



BRIEFING

MIQ fees for Australians

Date:	14 April 2021	Priority:	Urgent
Security classification:		Tracking number:	2021-2962

Action sought		
	Action sought	Deadline
Hon Chris Hipkins Minister for COVID-19 Response	Agree to progress validating legislation to ensure that Australians are appropriately charged for MIQ	15 April 2021
Hon Kris Faafoi Minister of Immigration	For information	N/A

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

The following departments/agencies have been consulted
Immigration New Zealand (INZ), MBIE (Immigration Policy), Crown Law Office, Ministry of Foreign Affairs and Trade (MFAT), The Treasury.

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 Withdrawn |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



BRIEFING

MIQ fees for Australians

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Purpose

To inform you of a technical issue with the application of MIQ fees for some Australian nationals, and seek your agreement to urgently address this issue via validating legislation.

Executive Summary

Officials have identified a technical issue relating to how some Australians have been charged for their MIQ stay.

Due to New Zealand's special relationship with Australia, Immigration New Zealand's processes for granting visas to Australians are different to those for other countries. Regardless of the visa they have travelled on during COVID-19 (including temporary visas enabling travel while border restrictions have been in place), Australians are all generally converted to the same *resident visa* when they are granted entry to New Zealand.

This visa conversion process, which was not fully understood at the time that the fees were introduced, has implications for whether an Australian temporary entry class visa holder is liable for MIQ fees, and if so, which fee level should apply.

Legal professional privilege
Legal professional privilege

We consider that the way these Australians have been charged is reflective of Cabinet's policy intent to recuperate some of the costs of MIQ from temporary entry class visa holders, including critical workers and critical health workers. MBIE and MFAT have not received any queries or complaints from Australians on the issue. However, we recommend that this issue is resolved as soon as possible to address any uncertainty about how Australians have been charged.

We have identified the following two options:

- **Option 1** - identify and refund all incorrectly charged individuals and amend the Regulations to ensure they reflect Cabinet's policy intent.
- **Option 2 (recommended)** - introduce legislation to retrospectively validate how Australian nationals have been charged for MIQ, and amend the Regulations to ensure they reflect Cabinet's policy intent.

If you agree with Option 2, there are a number of potential legislative vehicles that could be used to implement this option. The Treasury's Budget Night Bill (recommended) would be the quickest way to address the issue, but the timing would be very tight. If you agree to progress this option, we recommend that you take an oral item to the Cabinet Business Committee (CBC) on Monday 19 April 2021 to seek agreement to address the Australian fees issue via validating legislation in the Budget Night Bill.

The alternatives are to wrap validation into the COVID-19 Act Amendment Bill or for MBIE to run a bespoke Amendment Bill process. Both alternatives are on a slower track and would mean a later commencement date. In the interim, MBIE would need to charge Australians on the basis of the resident visa they are granted on entry, which would result in Australian temporary entry visa class holders (including critical workers) being charged the lower fee or not liable for fees at all.

Recommended action

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

- a **Note** that due to a technical issue the MIQ fee charging practices for some Australian temporary entry class visa holders (a category that includes critical workers and critical health workers) could be viewed as unlawful.

Noted

- b **Note** that we consider that the way Australians have been charged is however reflective of Cabinet's policy intent to recuperate some of the costs of MIQ from temporary entry class visa holders, including critical workers and critical health workers.

Noted

- c **Agree** to address the issue by either:

Option 1- identifying and refunding all incorrectly charged individuals and amending the Regulations to ensure they reflect Cabinet's policy intent going forward.

Agree / disagree / discuss

Option 2 (recommended) - introducing legislation to retrospectively validate the charges and amending the Regulations to ensure they reflect Cabinet's policy intent going forward.

Agree / disagree / discuss

If you agree to Option 1 (identifying and refunding all incorrectly charged individuals)

- d **Note** that we will provide you with further advice on the financial and time implications of pursuing this course of action.

Noted

If you agree to Option 2 (validating legislation)

- e **Indicate** your preferred legislative vehicle for this:

Option A – Budget Night Bill (recommended)

Agree / disagree / discuss

Option B- (Existing) COVID-19 Act Amendment Bill

Agree / disagree / discuss

Option C - New MIQ-led Amendment Bill.

Agree / disagree / discuss

If you choose to implement Option 2A (validation via the Budget Night Bill):

- f **Agree** to take an oral item to the Cabinet Business Committee on 19 April 2021 to seek policy approvals to address this technical issue via validating legislation in the Budget Night Bill.

