehensive and enduring option to meet Government objectives for FCVs. Reflagging addresses all of the issues identified by the Ministerial Inquiry, including health and safety and labour conditions of crew, securing access to international markets and protecting New Zealand's international reputation.

What are the benefits of reflagging for foreign crew?

Reflagging will provide greater protection to the crew as they would be employed by a New Zealand-based party under a New Zealand employment agreement. If breaches of labour law (underpayment of wages, illegal deductions) occurred, the Department of Labour in New Zealand would be able to investigate and address these.

The New Zealand employment relations law would automatically apply and be enforceable. There would no need to extend the application of the Minimum Wage Act 1983 and the Wages Protection Act 1983 through the Fisheries Act 1996.

New Zealand workplace health and safety would also automatically apply – this would be monitored and enforced by Maritime New Zealand.

Why is the Government requiring reflagging of all vessels?

The Government analysed the options and believes that reflagging best meets the Government objectives for FCVs by:

- placing FCVs under the responsibility and control of New Zealand in the same way as other New Zealand ships and flagged fishing vessels;
- holding domestic operators accountable for the employment of crew and vessel making any enforcement action by agencies more effective;
- ensuring New Zealand criminal law applies in full to New Zealand-flagged vessels - if breaches of labour law (underpayment of wages, illegal deductions) occurred, the Department of Labour in New Zealand would be able to investigate and address these;
- resolving trade access and reputational concerns through New Zealand's complete control over the activities of vessels in our EEZ.

The Government considers the mistreatment of crew on board FCVs as unacceptable practice by New Zealand and international standards.

The activities of some FCVs have seriously impacted New Zealand's reputation because fish caught on those vessels is considered to be New Zealand product.

New Zealand is believed to be the only developed country that allows foreign charter vessels to operate under a foreign flag in its waters.

The Government wants a long-term solution that protects New Zealand's reputation as a safe place to work and a reliable supplier of responsibly and sustainably caught seafood.

Reflagging is the best option to achieve this outcome.

What is the process to require reflagging?

The requirement to reflag all vessels to New Zealand will require legislative changes to the Fisheries Act. Interested parties will have an opportunity to comment further through consultation under the legislative Bill process.

Officials will continue to engage with Industry on implementation of the changes resulting from Cabinet's decisions to date.

What are the main changes for New Zealand companies that use FCVs?

Reflagging will result in the following changes:

- A New Zealand operator will be required to flag the foreign-owned vessel to New Zealand under the Ship Registration Act for the duration of time the vessel is fishing in the New Zealand EEZ;
- The New Zealand operator will employ the crew and all crew, whether New Zealand and/or foreign, will have a New Zealand employment agreement;
- All crew will be required to have qualifications recognised as equivalent to the necessary New Zealand qualifications.

New Zealand companies will not be required to pay tax or ACC levies for any foreign crew, as long as they continue to meet the exemption criteria.

Will operators of vessels reflagged to New Zealand be required to employ New Zealand crew?

New Zealand companies will not be required to employ only New Zealand/domestic crew.

The existing immigration Approval in Principle process will continue to assess whether there are no suitable and available New Zealand applicants.

The New Zealand company will continue to be able to employ either domestic or foreign crew, as long as the Code of Practice has been adhered to, including recognition of qualifications and work visas in accordance with New Zealand law.

When will reflagging of all FCVs be required?

There will be a four-year transition period from the date of announcement of Cabinet's decision to enable industry to make adjustments to existing business arrangements and reflag vessels to New Zealand.

All fishing vessels operating in the New Zealand EEZ will be required to reflag to New Zealand by 22 May 2016.

What will happen to the Code of Practice for Foreign Fishing crew (the Code) under reflagging?

A second-phase review of the Code of Practice will be undertaken towards the end of the four-year transition period. The Code will be substantially revised and its primary purpose will be related to the immigration Approval in Principle (AIP) application and audit process. As all New Zealand law will apply once reflagging takes effect, the Code from that point on will not be required to set minimum New Zealand standards.

How will foreign crew be protected until the reflagging takes effect in four years?

Protections for crew will continue during the transition period as the Code of Practice will continue to be used to set the minimum remuneration and labour standards on board FCVs.

The Code of Practice will be strengthened by a range of measure including the burden of proof being placed on foreign operators, and New Zealand bank accounts being required for crew wages.

The Department of Labour has already taken steps to improve monitoring and enforcement of FCVs as recommended by the Inquiry.

As part of the strengthened regime for monitoring compliance with the Code, the Department is using an independent audit provider, KPMG, to carry out audits. These new audits are part of the Approval in Principle (AIP) process which enable the recruitment of foreign fishing crew. The first two audits under the improved system are underway.

Will the review of the Code of Practice continue in the meantime?

The review of the Code of Practice continues in line with the Inquiry Panel recommendations.

The first phase of the review which is underway now includes establishing a “fit and proper person” test and incorporating the improved audit system.

As part of this first phase review, the Department will also look at the recommendation to replace the Deepsea Fishing Crew Employment Register with the standard immigration Labour Market Test.

Once the first phase review is complete, then the Department and industry will renegotiate the Code before it is finalised.

This first phase review will be completed within six months.

What other measures will happen to ensure that FCVs are managed safely in the interim?

Recommendations 1 to 6 of the Ministerial Inquiry were agreed by the Minister for Primary Industries and the Minister of Labour in March 2012.

These recommendations are currently being implemented and will make significant improvements to the monitoring and enforcement of employment and health and safety rules on board FCVs.

MPI and MFAT will continue to work with our international trading partners to maintain access to markets where possible until reflagging is implemented.

Besides reflagging, how is the Government responding to the remaining recommendations of the Ministerial inquiry?

Based on the decision to reflag all vessels to New Zealand, Ministers will shortly make further decisions on recommendations 7-11 and 14 of the Ministerial Inquiry report.

Amendments to Fisheries Act, Health and Safety in Employment Act and Maritime Rules will be developed as appropriate to effectively implement the decisions.

The new strengthened audit system under recommendation 3 is in place and includes set timeframes for when companies have to provide information. The review of the Code of Practice is continuing, as noted above. This review will also address the recommendation requiring FCV crew to be paid into a New Zealand bank account.

Improvements are also being made to the process of distributing information to foreign crew, through pamphlets in eleven languages which set out the rights and responsibilities for FCV crew. Information will be published on the Department of Labour's website. This work will be completed by July.

Ministers of Transport, Primary Industry will be making recommendations on whether to proceed with National Interest Analysis on the Conventions within the next 6 months.

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