

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity Legislation Amendment (Incoming International Flights) Determination 2021

Purpose

The purpose of the *Biosecurity Legislation Amendment (Incoming International Flights) Determination 2021* (Amendment Determination) is to amend the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with pandemic Potential) (Emergency Requirements—Incoming International Flights) Determination 2021* (Emergency Requirements Determination) and the *Biosecurity (Human Coronavirus with Pandemic Potential) (Preventative Biosecurity Measures—Incoming International Flights) Determination 2021* (Preventative Biosecurity Measures Determination).

These instruments place requirements on passengers, aircrew and airlines relating to the wearing of face masks, exposure to human coronavirus with pandemic potential (COVID-19) and returning a negative COVID-19 test result prior to departure, for incoming international flights into Australia.

The Amendment Determination establishes further exemptions for specified classes of persons from the testing requirements set out in the Emergency Requirements Determination and the Preventative Biosecurity Measures Determination, and requires medical certificates to be provided within a specified time frame for the purposes of the relevant exemptions set out in the Emergency Requirements Determination. This ensures that the certificates are current for a person before they undertake a relevant international flight (or connecting flight) into Australian territory.

The Amendment Determination also amends the Emergency Requirements Determination and the Preventative Biosecurity Measures Determination to change the relevant period, before a person undertakes a relevant international flight (or connecting flight) into Australian territory, to obtain a negative test from 72 hours to 3 days in recognition that some test results do not specify the exact time the negative result was provided to the person. It also removes the exemption from the requirement to provide a negative test result for persons on a relevant international flight that commenced in a country with which Australia has established a safe travel zone (which allows for quarantine-free travel to Australia).

The Amendment Determination ensures that the measures in place are appropriate to address the emergency human biosecurity risk posed by returning overseas travellers.

The Amendment Determination is a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act).

Authority

Emergency Requirements Determination

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Declaration) has been made by the Governor-General pursuant to section 475 of the *Biosecurity Act 2015* (Biosecurity Act), and declares that a human biosecurity emergency exists regarding the listed human disease ‘human coronavirus with

pandemic potential' (COVID-19). The human biosecurity emergency period declared by the Declaration is currently in force until 17 December 2021 (unless extended).

During a human biosecurity emergency period, the Health Minister may, in accordance with sections 477 of the Act, determine emergency requirements that he or she is satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the declaration listed human disease, COVID-19, in Australian territory or a part of Australian Territory. A person who fails to comply with a requirement may commit a criminal offence (punishable by imprisonment for a maximum of 5 years, or 300 penalty units, or both, see section 479 of the Biosecurity Act).

The Emergency Requirements Determination is made under subsection 477(1) of the Biosecurity Act.

Subsection 477(2) of the Biosecurity Act provides that a determination made under subsection 477(1) is a legislative instrument, but section 42 (disallowance) of the Legislation Act does not apply to the determination. This is because the potential risk of such disallowance would inhibit the Commonwealth's ability to act urgently on public health advice to manage a human biosecurity risk that could threaten or harm human health as it would create uncertainty as to whether the instrument might be disallowed.

Subsection 477(3) of the Biosecurity Act sets out the kinds of requirements that the Health Minister may make in a determination under subsection 477(1), including requirements that apply to persons, goods or conveyances when entering or leaving specified places, such as those requirements set out in the Emergency Requirements Determinations for persons entering Australian territory via the relevant incoming international flight to have returned a negative test for COVID-19.

Subsection 477(4) of the Biosecurity Act relevantly provides that, before determining an emergency requirement under subsection 477(1), the Health Minister must be satisfied that the requirement:

- is likely to be effective in, or to contribute to, achieving its purpose; and
- is appropriate and adapted to achieve its purpose; and
- is no more restrictive or intrusive than is required in the circumstances, including, for a requirement, in the way it is applied.

In addition to being satisfied of the above, the Health Minister must also be satisfied that the period during which a requirement is to apply is only as long as is necessary. The period during which a requirement applies cannot exceed the human biosecurity emergency period. The requirements in the instrument will apply until the end of that period, unless the instrument is amended or revoked sooner.

This ensures that the emergency powers are only used where necessary to protect the health of Australians, based on expert advice and following appropriate consultation.

The Director of Human Biosecurity (the Commonwealth Chief Medical Officer) has advised the Health Minister, and the Health Minister is satisfied, that the amendments are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory.

