



Chief Ombudsman’s opinion under the Ombudsmen Act

Legislation	Ombudsmen Act 1975, ss 13, 22 COVID-19 Public Health Response (Air Border) Order (No 2) 2020 COVID-19 Public Health Response (Maritime Border) Order (No 2) 2020
Agency	Ministry of Business, Innovation and Employment – Hīkina Whakatutuki
Complaint about	Advice on the Managed Isolation Allocation System in regard to offshore seafarers
Ombudsman	Peter Boshier
Case numbers	542700, 545161
Date	21 March 2023

Contents

Summary	2
Introduction	4
Background to MIQ	6
New Zealand’s COVID-19 response – Elimination Strategy	6
Legal framework for MIQ	7
High-level overview of MIQ	7
Context of MIQ policy advice	9
Setting the scene – offshore seafarers	11
Maritime allocation in MIQ	11
Maritime law and international cooperation	11
The complainants’ concerns	12
The advice and recommendation at issue	13
Analysis and findings	15

Maritime law and international cooperation _____	16
MBIE's advice _____	16
Assessment _____	16
Difficulties in securing an online voucher through MIAS _____	18
MBIE's advice _____	18
Assessment _____	18
Consequences of not being able to return _____	19
MBIE's advice _____	19
Assessment _____	20
Comparison to other fly in, fly out workers _____	21
MBIE's advice _____	21
Assessment _____	22
Chief Ombudsman's opinion _____	23
Recommendations _____	24
Appendix 1. Repatriation under the MLC _____	25
Appendix 2. International resolutions _____	27

Summary

The complainants are New Zealand seafarers who work offshore on foreign-flagged ships (offshore seafarers).¹ They need to fly home to New Zealand at the end of each tour, when crew change occurs. From 3 November 2020 to 5 March 2022, the complainants needed a voucher for a space in Managed Isolation and Quarantine (MIQ) in order to re-enter New Zealand.

While there was a specific offline maritime allocation in MIQ for maritime arrivals and crew changeovers at New Zealand ports, offshore seafarers, such as the complainants, could not access this. Instead, they had to book a voucher using the online part of the Managed Isolation Allocation System (MIAS), which was difficult due to the nature of seafaring work.

In March 2021, following the Minister of Transport's announcement earlier that month that he would review the position of offshore seafarers, the Ministry of Business, Innovation and Employment (MBIE) advised the Minister for COVID-19 Response (the Minister) that the settings for offshore seafarers were fit for purpose, and recommended against creating a specific offline allocation for them. The Minister agreed with this advice and recommendation. Consequently, offshore seafarers had to continue to use the online allocation system.

¹ For clarity, I use the term offshore seafarers throughout this opinion to mean New Zealanders working overseas on foreign-flagged ships. Different considerations apply in respect of New Zealand-flagged ships, and seafarers working in New Zealand.

Having considered the complaints made to me, I decided to investigate the reasonableness of the advice that MBIE tendered to the Minister with respect to the possible creation of an offline allocation for offshore seafarers. I do not have jurisdiction under the Ombudsmen Act 1975 (OA) to investigate decisions of Ministers of the Crown.

I acknowledge at the outset that a number of difficult decisions had to be made about the response by New Zealand to the COVID-19 pandemic, including in relation to MIQ. I recognise the important aims of MIQ, and the vital role it played in preventing outbreaks of COVID-19 in the community.² Nothing similar to the border closure and subsequent restriction on the ability of New Zealanders to enter New Zealand has ever occurred before. The general work of MBIE and the wider public service in managing New Zealand's response to COVID-19 is commendable.

MBIE, as the lead agency for MIQ, was working in a novel and complex policy context, under time-pressure, and in a high-stakes environment with limited access to reliable information and where there was necessarily a high degree of cross-agency collaboration and ministerial involvement and direction. I acknowledge, in particular, that the Minister made the final decision to not have an offline allocation for offshore seafarers.

However, it is apparent that MIQ, and the operation of MIAS in particular, caused immense stress and frustration for offshore seafarers trying to return to New Zealand at the end of their tours. In addition to the two complaints that are the subject of this investigation, I also received several other complaints relating to the position of offshore seafarers. I note the High Court found in the *Grounded Kiwis* judicial review proceedings³ that the MIQ allocation system operated in a way that meant New Zealanders' right to enter their country could be unjustifiably infringed in some instances. MBIE has told me it has accepted this finding.

I acknowledge that in matters of policy, opinions can differ. However, an Ombudsman's expectation is that in providing advice to Ministers on policy matters, officials carefully assess the options available and the implications of these on people, and that they advise and provide recommendations to Ministers that include options that will ameliorate any unfairness on people. It is the role of the Ombudsman to investigate and form their own opinion as to whether there have been unfair administrative acts or omissions of public sector agencies which impact on people. In my view, an Ombudsman's opinion will always be useful for policy advisors and makers.

In this case, I have formed the opinion that MBIE acted unreasonably in providing the advice that it did to the Minister in respect of offshore seafarers, because the advice:

- did not sufficiently address the need for international cooperation for global trade, relevant International Maritime Organization (IMO) and United Nations General Assembly resolutions, and the designation of seafarers as key workers;

² MBIE has advised me that MIQ was responsible for stopping more than 4,600 cases of COVID-19 at the border.

³ *Grounded Kiwis Group Inc v Minister of Health and Ors* [2022] NZHC 832.

- did not specifically consider New Zealand Bill of Rights Act 1990 (NZBORA) implications for offshore seafarers as a particular class of New Zealanders;
- did not sufficiently address the limitations of the emergency allocation process as a solution for offshore seafarers; and
- drew an inappropriate comparison to other fly in, fly out workers.

As discussed in my self-initiated broader investigation into MBIE's administration of MIAS,⁴ I accept that implementing a more individualised allocation system that considered individual circumstances and prioritised would have been difficult and costly, but my view is that careful consideration of options for doing so was necessary given the profound impact the system was having on people. I note the High Court also found the same from a human rights perspective. Offshore seafarers are an example of a class of New Zealanders who suffered from a lack of consideration of individual circumstances and prioritisation in MIAS.

I recommend that, if the need to use the MIQ system arises again, MBIE provide fresh advice to the Minister on offshore seafarers in a manner that addresses the deficiencies I have identified. I also recommend that MBIE consider apologising to the complainants.

Introduction

1. I received complaints from two offshore seafarers⁵ that they were not eligible to access the offline maritime allocation in MIQ available to other seafarers. This meant they had to use the online allocation system operated by MBIE, which proved difficult due to the nature of seafaring work.
2. MBIE had provided advice to the Minister on 19 March 2021 on the challenges that offshore seafarers were having in accessing spaces in MIQ.⁶ MBIE considered that the settings for offshore seafarers were fit for purpose, noting that they could access an emergency allocation space in certain circumstances.⁷ MBIE's advice touched on international law obligations, offshore seafarers' concerns about using the online part of MIAS, and why these were not seen to warrant a separate allocation for them. MBIE noted that Ministers could create a specific offline allocation of rooms for offshore seafarers in addition to the existing maritime allocation, but recommended against that option. The Minister agreed with the advice and recommendation.

