

Briefing

Improvements to the Maritime Border Order – third quarter omnibus amendments

Date due to MO: 28/09/21	Action required by: 06/10/21
Security level: IN CONFIDENCE	Health Report number: 20211654
To: Hon Chris Hipkins, Minister for COVID-19 Response	
Copy to: Hon Meka Whatiri, Minister of Customs Hon Michael Wood, Minister of Transport	

Contact for telephone discussion

Name	Position	Telephone
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Maree Roberts	Deputy Director-General, System Strategy and Policy	§ 9(2)(a)

Minister's office to complete:

- | | | |
|---|------------------------------------|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Decline | <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 Withdrawn | |

Comment:

Improvements to the Maritime Border Order – third quarter omnibus amendments

Security level: IN CONFIDENCE **Date:** 28 September 2021

To: Hon Chris Hipkins, Minister for COVID-19 Response

Purpose of report

1. This briefing seeks your approval to make several amendments to the COVID-19 Public Health Response (Maritime Border) Order (No. 2) 2020 that will strengthen and improve implementation of the Order and New Zealand's maritime border settings.

Summary

2. The COVID-19 Public Health Response (Maritime Border) Order (No. 2) 2020 (the Order) is part of the legal framework that supports our COVID-19 Elimination Strategy. Officials propose several amendments to the Order will strengthen and improve maritime border settings. These include four substantive changes and some minor and technical amendments. The four substantive proposals are:
 - a. a new power for Medical Officers of Health to require additional testing, self-isolation, or transferal to a managed isolation or quarantine facility (MIQF) of a New Zealand-based worker conducting a necessary task on a ship in isolation or quarantine
 - b. amending the trigger point for requiring a ship to enter isolation or quarantine when a new crew member joins a ship who is subject to isolation or quarantine under New Zealand law
 - c. amending the application of the order to allow vessels to go beyond the 12 nautical mile boundary without triggering re-entry requirements
 - d. clarifying the time that must be spent in isolation where crew (or part of a crew) are transferred to managed isolation.
3. Officials have consulted with ports and industry representatives, the Ministries of Transport, Primary Industries, and Foreign Affairs and Trade, and the New Zealand Customs Service. We have also consulted with Maritime New Zealand and Regional Public Health Units on the proposals.
4. To give effect to the proposals in this report, I recommend that you:
 - a. consult on the proposals with the Prime Minister, the Minister of Justice, the Minister of Health, and any other relevant Ministers.
 - b. agree that the Ministry of Health (the Ministry) issue drafting instructions to the Parliamentary Counsel Office (PCO) to draft the required amendments to the Required Testing Order.

Recommendations

We recommend you:

- a) **Note** that officials have consulted with key government agencies, ports and Regional Public Health Units in the development of these amendments.
- b) **Agree** to each of the proposals to clarify, amend or include new provisions in the COVID-19 Public Health Response (Maritime Border) Order 2020 as set out in the "Proposed Amendments to the Order" section below. Yes/No
- c) **Agree** to making minor and technical amendments to the COVID-19 Public Health Response (Maritime Border) Order 2020 as set out in the appendix. Yes/No
- d) **Agree** to consult on the proposals in this paper with the Prime Minister, the Minister of Justice, the Minister of Health and any other Ministers you think fit, in accordance with section 11 of the COVID-19 Public Health Response Act 2020. Yes/No
- e) **Agree**, subject to the outcome of your consultation with Ministers, that the Ministry of Health issues drafting instructions to the Parliamentary Counsel Office to draft the proposed amendment to the COVID-19 Public Health Response (Maritime Border) Order 2020, to give effect to the proposals in this paper. Yes/No



Dr Ashley Bloomfield

Te Tumu Whakarae mō te Hauora

Director-General of Health

Date: 27/09/21

Hon Chris Hipkins

Minister for COVID-19 Response

Date: 12/10/2021

Improvements to the Maritime Border Order – Omnibus Amendments

Background

1. The Maritime Border Order is an integral part of the legal framework that supports our COVID-19 Elimination Strategy. The purpose of the Order is to prevent and limit the risk of an outbreak or the spread of COVID-19 by:
 - a. restricting which ships may arrive in New Zealand
 - b. continuing isolation and quarantine requirements for people who arrive in New Zealand by sea
 - c. facilitating the safe transfer of crew and cargo at ports.
2. In light of the increased risk posed by the delta variant of COVID-19 and its presence within the international maritime context, officials have identified a range of amendments to introduce new requirements, clarify existing requirements and further mitigate the public health risk associated with maritime movements.