Agree / disagree / discuss

If you choose to implement Option 2B (validation via Health's COVID-19 Act Amendment Bill):

- g **Agree** that MIQ officials will work with Health to update the draft Amendment Bill Cabinet paper so that it also seeks agreement to address this technical issue via validating legislation in the COVID-19 Act Amendment Bill.

Agree / disagree / discuss

- h **Note** that, in the interim, MBIE would need to charge Australians on the basis of the resident visa they are granted on entry, which would result in temporary entry visa class holders (including critical workers) being charged the lower fee or not be liable for fees at all.

Noted

If you agree to implement Option 2C (new MIQ-led Amendment Bill)

- i **Note** that we will report back on the approach and the timeframe for this Bill by the end of May 2021.

Noted

Privacy of natural persons

**Policy Manager
MIQ, MBIE**

14 / 4 / 21

Hon Chris Hipkins
Minister for COVID-19 Response

18 / 4 / 21

Background

1. After the New Zealand border closed on 19 March 2020 to everyone but New Zealand citizens or permanent residents, Prime Ministers Ardern and Morrison agreed that citizens of each other's country who were ordinarily resident in the other would be exempt from the border restrictions.¹
2. All other Australian nationals (and nationals of other countries) who were not in New Zealand on the day the borders closed were prevented from entering New Zealand unless they had a border exception.
3. The Immigration Instructions set out the criteria for a border exception which include 'critical health workers' and 'other critical workers'. If a person meets the criteria for the border exception, they are generally invited to apply for a critical purpose visa (a type of temporary entry class visa). The critical purpose visa permits a person to travel to New Zealand, and to enter New Zealand once here.

Cabinet's intention was that Australians not ordinarily resident in New Zealand would be liable for MIQ fees

4. The COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020 (the Regulations) came into effect on 11 August 2020. The Regulations set out who is liable to pay MIQ charges and the level that they are required to pay. There are four prescribed classes of persons who are liable for MIQ fees. These are set out in Annex 1.
5. It is our view that Cabinet's policy intent with regard to charging MIQ fees to Australians is clear. Australians who were ordinarily resident in New Zealand are specified in the Regulations as having the same liability as New Zealanders (i.e. fees only apply if they last departed New Zealand after the fees came into place, or if they are returning for less than 90 days²). Other Australians would therefore be expected to be captured by the generic liability provisions relating to temporary entry class visa holders, critical workers and critical health workers.
6. We have identified a technical issue whereby some Australians may have been charged an MIQ fee for which it could be argued there is no lawful authority to charge. This briefing outlines the issue and seeks your agreement to address the issue via validating legislation.

Issue with the application of MIQ fees for some Australians

7. As part of the development of quarantine free travel proposals, we have come to understand that because of New Zealand's special relationship with Australia, Immigration New Zealand's (INZ's) processes for granting visa to Australians are different to those for other countries.
8. Regardless of the type of visa they travel and arrive into the country on, Australian citizens and permanent residents are all generally converted to the same *resident visa* when they are granted entry to New Zealand. This is in accordance with Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010.
9. In contrast, people from other countries who travel to New Zealand on a critical purpose visa are permitted entry based on their critical purpose visa.

¹ <https://www.beehive.govt.nz/release/transit-between-australia-and-new-zealand>

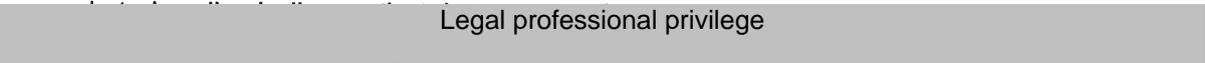
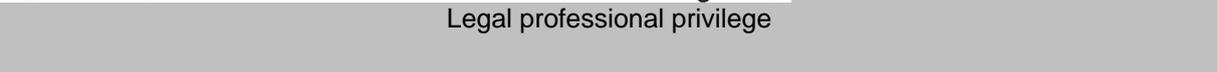
² 180 days from June 1 2021.

10. This visa conversion process for Australians, which had not been fully understood at the time that the Regulations were made, has implications for whether an Australian is liable for fees under the Regulations, and if so, which fee level should apply.
11. It raises a statutory interpretation issue around the point at which a person becomes liable for MIQ fees. Specifically, whether liability is based on the visa type/border exception a person travels to New Zealand on (i.e. a temporary entry class visa in the case of some Australians), or the visa they hold when they clear customs and are granted entry into the country (for Australians, a resident visa).