The view that the requirements are proportionate, likely to be effective and that the length of the period of application is supported by advice from the Commonwealth Chief Medical Officer.

Preventative Biosecurity Measures Determination

Subsection 51(2) of the Biosecurity Act provides that the Health Minister may make a Determination specifying one or more of the following measures to be taken by specified classes of persons:

- banning or restricting a behaviour or practice;
- requiring a behaviour or practice;
- requiring a specified person to provide a specified report or keep specified records;
- conducting specified tests on specified goods.

Subsection 51(4) of the Biosecurity Act provides that a determination made under subsection 51(2) is a legislative instrument, but section 42 (disallowance) of the Legislation Act does not apply to the determination. This is because the potential risk of such disallowance would inhibit the Commonwealth's ability to act urgently on public health advice to manage a human biosecurity risk that could threaten or harm human health as it would create uncertainty as to whether the instrument might be disallowed.

A biosecurity measure must not be specified in a determination under subsection 51(2) unless the Health Minister is satisfied that the biosecurity measure is appropriate and adapted to prevent, or reduce the risk of, the disease entering, or emerging, establishing itself or spreading in, Australian territory or a part of Australian territory (see subsection 51(5)).

The Director of Human Biosecurity (the Commonwealth Chief Medical Officer) has advised the Health Minister, and the Health Minister is satisfied, that the amendments are appropriate and adapted to prevent and reduce the risk of the entry, emergence, establishment or spread of COVID-19 in Australian territory.

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power is construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Background

On 5 January 2020, the World Health Organization (WHO) notified Member States under the *International Health Regulations (2005)* of an outbreak of pneumonia of unknown cause in Wuhan city, China. On 21 January 2020 'human coronavirus with pandemic potential' became a 'listed human disease' under section 42 of the Act. On 30 January 2020, the outbreak was declared by the WHO to constitute a Public Health Emergency of International Concern.

On 11 February 2020, the WHO announced that the International Committee on Taxonomy of Viruses named the pathogen virus 'severe acute respiratory syndrome coronavirus (SARS-CoV-2)'. It is closely related genetically to the virus that caused the 2003 outbreak of Severe Acute Respiratory Syndrome (SARS). The international name given by the WHO to

the disease caused by SARS-CoV-2 is coronavirus disease 2019 (COVID-19). On 11 March 2020, the WHO declared the outbreak of COVID-19 a pandemic.

On 18 March 2020, the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease ‘human coronavirus with pandemic potential’ (COVID-19) (section 475 of the Biosecurity Act, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*). The human biosecurity emergency period is currently in force until 17 December 2021 and may be extended under the Act.

COVID-19 has entered Australia. It represents a severe and immediate threat to human health in Australia as it can cause high levels of morbidity and mortality, and has the ability to disrupt the Australian community socially and economically.

Commencement

The Amendment Determination commences on the day after registration.

Consultation

During the development of the measures, the Department of Health consulted the Attorney-General’s Department, the Department of Foreign Affairs and Trade, the Department of Home Affairs and the Department of the Prime Minister and Cabinet. The Ministers responsible for Health from each State and Territory and the Director of Biosecurity were also consulted, in accordance with subsection 51(7) of the Biosecurity Act.

Biosecurity Legislation Amendment (Incoming International Flights) Determination 2021

Section 1 states that the name of this instrument is the *Biosecurity Legislation Amendment (Incoming International Flights) Determination 2021*.

Section 2 provides that the instrument commences on the day after registration.

Section 3 provides that this instrument is made under subsections 51(2) and 477(1) of the *Biosecurity Act 2015*.

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1—Amendments

Items 1 to 8 to Schedule 1 amend the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Incoming International Flights) Determination 2021*. The amendments made by these items are discussed below.

Items 9 to 11 to Schedule 1 amend the *Biosecurity (Human Coronavirus with Pandemic Potential) (Preventative Biosecurity Measures—Incoming International Flights) Determination 2021*. The amendments made by these items are discussed below.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Incoming International Flights) Determination 2021

Item 1 – Section 9

Item 1 amends section 9 to omit the words “72 hours before the flight’s scheduled departure time” and substitutes the words “3 days before the day the flight was scheduled to commence,”.

