

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2021

Purpose

The *Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2021* (Amendment Determination) amends the *Biosecurity (Emergency Requirements—High Risk Country Travel Pause) Determination (No. 2) 2021* (High Risk Country Travel Pause Determination), the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2021* (Vaccination Status Determination) and the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination (No. 2) 2021* (Travel History Determination).

The High Risk Country Travel Pause Determination requires passengers on a relevant international flight not to enter Australian territory at a landing place if the person has been in an Omicron high risk country (Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, Seychelles, South Africa and Zimbabwe) within 14 days of the day the flight was scheduled to commence, unless an exemption set out in section 7 applies to the person.

The Amendment Determination amends the definition of Omicron high risk countries to remove the Seychelles, as there are no cases of the Omicron variant of COVID-19 in accordance with public health advice.

The Amendment Determination also makes technical and operational amendments to the Vaccination Status Determination and Travel History Determination.

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

Authority

High Risk Country Travel Pause Determination

During a human biosecurity emergency period, the Health Minister may, in accordance with section 477 of the *Biosecurity Act 2015* (Biosecurity Act), determine emergency requirements they are 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.

Subsection 477(1) of the Biosecurity 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 of the declaration listed human disease into Australian territory or a part of Australian territory, or the emergence,

- establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory; or
- Prevent or control the spread of the declaration listed human disease to another country; or
 - Give effect to a recommendation that has been made to the Health Minister by the World Health Organization under Part III of the International Health Regulations in relation to the declaration listed human disease.

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. 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.

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

Vaccination Status Determination and Travel History Determination

Subsections 44(1) and 44(2) of the *Biosecurity Act 2015* (the Biosecurity Act) relevantly provide that the Health 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 or a part of Australian territory.

Subsection 44(3) of the Biosecurity Act provides that a determination made under subsection 44(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 set out appropriate requirements to prevent a listed human disease that could threaten or harm human health from entering, establishing or spreading in Australia, as it would create uncertainty as to whether the instrument might be disallowed.

Subsection 44(5) of the Biosecurity Act sets out that a section 44 determination may specify:

- requirements for all individuals, or classes of individuals; and
- specific requirements in relation to specified listed human diseases; and
- general requirements in relation to listed human diseases generally; and
- requirements relating to the manner in which an individual must comply with a requirement.

Subsection 44(6) of the Biosecurity Act provides that a section 44 determination may specify one or more requirements relating to, among other matters, a requirement for an individual to provide a declaration as to whether the individual has received a specified vaccination within a specified previous period or evidence that the individual has received a specified vaccination within a specified previous period, and where the individual has been before entering Australian territory.

If a person fails to comply with the new entry requirements, they may contravene a civil penalty provision in the Biosecurity Act. Additionally, if a person provides false or misleading information or documents regarding entry requirements, they may commit an offence under the Criminal Code or contravene a civil penalty provision in the Biosecurity Act.

Background

On 5 January 2020, the World Health Organisation (WHO) notified Member States under the *International Health Regulations* (2005) (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.

On 18 March 2020, the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease ‘human coronavirus with pandemic potential’ (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 (unless extended).

COVID-19 has entered Australia and 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 27 November 2021, the WHO announced a new COVID-19 variant of concern: B.1.1.529 (‘Omicron’). Public health measures have been put in place in Australia and around the world to address this new variant of concern.

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 shall be 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.

Commencement

Sections 1 to 4 of the Amendment Determination and anything in the instrument not elsewhere covered by the commencement information table commences immediately after the instrument is registered. Schedule 1 of the Amendment Determination commences immediately after the instrument is registered. Schedule 2 of the Amendment Determination commences the day after the instrument is registered.

Consultation

The Department of Home Affairs, the Department of Foreign Affairs & Trade, and the Department of Prime Minister & Cabinet were consulted in the preparation of the Amendment Determination.

Attachment

A provision by provision description of the Amendment Determination is set out in the Attachment.

Details of the *Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2021*

Section 1 provides that the name of the instrument is the *Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2021*.

Section 2 provides that the Amendment Determination provides for certain commencement dates. Sections 1 to 4 and anything in the instrument not elsewhere covered by the commencement information table commences immediately after the instrument is registered. Schedule 1 commences immediately after the instrument is registered. Schedule 2 commences the day after the instrument is registered.

Section 3 states that the authority for making the Amendment Determination is subsections 44(2) and 477(1) of the Biosecurity Act.

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 commencing immediately after registration

Biosecurity (Emergency Requirements—High Risk Country Travel Pause Determination (No. 2) 2021

Item 1

Item 1 repeals paragraph (g) in section 4 to remove Seychelles from the definition of *Omicron high risk country*.

This means that persons who have only been in the Seychelles, or a country that is not an Omicron high risk country, within 14 days before the day their scheduled flight, are not covered by the High Risk Travel Ban, although they would still require a lawful basis to enter Australia under the *Migration Act 1958*.

Schedule 2—Amendments commencing day after registration

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2021

Item 1

Item 1 repeals subsection 5(2) and substitutes a new subsection. The new subsection requires that an individual must be able to produce, to a relevant official, evidence that, before the individual boarded the aircraft, the individual made a written statement using an electronic system maintained the Department of Home Affairs, or a paper form where exceptional circumstances prevented them using such a system. In the latter instance, this statement in paper form must be accompanied by a statement that the person was prevented from using such a system by exceptional

circumstances. A note has been added to subsection 5(2) to provide examples of such circumstances.

Item 2

Item 2 omits “2(a)” and substitutes “2(c)” in subsection 5(3) to reflect the numbering of the amended subsection 5(2) set out in Item 1.

Item 3

Item 3 repeals subsection 5(4). This is a consequential amendment to the amendments made to subsection 5(2) by Item 1. The manners in which a statement can be given under subsection 5(2) is now addressed in the amended version of that subsection set out in Item 1.

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination (No. 2) 2021

Item 4

Item 4 repeals subsection 5(2) (including the note), and substitutes a new subsection. The new subsection requires that an individual must be able to produce, to a relevant official, evidence that, before the individual boarded the aircraft, the individual made a written statement using an electronic system maintained the Department of Home Affairs, or a paper form where exceptional circumstances prevented them using such a system. In the latter instance, this statement in paper form must be accompanied by a statement that the person was prevented from using such a system by exceptional circumstances. The note in subsection 5(2) provides examples of such exceptions.

Subsection 5(2) has also been amended to clarify that the written statement required under subsection 5(2) includes a declaration setting out an individual’s ‘international’ travel history for the 14 days before the day that the relevant incoming international flight was scheduled to commence.