



## BRIEFING

### New South Wales Managed Returns: Ministerial power to waive and refund MIQ charges

<b>Date:</b>	15 July 2021	<b>Priority:</b>	Urgent
<b>Security classification:</b>		<b>Tracking number:</b>	2122-0154 NSW-006

Action sought		
	Action sought	Deadline
Hon Chris Hipkins <b>Minister for COVID-19 Response</b>	<p><b>Indicate</b> your preferred option for criteria, for exercising the Ministerial power to waive or refund MIQ charges for classes of people.</p> <p><b>Agree</b> to authorise officials to instruct the Parliamentary Counsel Office to draft the amendments to the MIQ Charges Regulations.</p>	15 July 2021

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Kara Isaac	General Manager, MIQ Policy	Privacy of natural persons	✓
Privacy of natural persons	Policy Manager, System and Strategy, MIQ		
	Adviser, System and Strategy, MIQ		

The following departments/agencies have been consulted
The Department of the Prime Minister and the Cabinet, The Ministry of Foreign Affairs and Trade, Crown Law, Ministry of Transport, Immigration New Zealand, Customs, Ministry of Health

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments



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#### Purpose

To seek your agreement on criteria for a proposed power for the Minister for COVID-19 Response to grant fee waivers and refunds for people entering Managed Isolation and Quarantine (MIQ), who would ordinarily be liable for MIQ charges.

#### Executive summary

On 9 July 2021, you announced that managed return flights from New South Wales (NSW) for New Zealanders who were unable to return due to a suspension in quarantine-free travel (QFT) would commence on 13 July 2021. Returnees would be required to undergo 14 days of Managed Isolation or Quarantine (MIQ) but would not be invoiced for their MIQ stay [NSW-001 refers].

To give effect to this decision, an amendment to the COVID-19 Public Health (Managed Isolation and Quarantine Charges) Regulations 2020 is required. Cabinet authorised you to take decisions to amend the Regulations to provide a Ministerial waiver and refund power, so that Regulations can be drafted.

We have identified three options relating to this Ministerial power. These include:

- Option 1: a broad power that the Minister can apply to any situation;
- Option 2: a power which applies where changes to border settings impose a new and temporary requirement for returnees to enter MIQ; and
- Option 3: a narrower power which applies where changes to border settings impose a new and temporary requirement for returnees to enter MIQ and is limited to people entering New Zealand as part of a managed return.

There are risks involved with creating a discretionary power. To mitigate some of these risks, we recommend that you agree to limit this proposed power to situations where changes to border settings impose a new and temporary requirement for MIQ (option 2). We also recommend that this power is subject to a sunset clause (to be revoked six months after commencement).

Following your feedback on this paper, the Ministry of Business, Innovation and Employment (MBIE) will instruct Parliamentary Counsel Office (PCO) to draft amendments to the Regulations.

#### Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that Cabinet authorised you to take decisions on the proposals to amend the Regulations to provide for a Ministerial waiver and refund power so that regulations can be drafted [CAB-21-MIN-0284 refers].

Noted

b **Note** that you agreed to amend the Regulations to introduce a power for you to waive or refund MIQ charges for classes of people in certain circumstances.

Agree /  Disagree

c **Indicate** your preferred option for criteria for exercising the Ministerial power to waive or refund MIQ charges for classes of people:

**Option 1** - in any situation where the Minister deems such a waiver or refund appropriate.

Agree /  Disagree

**Option 2 (recommended)** - where changes in border settings impose a new and temporary requirement for returnees to enter MIQ and the Minister deems such a waiver or refund appropriate.

Agree /  Disagree

**Option 3** – where changes in border settings impose a new and temporary requirement for returnees to enter MIQ and returnees have arrived on managed return flights and the Minister deems such a waiver or refund appropriate.

Agree /  Disagree

d **Agree** that a discretionary Ministerial power to waive and refund MIQ charges be made subject to a sunset clause where the power would automatically be revoked six months after commencement.

