

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021

Purpose

The *Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021* (the Amendment Determination) amends the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (the Determination). The Determination prevents Australian citizens and permanent residents from leaving Australian territory unless an exemption applies. The Amendment Determination also makes a consequential amendment to the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2020* to update the definition of the Overseas Travel Ban Determination, as amended, by specifying it as the instrument that is in force on 1 November 2021.

The Amendment Determination amends the Determination to include an automatic exemption for fully vaccinated Australian citizens and permanent residents to depart Australian territory, provided they meet the specified criteria. ‘Fully vaccinated’ means that a person has been vaccinated with a vaccine that is registered on the Australian Register of Therapeutic Goods or is recognised by Australia’s Therapeutic Goods Administration.

Other persons will still be able to be considered for travel under the exceptions contained within the Determination, and this includes persons unable to be vaccinated for medical reasons or for those under 12 years of age at the time that their scheduled flight is due to depart. The Amendment Determination also removes the need for exemptions for these two cohorts to be made in writing.

The Determination continues to play an important role in reducing the unnecessary and avoidable burden of COVID-19 on Australia’s public health and quarantine systems.

Advice from the Director of Human Biosecurity (the Commonwealth Chief Medical Officer) is that fully vaccinated persons travelling overseas pose less of a risk to Australia’s public health and quarantine systems than non-vaccinated persons, particularly because fully vaccinated travellers are less likely to be infected if exposed to COVID-19 and far less likely to develop severe disease than those who are unvaccinated.

The Minister for Health is satisfied the current Determination, as amended by the Amendment Determination, is necessary to continue to prevent or control the:

- potential spread of COVID-19 to other countries by non-vaccinated Australian citizens and permanent residents departing Australian territory; and
- further entry into, or the emergence, establishment or spread of COVID-19 into Australian territory or a part of Australian territory upon their return.

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

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 section 477 of the Act, determine emergency requirements the Minister is satisfied are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia. 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.

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 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.

Section 44 of the Biosecurity Act relevantly provides that the Minister may determine one or more requirements for individuals who are entering Australian territory at a landing place or port for the purpose of preventing a listed human disease from entering, or establishing itself or spreading in Australian territory.

Subsection 44(3) of the Biosecurity Act provides that a determination made under subsection 44(2) of the Biosecurity Act 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.

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 1 November 2021.

Consultation

The Department of Infrastructure, Transport, Regional Development and Communications; the Department of Home Affairs; the Australian Border Force; the Department of Foreign Affairs and Trade; the Attorney-General's Department and the Department of Prime Minister and Cabinet have been consulted on the Amendment Determination.

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021

Section 1 states that the name of this instrument is the *Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021*.

Section 2 provides that the instrument commences on 1 November 2021.

Section 3 provides that this instrument is made under subsections 44(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

Biosecurity (Entry Requirements – Human Coronavirus with Pandemic Potential) Determination 2020

Item 1 – Section 4

Item 1 amends the definition of *Overseas Travel Ban Determination* and omits the words “11 August” and substitutes the words “1 November”. This is a consequential amendment to update the definition of the Overseas Travel Ban Determination, as amended, by specifying it as the instrument that is in force on 1 November 2021.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020

Item 2 – Section 4

Item 2 amends section 4 of the Determination to insert a new definition for *accepted COVID-19 vaccine* to mean a vaccine that is registered on the Australian Register of Therapeutic Goods or that is recognised by Australia’s Therapeutic Goods Administration.

Item 3 – Section 4

Item 3 repeals the definitions of *Australian Border Force* and *Australian Border Force employee* in section 4 of the Determination.

Item 4 – Section 4

Item 3 amends section 4 of the Determination to insert two new definitions for *Home Affairs employee* and *Therapeutic Goods Administration*.

The intention is to broaden the category of persons who will be able to check travellers’ vaccine certificates under the new subsection 6(4) and grant exemptions for exceptional circumstances under section 7, to minimise the administrative burden on the Australian Border Force and its employees.

Item 5 – At the end of section 6

Item 5 adds a new subsection 6(4) in the Determination. New subsection 6(4) provides a new automatic exception to the requirements in section 5 that a person can leave Australian territory as a passenger on an outgoing aircraft or vessel if that person has received all required COVID-19 vaccinations with a vaccine that is registered on the Australian Register of Therapeutic Goods or recognised by the Therapeutic Goods Administration (for example, the person has received the required two doses of the Pfizer vaccination).

New subsection 6(4) also requires the person to have been fully vaccinated at least 7 days before the day the person’s flight or voyage of the outgoing aircraft or vessel is scheduled to depart Australian territory.

The person departing Australian territory must carry proof of being fully vaccinated, and present this proof to an employee of the Australian Government Department of Home Affairs, if requested to do so by the Home Affairs employee, or to a staff member of the aircraft or vessel if requested by them.

Item 6 – Subsection 7(1)

Item 6 amends subsection 7(1) of the Determination to omit the words “Australian Border Force employee” and substitute the words “a Home Affairs employee”.

Item 7 – At the end of section 7

Item 7 adds new subsections 7(4) and 7(5) in the Determination. New subsection 7(4) provides that if an exemption is granted to a person who is under the age of 12 on the day of the flight or voyage of the outgoing aircraft or vessel is scheduled to commence, it does not need to be made in writing.

New subsection 7(5) provides an exception to the requirements in subsection 7(3) for an exemption to be made in writing for a person who is registered on the Australian Immunisation Register and who has a medical contraindication to COVID-19 vaccines. The person must be carrying evidence of their medical contraindication to COVID-19 vaccines and present this to an employee of the Australian Government Department of Home Affairs if requested to do so.

New subsection 7(5) includes a note to refer to paragraph 9(c)(ii) of the *Australian Immunisation Register Act 2015* in relation to persons who are medically contraindicated.