Proposed Amendments to the Order

3. The amendments below include proposals to clarify and include new provisions in the Order. The proposals have been identified as necessary or useful by Ministry of Health (Ministry) officials, government agencies, port authorities and Regional Public Health Units.

Discretionary power for Medical Officers of Health to require additional testing and/or isolation or quarantine of New Zealand-based workers

4. **Proposed amendment:** Officials recommend including a discretionary power in the Order for an authorised Medical Officer of Health to require additional testing, self-isolation and/or transfer to a MIQF of New Zealand-based workers undertaking a necessary task on a ship in isolation or quarantine should the nature of the task result in an increased risk of COVID-19 infection.
5. **Rationale:** New Zealand-based workers undertaking a necessary task, such as repairs or unloading cargo onboard a ship in isolation or quarantine may immediately re-enter the community. This potentially poses a public health risk should the worker spend an extended period with or be in close contact with crew with an unknown COVID-19 status or if the worker fails to use appropriate infection prevention control measures. This includes; appropriate PPE, physical distancing and/or if there are known instances of transmission amongst crew onboard.
6. This power would help to mitigate this risk and would be employed on a discretionary basis by Medical Officers of Health, with decisions being made based on the potential exposure risk for New Zealand-based personnel that carry out necessary tasks.

Consideration would be given to the time spent onboard and whether the use of infection prevention measures such as PPE and physical distancing was observed.

Minister's decision: YES / NO

Trigger point for requiring a ship to enter into isolation or quarantine when a new crew member joins a ship

7. **Proposed amendment:** We recommend amending the trigger point for requiring a ship to enter isolation or quarantine to include when any person subject to isolation or quarantine under New Zealand law boards the ship.
8. **Rationale:** There is a public health risk associated with new crew who have not completed the mandatory 14-day isolation period joining a ship no longer in isolation or quarantine. At present, only crew who are on board a ship when it arrives in New Zealand are subject to the isolation and quarantine requirements of the Maritime Border Order and the ship's crew is not required to go back into isolation should an additional crew member join the ship.
9. Amending the trigger point for requiring isolation and quarantine to include all persons who are subject to isolation or quarantine under New Zealand law will provide the necessary legal framework to require a ship's crew to re-enter isolation and quarantine should a new crew member that is subject to isolation and quarantine requirements join the ship after the ship's crew has completed isolation or quarantine.

Minister's decision: YES / NO

The 12 nautical mile boundary trigger for re-entering isolation and quarantine is unnecessary from a public health perspective and has unintended consequences

10. **Proposed amendment:** Under clause 17(4A) of the Order, crew members are not re-subject to isolation or quarantine if:
 - a. they have completed their isolation and quarantine period; or
 - b. they leave a New Zealand port that is at Level 1; and
 - c. then arrive back in New Zealand at another port after having been outside the 12 nautical mile boundary but having stayed inside the Exclusive Economic Zone (EEZ).We recommend the Level 1 condition at the port of departure is removed from this clause.
11. **Rationale:** If a ship departs a New Zealand port that is not at Alert Level 1, and travels to another New Zealand port (regardless of Alert Level) by going outside 12 nautical miles (considered the boundary of New Zealand under the Covid Response Act) the crew on board the ship will be required to restart their isolation and quarantine period and meet the low-risk indicators before disembarking.
12. Government and industry stakeholders have noted that this is too restrictive and results in impractical impediments for coastal shipping movement around New Zealand. From an operational perspective, this may incentivise ships to remain closer to the New Zealand

coast than is safe so as to remain within 12 nautical miles of the shore. It will also mean the crew of most New Zealand-based coastal freighters will not be able to disembark their ships without either spending 14 days at sea between ports or entering a MIQF.

13. There is no additional COVID-19 public health risk associated with ships re-entering the 12 nautical mile boundary, where travel occurs directly from one New Zealand port at Alert Level 1 or 2 to another at those Alert Levels, and there is no contact with other ships' crews. Public health risks associated with travel between ports at higher levels and lower levels is managed through the Alert Level Order requirements. We will also ensure that other requirements that would normally be triggered on entry (such as requiring notification of arrival) do not apply to ships in this situation.

