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December 29, 2016

The Honorable Kaniela Ing  
Representative, House District 11  
Hawai'i State Legislature  
State Capitol, Room 427  
415 S. Beretania Street  
Honolulu, Hawai'i 96813

Re: Inquiries Regarding Commercial Fishing Industry

Dear Representative Ing:

This letter responds to your letter of November 29, 2016, in which you asked several questions regarding labor conditions in the commercial fishing industry at Honolulu Harbor.

Some questions depend on circumstances where more investigation would be necessary to provide a definitive answer. On those questions, our analysis is necessarily limited.

Also, your questions turn on the application of various principles of Hawai'i law. Depending on the circumstances, however, the fishing vessels and crew members in question may be outside Hawaii's legal jurisdiction. Maritime law is generally within federal jurisdiction, not state. *See, e.g., 2 Am. Jur. 2d Admiralty § 6* ("In view of the comprehensive grant of admiralty jurisdiction to the federal courts by the Constitution, the states are without power to create or enforce any admiralty or maritime rule that conflicts with federal legislation, either directly or indirectly.").

With these limitations in mind, the balance of this letter focuses on the legal questions posed. We have rephrased and reorganized some of your questions to aid in our analysis.

**A. Questions Presented and Short Answers**

1. *Question.* Is it contrary to statute under sections 189-2 and 189-5, Hawaii Revised Statutes (HRS), for the Department of Land and Natural Resources to issue licenses to persons who take marine life for commercial purposes who are not lawfully admitted to the United States and are subject to deportation orders?

*Short Answer.* Yes, it would be contrary to HRS sections 189-2 and 189-5 for the Department to issue a commercial marine license to a person who is not lawfully admitted to the United States and is subject to a deportation order. However, we have been informed by the Department that its practice is to require persons applying for a commercial marine license to first provide proof of their lawful admission to the United States.

2. *Question.* Are Hawai'i licensed fishing boat owners, who sell their fish in or to Hawai'i markets, and who contract with recruitment companies, subject to chapter 373 and section 373-11, HRS, in particular?

*Short Answer.* No. HRS chapter 373 only applies to commercial employment agencies. That chapter neither addresses nor imposes any obligations on the clients of commercial employment agencies (here, the Hawai'i licensed fishing boat owners referenced in your letter). However, if the "recruitment companies" described in your letter are acting as commercial employment agencies, they would be subject to all of the requirements of HRS chapter 373, including section 373-11.

3. *Question.* Do the Harbor Master's Notices have to comply with the rulemaking requirements of chapter 91, HRS?

*Short Answer.* No. Harbor Master's Notices are not required to comply with the rulemaking requirements of chapter 91, HRS, because the notices are not "rules" by definition.

4. *Question.* If an employee is prohibited from quitting his or her job and working for a competitor, do such circumstances constitute a restraint of trade in violation of chapter 480, HRS?

*Short Answer.* This question assumes that a fisherman is an employee

under Hawaii law. A restrictive covenant prohibiting the employee from working for the employer's competitor for a period of time after the employee has terminated the employment arrangement may or may not be a violation of chapter 480.

5. *Question.* If an employee on any fishing vessel in this state is subject to work conditions, pay, health, or safety measures that fall below industry standards, do such circumstances constitute a restraint of trade in violation of chapter 480, HRS?

*Short Answer.* Without further investigation, we are unable to substantively responded to this inquiry. If working conditions are below industry standards, that is not necessarily connected to possible violations of HRS chapter 480.

6. *Question.* Do the members of the Hawai'i Longline Fishing Association constitute an oligopoly, in violation of chapter 480, HRS?

*Short Answer.* Further investigation would be necessary before we would be able to make a determination on whether the members of the association constitute an oligopoly. Depending on the circumstances, the practices engaged by firms in that market structure could violate chapter 480.

7. *Question.* Do businesses engage in unfair or deceptive trade practices in violation of chapters 480 and 481A, HRS, if they sell fish which a reasonable consumer would believe were caught by local fishermen when in fact the fish were caught by foreign fishermen? From the retailer seller to the original fishing vessel in the supply chain, which entities who participate in such practices might be liable under chapters 480 and 481A, HRS?

*Short Answer.* Further investigation would be required to enable us to opine on whether Chapters 480 and 481A would be violated, or enable us to opine on the entities that may be exposed to liability.