Legal advice

12.  Legal professional privilege
13. 
14. 

We recommend that this issue is addressed with urgency

15. We consider that the way Australians have been charged is reflective of Cabinet’s policy intent to recuperate some of the costs of MIQ from temporary entry class visa holders, including critical workers and critical health workers. However, we recommend that this technical issue is resolved as soon as possible to address any uncertainty about whether any Australians have been charged unlawfully.  Legal professional privilege
 Legal professional privilege
16. The introduction of quarantine free travel with Australia from 19 April 2021 is expected to significantly reduce the number of Australians entering MIQ.  Legal professional privilege
 Legal professional privilege
17. We have identified the following options to address this issue:
 - **Option 1** - identify and refund all incorrectly charged individuals and amend the Regulations to ensure they reflect Cabinet’s policy intent going forward.
 - **Option 2 (recommended)** - introduce legislation to retrospectively validate the charges and amending the Regulations to ensure they reflect Cabinet’s policy intent going forward.

³ Regulation 6(2)(c) of the Regulations

⁴ Regulation 6(2)(d) of the Regulations

⁵ Regulations 6(2)(a)(i) and 6(2)(b)(i) of the Regulations

Option 1 - identifying and refunding all incorrectly charged Australians

18. This option would include identifying and refunding all Australians that were incorrectly charged. We would also need to amend the Regulations to ensure that Australian citizens and permanent residents travelling on a critical worker or critical health worker border exception, or on a temporary entry class visa, are liable for MIQ charges under the relevant provision. This would ensure that charging is lawful going forward.
19. This option requires working through any available data on which Australians have entered New Zealand since the Regulations came into effect, what visa they entered on, and how much they were charged. Given our current MIQ information sharing limitations, it would be very difficult to accurately identify who was affected.
20. MIQ does not have any systems-based way to identify the nationality and immigration status of people who have been charged for MIQ (e.g. our systems cannot filter by the reason they were considered liable).
21. It would be very difficult, costly and time consuming to create a system to identify fee liability by nationality. We would have to:
 - go back through every record (noting over 94,000 people have been in MIQ since 11 August 2020) to firstly identify who may fall in this category using Health data, MIF data, and fee and waiver forms (if the form was even filled out)
 - determine if anyone we identify as falling into the relevant category was recorded as liable (they may have received a waiver or been exempt or not liable for some other reason)
 - determine if any payments had been made in respect of identified people (noting that if they were in a room with more than one person, we would then need to assess their portion of the cost of the room – e.g. the first \$3,100 or \$950 for a second adult etc.).
22. This option would be inconsistent with Cabinet's intent that those travelling to New Zealand on a temporary entry class visa (including critical workers and critical health workers) are liable to pay for their MIQ stay.
23. It is not clear how much it would cost in total to refund the affected Australian nationals. INZ data shows that between 1 August 2020 and 15 March 2021, approximately 4,600 Australian citizens of all visa types arrived in New Zealand (this includes multiple arrivals by the same person). This does not include Australian permanent residents who travel on non-Australian travel documents. Only a portion of this total would be temporary entry class visa holders who would be eligible for a refund.

Option 2 (recommended) - introducing legislation to retrospectively validate the charges

24. This option would involve passing validating legislation to clarify that it was Cabinet's intention that Australians are charged in accordance with the visa or border exception they travel on, in the same way as other nationals, and validate how Australians have been charged to date.
25. This is our recommended option, given that Cabinet has not indicated that it intended for Australian temporary entry class visa holders to be treated differently from other nationalities and exempt from MIQ fees. Rather, since the fees Regulations came into effect in August 2020, Cabinet has increased the fee for temporary entry class visa holders and critical workers. This reinforces our view of how Cabinet wanted people who arrive on a temporary entry visa to be treated within the fees regime.

26. As with Option 1, Option 2 would also require amending the Regulations to ensure that going forward, Australians travelling under a critical worker or critical health worker border exception, or on a temporary entry class visa, are liable for MIQ charges under the relevant provision.

27. International relations

28.

Implementation

29. If you agree to Option 2, we recommend that validating legislation is progressed urgently to avoid any further interpretation ambiguity. This would mean amendments to the COVID-19 Public Health Response Act 2020 (the Act), as the empowering legislation.