Minister's decision: YES / NO

Extending the 12 nautical mile boundary for ships that have received an exemption to the Order

14. **Proposed amendment:** Under clause 11 of the Order, the Director-General of Health may grant an exemption for a ship to enter and operate in New Zealand waters within a 12 nautical mile boundary of the shore. Officials recommend extending this boundary to permit ships to operate within New Zealand's Exclusive Economic Zone (EEZ) provided they do not come into contact with other ships, ports or people that are not part of the ship's crew.
15. **Rationale:** Current provisions in the Order have the unintended effect of triggering the requirement for ships which have been granted an exemption to arrive in New Zealand by the Director-General and that go outside New Zealand's 12 nautical mile boundary to obtain a new exemption to re-enter New Zealand.
16. This 12 nautical mile boundary is too restrictive for practical and safe shipping movements. Ships transiting between ports within New Zealand, such as Nelson and Taranaki, will generally leave and re-enter the boundary during normal operation. Officials consider that it is operationally unfeasible to require exempt ships to re-apply for an exemption upon re-entering the 12 nautical mile boundary and that these ships be permitted to operate within New Zealand's EEZ without seeking a new exemption. There is no additional COVID-19 risk associated with these practices, where travel occurs directly from one New Zealand territory to another and there is no contact with other ship's crews. In addition, this generally aligns with current controls on ships' crews in the Order.

Minister's decision: YES / NO

Transferal of crew from a ship to managed isolation or quarantine facilities

17. **Proposed amendment:** Officials recommend that for the purposes of transferring personnel from a ship to a managed isolation or quarantine facility, the start time for the period of isolation or quarantine in the MIQF is clarified. Where the entire crew is transferred to a MIQF, the 14-day mandatory isolation period should not reset as the COVID-19 status of all crew will be visible from testing conducted during their stay. Where

only some of the crew are transferred, the start time should generally be reset to when they enter the MIQF as there is no visibility of the COVID-19 status of those crew who are not transferred. However, some discretion should be retained by Medical Officers of Health to reduce this period where the public health risk justifies it. For example, this might be where the entire crew is tested near the end of their isolation or quarantine period but only a few crew are transferred off the ship.

18. **Rationale:** Providing clarity around the start time for isolation and quarantine for those transferred off a ship and into a MIQF will ensure public health risks are managed and instances of unlawful detention are avoided. A discretionary power given to the Medical Officer of Health to reduce the length of the isolation and quarantine period when the clock restarts will also ensure that the public health risk is managed in a proportionate way and MIQF resources are used appropriately.

Minister's decision YES / NO

Equity

19. The Ministry's equity definition is:

In Aotearoa New Zealand, people have differences in health that are not only avoidable but unfair and unjust. Equity recognises different people with different levels of advantage require different approaches and resources to get equitable health outcomes.

20. The amendments to the Maritime Border Order are designed to strengthen the Order and assist public health teams who are at the front line of the COVID-19 response. The amendments will help to mitigate public health risks and ensure resources can be directed to where they are most needed.

Minor and technical amendments

21. In addition to the amendments outlined above, officials recommend you agree to a further set of minor and technical amendments to the Orders. These amendments will clarify understanding in some areas and will not involve changes in policy or intent.
22. The substantive list of changes, including minor and technical amendments is attached in the appendix.

Mechanism for making the proposed amendments

23. If you agree, the proposed amendments will affect the Maritime Border Order issued under the COVID-19 Public Health Response Act 2020 (the Act). Under section 15(4) of the Act, to make an amendment to an Order, you must be satisfied that the amendment is appropriate to achieve the purpose of the Act and:
- have had regard to advice from the Director-General of Health about the risks of the outbreak or spread of COVID-19, and the nature and extent of measures that are appropriate to address those risks
 - have had regard to any decision by the Government on the level of public health measures appropriate to respond to those risks, and avoid, mitigate, or remedy the effect of the outbreak or spread of COVID-19

- c. be satisfied that the amendment does not limit, or is a justified limit on, the rights and freedoms in the New Zealand Bill of Rights Act 1990 (NZBORA)
- d. have consulted the Prime Minister, the Minister of Justice and the Minister of Health, and any other Minister thought fit.

