

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020

Subsection 477(1) of the Biosecurity Act 2015 (**the Act**) provides that during a human biosecurity emergency period the Health Minister may determine any requirement that he or she is satisfied is necessary:

- to prevent or control the entry, emergence, establishment or spread of a listed human disease in Australian territory; or
- to prevent or control the spread of the listed human disease to another country; or
- to give effect to a recommendation made to the Health Minister by the World Health Organization (WHO) under Part III of the International Health Regulations.

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 Act, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential Declaration 2020)*). The Declaration is in force for 3 months and ceases on 17 June 2020, unless this timeframe is extended by the Governor-General.

There is growing public concern that protective gear and disinfectants are not reaching those with the greatest need, as a small number of individuals continue to purchase these goods in large quantities from retailers with the intention of re-selling them at extortionate prices (a practice known as ‘price gouging’) or sending them offshore. This practice prevents these goods from reaching the individuals who need them the most, including essential service providers such as front-line health professionals and law enforcement, whose services are vital to preventing or controlling the spread of COVID-19 and who frequently deal with individuals who carry a high risk of transmitting the virus.

In accordance with subsection 477(1) of the Act, the Health Minister has made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020* (the Determination), which prohibits the practice of price gouging and imposes requirements to ensure that those who breach relevant restrictions surrender these goods to law enforcement. Law Enforcement agencies will be required to redistribute the surrendered goods to the National Medical Stockpile (**the Stockpile**) provided they are not deficient.

A person who willingly fails to comply with the Determination may commit a criminal offence punishable by a maximum sentence of five years’ imprisonment, or 300 penalty units (\$63,000), or both.

This Determination is a legislative instrument, but is not subject to disallowance pursuant to subsection 477(2) of the Act.

The Director of Human Biosecurity (who is also the Commonwealth Chief Medical Officer) and the Secretary of the Department of Home Affairs have advised the Secretary of the

Department of Health, and the Health Minister is satisfied, that the Determination is necessary to prevent or control the spread of COVID-19 in Australian territory.

Before making an emergency requirement or giving a direction, the Health Minister must be satisfied that the requirement or direction:

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

In addition to being satisfied of the above effectiveness and proportionality matters, the Health Minister must also set a suitable period for the particular requirement to remain in force. This must be no longer than necessary, and at any rate cannot exceed the human biosecurity emergency period (which, under the Act, is limited to three months, unless this timeframe is extended by the Governor-General).

The effectiveness and proportionality of the Determination, and its period (applying for the duration of the human biosecurity emergency period) are supported by the Director of Human Biosecurity and the Secretary of the Department of Home Affairs.

Background

On 5 January 2020, the World Health Organization (**WHO**) notified Member States under the International Health Regulations (2005) (IHR) of an outbreak of pneumonia of unknown cause in Wuhan city, China. The pathogen is a novel (new) coronavirus. On 21 January 2020 'Human coronavirus with pandemic potential' became a 'listed human disease' by legislative instrument made by the Director of Human Biosecurity under the Act.

On 30 January 2020, the outbreak was declared by the WHO International Regulations Emergency Committee to constitute a Public Health Emergency of International Concern.

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

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

On 24 March 2020 the Prime Minister announced that the Commonwealth Government will take action to help prevent exploitative price gouging and exporting of products that are essential to preventing and controlling the spread of coronavirus, including face masks and hand sanitiser. The Prime Minister clarified that these measures will not be designed to affect normal consumer buying of goods, commercial imports and exports, or other appropriate bulk sales.

The export measure was partly enacted through the *Customs (Prohibited Exports) Amendment (COVID-19 Human Biosecurity Emergency) Regulations 2020* (**the Customs**

Amendment Regulations), which came into force on 30 March 2020 and implements a temporary prohibition on the non-commercial export of certain goods that contribute to controlling and preventing the spread of the COVID-19 virus.

Emergency requirements

The requirements that the Health Minister may determine include: requirements that apply to persons, goods or conveyances when entering or leaving specified places; requirements that restrict or prevent the movement of persons, goods or conveyances in or between specified places; and requirements for specified places to be evacuated (subsection 477(3)).