8. *Question.* Do the actions of the State in restricting the movement of persons on these boats violate the constitutionally protected freedom of movement recognized by the Hawai'i Constitution?

*Short Answer.* No. As far as we have been informed, there is no action by any agency or officer of the State of Hawai'i in this circumstance

that could trigger the application of the Hawai‘i Constitution.

9. *Question.* Do the actions of the State in restricting the movement of persons on the boats violate the Law of the Splintered Paddle, as reflected in article IX, section 10 of the Hawai‘i Constitution?

*Short Answer.* No. As far as we have been informed, there is no action by any agency or officer of the State of Hawai‘i in this circumstance that could trigger the application of the Hawai‘i Constitution. Furthermore, article IX, section 10 is not self-executing and cannot be enforced on its own.

## B. Discussion

### 1. *Commercial Fishing Licenses*

You asked whether it is contrary to Hawai‘i law for the Department of Land and Natural Resources to issue commercial fishing licenses to persons who are not lawfully admitted to the United States and are subject to deportation orders. Our answer is yes.

The Division of Aquatic Resources, Department of Land & Natural Resources, issues commercial marine licenses under HRS section 189-2. This section prohibits persons from taking marine life for commercial purposes without first obtaining a commercial fishing license. HRS section 189-5 makes it unlawful for “any person who has not been lawfully admitted to the United States to engage in taking marine life for commercial purposes in the waters of the State.” Read together, these provisions require that only a person who is lawfully admitted to the United States may take marine life for commercial purposes with a properly issued commercial marine license.

Importantly, however, we have been informed by the Division of Aquatic Resources that its practice is to require that a person applying for a commercial marine license must first provide proof that he or she is lawfully admitted to the United States. For foreign fishing crew members, this proof is usually in the form of a crewman’s landing permit—the I-95 document issued by the Department of Homeland Security, U.S. Customs and Border Protection—and a valid passport.

### 2. *Licensing Requirements*

You asked whether Hawai‘i licensed fishing boat owners, who sell their fish in or to Hawai‘i markets, and who contract with recruitment companies, must

comply with section 373-11, HRS. Our answer is no. You also asked whether Hawai'i licensed fishing boat owners must comply with section 388-6, HRS, as employers. Our answer is yes, but there are exceptions.

Chapter 373, HRS, applies to commercial employment agencies. Assuming that the "recruitment companies" described in your letter are acting as commercial employment agencies within Hawaii's legal jurisdiction, they would be subject to all of the requirements of chapter 373, HRS (including section 373-11), and the rules adopted under it. However, chapter 373 does not impose any obligations on the clients of commercial employment agencies (here, the fishing boat owners).

You also asked whether these fishing boat owners must comply with section 388-6, HRS, as employers. Our answer is yes, as to fishing boats that fall within Hawaii's legal jurisdiction. There are exceptions. An employer that has employees as defined by section 388-1, HRS, must comply with section 388-6, HRS, if they fall within Hawaii's legal jurisdiction. For purposes of this chapter, an employee is anyone who is permitted to work. Under section 388-6, HRS, an employer may not deduct or retain an employee's compensation, unless required by federal or state statute; court process; or with an employee's written authorization. We note that certain kinds of deductions or withholding are prohibited by section 388-6, HRS. Those exceptions are not presently pertinent.

### *3. Harbor Master's Notice*

You asked whether the Harbor Master's Notice, Oahu District, HMN-O-02-12, dated November 1, 2012, and similar notices, are required to comply with the rulemaking requirements of chapter 91, HRS. Our answer is no.

The Harbor Master's Notice provides that the Harbors Division of the Department of Transportation, State of Hawai'i, will implement security measures to ensure compliance with federal and state law. Among these laws are Hawaii Administrative Rules (HAR) chapters 19-42 and 43. HAR chapter 19-42 governs vessel and harbor controls. HAR chapter 19-43 governs the operation of motor vehicles at commercial harbors. Under state law, a "harbor master" is a person who is vested with operational control of a state commercial harbor and has the authority to issue orders regarding harbor operations. HAR §§ 19-41-1, 19-42-1. Those who use commercial harbors must comply with all federal, state, and county laws. HAR § 19-42-15.

As a matter of state law, the Harbor Master's Notice is not subject to the chapter 91 rulemaking process. A "rule" does not include matters of internal management:

“Rule” means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. *The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.*

HRS § 91-1(4) (emphasis added).