Agree /  Disagree

e **Agree** that when the Ministerial power to waive MIQ charges is exercised, regulations require the waiver to be gazetted and published on a publicly accessible internet site maintained by or on behalf of the New Zealand Government.

Agree /  Disagree

f **Note** that, MBIE is likely to recommend that the class includes travellers and air crew on managed return flights

*Noted*

g **Agree** to amend the Regulations to remove the requirement to issue an invoice where the Ministerial waiver applies.

Agree /  Disagree

h **Agree** to seek Cabinet agreement to waive the 28-day rule to enable the proposed amendments to the Regulations to come into force as soon as they are published in the New Zealand Gazette.

Agree /  Disagree

i **Authorise** officials to instruct the Parliamentary Counsel Office to draft the amendments to the Regulations to give effect to your decisions.

Yes /  No

j **Note** that we may seek further policy decisions from you during the drafting process if the need arises.

*Noted*

k **Note** that we will report back to you on the scope of the next review of MIQ fees regime by December 2021, which will include, any issues arising from a new Ministerial power to waive and refund MIQ charges.

*Noted*

l **Agree** that this briefing will be proactively released with appropriate redactions consistent with withholding grounds under the Official Information Act 1982.

Agree /  Disagree



Kara Isaac  
**General Manager, MIQ Policy**  
MIQ, MBIE

15 / 7 / 21



Hon Chris Hipkins  
**Minister for the COVID-19 Response**

15 / 7 / 2021

## **Background**

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1. On 9 July 2021, the Government announced that managed return flights would start on 13 July 2021 from New South Wales (NSW) for people who have been unable to return to New Zealand due to the suspension of quarantine free travel (QFT). Returnees must enter Managed Isolation and Quarantine (MIQ) for 14 days. The Government also announced that they will not be invoiced for their stay.
2. We advised you that to give effect to Government's decision, it is necessary to amend the Regulations so that people returning from NSW are not charged. We also advised that it was not possible to provide advice on what criteria would be prescribed on such a power due to the truncated timelines [NSW-001 refers]. Since this advice, we have undertaken further analysis on the potential scope of this power and identified three options for criteria that should apply to the waiver power.

## **A Ministerial power to waive fees for classes of cases**

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3. Section 32F of the COVID-19 Public Health Response Act 2020 (the Act) provides that regulations made under the Act may authorise the relevant Minister or the Chief Executive of MBIE to exempt, waive, or refund the whole or part of any prescribed charge, or defer the time for payment, in any particular case or any class or classes (and may or may not prescribe criteria to be applied by the relevant Minister or the chief executive in doing so).
4. A power to exempt people from fees is not possible because NSW returnees have already started arriving in MIQ and an exemption power could not be applied retrospectively without express authorisation from Parliament through primary legislation. A power to waive liability for fees would apply prospectively from the time the power is exercised.
5. Under the Regulations, the Chief Executive of MBIE currently has a discretionary power to waive fees for individuals under special circumstances. This power does not extend to a class of cases and the Chief Executive is legally required to make decisions on a case-by-case basis. We do not consider the current Chief Executive power to waive fees for individuals to be an appropriate mechanism for returnees from NSW. This could create a risk of legal challenge to the Chief Executive, and it would also be administratively inefficient. Consistent with our advice to you on 9 July 2021, we therefore consider it appropriate that a power to waive fees for returnees from NSW be applied to a class of people.
6. We recommend that the Regulations are amended to authorise the relevant Minister a power to waive and refund MIQ charges as opposed to the Chief Executive and for that power to apply to classes of people and not to individual cases.

## **Risks with the new discretionary Ministerial power to waive fees**

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### ***Pace at which changes have been proposed***

7. The pace at which these legislative changes will come into effect means that the risks involved have not been fully analysed or quantified. This leaves room for potential drafting errors and has the potential to add further complexity to MIQ fees settings. We will advise you on any further decisions that will be required, as they are identified during the drafting process.