These emergency powers may override any Commonwealth, state or territory law (subsections 477(5) and 478(4)) although state and territory officials cannot be directed without agreement (subsection 478(5)). Biosecurity measures under a human biosecurity control order may continue to be imposed on an individual basis (subsections 477(6) and 478(6)).

The Australian Government has established protocols for the exercise of emergency powers under the Act to ensure that the emergency powers are only used where necessary to protect the health of Australians, based on expert advice and following appropriate consultation.

To ensure that the Determination is in place to address emergency human biosecurity risk, Parts 1 and 2 of the Determination, any anything in the Determination not elsewhere covered by the table in Section 2 of the Determination commence the day after the Determination is registered. Part 3 of the Determination commences on the later of the day after the Determination is registered and the day the Customs Amendment Regulations commence. As the Customs Amendment Regulations commenced on 30 March 2020, Part 3 also commences the day after this instrument is registered.

Consultation

The Determination is supported by advice from the Director of Human Biosecurity and the Secretary of the Department of Home Affairs.

The Treasury, Department of Foreign Affairs and Trade, Attorney-General's Department, Australian Border Force, Australian Federal Police, Department of Home Affairs and the Department of Health were also consulted in relation to the Determination.

The Determination is a non-disallowable legislative instrument under the *Legislation Act 2003*. The Act provides for the requirement to be non-disallowable to ensure that the Commonwealth is able to take the urgent action necessary to manage a nationally significant threat or harm to Australia's human health.

A provision by provision description of the requirements in the instrument is contained in the Attachment.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020

Part 1 – Preliminary

Section 1 – Name

This section provides that the title of this instrument is the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020*.

Section 2 – Commencement

Subsection 2(1) provides that Parts 1 and 2 of this instrument, and anything in this instrument not elsewhere covered by the table in this subsection, commences, or is taken to have commenced, the day after the instrument is registered.

Subsection 2(1) also provides that Part 3 of this instrument commences, or is taken to have commenced, on the later of: the day after this instrument is registered; and the day the *Customs (Prohibited Exports) Amendment (COVID-19 Human Biosecurity Emergency) Regulations 2020 (the Customs Amendment Regulations)* commence. As the Customs Amendment Regulations commenced on 30 March 2020, Part 3 will also commence the day after this instrument is registered.

Section 3 – Authority

This section provides that this instrument is made under subsection 477(1) of the *Biosecurity Act 2015 (the Act)*.

Section 4 – Definitions

This section lists / provides definitions for the following terms in this instrument:

‘COVID-19 human biosecurity emergency period’ means a human biosecurity emergency period if the declaration listed human disease in relation to the period is human coronavirus with pandemic potential.

‘Essential goods’ is defined by subsection 5(5) of the instrument to include any of the following equipment that, when worn, is capable of limiting the transmission of organisms to humans: disposable face masks, disposable gloves, disposable gowns, goggles, glasses or eye visors. ‘Essential goods’ also includes any of the following disinfectant products: alcohol wipes or hand sanitizer.

‘Law enforcement officer’ means the Commissioner of the Australian Federal Police; or a Deputy Commissioner of the Australian Federal Police; or a member of the Australian

Federal Police; or a special member of the Australian Federal Police; (all within the meaning of the *Australian Federal Police Act 1979*). This term is relevant to the enforcement of price gouging measures in Part 2 of this instrument.

‘Price gouging’ is defined by subsection 5(2) of this instrument, while retail transaction is defined by subsection 5(3).