Justification for making the proposed amendments

24. The proposed amendments are consistent with the purposes of the Act. The Orders are part of a legal framework for managing the public health risks posed by COVID-19. They support the Government's Elimination Strategy and have the purpose of preventing COVID-19 reaching and being transmitted in our community. They are essential tools to managing the public health risk of COVID-19.

Public health justifications

25. COVID-19 is a highly infectious disease which may be spread by people who are not showing symptoms. The risk presented by the virus provides the justification for taking appropriate measures to identify potential cases of COVID-19 and reduce the risk of any transmission in New Zealand and overseas.
26. You are receiving ongoing advice about the risks associated with COVID-19 transmission in New Zealand. In accordance with section 9(2) of the COVID-19 Public Health Response Act 2020 (the Act), you may have regard to that advice without it being repeated in this briefing. However, any specific and relevant public health justification(s) for the proposed amendments are set out in this briefing.

Consistency with the New Zealand Bill of Rights Act 1990

27. Officials have had regard to the obligation that the Maritime Border Order must be consistent with the New Zealand Bill of Rights Act 1990 (NZBORA). We have undertaken our NZBORA analysis with an understanding that the Maritime Border Order is an essential tool for managing the public health risk of COVID-19.
28. The NZBORA rights that are engaged by the proposals in this paper and appendix one include:
 - a. the right to refuse medical treatment
 - b. the right to be free from unreasonable search and seizure
 - c. freedom of expression
 - d. freedom of peaceful assembly
 - e. freedom of association
 - f. freedom of movement
 - g. liberty of the person (against arbitrary detention)
 - h. respect and dignity in detention.
29. In undertaking our analysis, we have considered the affected individual or individuals. The Order reduces the risk that a person travelling to, through or from New Zealand will catch COVID-19 themselves. The restrictions being imposed on an individual have a public

health focus. Their objective is to keep Aotearoa New Zealand and all people here safe and well through preventing illness and fatalities.

Next steps

30. If you agree, the Ministry will instruct the Parliamentary Counsel Office (PCO) to draft the necessary amendments into the Maritime Border Order, which will then be provided to you for Ministerial consultation.

ENDS.

PROACTIVELY RELEASED

Appendix: Minor and Technical Amendments to the Maritime Border Order

Clause	Proposed amendment	Rationale
11	Officials recommend inserting an additional reason for an exemption to be granted under clause 11 to cater for scenarios where a ship needs to enter New Zealand to seek urgent medical care for a crew member or undertake safety critical repairs.	Cargo and fishing vessels are only able to come into port under limited circumstances, for example to unload cargo or catch or for reprovisioning. Under the current exemption pathways contained within the Order, urgent medical care is not a reason for entering New Zealand. Neither is urgent safety or critical repairs if a ship is not currently "in distress".
21	Officials recommend that an additional requirement be made for individuals disembarking from a ship that is in isolation or quarantine to notify and comply with conditions imposed by an enforcement officer or Medical Officer of Health	Notifying an enforcement officer prior to disembarkation will allow for greater oversight of individuals who disembark a ship in isolation or quarantine for exceptional reasons. Further to this, requiring notification will allow enforcement officers and medical officers of health to impose conditions on disembarking under clause 20.
New	Officials recommend updating the list of persons who may board a ship in isolation or quarantine to include the Department of Conservation (DOC) and the Transport Accident Investigation Commission (TAIC) workers.	Both TAIC and DOC workers may be required to conduct a necessary task onboard ship, such as accident investigation or conservation activities. Including these workers in the list of people who may board a ship in isolation or quarantine allows key government agencies to conduct necessary tasks on these ships as required.
21	Officials recommend including a requirement for persons disembarking before the end of the isolation or quarantine period to comply with conditions imposed by the Director-General.	The Director-General may impose conditions on a person disembarking prior to the of the isolation or quarantine period. The Order does currently not explicitly state that individuals disembarking under this provision must comply with the conditions imposed by the Director-General.
14(2)	Officials recommend amending clause 14(2) to specify that an extended notice	The current requirements specify that the ENOA must be submitted at least 168