### ***Usage of the power***

8. Due to the changing nature of the COVID-19 pandemic, it is difficult to predict how the proposed power may be required (and applied) in the future. For example, it is not clear how long the current suspension of the QFT arrangement with NSW will last or whether New

Zealand will need to suspend its QFT arrangements with other Australian states or the Cook Islands in the future. Using a discretionary power to waive fees for people returning from NSW sets a precedent that fees will be waived for returnees in similar situations in the future.

## **Options around creating a new power**

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9. We have identified three options for the Ministerial power to waive MIQ charges. In our assessment we took into account the following:
- Risks to the integrity of the MIQ fees regime (including cost recovery);
  - Right of New Zealanders to return home ;
  - Flexibility to respond to future situations; and
  - Fairness to those in similar situations.

### **Option 1: The Minister for COVID-19 Response may waive or refund MIQ charges in any situation where the Minister deems such a waiver or refund appropriate**

10. Under this option the Minister would be given broad abilities to waive charges in accordance with the circumstances (which could include non-QFT related situations).
11. We do not recommend this option, as it would not provide clarity or certainty on the circumstances in which the Minister could and should use his power. While it could potentially mean that more returnees would be able to seek fee waivers, it would not be confined to the specific circumstance that has driven the need to change the Regulations (i.e. return on a QT flight).
12. We also do not recommend this option because it could create situations where you could be lobbied to grant waivers to various groups.

### **Option 2: The Minister for COVID-19 Response may waive or refund MIQ charges in situations where changes in border settings impose a new and temporary requirement to undergo MIQ (recommended)**

13. Under this option, the Minister would have the power to waive fees and issue refunds where people returning to New Zealand are required to undergo MIQ in response to changes in the border settings, which impose a new and temporary requirement for MIQ, and where the Minister deems such a waiver is appropriate.
14. This would not limit the power to people returning as part of a managed return. For example, as the situation in Australia evolves, it could relate to those stranded in Australia that are able to arrive in New Zealand after securing a place in MIAS (rather than via a managed return flight). This option would also enable the power to be exercised in a range of circumstances where border settings may change.
15. We consider that this option would pose fewer risks to the integrity of the fees regime than option 1 and could potentially have less impact on cost recovery. We also consider that this option is likely to be more flexible than option 3, as it will not limit the waiver provisions to people on managed return flights.

### **Option 3: The Minister for COVID-19 Response may waive or refund MIQ charges in situations where changes in border settings impose a new and temporary requirement to undergo MIQ – but would only apply to people returning to New Zealand as part of a managed return flight**

16. Under this option, the Minister would have the power to waive fees and issue refunds, where people returning to New Zealand are required to undergo MIQ in response to changes in the border settings which impose a new and temporary requirement for MIQ. This power would be limited to people returning to New Zealand on a managed return flight and who are required to undergo MIQ.
17. This option is the most limited. The Minister would not have the power to waive fees in the situation of people returning on a non-managed flights (as would be the case in options 1 and 2).
18. We consider this option would have less impact on cost-recovery than the options described above (because it is assumed it would impact on fewer people) and has the advantage of being clear and transparent about what circumstances apply (i.e. for returnees on managed flights only). However, this option will limit our ability to respond to future situations. We therefore do not recommend this option.

### **We recommend that the power be subject to a sunset clause**

19. We consider that the addition of a sunset clause would somewhat mitigate the risks to fairness and public confidence in the MIQ fees system that come with giving the Minister discretionary powers to waive MIQ fees. This clause could apply to any of the options outlined above. We recommend that this clause dictate that this power will expire six months after the power comes into effect (i.e. on 3 February 2022 – as per our indicative timeframe below).
20. The addition of a sunset clause would not limit the flexibility to respond to future situations. If needed, Cabinet's agreement would need to be sought to extend the term of the power.
21. Once you have agreed to the parameters of the Ministerial power, it will need to be approved by Cabinet.

### **Changing the requirements to issue an invoice**

22. The current Regulations require that invoices are issued for all liable persons. This means that even where fees are waived an invoice is required to be issued. Removal of the requirement for an invoice to be issued where a Ministerial waiver has ended the liability would be administratively efficient.
23. We recommend that the Regulations are amended to remove the requirement to issue an invoice in situations where a Ministerial waiver applies.