30. If you agree to progress validating legislation, we seek your agreement to your preferred legislative vehicle.

31. We have identified the following potential options.

Legislative vehicle option	Description	Timeframe	Assessment
1- Budget Night Bill <i>(recommended)</i>	The Treasury use this Bill to implement Budget decisions	The Bill is introduced and passed on Budget day (20 May)	<ul style="list-style-type: none"> • The quickest way to address the issue. • Avoids the potential for requests for refund between introduction and passage of the legislation. • Would not require as much MIQ resource as running a bespoke Bill (Option 3 below). • No Select Committee process. • Will require fast turnaround on Ministerial decisions and allow minimal time for consultation. • Potential risks with making changes to the fees regime at pace, including at the drafting stage.
2 - (Existing) COVID-19 Act Amendment Bill	Ministry of Health-led Bill that is introducing the legal framework for MIQ and reversing fee liability	August/Sep	<ul style="list-style-type: none"> • Would allow more time for drafting and ensure INZ visa processes are understood and accurately reflected. • Would not require as much resource as running a bespoke Bill (Option 3 below). • Would take longer to address the technical issue and any confusion on how Australians should be charged. • Slower than is desirable to fix a known issue.

Legislative vehicle option	Description	Timeframe	Assessment
3 - New MIQ-led Amendment Bill	We would introduce an MBIE MIQ-led Bill to fix this issue	Unclear – depends on House schedule	<ul style="list-style-type: none"> • Would allow more time to understand the complexities of INZ processes and for the drafting process. • Dedicated resources required to run a bespoke Bill process and only advantageous if faster than the planned COVID-19 Act legislation. • Depending on the timing of the Bill, it could take several months to address this technical issue, and any confusion on how Australians should be charged.

32. To ensure that this technical issue is addressed as quickly as possible, we recommend that it is progressed through the Budget Night Bill.
33. If you agree to proceed with validating legislation via the Budget Night Bill, we recommend that you take an oral item to the Cabinet Business Committee (CBC) on Monday 19 April 2021 seeking its agreement to the proposal.
34. As outlined above, the other alternatives are to wrap validation into the current proposed COVID-19 Act Amendment Bill or for MBIE to progress it through its own Bill along with any recommended changes from the Fees Regime Review. Both options are on a slower track and would mean a later commencement date. In the interim, MBIE would need to charge Australians on the basis of the resident visa they are granted on entry. This would result in Australian temporary entry visa class holders (including critical workers) being charged the lower fee or not liable for fees at all.
35. Using the existing Amendment Bill is our preferred option of the two slower track vehicles as we would be able to leverage off processes already in place.

Next steps

36. If you agree to take an oral item to CBC on Monday 19 April 2021, we will provide you with talking points to support your discussion.
37. If you would like to proceed with validating legislation via the existing COVID-19 Act Amendment Bill, we will work with Health to update the Amendment Bill paper so that it also seeks agreement to include validating legislation as part of the Bill. If you agree with progressing this change through an MIQ-led Bill, then we will report back to you on the approach and timeframes by the end of May 2021.
38. If you would prefer another legislative vehicle, or do not wish to proceed with validating legislation, we will provide you with further advice in due course.

Annexes

Annex 1: People liable for MIQ fees under the Regulations

Annex 1: People liable for MIQ fees under the Regulations

Currently, the Regulations provide that a person is only liable for MIQ fees if one or more of the following applies:

- a) the person last departed New Zealand on or after 12.01 am on August 2020⁶ and is—
 - i. a New Zealand citizen or residence class visa holder; or
 - ii. an Australian citizen or a person who holds a current permanent residence visa (including a resident return visa) issued by the Government of Australia and who, on the date on which they entered New Zealand, was ordinarily resident in New Zealand:
- b) the person is visiting New Zealand for a period of less than 90 days and is—
 - i. a New Zealand citizen or residence class visa holder; or
 - ii. an Australian citizen or a person who holds a current permanent residence visa (including a resident return visa) issued by the Government of Australia and who, on the date on which they entered New Zealand, was ordinarily resident in New Zealand:
- c) the person is a temporary entry class visa holder (subject to a narrow exemption);
- d) the person entered New Zealand on a border exception as either of the following in accordance with immigration instructions:
 - i. critical health worker
 - ii. other critical worker.

⁶ This is the date that MIQ fees came into effect.