⁴ See www.ombudsman.parliament.nz/resources/chief-ombudsmans-opinion-under-ombudsmen-act.

⁵ As above, I use the term offshore seafarers to mean New Zealanders working overseas on foreign-flagged ships.

⁶ *Offshore maritime workers – challenges accessing space in managed isolation* dated 19 March 2021, ref 2021-2871.

⁷ Where there was a serious risk to their health, or where they were unable to legally remain in their current location and had no other option but to return to New Zealand.

3. On 23 July 2021, I commenced this investigation to address the complaints. I have also received several other complaints relating to the difficulties faced by offshore seafarers in securing MIQ vouchers.
4. I recognise that MBIE, the lead agency for MIQ, was dealing with an unprecedented situation that posed significant challenges. MIAS had to manage large numbers of people seeking to enter, or return to, New Zealand in the context of a constantly shifting global pandemic during which New Zealand closed its borders for the first time. The management of MIQ involved the interaction of a range of public health, economic and fiscal policies, with the competing interests of individuals seeking entry having to be balanced against the need to keep New Zealand safe.
5. Reflecting the complexity and high stakes nature of the environment, namely, the public health emergency and the potential for people in New Zealand to be exposed to a deadly virus, there was significant cross-agency collaboration and ministerial and Cabinet involvement in MIQ, with key decisions made at the ministerial level, including decisions about the creation of and criteria for offline allocations.
6. Under section 13(1) of the OA, I have the authority to investigate the administrative acts, decisions, omissions and recommendations of government agencies, including MBIE. Under section 13(2), this specifically includes recommendations made to a Minister of the Crown. However, I do not have the authority to investigate the administrative conduct or decision making of Ministers under the OA.
7. Therefore, my investigation concerns the reasonableness or otherwise of the advice and recommendation that MBIE provided to the Minister on the MIQ allocation system in regard to offshore seafarers. This enables me to consider the substance of the complainants' concerns through the lens of MBIE's actions, as well as the information that it provided to the Minister.
8. Throughout my investigation, I have been particularly vigilant to ensure that my understanding of MBIE's advice and recommendation is confined to the circumstances as they were at the time. Further, I have been cognisant that opinions can legitimately differ on policy issues. As MBIE advised me, policy formulation must provide options for consideration as there is not typically a single right or wrong answer. I agree.
9. As Chief Ombudsman, my role is not to substitute the advice I would have given for that of MBIE's, but rather to assess whether, in all the circumstances, MBIE acted unreasonably in its provision of advice to the Minister. An Ombudsman's expectation is that officials carefully assess the options available and the implications of these on people, and that they advise and provide recommendations to Ministers that include options that will ameliorate any unfairness on people.
10. In these respects the Ombudsman's role and inquisitorial method of investigation is broader than and quite different to that of a Court. It is the role of the Ombudsman to investigate and form their own opinion as to whether there have been unfair administrative acts or omissions of public sector agencies which impact on people. In my

view, an Ombudsman's opinion will always be useful for policy advisors and makers, and have a healthy effect on decision-making in the New Zealand Government.

11. I note that, during my investigation, the High Court heard and determined the Grounded Kiwis judicial review proceedings. The Court held that MIAS as a whole operated in a way that meant New Zealanders' right to enter their country could be unjustifiably infringed in some instances as an unjustified limit on the right of New Zealand citizens to return under NZBORA, because (and to the extent that) the system did not sufficiently allow individual circumstances to be considered and prioritised where necessary.

Background to MIQ

New Zealand's COVID-19 response – Elimination Strategy

12. In March 2020, the New Zealand Government decided to pursue an Elimination Strategy in response to the COVID-19 pandemic. This plan was based on the New Zealand Influenza Pandemic Plan, which the Government believed could reasonably be applied to COVID-19. The objective was to prevent cases of COVID-19, and to act quickly to eliminate any chains of transmission in the community. One of the pillars of the Elimination Strategy was Keep It Out, which involved strong border settings so as to delay as much as possible the arrival of the virus into New Zealand. MIQ was part of this pillar. The other pillars, Prepare for It, Stamp It Out, and Manage the Impact, were focussed on testing, alert levels,⁸ contact tracing, other public health measures, health system preparedness, and vaccination.
13. New Zealand subsequently moved to a minimisation and protection strategy, the COVID-19 Protection Framework (colloquially known as the traffic light system), in December 2021, following vaccination rollout. The objective was to minimise the spread of COVID-19, and to protect people from it, as well as to protect the health system.
14. While New Zealand was pursuing an Elimination Strategy, and during the transition to a minimisation and protection strategy, the border provided the first line of defence against outbreaks of COVID-19 in New Zealand. The aim of the Elimination Strategy was to protect the health system from being overwhelmed, protect vulnerable communities, and protect the health of New Zealanders overall, whilst also supporting the economy. These were important aims, particularly in the time before vaccines against COVID-19 were developed and made available in New Zealand.

⁸ Four alert levels were put in place, with an increasing extent of restrictions on people's ability to socialise and be out in public, culminating in alert level 4 lockdown.

Legal framework for MIQ

15. MIQ was initially established by Orders made under section 70 of the Health Act 1956.⁹ Such Orders continued to be made in the response to COVID-19 to underscore the importance of compliance with public health requirements, such as testing and isolation in the community.
16. The COVID-19 Public Health Response Act 2020 (the COVID-19 Act) was passed in May 2020 to provide a specific legal basis for the public health response to COVID-19.¹⁰ A number of orders have been made under it, including:
 - a. The COVID-19 Public Health Response (Air Border) Order 2020 (the Air Border Order), which set out the requirements for people arriving in New Zealand by air.¹¹ The requirement to have an MIQ voucher before flying to New Zealand was made under that Order.
 - b. The COVID-19 Public Health Response (Maritime Border) Order 2020 (the Maritime Border Order), which prohibited certain maritime arrivals, and set out the requirements for others, including in relation to crew changes.¹²
 - c. The COVID-19 Public Health Response (Isolation and Quarantine) Order 2020, which set the requirements for people while they were in MIQ, including when they could leave.¹³
17. These Orders were made by the Minister of Health, prior to the creation of the role of Minister for COVID-19 Response. Both the COVID-19 Act and the associated Orders are administered by the Ministry of Health.

High-level overview of MIQ

18. On 19 March 2020, New Zealand closed its borders for the first time in response to the global COVID-19 pandemic. MIQ was set up to enable people to enter New Zealand safely, whilst also protecting the population from exposure to the virus in accordance with the Keep it Out pillar of the Government's Elimination Strategy. On 9 April 2020, the then Director-General of Health issued an order requiring all passengers arriving by air to

⁹ See www.legislation.govt.nz/act/public/1956/0065/latest/whole.html#DLM307083.

¹⁰ See www.legislation.govt.nz/act/public/2020/0012/latest/LMS344134.html.