The note to this section provides that a number of expressions in this instrument are defined in the Act, including the following:

- ‘Declaration listed human disease’ – in relation to a human biosecurity emergency declaration and a human biosecurity emergency period, means the listed human disease specified under paragraph 475(3)(a) of the Act in the human biosecurity emergency declaration that specifies the human biosecurity emergency period.
- ‘Human biosecurity emergency period’ – means the period specified under paragraph 475(3)(c) of the Act in a human biosecurity emergency declaration as the period during which the declaration is in force.
- ‘Officer of Customs’ – under section 4 of the Act, has the same meaning as the *Customs Act 1901* (**Customs Act**) which, at section 4, includes:
 - a. the Secretary of the Department; or
 - b. the Australian Border Force Commissioner (including in his or her capacity as the Comptroller-General of Customs); or
 - c. an APS employee in the Department; or
 - d. a person authorised under subsection 4(1B) to exercise all the powers and perform all the functions of an officer of Customs; or
 - e. a person who from time to time holds, occupies, or performs the duties of an office or position (whether or not in or for the Commonwealth) specified under subsection 4(1C), even if the office or position does not come into existence until after it is so specified; or
 - f. in relation to a provision of a Customs Act:
 - a person authorised under subsection 4(1D) to exercise the powers or perform the functions of an officer of Customs for the purposes of that provision; or
 - a person who from time to time holds, occupies, or performs the duties of an office or position (whether or not in or for the Commonwealth) specified under subsection 4(1E) in relation to that provision, even if the office or position does not come into existence until after it is so specified.

Part 2 – Price gouging

Section 5 – Requirement not to engage in price gouging in relation to essential goods

Subsection 5(1) provides that a person must not engage in ‘price gouging’ in relation to ‘essential goods’.

Subsection 5(2) provides that a person engages in price gouging in relation to essential goods if:

- a. the person supplies, or offers to supply, the goods during the COVID-19 human biosecurity emergency period; and
- b. the person purchased the goods in a retail transaction on or after 30 January 2020; and
- c. the value of the consideration for which the person supplies, or offers to supply, the goods is more than 120% of the value of the consideration for which the person purchased the goods.

Subsection 5(3) provides that, for the purposes of determining whether the person purchased the goods in a ‘retail transaction’, it is not relevant whether or not, at the time of purchase, the person intended to supply the goods, or offer to supply the goods. The term ‘retail transaction’ is otherwise intended to be interpreted according to its ordinary meaning, generally meaning transactions that are ‘consumer-facing’ rather than wholesale purchases made by a major supplier or a manufacturer of the goods.

The phrase ‘purchased the goods in a retail transaction’ ensures that the prohibition will apply to an individual who purchases goods directly from supermarkets, pharmacists, chemists or other retail stores (whether online or in person) on or after 30 January 2020 and sells them, or offers to sell them, during the relevant biosecurity emergency period at over 120% of the consideration of the value they purchased them for. This also ensures that entities that are integral to maintaining Australia’s supply chains for essential goods, including major suppliers (who generally purchase goods wholesale) and manufacturers of these goods, will not be bound by this prohibition.

30 January 2020 was the date that the World Health Organization declared a Public Health Emergency of International Concern and confining the offence to purchases made on or after this date ensures that this offence will only apply where purchases were made after the global nature of the virus was made clear by authorities, ensuring that it does not cover individuals who purchased goods before any awareness of the virus arose in Australia.

Subsection 5(4) provides that for the purposes of paragraph (2)(c), so much of the value of the consideration for which the person supplies, or offers to supply, the goods as is directly attributable to costs reasonably incurred by the person in transporting or delivering the goods should be disregarded. This ensures that small remote stores, who may purchase their goods at retail and transport them large distances, will not be negatively affected.

Subsection 5(5) defines ‘essential goods’ as any of the following equipment that, when worn, is capable of limiting the transmission of organisms to humans: disposable face masks,

disposable gloves, disposable gowns, goggles, glasses or eye visors. 'Essential goods' also includes any of the following disinfectant products: alcohol wipes or hand sanitizer.

These 'essential goods' are vital to preventing and controlling the spread of COVID-19 in Australia, ensuring that individuals lower their chances of transmitting or contracting the virus, and protecting vital services (including health workers, pharmacists and law enforcement) that are required to deal with individuals who carry a high risk of transmission.