### **Exercising the power to waive or refund fees**

24. Under the options outlined in this paper, the Ministerial power to waive fees will have a level of discretion. Officials will provide advice to support Ministerial decision making, as required.
25. In the interest of transparency, and to be consistent with the exercise of other similar Ministerial discretionary powers, we recommend that the Regulations require that, when the Minister exercises this power to waive or refund fees to any class of persons, that the Regulations require the waiver to be gazetted and published on a publicly accessible internet site maintained by, or on behalf of the New Zealand Government.

26. The Cabinet Manual requires that regulations must not come into force until at least 28 days after they have been notified in the New Zealand Gazette. However, as the regulatory changes proposed in this paper confers only benefits on the public, we recommend that you seek Cabinet approval to waive the 28-day rule.
27. If Cabinet agrees to waive the 28-day rule, the earliest that these changes to the Regulations could come into force would be 3 August 2021 when they are published on the New Zealand Gazette (see indicative timeframes below).

## **Applicability of the power**

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### Eligibility for managed return flights – visa status

28. The COVID-19 website sets out the eligibility criteria for travellers with an exceptional need to return to New Zealand. It also sets out immigration requirements. These returnees include:
  - New Zealand citizens.
  - New Zealand permanent residents or resident visa holders.
  - Citizens of Australia or persons who hold current permanent residence visas (including a resident return visa) issued by the Government of Australia who last departed New Zealand after 5 April 2021.
  - Holders of New Zealand temporary visas who last departed New Zealand after 5 April 2021.
  - Spouses, civil union partners, de facto partners, dependent children, or parents of dependent children of any of the above categories.
29. These returnees are eligible for the managed return flights and do not require a pre-departure COVID19 test or a MIAS voucher.
30. MBIE is aware of proposed changes to the Immigration Instructions, which if certified by the Minister for Immigration will allow Australian citizens and permanent residents who are not ordinarily resident in New Zealand to enter New Zealand while border restrictions are in place. In effect, they would be treated the same as New Zealanders.
31. It is intended that these changes would come into effect from 30 July 2021, and once they are in place, any Australians entering on a critical worker visa will be liable for the same MIQ charges as a New Zealand citizen or permanent resident. If any of these Australians arrive as part of a managed return (due to a QFT suspension), then it is expected that they would also not be required to pay an MIQ fee.



## Aircrew

32. There are no requirements on QFT aircrew (whether New Zealand-based or overseas-based) to isolate or quarantine. They must declare that they have had a COVID test within the 7 days before the scheduled departure of the flight, and are permitted to continue to fly if they are awaiting test results. This is set out in the COVID-19 Public Health Response (Exemptions and Conditions for Quarantine-free Travel) Notice 2021.
33. Usually on red flights, the Air Border Order requires that overseas-based aircrew isolate in a managed isolation facility (MIF) for the duration of their layover until they depart New Zealand for their next flight. Most New Zealand based aircrew do not have to isolate or quarantine unless they have been on a high risk route (in which case they self-isolate for 48 hours) or if they are symptomatic or have failed to meet other controls such as key safety standards (in which case they enter a MIQF but may depart early if they meet low risk indicators).
34. The COVID-19 Public Health Response (Exemptions and Conditions for Quarantine Travel from Australia) Notice 2021 came into effect on 11.59pm on 12 July and sets out requirements for aircrew on managed return flights from NSW. Under that, it is unlikely that aircrew will be required to enter MIQ.
35. New Zealand based aircrew on managed return flights are not required to isolate or quarantine provided that they meet the conditions of the NSW flights (e.g. pre-boarding declarations and not being symptomatic), are tested every 7 days, and if they leave the airside area and travel landside while they are in NSW they must comply with the key safety standards. If they do not meet these conditions, then they are treated as red flight crew under the ABO – i.e. they only go into MIQ in rare cases where they are symptomatic or have not met other specified controls.
36. Overseas based aircrew on managed return flights must declare that they have had a COVID test within the 7 days before the scheduled departure of the flight. If they leave the airside area while they are in NZ they must notify the Ministry of Health of their plans to self-isolate while they remain in NZ and of their self-isolation address and contact details. If they do not meet these conditions, then they are treated as red flight crew under the Air Border Order (ABO) and must enter an MIQ for their layover until their scheduled departure.
37. We recommend that the class to which the Minister's power to waive and refund applies also includes New Zealand based aircrew arriving from a region that is subject to a QFT pause and is required to enter a MIF, in accordance with the ABO. This means that where a New Zealand-based aircrew enters an MIQ because they present as symptomatic, they will not be liable to pay the MIQ fee for their stay.