¹¹ See www.legislation.govt.nz/regulation/public/2020/0120/latest/LMS360123.html, and subsequent versions www.legislation.govt.nz/regulation/public/2020/0239/latest/whole.html, and www.legislation.govt.nz/regulation/public/2021/0427/latest/LMS577674.html.

¹² See www.legislation.govt.nz/regulation/public/2020/0134/latest/LMS363151.html and subsequent version www.legislation.govt.nz/regulation/public/2020/0240/latest/whole.html.

¹³ See <https://www.legislation.govt.nz/regulation/public/2020/0241/latest/whole.html>.

undergo MIQ for 14 days.¹⁴ From 13 July 2020, MBIE was the lead agency for MIQ, and had overall responsibility for the management of MIQ, including the allocation system.

19. On 5 October 2020, MBIE, on Cabinet's direction, introduced MIAS to handle the online and offline allocation of MIQ vouchers. To obtain an online voucher, a traveller had to put a hold on an available date in MIAS, book corresponding flights, and then return to MIAS to confirm their flights. To obtain an offline voucher, a traveller had to make an application to MBIE and meet the criteria set by the Minister. From 3 November 2020, travellers were legally required under the Air Border Order to have an MIQ voucher before flying to New Zealand (unless they were exempt).
20. There was sustained high demand for MIQ spaces between November 2020 and March 2021. However, following the introduction of quarantine-free travel (QFT) from Australia in April 2021, supply exceeded demand. Demand began increasing again in June 2021, and by August 2021 MIQ capacity was under significant pressure due to managed returns from New South Wales,¹⁵ evacuees from Afghanistan,¹⁶ and a community Delta outbreak of COVID-19.
21. Access to online vouchers via MIAS was temporarily paused from 23 August 2021 due to a community outbreak. When it reopened on 20 September 2021, it was as a 'virtual lobby'. This meant that, in order to put a hold on an available date in MIAS to obtain an online voucher, a traveller had first to get to the front of a randomised queue whenever a virtual lobby was held.
22. When the virtual lobby was held for the first time in September 2021, there were over 30,000 people in the queue, vying for 3,000 rooms. Over time, the number of people in the queue in virtual lobbies trended downwards, significantly so in late November 2021 after the Government's border reopening announcement. Several lobbies ended with rooms untaken.
23. From 27 February 2022, New Zealand's border reopened in phases, with certain travellers allowed to self-isolate, and, by 3 March 2022, not needing to isolate at all. This was widened over time to include further categories of travellers. New Zealand's border fully reopened on 1 August 2022. Over its lifetime, more than 230,000 people went through MIQ.

¹⁴ Under section 70 of the Health Act 1956. The legal basis for this requirement was subsequently changed to the Air Border Order on 22 June 2020.

¹⁵ Due to the suspension of QFT.

¹⁶ A large-scale evacuation of foreign citizens and some Afghan citizens took place after the Taliban took control of Afghanistan, and the United States military withdrew. Approximately 500 evacuees were placed in MIQ from contingency spaces (including NZDF personnel and government officials). A small number of returnees from Afghanistan subsequently entered MIQ through the emergency allocation process.

Context of MIQ policy advice

24. The public policy making process involves the elected Government (Ministers or Cabinet), taking decisions for the public good, based at least in part on advice and recommendations provided by an impartial public service. The usual process includes issue identification, information gathering and research, policy formulation, inter-agency consultation, agencies tendering advice and recommendations to the Government, and Government decision-making at various stages. In addition to these steps, some form of public consultation or engagement may occur, at any stage, or multiple stages, of the process.
25. In the context of MIQ, there was an intermingling of formal ministerial policy direction being given at the same time as MBIE's provision of advice. A significant volume of advice was provided to Ministers and Cabinet over two years, in various diverse briefings and verbal discussions, on a range of complex issues.¹⁷ The context of the COVID-19 pandemic meant that MBIE, as well as other agencies, were required to receive ministerial direction, advise Ministers, and consult with each other at pace in a constantly changing and novel environment, often based on emerging, limited and imperfect information. MBIE emphasised to me that the MIQ system was built at speed and required constant changes to meet the new challenges presented by COVID-19. MBIE was working in a high-stakes environment, with decisions about MIQ potentially presenting significant and grave public health risks to New Zealand.
26. Given these circumstances, the policy-making process was often truncated, as the need for urgent decisions did not allow for fulsome consideration of the issues. MBIE also advised me that this urgency resulted in an iterative policy process, where policy advice evolved through frequent and often daily meetings between Ministers and officials, and advice was often discussed in advance of a written briefing. MBIE advised me that these meetings often resulted in the commissioning of policy advice, which would then be undertaken and brought back to the next meeting for a decision to be made. MBIE considers that the quality of its advice cannot fairly be assessed solely on the basis of the written record in these circumstances, as it received directions verbally and decisions were made by Ministers at meetings. Further, advice was sometimes given through email. I have considered the relevant details MBIE has provided to me in respect of verbal briefings and emails in forming my opinion.
27. MBIE also considers that the Government understood the policy choices it was making with the design and implementation of MIAS, and the trade-offs in the decisions they made. It emphasised that the policy process was heavily influenced at all stages by ministerial directions and decisions. MBIE also noted that Ministers had a depth of knowledge about the COVID-19 pandemic, both as it affected New Zealand and

¹⁷ MBIE states that over 45,000 emails were sent between MIQ Policy and Ministers.

globally.¹⁸ However, in my view this does not obviate the need for officials to provide considered and relevant advice to Ministers.

28. MBIE also noted that Ministers received advice from across a number of agencies involved in the response to COVID-19. For example, it stated that Crown Law led the work on identifying issues with MIQ that could impact on New Zealanders' rights, and in this capacity would often provide both verbal and written advice to MBIE or directly to Ministers.¹⁹
29. This unique context, including a high degree of ministerial involvement in policy development, is highly relevant to my assessment of the reasonableness or otherwise of MBIE's advice and recommendation to the Minister about offshore seafarers. Nonetheless, it does not change my jurisdiction to consider MBIE's advice, nor MBIE's obligation to provide sound advice and recommendations, proactively where necessary.²⁰ While the final decision about an offline allocation for offshore seafarers was made by the Minister, and is therefore not within my jurisdiction to investigate and form an opinion on, section 13(2) of the OA is quite clear that I am expected to investigate recommendations made to Ministers. This includes those which were formed in policy development processes which affect people. In this case, MIAS involved a limit on a fundamental right, and MBIE was obliged to give free and frank advice regardless of parameters set by Ministers. While MBIE emphasised to me the informal nature of policy advice in the COVID-19 context, it has not demonstrated to me that its verbal advice to Ministers was significantly different to its written advice, nor provided me with any relevant email advice to Ministers. While a number of agencies were involved in the response to COVID-19, MBIE had responsibility for the allocation system.