Section 9 provides that a person who is a passenger, or the person in charge or a member of the crew, of an aircraft on a relevant international flight must not enter Australian territory at a landing place if the person had been exposed, without adequate personal protective precautions, to a person who tested positive for the coronavirus known as COVID-19 in the period specified in section 9 (noting this general rule is subject to the other requirements in paragraphs 9(a) and (b), and new paragraph 9(c) as inserted by Item 2 below). The amendment will change the period specified in section 9 from 72 hours before the scheduled departure time to 3 days before the flight was scheduled to commence.

The amendment in Item 1 intends to simplify the period specified in section 9 to reduce the challenges associated with determining whether the time period requirement has been met, as some test results only state the date of the result, not the specific time. The amended period will also assist to ensure that a person does not board a flight during a potential infectious period should they have been exposed to, and subsequently contracted, COVID-19.

The intention of this amendment is to make it easier for persons to comply with the requirement. This amendment is also consistent with the amendments to other provisions of the Emergency Requirements Determination in Items 3, 4 and 5.

Item 2 – After paragraph 9(b)

Item 2 inserts a new paragraph 9(c) into the Emergency Requirements Determination.

New paragraph 9(c) provides a new exception to the requirement in section 9 that a person must not enter Australia if the person had been exposed, without adequate personal protective precautions, to a person who tested positive for the coronavirus known as COVID-19 in the specified period before the incoming flight was scheduled to commence.

New paragraph 9(c) provides the general rule in section 9 does not apply if an exemption from the condition in paragraph 11(1)(a) (to provide evidence of a negative COVID-19 test before departure to, and if requested upon arrival in, Australia) applies to a person under paragraph 14(1)(d) or (e) (see Item 8 below). The intention of this provision is to provide an exception to enter Australia for a person, who was exposed to another person who has tested positive for COVID-19, if they, and any person who is accompanying them, are being evacuated from another country due to a medical emergency on an emergency medical evacuation flight.

Item 3 – Paragraph 11(2)(a)

Item 3 amends paragraph 11(2)(a) of the Emergency Requirements Determination to omit the words “that began 72 hours before the scheduled departure time of the relevant international flight” and substitute the words “of 3 days before the day the relevant international flight was scheduled to commence”.

Subsection 11(1) sets out that a person who is a passenger of an aircraft on a relevant international flight must not enter Australian territory at a landing place unless either:

- they have provided sufficient evidence that in the specified period they were tested for COVID-19 and returned a negative result:
 - before the person boarded the aircraft if requested by a member of the aircraft operator’s staff; and
 - at the landing place if requested by a relevant official; or
- one of the exemptions in sections 14, 15 or 16 of the Emergency Requirements Determination applies.

Subsection 11(2) sets out the specified period that a person must be tested within for the purposes of subsection 11(1). There are similar but separate requirements for connecting travellers.

The amendment to paragraph 11(2)(a) has the effect that a person, who was not a connecting traveller, who is a passenger of an aircraft on a relevant international flight, must not enter Australian territory at a landing place unless they have provided sufficient evidence that in the period of 3 days before the day the relevant international flight was scheduled to commence they were tested for COVID-19 and returned a negative result.

The intention of this amendment is to reduce the challenges associated with determining whether the time period in paragraph 11(2)(a) has been met, as some test results only state the date of the result, not the specific time.

Item 4 – Paragraph 11(2)(b)

Item 4 amends paragraph 11(2)(b) of the Emergency Requirements Determination to omit the words “the period that began 72 hours before the scheduled departure time of the person’s connecting flight (or, if the person undertook more than one connecting flight, the person’s first connecting flight)” and substitute “of 3 days before the day the person’s connecting flight (or, if the person undertook more than one connecting flight, the person’s first connecting flight) was scheduled to commence”.

Similar to and consistent with Item 3 above, the amendment to paragraph 11(2)(b) has the effect that a person who was a connecting traveller, who is a passenger of an aircraft on a relevant international flight, must not enter Australian territory at a landing place unless they have provided sufficient evidence that in the period of 3 days before the day of the relevant connecting flight (or first connecting flight if they undertook more than one connecting flight) was scheduled to commence, they were tested for COVID-19 and returned a negative result.

The intention of this amendment is to reduce the challenges associated with determining whether the time period in paragraph 11(2)(b) has been met, as some test results only state the date of the result, not the specific time.

Item 5 – Subsection 12(1)

Item 5 amends subsection 12(1) of the Emergency Requirements Determination to omit the words “72 hours” and substitutes the words “3 days”.