The Harbors Division is responsible for management of the commercial harbors. HRS § 266-2(a)(1). The Harbor Master’s Notice is a means of managing Honolulu Harbor. Custodial management of public property is primarily a matter of internal management. *Holdman v. Olim*, 59 Haw. 348, 355, 581 P.2d 1164, 1170 (1978). Thus the notice falls outside the definition of a “rule” under Hawai‘i law.

The Harbor Master’s Notice also does not affect the private rights or procedures available to the public. It is the existing laws, both state and federal, that affect the private rights or procedures available to the public. The Harbors Division need not adopt a rule to enforce existing law. The Harbor Master’s Notice is therefore not required to comply with the rulemaking requirements of chapter 91.

#### 4. *Employee and Competitor*

You also asked about a unique fact pattern where an employee is not only prohibited from working for the employer’s competitor, but also prohibited from terminating the existing employment arrangement.

Generally, an employee has the right to determine whom to work for, and enjoys a corresponding right to terminate an employment arrangement. Your premise that an employee is prohibited from terminating their employment suggests that there is a special circumstance effectively preventing an employee from quitting his or her job. If that circumstance is a deportation order, we would need to review the order to assess the nature of any restrictions and prohibitions. We are not aware of any applicable deportation proceeding where an Immigration Judge has issued such an order. There may be other legal bars preventing various individuals from lawfully entering the United States.

We are hesitant to adopt the premise that a person working as a fisherman on a fishing vessel is an “employee” because further investigation is necessary to

determine the critical details. This would include, for example: the citizenship or immigration status of each fisherman; the manner and terms by which each fisherman is hired or retained; any prohibitions on termination of the employment arrangement; and other information that could be helpful in assessing the fisherman's employment status.

Even if it is appropriate to characterize a fisherman as an employee, your hypothetical would not necessarily violate HRS chapter 480. For example, an employer and an employee may lawfully agree to a restriction prohibiting the employee from working for a competitor for a period of time after the employee has terminated the employment arrangement. However, such a restrictive covenant could be determined to be "not reasonable" and invalid if:

- (i) it is greater than required for the protection of the person for whose benefit it is imposed;
- (ii) it imposes undue hardship on the person restricted; or
- (iii) its benefit to the covenantee is outweighed by injury to the public. . . .

*Technicolor, Inc. v. Traeger*, 57 Haw. 113, 122, 551 P.2d 163, 170 (1976) (citation omitted).

Under this case law, a restrictive covenant may not violate chapter 480. In light of that, without the results of further investigation, we will refrain from speculating whether there is any harm to the public interest by the restrictive covenant, and if there is such harm, whether the harm outweighs the associated benefits.

##### 5. *Working Conditions and Industry Standards*

You asked whether chapter 480 would be violated where an employee on a fishing vessel in the State of Hawai'i is subject to verified working conditions that fall below industry standards.

Further investigation would be necessary to determine the nexus between working conditions that are below industry standards on the one hand, and violations of chapter 480 on the other hand. Chapter 480 governs anticompetitive trade practices, not working conditions. Even if there is such harm, the harm must also outweigh any claimed benefits. *Traeger*.

6. *Hawaii Longline Association*

This question has two parts: (a) whether the business-members of the Hawai'i Longline Fishing Association constitute an oligopoly; and if so, (b) whether this oligopoly is in violation of chapter 480, HRS. We believe "Hawai'i Longline Fishing Association" refers to the "Hawaii Longline Association," a domestic non-profit entity incorporated under the laws of the State of Hawai'i.

The first part of this inquiry requires, among other things, information on who the business-members in the association are, and an analysis of whether such members can be characterized as an oligopoly. "Oligopoly" is an economics term describing a market structure typically consisting of a few firms, and sometimes where an industry is dominated by a few firms. Even if the members were characterized as an oligopoly, this market structure does not necessarily establish a violation of chapter 480 by itself. That said, depending on the circumstances, the practices engaged by firms in an oligopoly could hypothetically violate chapter 480.

As for the practices, your letter mentions the "present mechanisms of selling fish [which] may constitute unlawful collusion among businesses." Without a clear understanding of what the "present mechanisms" are, we are unable to assess whether the collusion you refer to is a violation of chapter 480. As a general matter, however, not all collusion is considered unlawful. For example, unlike overt collusion, tacit collusion is not viewed as anti-competitive.

As a point of clarification, we do not hold the position that there are never instances of anticompetitive behavior associated with any of your concerns. Instead, without further investigation, we have refrained from characterizing unknown conduct as anticompetitive.