¹⁸ At a media conference on 24 November 2021, then Minister for COVID-19 response, Chris Hipkins, noted '*the very difficult trade-offs that we've needed to make to keep our country as safe as possible over the last two years. We acknowledge that it has been very tough. Families have been separated, people have found themselves having to shelter in places they did not expect to stay, for prolonged periods of time, and we are acutely aware of the impact that these restrictions have had on individuals' lives and their livelihoods. As I've said standing here many times before, when it comes to COVID-19 there are often no easy decisions and we've often been faced with the task of making the least worst decision, because we know that whatever steps we've taken, there have been consequences and people's lives have been affected, and the border is clearly an example of that.*'

¹⁹ This investigation does not concern or comment on advice, acts or omissions by other agencies. Nor does the Ombudsman have jurisdiction to investigate any decisions, recommendations, acts or omissions of any person acting as legal adviser to the Crown: see section 13(7)(c) of the OA.

²⁰ These obligations are reflected in the Public Service Act 2020, sections 12(1)(b) and 52(1)(d) and (f).

Setting the scene – offshore seafarers

Maritime allocation in MIQ

30. Provisions for maritime crew changeovers and maritime arrivals in New Zealand were set out in the Maritime Border Order. To facilitate these arrangements, there was a specific offline maritime allocation in MIQ of 80 rooms.²¹ This maritime allocation was available to seafarers entering New Zealand to join a New Zealand or foreign-flagged vessel, or disembarking a New Zealand or foreign-flagged vessel in New Zealand before flying home, as well as to other people arriving in New Zealand by sea.
31. However, the offline maritime allocation was not available to offshore seafarers seeking to return to New Zealand at the end of their tours, including the two complainants. Rather, before the border began reopening, they had to book a voucher using the online aspect of MIAS in order to come back, in the same way as any other New Zealander seeking to return, who did not meet the criteria for offline allocation.

Maritime law and international cooperation

32. The Maritime Labour Convention (MLC) is an international treaty setting out seafarers' rights and labour protections. New Zealand ratified the MLC in 2016, and it came into force one year later.
33. The MLC specifically addresses the issue of seafarer repatriation – the return of seafarers to their home at the end of their tour. New Zealand's legal obligations under the MLC relate to seafarers on ships that fly the New Zealand flag and to facilitating repatriation of seafarers on foreign-flagged ships visiting New Zealand. If the ship-owner and foreign-flag State both fail to repatriate offshore seafarers as they are legally required to do, New Zealand *may* arrange for repatriation and recover the cost from the flag State (provided they are a Member State of the MLC). However, this is not a legal requirement under the MLC. The details of these provisions are set out in more detail in [Appendix 1](#).
34. The MLC also provides more generally that Member States '*shall cooperate with each other for the purposes of ensuring the effective implementation and enforcement*' of the MLC.²²
35. Further, the United Nations General Assembly and the International Maritime Organisation (IMO) issued resolutions emphasising the importance of international cooperation for global trade during the COVID-19 pandemic. The IMO is a specialised agency of the United Nations tasked with creating a regulatory framework for the shipping industry. New Zealand is a Member State of the IMO.
36. These international resolutions urged Member States to:

²¹ Originally 60 rooms.

²² Article I.

- a. designate seafarers as key workers providing an essential service;
- b. grant them exemptions from restrictions (including isolation and quarantine requirements) in order to facilitate their joining or leaving ships; and
- c. expedite repatriation efforts.

The details of these resolutions are set out in more detail in [Appendix 2](#).

37. New Zealand designated seafarers as key workers, and implemented measures to facilitate crew changes in New Zealand in the Maritime Border Order. However, these did not extend to crew changes in overseas ports involving New Zealand seafarers working on foreign-flagged vessels, such as the two complainants in this case. No specific provision was made for their repatriation.

The complainants' concerns

38. The complainants believe that the treatment that they and other offshore seafarers received was inconsistent with New Zealand's obligations under the MLC. They stated that ship-owners were not able to carry out their responsibility to repatriate seafarers because of the way the MIQ allocation system operated. They also referred to the calls from the IMO to designate seafarers as key workers and facilitate their repatriation in order to keep global supply lines open. They advised that they had to resign and remain in New Zealand, not working, until the borders began to reopen, because MIAS made repatriation difficult.
39. Further, the complainants considered that the circumstances of offshore seafarers were unique, and warranted a specific offline allocation for the following reasons:
 - a. Due to the nature of seafaring, particularly in the shipping industry, the complainants did not know in advance exactly when crew changes would happen, or exactly where they would be able to disembark. Essentially, they needed a short-notice MIQ booking in order to get home. At times of high demand for limited MIQ capacity, they claimed that it was extremely difficult, if not impossible, to get a short-notice MIQ booking through the online aspect of MIAS.
 - b. Internet access at sea is often non-existent or unreliable. The complainants advised that the MIAS website frequently timed out on them due to poor internet connectivity. Further, they said that they worked long days and were therefore not able to spend a long time online checking for availability on the MIAS website. They considered that these factors put them at a disadvantage compared to other people trying to access online MIQ spaces on MIAS.
 - c. The complainants stated that the difficulty in securing an MIQ voucher effectively left them stranded overseas with no support (often in a developing country), or forced to do another tour on their ship. In some countries, crew changes were allowed only with proof of flights home, which meant seafarers could not disembark without an MIQ voucher. They also said that they were generally only

given permission to transit through a port, and were concerned about being detained for being there illegally if they were forced to wait for weeks or months to obtain an MIQ voucher. They also raised concerns about doing back-to-back rotations on their ships, which they claimed put their physical and mental health at risk.

40. Although the complainants tried to secure emergency allocation spaces, both had applications under category 2(c)²³ of the emergency allocation criteria declined. One of the complainants unsuccessfully applied for an emergency allocation space when he was meant to disembark from his vessel in Myanmar during a military coup. The complainants also stated that emergency allocation requests took too long to process, which did not work in their circumstances.
41. The complainants considered they should have been able to access a specific offline allocation (such as the maritime allocation), rather than have to use the online allocation part of MIAS coupled with emergency allocation requests. Alternatively, they believed they should have been treated comparably to New Zealand-based aircrew who were exempt from needing an MIQ voucher, and in some circumstances were also exempt from having to isolate or quarantine.²⁴

The advice and recommendation at issue

42. On 9 March 2021, the Minister of Transport publicly stated that he would review the MIQ settings for offshore seafarers, after receiving correspondence from some seafarers about the difficulties they were experiencing in booking a voucher online in MIAS.²⁵
43. In response to this announcement, MBIE decided on 10 March 2021 to provide advice on this topic to the Minister for COVID-19 Response (as the Minister responsible for MIQ).
44. On 11 March 2021, Maritime New Zealand (MNZ) contacted MBIE stating:

My team [...] is fielding a number of emails and queries around returning NZ seafarers not being able to access an MIQ voucher. [...] Maritime NZ is more than happy to assist with any advice and support that may help us find a workable solution.
45. MBIE met with MNZ and Ministry of Transport (MOT) staff on 15 March 2021 to gain an understanding of the numbers of offshore seafarers affected, how the difficulties they were experiencing differed from those experienced by other New Zealanders trying to

²³ At the time: New Zealand citizens or residents, who are unable to legally remain in their current location and have no other option but to return to New Zealand.