Section 12 of the Emergency Requirements Determination provides that the Director of Human Biosecurity may extend the period for being tested as mentioned in paragraph 11(1)(a) for a class of persons, if it is not reasonably practicable for that class of persons to be tested and receive test results within the specified period. Section 12 is being amended to align with the amendments introduced by Items 3 and 4, which amend the relevant time periods from 72 hours to 3 days.

Item 6 – Section 14

Item 6 inserts “(1)” before “An” at the start of section 14 of the Emergency Requirements Determination. This is a technical amendment to reflect that new subsections are being added to section 14 (see Item 8 below).

Item 7 – Paragraph 14(b)

Item 7 inserts the words “within 30 days before the day the relevant international flight was scheduled to commence” after the word “practitioner” in paragraph 14(b) of the Emergency Requirements Determination.

Section 14 of the Emergency Requirements Determination sets out that an exemption from the condition in paragraph 11(1)(a) applies to certain categories of persons as set out in the section. Paragraph 14(b) provides an exemption from the requirement to return a negative test in paragraph 11(1)(a) (detailed further in Item 3), which applies to a person who is carrying evidence, provided by a medical practitioner, that the person has a medical condition that prevents the person from taking a test for the coronavirus known as COVID- 19.

The amendment inserted by Item 7 imposes a timeframe (30 days) within which the relevant medical evidence must be obtained. The intention of the amendment is to ensure that the medical evidence is current for the person before their international flight commences, which

will assist Australia to appropriately manage the risk of COVID-19 entering Australian territory.

Item 8 – Paragraph 14(c)

Item 8 repeals paragraph 14(c) to remove the exemption for persons travelling from an established ‘safe travel zone’ from the condition in paragraph 11(1)(a), which requires a person to be tested for COVID-19 and return a negative result before entering Australia on a relevant international flight. It then substitutes new paragraphs 14(1)(c), (d) and (e) to section 14 of the Emergency Requirements Determination to provide further exemptions to the condition in paragraph 11(1)(a).

Item 8 also inserts new subsections 14(2) and (3) into section 14 to set out the full requirements for the exemptions in new paragraphs 14(1)(c), (d) and (e).

The repeal of paragraph 14(c) removes the exemption from the requirement in paragraph 11(1)(a) for a person who is a passenger of an aircraft on a relevant international flight that commenced in a country with which Australia has established a safe travel zone (which allows for quarantine-free travel to Australia). The effect of this provision is that all persons will need to provide evidence of a negative test before entering Australia, regardless of country of origin. The amendment reflects the risk that COVID-19 transmission is no longer limited in certain countries, and that vaccination and testing will become the main mechanism to manage public health risk as international travel resumes.

New paragraph 14(1)(c) provides that an exemption from the condition in paragraph 11(1)(a) applies to a person who is carrying a certificate, provided by a medical practitioner within 30 days before the day the relevant international flight was scheduled to commence, that includes the matters mentioned in new subsection 14(2) relating to a certificate for recovered persons.

New paragraph 14(1)(d) provides that an exemption from the condition in paragraph 11(1)(a) applies to a person who is a passenger of an aircraft on an international flight that is an emergency medical evacuation flight, and who meets the requirement mentioned in new subsection 14(3) relating to emergency medical evacuation flights.

New paragraph 14(1)(e) provides that an exemption from the condition in paragraph 11(1)(a) applies to a person who is a passenger of an aircraft on an international flight that is an emergency medical evacuation flight, and who is accompanying and supporting a person (the patient) mentioned in paragraph 14(1)(d) because of the patient’s medical condition.

New subsection 14(2) relevantly provides that, for the purposes of new paragraph 14(1)(c), the certificate mentioned in that paragraph must include the following:

- the day the certificate is provided;
- a statement to the effect that the person has had the coronavirus known as COVID-19 but is now recovered and is not considered to be infectious;
- the day when there was first a positive result of a PCR test for the coronavirus known as COVID-19 for the person; and
- a statement to the effect that, on the day the certificate is provided, it has been at least 14 days since the day that there was first a positive result of a PCR test for the coronavirus known as COVID-19 for the person and (if the person had symptoms of COVID-19) the person has not had a fever, or respiratory symptoms of the coronavirus known as COVID 19, in the last 72 hours.

