

Provided by email from Matt McGrath, Senior Solicitor, DPMC to Minister Hipkins' Office
[Thursday, 9 September 2021 12:58 am]

Kia ora Ashlee and Morehu,

The signature copy of tonight's amendment order is attached herewith.

As discussed earlier, this is due to come into force from 0900 this morning. It would be appreciated if the signed version could be returned by 0800 in order to allow time for it to be published and gazetted in time for its commencement.

Once signed, could you please return it to the addressees on this email so that the PCO Publications team can arrange for the gazetting and publication.

Could you please also ensure that the below information is provided to the Minister, together with the order.

High Level Summary of the Amendment Order

Adding some critical building product manufacturers as an Alert Level 4 Business or Service

This amendment empowers the CE of MBIE to authorise manufacturers and distributors of certain critical building products to operate as Alert Level Four Business and Services. It empowers her to impose conditions on such an authorisation including in respect of the number of workers that are permitted to enter the premises of those businesses and services. It further provides that the total number of workers of all businesses and services authorised by the CE under this authorisation to enter their workplaces must not exceed 100.

You are able to make a COVID-19 Order that authorises another person (in this case, the CE of MBIE) to authorise otherwise prohibited activities pursuant to s12(1)(d)(ii) of the COVID-19 Public Health Response Act 2020 (the Act)

The amendment requires that the CE considers the following when making her decision:

- (i) the need to maximise the supply of the specified products; and
- (ii) the need to minimise movement within the Alert Level 4 area to avoid the risk of the spread of COVID-19;
- (iii) the measures the business or service has in place to mitigate the risk of the transmission of COVID-19; and
- (iv) the need for each of the specified products be available;

The specified products are coated building steel, plaster board and gypsum plaster; and cavity insulation.

This amendment is in line with the decision taken by the COVID-19 Ministerial Group on 7 September 2021 [CMG-021-MIN-0018 refers].

Procedural Requirements for a COVID-19 Order

48 Hour Notification Period

The Act requires that a COVID-19 order must be published and gazetted at least 48 hours before it comes into force. However, this notice period is not required to be observed where the Minister is satisfied that the order should come into force urgently to prevent or contain the outbreak or spread of COVID-19 or where the effect of the order is only to remove or reduce requirements imposed by a COVID-19 order.

In this instance, amendment to the order is a reduction of otherwise applicable requirements. Accordingly, we consider that the 48-hour notice period need not be observed in this case.

Consultation

The Act requires that before making a COVID-19 order, you consult with the Prime Minister, the Minister of Justice, and the Minister of Health.

As this decision was considered by the COVID-19 Ministerial Group, the necessary consultation has been undertaken with the specified Ministers.

Public Health Advice

The Act requires that before making a COVID-19 order, you must have had regard to advice from the Director-General of Health about the risks of the outbreak or spread of COVID-19 and the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks.

We are advised that the Director-General provided advice directly to the COVID-19 Ministerial Group on this matter. The Ministry of Health has reviewed a summary of the proposed amendment and confirmed that they had no additional public health concerns. However, at the time that the proposal was reviewed, our understanding was that the 100-person cap would apply *per business*. It has since been confirmed that the cap is intended to apply across all businesses in this category. The final proposed amendment restricts personal movement to a greater extent than the alternative proposal. Accordingly we consider that the proposal is consistent with the Director-General's advice on the appropriate Alert Level 4 settings generally.

New Zealand Bill of Rights Act 1990 and other legal considerations

A matter for you to consider each time an order is proposed is whether the exercise of such powers will be appropriate. The power to make an order under section 11 of the Act must be exercised consistently with the New Zealand Bill of Rights Act 1990 (NZBORA). Additionally, as you will be creating a decision-making power, vested in the CE of MBIE, it is important that you are alive to the legal risks associated with that power and the exercise of it.

s9(2)(h)