²⁴ Under clauses 20 and 21 of the Air Border Order.

²⁵ See www.1news.co.nz/2021/03/09/quarantine-rule-change-considered-to-help-kiwi-seafarers-get-home/.

obtain an MIQ space, and whether there was a case for creating a specific allocation for them.

46. On 16 March 2021, MBIE asked MNZ and MOT officials if they wished to provide any information for the briefing that it was developing, such as background on crew change processes, the extent of the challenges for offshore seafarers, and MLC and IMO considerations.
47. On 18 March 2021, MNZ detailed the repatriation challenges seafarers were experiencing globally, and discussed relevant international law, stating:

Whilst there may be no legal requirement to support Crew changes outside of New Zealand, it could be considered contrary to the spirit of the [MLC] and the UN Resolution to effectively prevent a crew change occurring overseas (involving a New Zealand seafarer), through the inability to book quarantine accommodation via the currently available MIAS system.

MNZ stated that, while offshore seafarers who regularly departed and returned to New Zealand did not differ from other offshore workers who left New Zealand contrary to governmental advice not to travel, there might be some justification for according them different treatment due to their status as key workers. MNZ also suggested that in situations where offshore seafarers had been unable to return since the start of border restrictions, or had had to spend an extended period on board their vessel, it might be possible to accommodate them through the existing maritime allocation or the exemption process.

48. On the same day – 18 March 2021 – MOT provided MBIE with feedback on its draft briefing, stating:

On a general note, we would have liked to see more in the briefing, as we think that this is an opportunity to put something before the Minister and provide him with options. We think there are two options:

- 1. The status quo – nothing changes and they have to go into the general pool*
- 2. Provide a limited amount of beds for these seafarers*

The pros and cons of both options should be identified and the Minister would then be able to make a choice.

49. In response, MBIE amended the draft briefing to state that Ministers could create a specific offline allocation of rooms for offshore seafarers in addition to the existing maritime allocation, but it recommended against that option. MBIE asked MNZ and MOT if the briefing could state that both agencies agreed with the recommended option. MNZ advised that the briefing could state that it had been consulted.
50. MBIE's advice, reflecting the position outlined above, was tendered to the Minister for COVID-19 Response on 19 March 2021. The Minister agreed with MBIE's advice and

recommendation not to create a specific offline allocation for offshore seafarers. Consequently, offshore seafarers had to continue to use the online allocation system.

51. On 6 August 2021, MBIE provided the Minister with an update on the maritime allocation, and sought his agreement to increase the number of rooms used for Pacific-servicing cargo crew by 20, thereby increasing the total number of maritime rooms from 60 to 80. MBIE noted that, while offshore seafarers had argued for access to the maritime allocation, it reiterated its earlier advice that the current settings were considered to be fit for purpose.

Analysis and findings

52. I acknowledge the difficult challenges that MBIE faced in managing MIQ, and the vital role that MIQ played in the Government's response to the COVID-19 pandemic. MBIE provided a large volume of advice to Ministers at pace, in unprecedented circumstances, and in a high-stakes and constantly changing environment where the risk to public health was high. I accept that the design and administration of MIAS was characterised by a high degree of cross-agency collaboration and ministerial involvement and direction, including frequent meetings at which Ministers were involved in policy development, as well as significant collaboration between MBIE and other agencies.
53. The Minister informed me that various groups of New Zealanders had requested priority throughout the lifetime of MIQ, that he had received advice on these matters and held discussions with officials, and that he had reflected on the range of considerations put before him. He had also requested that written briefings be concise, and was receiving information through a number of channels.
54. These factors inform the context and basis of my finding on the reasonableness or otherwise of MBIE's advice and recommendation. However, they do not negate MBIE's responsibility to adequately advise the Minister.
55. When providing advice to a Minister, agencies must inform them of all relevant law, policy and facts so the Minister can make a decision on a properly informed basis. In my view, this is even more important when the decision engages people's fundamental human rights.
56. Agencies should take care to:
 - a. correctly state the applicable law and policy;
 - b. accurately summarise the facts and the issues arising from them;
 - c. present all relevant factors for consideration;
 - d. give appropriate weight to those factors; and
 - e. not include irrelevant matters.

57. In this case, I would have expected MBIE's advice to the Minister to have adequately addressed New Zealand's obligations under the MLC, international cooperation for global trade, international resolutions, the designation of seafarers as key workers, the difficulties offshore seafarers were experiencing obtaining vouchers, considerations under NZBORA, and the impact of being unable to return on those who work at sea. I discuss these topics in turn below.

Maritime law and international cooperation

MBIE's advice

58. In its advice of 19 March 2021, MBIE informed the Minister:

With regard to seafarer repatriation, New Zealand's obligations under the MLC relate to seafarers on merchant ships that fly the New Zealand flag, and to facilitating repatriation of seafarers on foreign ships visiting New Zealand.

The New Zealand seafarers who are having difficulty returning home are not on New Zealand ships and should be covered by the foreign flag state's obligation under the MLC to ensure that seafarers on their ships are repatriated at the end of their contract. However, New Zealand's actions could be seen as frustrating the repatriation of seafarers by not giving them priority for MIQ vouchers. New Zealand's action may be inconsistent with the spirit of the MLC rather than in breach of New Zealand's convention obligations.

Assessment

59. In my view, MBIE correctly advised the Minister about New Zealand's legal obligations under the MLC. However, while MBIE acknowledged that New Zealand's actions in respect of offshore seafarers could be seen as frustrating their repatriation, and therefore as being inconsistent with the spirit of the MLC, I do not consider that the briefing fully addressed this issue.
60. New Zealand has a general obligation to cooperate with other States that have ratified the MLC to ensure its effective implementation and enforcement.²⁶ The MLC requires flag States (first through owners of ships flying their flag, and then directly) to repatriate seafarers at no charge. If these seafarers are unable to acquire MIQ vouchers, however, this makes it more difficult for foreign flag states to fulfil their obligations. On this basis, not giving offshore seafarers priority for MIQ vouchers could be seen to hamper cooperation with other Member States, who have a responsibility to ensure that ships that fly their flag are able to repatriate seafarers.

²⁶ While this doesn't have legal force at international law, the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations made [these general observations](#) on matters arising from the application of the MLC during the pandemic. They urged States to further enhance cooperation in terms of article 1.