The intention of new subsection 14(2) is to provide an exemption from the requirement to return a negative COVID-19 test to persons who, due to having contracted COVID-19 in the past, may return a positive COVID-19 test after their infectious period has passed due to the shedding of the virus.

New subsection 14(3) relevantly provides that, for the purposes of new subparagraph 14(1)(d)(ii), the requirement is that the person (or the person accompanying and supporting the person as mentioned in new paragraph 14(1)(e)) is carrying evidence provided by a medical practitioner that all the following apply:

- The person has a serious medical condition;
- The person requires emergency management or an effective treatment of the medical condition that:
 - is available in Australian territory; and
 - was not reasonably available, in time to benefit the person, in the country where the relevant flight commenced; and
 - if the person is a connecting traveller, was not reasonably available, in time to benefit the person, in the country where the person’s connecting flight commenced (or, if the person undertook more than one connecting flight, any of the countries where the connecting flights commenced);
- the lack of the management or treatment mentioned above caused an immediate exacerbation of the person’s medical condition and the need for the person to enter Australian territory within 48 hours.

The intention of new subsection 14(3) is to provide an exemption from the requirement to return a negative COVID 19 test to persons who are required to be evacuated from the country the emergency medical evacuation flight originates from due to the need for emergency management or effective treatment of a serious medical condition. This is a beneficial amendment to permit vulnerable persons to be able to obtain the health care they need in Australian territory.

Biosecurity (Human Coronavirus with Pandemic Potential) (Preventative Biosecurity Measures—Incoming International Flights) Determination 2021

Item 9 – Section 4 (definition of *Emergency Requirements Determination*)

Item 9 amends the definition of the Emergency Requirements Determination in section 4 of the Preventative Biosecurity Measures Determination to omit the words “at the commencement of this instrument” and substitute the words “on 22 October 2021”.

Item 9 is a technical amendment to ensure that the terms and requirements set out in the Preventative Biosecurity Measures Determination incorporate by reference the updated requirements in the Emergency Requirements Determinations (as amended in Items 1 to 8 described above) at the time the Amending Determination commences.

Item 10 – Paragraph 9(2)(a)

Item 10 amends paragraph 9(2)(a) of the Preventative Biosecurity Measures Determination to omit the words “that began 72 hours before the scheduled departure time of the relevant international flight” and substitute the words “of 3 days before the day the relevant international flight was scheduled to commence”.

Subsection 9(1) sets out that a person who is a passenger of an aircraft on a relevant international flight must provide sufficient evidence that in the specified period they were tested for COVID-19 and returned a negative result:

- before the person boarded the aircraft if requested by a member of the aircraft operator’s staff; and
- at the landing place if requested by a relevant official.

Subsection 9(2) sets out the specified period that a person must be tested and receive a negative result in for the purposes of subsection 9(1). There are similar but separate requirements for persons who were not connecting travellers, and persons who were connecting travellers.

The amendment to paragraph 9(2)(a) has the effect that a person who was not a connecting traveller, who is a passenger of an aircraft on a relevant international flight, must provide sufficient evidence that, in the period of 3 days before the day the relevant international flight was scheduled to commence, they were tested for COVID-19 and returned a negative result.

The intention of this amendment is to reduce the challenges associated with determining whether the time period in paragraph 9(2)(a) has been met, as some test results only state the date of the result, not the specific time.

Item 11 – Paragraph 9(2)(b)

Item 11 amends paragraph 9(2)(b) of the Preventative Biosecurity Measures Determination to omit the words “that began 72 hours before the scheduled departure time of the person’s connecting flight (or, if the person undertakes more than one connecting flight, the person’s first connecting flight)” and substitute “of 3 days before the day the person’s connecting flight (or, if the person undertook more than one connecting flight, the person’s first connecting flight) was scheduled to commence”.

Similar to and consistent with Item 10 above, the amendment to paragraph 9(2)(b) has the effect that a person who was a connecting traveller, who is a passenger of an aircraft on a relevant international flight, must provide sufficient evidence that in the period of 3 days before the day of the relevant connecting flight (or first connecting flight if they undertook more than one connecting flight) was scheduled to commence, they were tested for COVID-19 and returned a negative result.

The intention of this amendment is to reduce the challenges associated with determining whether the time period in paragraph 9(2)(b) has been met, as some test results only state the date of the result, not the specific time.