Section 6 – Requirement not to engage in price gouging in relation to essential goods

Subsection 6(1) provides that, subject to section 7, a person must not dispose of, or deal with, essential goods if a law enforcement officer has notified the person of the following in writing, and this notice has not been withdrawn:

- the officer suspects on reasonable grounds that the person has engaged, is engaging or intends to engage in price gouging in relation to the goods; and
- the person is required not to dispose of, or deal with, the goods; and
- the notice will be withdrawn if the person satisfies a law enforcement officer on reasonable grounds that the person has not engaged, is not engaging and does not intend to engage in price gouging in relation to the goods.

Subsection 6(2) provides that, if a person has been notified as above in relation to essential goods, a law enforcement officer must withdraw the notice, in writing, if the officer is satisfied on reasonable grounds that the person has not engaged, is not engaging and does not intend to engage in price gouging in relation to the goods.

A person could satisfy an officer of this on reasonable grounds, for example, by providing a receipt, financial record of a transaction or other compelling information demonstrating that the consideration for the sale was less than 120% more than the value of consideration for the purchase, that the price can be justified with reference to transport or delivery prices or that the goods were purchased wholesale or were manufactured. Once the notice is withdrawn, the person will be permitted to dispose of, or deal with, these essential goods again.

Section 6 is intended to complement the requirement to surrender goods at section 7 of the instrument, ensuring that a person cannot frustrate these mechanisms by merely disposing of, or otherwise dealing with, the essential goods once receiving written notification from law enforcement.

Section 7 – Requirement to surrender essential goods

Subsection 7(1) provides that a person must surrender essential goods to a law enforcement officer if the officer notifies the person, in writing, that

- the officer suspects on reasonable grounds that the person has engaged, is engaging or intends to engage in price gouging in relation to the goods; and
- the person is required to surrender the goods to the officer; and

- the goods will be destroyed or given away after 21 days unless the person satisfies a law enforcement officer on reasonable grounds that the person has not engaged, is not engaging and does not intend to engage in price gouging in relation to the goods.

Subsection 7(2) provides that the requirements outlined in subsections (3) and (4) apply to a law enforcement officer where a person surrenders essential goods under subsection (1).

Subsection 7(3) requires a law enforcement officer to return the goods to the person as soon as practicable if:

- the officer is satisfied on reasonable grounds that the person has not engaged, is not engaging and does not intend to engage in price gouging in relation to the goods; and
- the goods have not been destroyed or given away under subsection 7(4).

This effectively gives a person 21 days from the date of surrender to provide information that they have not engaged in, and do not intend to engage in, price gouging. A person could satisfy an officer of this on reasonable grounds, for example, by providing a receipt, financial record of a transaction or other compelling information demonstrating that the consideration for the sale was less than 20% more than the value of consideration for the purchase, that the price can be justified with reference to transport or delivery prices, or that the goods were purchased wholesale or manufactured. Once goods have been returned, a person will be able to deal with these goods again.

Subsection 7(4) provides that a law enforcement officer must do the following as soon as practicable if, 21 days after the person surrenders the goods, the officer is not satisfied on reasonable grounds that the person has not engaged, is not engaging and does not intend to engage in price gouging in relation to the goods:

- destroy the goods if the officer believes on reasonable grounds that: the goods are defective; or there is a risk that the goods are defective and, because of that risk, the goods should not be used; or
- otherwise – give the goods to the National Medical Stockpile.

The words ‘as soon as practicable’ acknowledge that law enforcement officers will be required to perform a significant number of other responsibilities during the COVID-19 crisis, and allows these officers to delay returning, destroying or redistributing these goods if there are higher priority tasks.

The Stockpile is a strategic reserve of drugs, vaccines, antidotes and protective equipment for use in the national response to a public health emergency and is intended to supplement holdings of drugs and protective equipment held by state and territory health authorities to support continuity of service provision. The Secretary of the Department of Health and the Chief Medical Officer of Australia have authority to approve a Stockpile deployment on request from state or territory authorities.

The Stockpile is therefore ideally placed to ensure that any disinfectants and protective gear surrendered under the requirement can be sent to authorities with the highest need for these products, including health workers, pharmacists, and government agencies dealing with individuals who carry a high risk of transmission. These entities provide services that are essential to preventing and controlling the further spread of COVID-19 in Australia, and

diverting disinfectants and protective equipment to these vital personnel is likely to contribute to slowing the spread of this virus.