## **Defining the class related to the NSW managed return**

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38. To meet Government's intention that people on managed return flights from NSW are not to be invoiced for the MIQ stay, we have identified the following indicative criteria for this class. This initial indication is provided to inform you of the likely nature of this class and to facilitate the exercise of your Ministerial power (once it has been approved by Cabinet).
  - a. Travellers returning to New Zealand on managed return flights from NSW; and
  - b. Air crew travelling on managed flights.
39. We note that this class does not capture people who have entered into New Zealand on QFT flights from other Australian locations but had originated in NSW (i.e. 'air border averters').

These people would have entered MIQ under the Air Border Order, having breached that Order, and would still be liable for MIQ charges.

40. Should the border settings change further (e.g: if the Government closes the border to other Australian states), MBIE will advise on how to update this class. This could be done by issuing a Gazette notice. Similarly, if airlines recommence red-zone flights from Australia for people with MIAS vouchers, we will provide further advice on whether the fees waiver should be expanded.

## **Operational implications of the proposed ministerial power**

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41. MBIE operational teams who are responsible for invoicing have reviewed the operational requirements of the proposal to waive fees for people returning from NSW on managed return flights. A process to identify the people who will qualify for waivers has been determined for this specific situation. This process relies on information from flight manifestos to identify who will qualify for the proposed waiver.
42. We note however that we have not investigated options for identifying the classes of people that might qualify for a waiver in future, for as yet unknown, scenarios. We therefore note that when exercising any power to waive fees in the future, the operational considerations should be considered for each circumstance.

## **Further review of the MIQ fees regime**

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43. MBIE will commence the next review of the MIQ fees regime later this year. The intent is to revisit the objectives of the settings (see below) against the changing environment.
44. This will include, but not be limited to, examining how the regime has operated in the context of QFT arrangements, and any future decisions that could be made relating to managed isolation (e.g. length of stay, type of facility). This will also include, any issues arising from a new Ministerial power to waive and refund MIQ charges, and the interface between the Health Act and the COVID-19 legislation. Our intent is to make recommendations that focus on a regime that is enduring.
  - Recovering some of the costs of MIQ services to make the provision of MIQ services more financially sustainable (the primary objective of the MIQ fees regime).
  - Reducing demand for MIQ relating to short-term travel.
  - Simplifying and streamlining the MIQ fees regime.
45. We will report back to you on the scope of that review by December 2021.

## **Next steps**

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46. Once you have indicated your preferred option, we will instruct the Parliamentary Counsel Office to proceed with drafting the changes to the Regulations to give effect to your decisions. On 22 July 2021, we will provide you with a draft LEG paper and draft regulations to take to Cabinet and the Executive Council on 2 August 2021.
47. During the drafting process we may seek further direction for policy decisions if the requirement arises.

48. An indicative timeline for the amendments is set out below:

<b>Action</b>	<b>Date</b>
The Parliamentary Counsel Office starts drafting	15 July 2021
Draft Cabinet Paper (LEG) and Regulations to Minister for Ministerial consultation	22 July 2021
Ministerial consultation on Cabinet paper (LEG) completed	27 July 2021
Cabinet paper (LEG) and Regulations lodged with Cabinet office	29 July 2021
LEG paper agreed by Cabinet and Executive Council	2 August 2021
Regulations are gazetted and come into force	3 August 2021