61. MBIE advised me that considerations of the obligation to cooperate under the MLC is part and parcel of the legal assessment that there was no breach of the MLC. MBIE also stated that the Minister could have sought further information on this topic.
62. The Minister advised me that he was aware generally of New Zealand's international obligations in respect of seafarers, from his involvement in setting up the maritime allocation and his consideration of seafarer welfare in respect of crew changes in New Zealand.
63. I consider that MBIE did not include in its advice sufficient consideration of international cooperation, nor the impact of relevant resolutions and seafarers' status as key workers. Although the Minister already had an understanding of these issues generally, MBIE did not advise him on their particular application to offshore seafarers. This was a different issue to New Zealand's obligations to seafarers in New Zealand, or to general prioritisation in MIQ. An agency is expected to present all relevant information for consideration, and not rely on a Minister to request further information.
64. In its report to me, MBIE advised that overseas seafarers will generally have been working on foreign-flagged ships that are not supporting New Zealand supply chains. The Minister also noted to me that the impact of approximately 200 New Zealand offshore seafarers being unable to work was unlikely to have a significant impact on global trade, with not many other countries pursuing a strict Elimination Strategy.
65. This seems to me to miss the point that New Zealand is part of an international maritime system. While offshore seafarers' vessels may not have been coming directly to New Zealand, they were still part of a global network that fed into New Zealand's supply chain. I acknowledge that the number of New Zealand seafarers working offshore was relatively low, but I also note that the impacts of COVID-19 restrictions across the world on global shipping were significant, which led to the General Assembly and IMO resolutions set out in [Appendix 2](#).
66. Overall, I consider that MBIE's briefing to the Minister should reasonably have addressed how the recommendation not to create a special offline allocation for offshore seafarers:
 - a. might affect the obligation on New Zealand as a Member State to cooperate under the MLC and, more generally, international cooperation for global trade;
 - b. might impact on New Zealand's ability to comply with IMO and General Assembly resolutions; and
 - c. might be seen to undermine the designation of seafarers as key workers;particularly as these issues had already been raised with MBIE by MNZ. While MBIE's conclusion (and the Minister's decision) may have been the same, these matters should have been considered and brought to the Minister's attention.

Difficulties in securing an online voucher through MIAS

MBIE's advice

67. The briefing noted that offshore seafarers had submitted that the particular circumstances of their employment – the inability to predict with certainty when they would reach a port at the end of their roster, and difficulties with internet connectivity – meant that trying to access an online voucher through MIAS was impractical. MBIE's response to these concerns in the briefing was to suggest that offshore seafarers could factor in delays in reaching a port when they booked an MIQ voucher, or they could rely on family or friends to book for them.

Assessment

68. The complainants advised that offshore seafarers' travel dates and itineraries are especially uncertain, and largely out of their control. For example, a ship's owner may direct the ship to sail to another port because cargo prices are better there, or because of issues at the port of destination. Sailing may be delayed by bad weather. Replacement crew may be delayed. Problems with a vessel may lead to early disembarkation.
69. The complainants also advised that offshore seafarers are generally given little notice of a crew change (sometimes only 72 hours), and that crew managers do not usually issue flight tickets until the day before disembarkation. High demand for MIQ vouchers could mean that there were none left by the time the seafarers knew they could disembark.
70. It was also particularly difficult for offshore seafarers to use the online aspect of MIAS because of the lack of internet connectivity at sea. Further, when at sea, seafarers typically work 10-12 hour shifts, every day, for weeks or months.²⁷ The complainants stated that they were unable to constantly monitor MIAS for the release of online vouchers, and subsequently were sometimes unable to participate in a virtual lobby at the set time.
71. MBIE's advice that offshore seafarers could mitigate these difficulties by asking someone else to make a booking for them presupposes that offshore seafarers had someone who could do this for them, and in any event they would still have needed to have been able to communicate the details of their return.
72. The argued inability of offshore seafarers to access online vouchers through MIAS on the same, equal basis as others has implications for their rights under NZBORA, in particular, the right to enter New Zealand under section 18(2). Despite this, NZBORA implications for this affected group were not addressed in MBIE's advice to the Minister.

²⁷ See <https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>.

73. MBIE and the Minister have advised me that the Minister was well aware of NZBORA issues associated with MIQ, with these having been discussed in at least 14 briefings prior to the advice at issue in this investigation.
74. While the Minister may have been well-briefed about NZBORA in general, MBIE did not advise him about the NZBORA implications for offshore seafarers in particular. None of the previous briefings relate in any way to offshore seafarers. Despite the fact that some of the previous briefings note that whether the MIQ allocation system breaches NZBORA is dependent on individual circumstances, no consideration was given to the particular circumstances of offshore seafarers in terms of NZBORA. Even in a concise briefing, I would expect Ministers to be advised about any specific NZBORA implications arising from a decision they are being asked to make.
75. As noted above, in the Grounded Kiwis judicial review proceedings, the High Court held that MIAS as a whole operated in a way that meant New Zealanders' right to enter their country could be unjustifiably infringed in some instances because, and to the extent that, the system did not sufficiently allow individual circumstances to be considered and prioritised where necessary. This related not just to difficulties in securing an MIQ voucher, but also to the consequences for individuals if they were unable to return.

Consequences of not being able to return

MBIE's advice

76. The briefing acknowledged that challenges in obtaining MIQ vouchers might mean a proportion of offshore seafarers would be unable to disembark from their ships, and noted that some seafarers had been forced to remain on board for an extended period and that this was causing distress. These situations were not considered to be sustainable and the briefing noted that there was risk that offshore seafarers might be removed from vessels by the owners.
77. However, the briefing went on to note that offshore seafarers who were confined to their ships at the end of their work rotations and could not legally remain in the country in which the ship was operating, could apply for an emergency allocation space under category 2(c) of the emergency allocation criteria, and that several applications had already been approved on that basis. The advice also stated that offshore seafarers experiencing severe mental distress could apply under category 1(a) of the emergency allocation criteria.²⁸ MBIE acknowledged that this would not benefit most offshore seafarers, but it did not consider remediation to be warranted. It further stated in the briefing that offshore seafarers would be able to access an emergency allocation space only once.

²⁸ At the time: New Zealand citizens or residents where a serious risk to health exists for the applicant or their dependant, which requires urgent travel to New Zealand.

Assessment

78. As the briefing acknowledged, the consequences of being unable to return to New Zealand were particularly harsh for offshore seafarers. They could be left stranded overseas in a potentially unfamiliar (and possibly dangerous) port with only a transit visa, or might be unable to disembark their ship and so end up doing back-to-back tours.

79. The IMO has stated in this regard:²⁹

Seafarers spending extended periods on board are more at risk of adverse health effects, including physical and mental health issues. Thousands of seafarers stranded on board ships have already expressed their exhaustion, fatigue, anxiety, depression and mental stress. And a physically and mentally fatigued seafarer has a much higher risk of becoming involved in an incident which causes a marine casualty.

80. Despite the fact that offshore seafarers could find themselves stranded overseas, or be forced to sign up for additional months of work, because of how the MIQ allocation system operated, MBIE saw no need to recommend to the Minister that allowance should be made for them, instead taking the view that they could apply for an emergency allocation space in certain circumstances. However, I note that MBIE did offer to do further work on a specific allocation for offshore seafarers if the Minister wished (he subsequently declined).