Part 3 – Essential goods in the possession of officers of Customs

The Customs Amendment Regulations will not operate to allow forfeiture of ‘essential goods’ currently held by customs officers as they will only operate from 30 March 2020. This means that customs officers do not currently have the power to seize and redistribute goods that were in a Customs place at the time the Regulations came into effect.

From 30 March 2020 (the date that the Customs Amendment Regulations came into force), this section obliges a person who has attempted to export essential goods on or after 30 January 2020 (the date when the World Health Organization declared a Public Health Emergency of International Concern) and before 30 March 2020 to surrender these goods to an ‘officer of Customs’ who currently possesses them, if the person has been notified by the officer that they are required to surrender the goods.

Customs officers will then be required, as soon as practicable, to destroy the goods if they believe on reasonable grounds that they are defective or that they should not be used due to a risk they are defective, or otherwise to give the goods to the Stockpile.

Section 8 – Requirement to surrender essential goods

Subsection (1) states that this section applies if:

- a person attempted to export goods at a time occurring on or after 30 January 2020 and before the commencement of regulation 13GI of the *Customs (Prohibited Exports) Regulations 1958* (which occurred on 30 March 2020), and
- on the commencement of that regulation, the goods are in the possession of an officer of Customs and the exportation of the goods is prohibited under that regulation.

On 30 January 2020 the World Health Organization declared a Public Health Emergency of International Concern and confining the surrender mechanisms to attempted exports made on or after this date ensures that these mechanisms only apply to attempted exports made after the global nature of the virus was made clear by authorities.

Confining these mechanisms to attempted exports made before the commencement of regulation 13GI of the *Customs (Prohibited Exports) Regulations 1958* is appropriate as, after this regulation came into force, officers of Customs would instead use the seizure and forfeiture mechanisms under the *Customs Act 1901* in relation to these goods.

Applying this section only to the exportation of goods prohibited under regulation 13GI ensures that this measure only covers exploitative exports of ‘essential goods’. Regulation 13GI has been carefully structured to exempt legitimate exports. The regulation establishes an absolute prohibition on exports of ‘essential goods’ via post, but does not prohibit export via other means (such as courier services or cargo) to relatives for personal use, by manufacturers or established exporters of the product, by humanitarian organisations or

agencies for non-commercial purposes or by passengers and crew on aircrafts or ships that carry the good for personal use.

Subsection (2) provides that the person must surrender the goods to an officer of Customs if the officer notifies the person, in writing, that the person is required to surrender the goods to the officer.

Subsection (3) provides that, where the person surrenders the goods under subsection (2), an officer of Customs must do the following as soon as practicable:

- destroy the goods if the officer believes on reasonable grounds that: the goods are defective; or there is a risk that the goods are defective and, because of that risk, the goods should not be used; or
- otherwise – give the goods to the National Medical Stockpile.

The words ‘as soon as practicable’ acknowledge that officers of Customs will be required to perform a significant number of other responsibilities during the COVID-19 crisis, and allows these officers to delay destroying or redistributing these goods if there are higher priority tasks.

The Stockpile is a strategic reserve of drugs, vaccines, antidotes and protective equipment for use in the national response to a public health emergency and is intended to supplement holdings of drugs and protective equipment held by state and territory health authorities to support continuity of service provision. The Secretary of the Department of Health and the Chief Medical Officer of Australia have authority to approve a Stockpile deployment on request from state or territory authorities.

The Stockpile is therefore ideally placed to ensure that any disinfectants and protective gear surrendered under the requirement can be sent to authorities with the highest need for these products, including health workers, pharmacists, and government agencies dealing with individuals who carry a high risk of transmission. These entities provide services that are essential to preventing and controlling the further spread of COVID-19 in Australia, and diverting disinfectants and protective equipment to these vital personnel is likely to contribute to slowing the spread of this virus.