

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021

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

- to prevent or control the entry into, or the emergence, establishment or spread of a listed human disease in Australian territory or a part of Australian territory;
- 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 (2005)* (IHR) in relation to the listed human disease.

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).

The human biosecurity emergency period is currently in force until 17 September 2021, and can be extended under the Act.

Purpose

The *Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021* (the Amendment Determination) amends the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Overseas Travel Ban Determination). The Overseas Travel Ban 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 11 August 2021.

The Amendment Determination will remove the automatic exemption for Australian citizens and permanent residents ordinarily resident in a country other than Australia, such that a person will no longer be able to rely on an automatic exemption to travel overseas where they ordinarily reside in a country other than Australia. However, in exceptional circumstances, the Australian Border Force (ABF) Commissioner or an ABF employee may grant an exemption to an Australian citizen or a permanent resident, or an operator of an outgoing aircraft or vessel from the requirement not to travel outside Australian territory. The person will be required to demonstrate that they have a compelling reason for needing to leave Australian territory.

The automatic exemption in the Overseas Travel Ban Determination was designed to enable Australian citizens and permanent residents ordinarily residing in a country other than Australia to leave Australian territory to return to their ordinary place of residence. Since the commencement of the Overseas Travel Ban Determination in March 2020, those persons who fall into this category have had substantial time in which to take action under the exemption.

The exemption was not intended to enable frequent travel between countries. Further, as repatriation flights continue, it will be critical to manage the numbers of people leaving Australia with the intention of returning in the near future to ensure flight and quarantine availability is prioritised for individuals who have been stranded overseas for some time. The amendment will reduce the pressure on Australia's quarantine capacity, reduce the risks posed to the Australian population from COVID-19, and assist in returning vulnerable Australians back home.

Advice from the Director of Human Biosecurity (who is also the Commonwealth Chief Medical Officer) supports the ongoing need for the Determination to help protect the quarantine system and reducing opportunities for cases of COVID-19 within quarantine to spread into the community, which is a critical intervention in preventing and managing the spread of COVID-19 in Australia.

The Minister for Health is satisfied that the Determination, as amended by the Amendment Determination, is necessary to continue to prevent or control the further entry into, or the emergence, establishment or spread of COVID-19 into Australian territory or a part of Australian territory.

The Minister for Health is also satisfied, that the amendment is:

- likely to be effective in, or contribute to, achieving its purpose
- appropriate and adapted to its purpose
- no more restrictive or intrusive than required in the circumstances, including the manner in which the requirement is to be applied, and
- only in place for as long as necessary.

The Minister for Health makes emergency requirements or gives directions personally (section 474 of the Act).

The Amendment Determination commences on 11 August 2021. The Determination as amended remains in force for the duration of the human biosecurity emergency period, unless it is revoked earlier.

Subsection 477(2) of the Act provides that a determination made under subsection 477(1) is a legislative instrument, but also provides that section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination. The 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.

Background

On 5 January 2020, the WHO notified Member States under the IHR 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' by legislative instrument made by the Director of Human Biosecurity. 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, the WHO announced that the International Committee on Taxonomy of Viruses named the pathogen virus ‘severe acute respiratory syndrome coronavirus (SARS-CoV-2)’. The international name given by 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.

Emergency requirements and directions

An emergency requirement is a non-disallowable legislative instrument (subsection 477(2) of the Act). The Act provides for the Determination 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.

The requirements that the Minister for Health may determine under section 477 of the Act include, but are not limited to: 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)).

Requirements determined under subsection 477(1) apply despite any provision of any other Australian law (subsection 477(5)), with the potential consequence that a person who acts in accordance with a requirement may be protected from criminal liability that would otherwise attach to a person’s required actions under State, Territory or Commonwealth law.

A person who fails to comply with a requirement determined under section 477 of the Act may commit a criminal offence (punishable by imprisonment for a maximum of 5 years, or 300 penalty units (\$66,600), or both) (subsection 479(3)).

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.

Consultation

The Department of Home Affairs, the Australian Border Force, the Department of Foreign Affairs and Trade, and the Department of Prime Minister and Cabinet have been consulted on the Amendment Determination.

A provision-by-provision description of the Amendment Determination is contained in the Attachment.

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021

Part 1 - Preliminary

1 Name

Item 1 provides that the instrument is the *Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021*.

2 Commencement

Item 2 provides that the instrument commences on 11 August 2021.

3 Authority

Item 3 provides that the instrument is made under subsection 477(1) of the *Biosecurity Act 2015*.

4 Schedules

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

Schedule 1—Amendments

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

1 Section 4 (definition of *Overseas Travel Ban Determination*)

Item 1 of Schedule 1 updates the definition of *Overseas Travel Ban Determination* to update the definition of the Overseas Travel Ban Determination, as amended, by specifying it as the instrument that is in force on 11 August 2021.

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

2 Paragraph 6(1)(a)

Item 2 of Schedule 1 repeals paragraph 6(1)(a).

The effect of the amendment is to remove the general exemption for a person (that is, an Australian citizen or permanent resident) ordinarily resident in a country other than Australia from the requirements of section 5 of the Determination.

A person who is ordinarily resident in a country other than Australia and to which the requirements in section 5 apply will be able to apply for an exemption under section 7 of the Determination from the requirements in exceptional circumstances.