81. In its report to me, MBIE advised that from 2 December 2020 to 27 August 2021, 45 emergency allocation applications were received from offshore seafarers, of which 15 were approved, 13 were declined, 10 were not processed (likely withdrawn), and seven were still being processed as at 27 August 2021. Further, MBIE emphasised that emergency allocations were a last resort and were not intended to facilitate regular travel. MBIE also advised me that one of the complainants' emergency allocation applications was declined because he was not looking to travel within the next seven days.³⁰ He later obtained an online voucher through MIAS.

82. MBIE advised me that the consequences for offshore seafarers of not being able to return were addressed in the briefing, including the limitations of the emergency allocation process.

83. I consider that MBIE should have addressed the issue of offshore seafarers' access to emergency allocation spaces in more detail. I note that MBIE subsequently collaborated with MNZ on that issue.³¹ Understandably, offshore seafarers did not want to disembark

²⁹ See <https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>.

³⁰ The period for emergency allocation travel was subsequently extended to 14 days.

³¹ In a briefing to the Minister dated 20 August 2021 on the emergency allocation criteria, MBIE advised that it was aware of issues with offshore seafarers' access to emergency allocation, and was collaborating with MNZ to ensure that its processes did not unfairly disadvantage them. This involved considering its communications

their ship in the hope that their emergency allocation application would be successful, and risk being detained while it was being processed or if it was not granted. Additionally, they sometimes only had a narrow window of opportunity to disembark and complete a crew changeover.

84. Furthermore, as MBIE noted in the briefing, emergency allocations did not benefit most offshore seafarers who needed to be repatriated, and were not intended to facilitate regular travel. By its own admission, MBIE appears to accept that they were not an answer to the concerns raised by offshore seafarers. As its own data shows, only a minority of emergency allocation applications from offshore seafarers were successful.³²

Comparison to other fly in, fly out workers

MBIE's advice

85. The briefing went on to compare offshore seafarers to other fly in, fly out workers,³³ stating:

While the current border restrictions have impacted on seafarers, this impact is for the most part similar to that experienced by most other New Zealanders working offshore in industries that rely on rotations arrangements. While the restrictions are a point of frustration for these workers we do not consider there to be a strong case for allocating these individuals rooms in managed isolation outside of the normal online booking process. [...]

Anyone with an uncertain date of travel faces similar challenges as the majority of the seafarers.

86. MBIE noted in its advice that some offshore seafarers may have been able to obtain a MIQ voucher after a period of delay. It took the view that delay was a common frustration experienced by many offshore New Zealanders wishing to return, as well as by critical workers seeking to enter New Zealand.
87. While MBIE stated that Ministers could create a specific offline allocation of rooms (approximately 20 per fortnight) that would be available only to offshore seafarers in addition to the existing maritime allocation, it recommended against this option because

with offshore seafarers and its way of working with MNZ, and assessing whether any policy changes were needed specifically to allow for the circumstances of offshore seafarers.

³² As noted earlier, the complainants both had emergency allocation applications declined, after receiving advice from MBIE to apply under category 2(c) of the emergency allocation criteria. One of the complainants was in a dangerous situation, on a ship near Myanmar during a military coup. He was not specifically informed that the reason his application was declined was due to a time limit, but was told 'Please try apply closer to the time of your return date'.

³³ Fly in, fly out workers are workers whose employer will temporarily transport them to a work site to work for a set period (usually weeks or months) and then transport them back, instead of relocating them and their families permanently. Such arrangements are common in the mining, and oil and gas drilling industries, and also apply in other sectors.

of the difficulty in forecasting numbers, which could result in some rooms remaining empty, and because of the precedent this would set for other New Zealanders working offshore in rotation arrangements.

Assessment

88. I do not consider MBIE's comparison of offshore seafarers to other fly in, fly out workers to be apposite. In my view, offshore seafarers were in a particularly difficult position owing to the nature of their work, as outlined above.
89. In contrast to the uncertainties faced by offshore seafarers, other fly in, fly out workers generally work in the same location throughout their rotation. Someone working in a mine in Australia, for example, will likely know well in advance when they will finish work and where the closest airport is. They did not routinely need a short-notice booking in the same way that offshore seafarers did.
90. Further, other fly in, fly out workers would not generally have been in the same position as offshore seafarers if they were unable to return to New Zealand in a timely manner. Other fly in, fly out workers, such as those working in mines in Australia, who were unable to return in a timely way to New Zealand at the end of their rotation, were more likely to be able to remain in the country where they had been working (although in some cases may have needed to acquire a different type of visa). This is quite different to being unable to disembark a ship.
91. MBIE advised me that there are strong similarities between offshore seafarers and other fly in, fly out workers, as these are people who went overseas to work during a pandemic. MBIE also told me that it was mindful, when advising the Minister, of potential issues of fairness associated with prioritising those who had chosen to travel for offshore rotations over other New Zealanders who were looking to return home. It considers that the briefing clearly spelt out the particular issues faced by offshore seafarers, and it was open to the Minister to draw his own conclusion.
92. I acknowledge that in some cases offshore seafarers made a deliberate choice to travel overseas at a time when it was known that MIQ vouchers were difficult to obtain. However, this was their livelihood, they were recognised as key workers, and they contributed to maintaining global trade supply chains. I also acknowledge that ultimately it was the Minister's decision whether or not offshore seafarers should be afforded priority in MIQ. However, I consider that MBIE's comparison of offshore seafarers to other fly in, fly out workers was inappropriate. Such a comparison does not sufficiently take into account international cooperation for global trade, the particular uncertainties offshore seafarers faced, or the especially harsh consequences if they were unable to return to New Zealand. Again, while MBIE's conclusion on whether offshore seafarers should be able to access a specific offline allocation (and the Minister's decision) may have been the same, I do not consider that the comparison to other fly in, fly out workers was valid.

93. I acknowledge that MBIE was genuinely concerned about causing further delay to others waiting for an MIQ voucher, and that this advice was part of an ongoing conversation between MBIE and the Minister about prioritisation. However, as above, I believe offshore seafarers could have been distinguished from other fly in, fly out workers.

Chief Ombudsman's opinion

94. I appreciate that the MIQ allocation system had to deal with large numbers of people seeking to enter or return to New Zealand in the context of a constantly shifting global pandemic, and that difficult decisions about prioritisation had to be made. I acknowledge the unique context of the advice and recommendation at issue, as set out above. But even taking into account these circumstances, I consider that there are legitimate concerns about the advice provided by MBIE to the Minister.
95. In my view, MBIE acted unreasonably in providing the advice that it did to the Minister in relation to offshore seafarers, because the advice:
- a. did not sufficiently address the need for international cooperation for global trade, relevant IMO and General Assembly resolutions, and the designation of seafarers as key workers;
 - b. did not consider specific NZBORA implications for offshore seafarers as a particular class of New Zealanders;
 - c. did not sufficiently address the limitations of the emergency allocation process as a solution for offshore seafarers; and
 - d. drew an inappropriate comparison to other fly in, fly out workers.
96. As discussed in my self-initiated broader investigation into MBIE's administration of MIAS, I accept that implementing a more individualised allocation system that considered individual circumstances and prioritised would have been difficult and costly, but in my view careful consideration of options for doing so was necessary given the profound impact the system was having on people. I note the High Court in the Grounded Kiwis judicial review proceedings also found the same from a human rights perspective. Offshore seafarers are an example of a class of New Zealanders who suffered from the lack of consideration of individual circumstances and prioritisation in MIAS.
97. I recognise that the Minister was accountable for the final decision not to have an offline allocation for offshore seafarers. However, in investigating the actions and recommendations of MBIE when providing advice to Ministers, I expect it to provide adequate free and frank, clear and sound advice on the situation and options and their

impacts on people, such as the two complainants. In investigating what occurred within an agency, an Ombudsman will look for 'reason, justice, sympathy and honour'.³⁴