7. *Fish Sold as Local*

You asked whether it would violate chapters 480 and 481A, HRS, if a business sold fish in a manner that would mislead a reasonable consumer to believe that fish had been caught by local fishermen when the fish were in fact caught by foreign fishermen who are subject to deportation orders and are prohibited from leaving their vessels when the vessel is docked in Hawai'i. Our answer is: it may be a violation, subject to the analysis below.

A deceptive practice is a (1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances where (3) the representation, omission, or practice is material. *Courbat v. Dahana Ranch, Inc.*, 111 Hawai'i 254, 264, 141 P.3d 427, 437 (2006).



A representation, omission, or practice is considered “material” if it involves “information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product” *Id.* This three-part test is an objective one, turning on whether the act or omission is likely to mislead consumers. *Id.*

More information is necessary to enable us to opine on whether chapters 480 and 481A would be violated, or what entities may be exposed to liability, in the situation you describe.

#### 8. *Freedom of Movement*

You asked whether “the actions of the state in restricting the movement” of persons on commercial fishing vessels violates the freedom of movement as recognized under the Hawai‘i Constitution. Our answer is no. The provisions of the Hawai‘i Constitution govern only the agencies and officers of the State of Hawai‘i. As far as we know, there is no action or law by any Hawai‘i agency or officer that could have triggered the application of the constitution.

Even setting that concern aside, the “freedom of movement” referenced in your letter does not relate to foreign crewmen on fishing boats. You inquired about two cases, *State v. Shigematsu*, 52 Haw. 604, 483 P.2d 997 (1971) and *State v. Beltran*, 116 Hawai‘i 146, 172 P.3d 458 (2007).

Both of these cases depend on the enactment of state or county laws, which were found to be unconstitutional by the Hawai‘i Supreme Court. Both cases are based on the premise that these vague and overbroad laws infringed upon or chilled the freedom of association and the freedom of movement. The statute at issue in *Shigematsu* criminalized being in the presence of illegal gambling, and the county ordinance at issue in *Beltran* banned camping, using vague words to describe the prohibited conduct. In both cases, the Court was concerned that these laws were overreaching, meaning that constitutionally protected conduct would be effectively caught up in the legal definition of the crime.

We see no application of these cases here. First, as explained above, to our knowledge there is no action by the State of Hawai‘i that is preventing the crewmen from disembarking their vessels in the harbor. Without state action, the freedom of association and freedom of movement protected by the Hawai‘i constitution are not implicated. Second, these two cases describe legal doctrines that limit how the State or the counties may enact laws. These cases do not establish a freedom of movement that could supersede any other federal laws governing these crewmen (for example, federal immigration laws).

9. *Article IX, Section 10 of the Hawai‘i Constitution*

You asked whether “the actions of the state in restricting the movement” of persons on boats violates the law of the splintered paddle, which is reflected in article IX, section 10 of the Hawai‘i Constitution. Our answer is no. As explained above, the provisions of the Hawai‘i Constitution govern only the agencies and officers of the State of Hawai‘i. As far as we know, there is no action by a Hawai‘i agency or officer that could have triggered the application of those provisions.

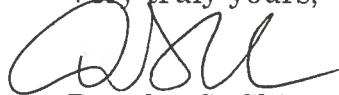
Furthermore, as to article IX, section 10, this provision does not create substantive rights by itself:

The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I—Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State’s concern for public safety. The State shall have the power to provide for the safety of the people from crimes against persons and property.

Haw. Const. art. IX, § 10. Not all provisions of the Hawai‘i constitution are self-executing. Many provisions—including this one—require further laws to implement the stated principles. *See, e.g., State v. Rodrigues*, 63 Haw. 412, 414, 629 P.2d 1111, 1113 (1981) (A constitutional provision “is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.”) (citation omitted); *De-Occupy Honolulu v. City & Cty. of Honolulu*, No. Civ. 12-00668, 2013 WL 2284942, at \*11 (D. Haw. May 21, 2013) (“As is clear from this language, the law of the splintered paddle serves only as a ‘symbol of the State’s concern for public safety.’ In other words, it provides a general principle and is not self-executing.”). As a result, article IX, section 10 is not enforceable on its own.

If we may be of further assistance, or if you would like us to clarify our responses, please do not hesitate to contact us.

Very truly yours,



Douglas S. Chin  
Attorney General