	of arrival (ENOA) may only be submitted between 168 - 192 hours before arriving in New Zealand.	hours prior to arrival in New Zealand. In practise, some shipping masters have been submitting the ENOA before a ship has left for New Zealand, consequently the information provided on the ENOA, including symptom status, is not current.
14	Officials recommend clarifying clause 14 to specify that any information may be obtained in the ENOA if it relates to addressing public health risk.	Broadening the scope of what information may be obtained through the ENOA will allow enforcement officers to gain information necessary to addressing public health risks including testing and vaccination status prior to the vessel's arrival.
New	Officials recommend extending the power of an enforcement officer to impose conditions on an individual that is disembarking a ship in isolation to an authorised Health Protection Officer (HPO).	Health Protection Officers already make key decisions under the Maritime Border Order and the Health Act. Granting HPOs the power to impose conditions on persons disembarking a ship in isolation or quarantine would help to further mitigate the risk associated with these practices.
17(4a)	Officials recommend including additional provisions within clause 17(4A) to ensure that the public health risk associated with ships leaving and returning to New Zealand ports is addressed appropriately.	Specify that a ship will be required to undertake a further 14-days isolation if a new crew member who has not completed the mandatory 14-day isolation period joins the ship during the voyage even if the ship remains within the EEZ.
21(2)(iii)	Under clause 21(2)(iii), clarify the settings in which PPE must be used and what forms of PPE must be worn by crew disembarking the ship to undertake essential tasks. We suggest modelling the wording in clause 25 that determines the use of PPE for New Zealand workers undertaking a necessary task.	This will clarify that PPE must be worn in accordance with guidance provided by the regulator for their industry. Remove the qualification of only needing to wear PPE if coming into close contact with crew in isolation or quarantine.
24(2)	Under clause 24(2) no person may board a ship in isolation or quarantine unless they are a necessary worker or crew member who has arrived in New Zealand.	Officials recommend specifying that a new crew member from within the New Zealand community can join the ship provided that the ship is to depart as soon as reasonably practicable, and the crew member is subject to the isolation or quarantine period of the ship's crew.

Removal	Remove clause 20(1)(e) as it is duplication of clause 18	Duplicate clauses cause confusion for operational staff and adds additional complexity.
20(2)	Officials recommend that Health Protection Officers are added to those who are able to impose conditions when crew disembark the ship.	Under clause 20(2), an enforcement officer may impose reasonable conditions when crew in isolation or quarantine disembark a ship for permitted reasons. Health Protection Officers are not enforcement officers but generally manage the disembarkation of crew in these circumstances.
4	Officials recommend the meaning of "depart from New Zealand" is clarified to make it clear that once a ship departs from New Zealand it cannot take on or discharge cargo at another New Zealand Port.	Crew who are in isolation or quarantine can only join a ship that is scheduled to depart from New Zealand as soon as is reasonably practicable. This amendment minimises the exposure of port workers to crew in isolation or quarantine.
17(4A)	The exemption in clause 17(4A) only applies to a person who has arrived in New Zealand on a ship. Officials recommend that those who join a ship from within New Zealand are also covered by this exemption.	Expanding those to whom the exemption applies to every person on the ship will ensure it covers crew on domestic coastal ships who join the ship from within New Zealand.
20(1)(c)	Officials recommend that the meaning of medical services is expanded to explicitly include testing for COVID-19 and vaccination of crew.	Under clause 20(1)(c), a medical officer of health may permit a person to disembark a ship if they are satisfied they need to access medical services. Expanding the meaning of medical services will avoid confusion and facilitate testing and vaccination.
4	Officials recommend expanding the meaning of a person undertaking a necessary task to include those who undertake or provide support services for testing for COVID-19 and vaccination.	The meaning of a person who undertakes a necessary task and the linked ability to board a vessel in isolation and quarantine includes health practitioners, but not all testers or vaccinators and their support team may meet this test, so they are not currently able to board a vessel to undertake these functions.
23	Officials recommend the clauses referenced in this clause (which specifies start times for isolation and quarantine if a crew member is transferred off a ship)	Some clauses referenced in clause 23 apply to people who arrive by air whereas the sub-clause refers to ship's arrival. This

	are reviewed to ensure the clause is workable in practice.	makes it difficult to interpret and apply in a practical way.
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PROACTIVELY RELEASED