98. Both of the complainants were directly and personally affected by the Minister's decision not to have an offline allocation for offshore seafarers, which was based on MBIE's advice. They both had to stay on-board their vessels for significantly longer than their usual tours, due to difficulties in securing an MIQ space, and then subsequently had to remain in New Zealand, not working, until the borders began to reopen. In my view, MBIE's advice to the Minister did not enable the decision about an offline allocation for offshore seafarers, such as the two complainants, to be made not just with reason, but with sympathy and honour.

Recommendations

99. I recommend that, if the need to use the MIQ system arises again, MBIE provide fresh advice to the Minister on offshore seafarers in a manner that addresses the deficiencies I have identified. While significant changes have since been made to MIQ, I consider it important, for any potential future closure of the borders, that the position of offshore seafarers be reassessed.
100. While I acknowledge that MBIE did not make the decision, its advice formed the basis of the Minister's decision against having an offline allocation for offshore seafarers, which had a direct impact on the two complainants. I therefore recommend that MBIE consider apologising to the two complainants for the deficiencies in its advice.



Peter Boshier
Chief Ombudsman

³⁴ Sir Guy Powles 'The New Zealand Ombudsman – the early days' (1982) 12 VUWLR 207, at page 207.

Appendix 1. Repatriation under the MLC

The MLC is divided into three parts: the Articles, the Regulations and the Code. The Code is then further divided into two sections: Part A which sets out mandatory Standards, and Part B which sets out non-mandatory Guidelines.

While the Guidelines are not mandatory, Member States “shall give due consideration to implementing [their] responsibilities in the manner provided for in Part B”.³⁵

Member States’ obligations around repatriation are set out in Regulation 2.5 and Standard A2.5, with further guidance set out in Guideline B2.5.2.

Regulation 2.5 provides:

Purpose: To ensure that seafarers are able to return home

1. *Seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code.*
2. *Each Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code.*

Standard A2.5 sets out the circumstances in which seafarers are entitled to repatriation (such as when their contract is complete) and requires Member States to ensure there are appropriate provisions in its laws and regulations or other measures to give this effect. Importantly, it states:

5. *If a shipowner fails to make arrangements for or to meet the cost of repatriation of seafarers who are entitled to be repatriated:
 - (a) *the competent authority of the Member whose flag the ship flies shall arrange for repatriation of the seafarers concerned; if it fails to do so, the State from which the seafarers are to be repatriated or the State of which they are a national may arrange for their repatriation and recover the cost from the Member whose flag the ship flies; [...]**
7. *Each Member shall facilitate the repatriation of seafarers serving on ships which call at its ports or pass through its territorial or internal waters, as well as their replacement on board.*

Finally, Guideline B2.5.2 sets out how the above Regulation and Standard should be implemented by Member States. It says that:

1. *Every possible practical assistance should be given to a seafarer stranded in a foreign port pending repatriation and in the event of delay in the repatriation of the seafarer, the competent authority in the foreign port should ensure that the consular or local representative of the flag State and the seafarer’s*

³⁵ Article VI, paragraph 2.

State of nationality or State of residence, as appropriate, is informed immediately.

2. *Each Member should have regard to whether proper provision is made:*
 - (a) *for the return of seafarers employed on a ship that flies the flag of a foreign country who are put ashore in a foreign port for reasons for which they are not responsible:*
 - (i) *to the port at which the seafarer concerned was engaged; or*
 - (ii) *to a port in the seafarer's State of nationality or State of residence, as appropriate; or*
 - (iii) *to another port agreed upon between the seafarer and the master or shipowner, with the approval of the competent authority or under other appropriate safeguards;*

Aspects of the Part B Guidelines have been incorporated into New Zealand domestic law (Maritime Rule 52.65),³⁶ but this does not extend to B2.5.2.

³⁶ Such as Guideline B2.5.1 paragraph 6 relating to the destinations to which seafarers may be repatriated.

Appendix 2. International resolutions

On 27 March 2020, the IMO issued a circular letter recommending that Governments designate seafarers as key workers providing an essential service, and grant them any necessary and appropriate exemptions from national travel or movement restrictions in order to facilitate their joining or leaving ships.³⁷

On 5 May 2020, the IMO issued a circular letter urging the implementation of a recommended framework of protocols for ensuring safe ship crew changes and travel during the COVID-19 pandemic.³⁸ The IMO stated:

Due to ongoing COVID-19 restrictions, large numbers of seafarers are having to extend their service on board ships after many months at sea, unable to be replaced after long tours of duty or be repatriated via aircraft to their home countries. Shipping is vital to the maintenance of global supply chains, but the current situation is unsustainable for the safety and wellbeing of ship crew and the safe operation of maritime trade.

In respect of the repatriation of seafarers to their place of ordinary residence, the protocols encourage Governments to:³⁹

Give serious consideration to exempting seafarers from any self-isolation or quarantine measures that might be applicable to other passengers arriving by aircraft from other countries.

On 21 September 2020, the IMO's Maritime Safety Committee adopted a resolution recommending action to facilitate ship crew change and seafarer travel during the COVID-19 pandemic.⁴⁰ The Committee urged Member States to engage in discussions on the implementation of the protocols and consider applying them to the maximum extent possible and to designate seafarers as key workers providing an essential service.

On 1 December 2020, the United Nations General Assembly adopted a resolution recognizing the importance of international cooperation to support global supply chains.⁴¹ It stated that it was:

Acknowledging that shipping has continued to transport more than 80 per cent of world trade essential to the normal functioning of society, including vital medical supplies, food and other basic goods that are critical for the COVID-19 response and recovery, [...]

³⁷ Circular Letter No.4204/Add.6.

³⁸ Circular Letter No.4204/Add.14. On 22 April 2021, the Recommended framework of protocols was issued as MSC.1/Circ.1636.

³⁹ 11.2.10, at page 46 of Annex 1.

⁴⁰ MSC.473(ES.2).

⁴¹ A/RES/75/17.

Deeply concerned about the significant challenges being faced by the global shipping community to effect crew change and repatriation of seafarers as a result of the COVID-19 pandemic,

The General Assembly urged Member States to designate seafarers as key workers, encouraged Governments to implement the IMO's protocols for ensuring safe ship crew changes and travel, and called upon Governments to implement relevant measures to facilitate maritime crew changes, including by expediting repatriation efforts.