

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2022

Purpose

This explanatory statement is for the *Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2022* (the “Determination”).

The Determination makes a number of amendments to the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022*; the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Incoming International Flights) Determination 2021*; and the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020*. This Determination also repeals the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2020*.

The *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022* made under s44(2) of the Biosecurity Act contains a number of requirements for incoming passengers, including passenger statements which include, among other matters, the persons’ international travel history for the 14 days before the day their international flight was scheduled to commence and a declaration about their vaccination status. The determination also includes a requirement for a statement from crew which includes a declaration that in the 3 days before the day the relevant international flight was scheduled to commence, the individual had not been exposed, without adequate personal protective precautions, to a person who tested positive for the coronavirus known as COVID-19 in that period. The determination also sets out entry requirements for passengers to produce evidence of a negative test result for COVID-19 in the relevant period before a relevant international flight.

The Determination makes a number of amendments to the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022*, including: (i) amending the exposure related requirements for crew to be a requirement for crew to attest that, in the 3 days prior to the commencement of the relevant international flight, they have not been exposed to a person who has tested positive to COVID-19 without wearing appropriate personal protective gear; and ii) amending the language in the pre-departure vaccination requirements to clarify that it is sufficient for a person to have received a course of vaccinations with one or more accepted COVID-19 vaccines in accordance with a schedule for receiving that course of vaccinations that is accepted by the Therapeutic Goods Administration, regardless of whether the individual has also received a booster dose of an accepted COVID-19 vaccine.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Incoming International Flights) Determination 2021* made under s477(1) of the Biosecurity Act sets out requirements for a person not to enter Australian territory unless (amongst other matters) they have met the relevant requirements for wearing suitable face masks or face coverings, not being exposed to persons who have tested positive for COVID-19, and returning a negative test for COVID-19 within the 3 days prior to boarding a relevant international flight. The Determination amends section 14(2)(d)(i) of the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Incoming International Flights) Determination 2021* to align it with the requirement contained in sub-paragraph 14(2)(d)(i) of the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022*.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* made under s477(1) of the Biosecurity Act sets out requirements relating to the prohibition on Australian citizens or permanent residents travelling outside Australian territory, unless an exemption applies. The Determination removes the exemption relating to travel to New Zealand, as there is no longer any public health basis for providing this exemption, in the context of the gradual re-opening of Australia's borders.

The Determination also amends the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* to align with the pre-departure vaccination requirements in the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022*.

The Determination also amends the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* to make it clear that the exemption from the prohibition on travel outside Australian territory applies to persons who have received a course of vaccinations in accordance with a schedule for receiving those vaccines that is accepted by the Therapeutic Goods Administration (TGA), regardless of whether it is a course of the same COVID-19 vaccinations, or a combination of different COVID-19 vaccinations.

The *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2020* made under s44(2) of the Act, sets out certain requirements for individuals who are arriving in Australia from New Zealand, and who are not subject to mandatory hotel quarantine on arrival, to provide contact tracing information, health screening information and to declare their travel history in the 14 days before arrival. The Determination repeals the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2020*, on the basis that it is no longer necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 within Australian territory.

The Director of Human Biosecurity (who is also the Commonwealth Chief Medical Officer) has advised the Health Minister, and the Health Minister is satisfied, that

these requirements are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in the designated areas, and in Australian territory more broadly.

The Director of Human Biosecurity has advised the Health Minister, and the Health Minister is satisfied, that these requirements:

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

The *Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2022* is a legislative instrument for the purposes of the *Legislation Act 2003*.

Authority

Section 44 of the Biosecurity Act

Subsections 44(1) and 44(2) of 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 the importance of the public health measures. In the circumstances of the Determination, disallowance of the entry requirements would remove safeguards that aim to minimise the risk of COVID 19 (particularly new variants) entering, emerging, establishing or spreading in Australia.

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 either 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.

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.

Section 477 of the Biosecurity Act

During a human biosecurity emergency period, the Health Minister may, in accordance with section 477 of the Biosecurity Act, determine emergency requirements that 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.

These emergency requirements may override any Commonwealth, state or territory law (subsection 477(5) of the Biosecurity Act). Biosecurity measures under a human biosecurity control order may continue to be imposed on an individual basis (subsection 477(6) of the Biosecurity Act).

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.

Background

On 5 January 2020, the 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 April 2022 (unless extended).

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

On 22 December 2021, the Australian Health Protection Principal Committee provided a statement on the public health implications of the Omicron variant. These included that current medical evidence indicates the Omicron variant is substantially more transmissible than the Delta variant in populations with a high previous exposure to COVID-19 or high vaccination coverage, with most recent estimates demonstrating that the number of cases are doubling every 2-3 days.

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

The *Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2022* will commence the day after the instrument is registered on the Federal Register.

Consultation

The Department of Home Affairs, and the Department of Foreign Affairs and Trade were consulted.

Details of the Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2022

Part 1—Preliminary

Section 1 provides that the name of the Determination is the *Biosecurity Legislation Amendment (Emergency & Entry Requirements) Determination 2022*.

Section 2 provides that the Determination commences on the day after the instrument is registered.

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

Section 4 states 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 2022

Item 1

Item 1 replaces the words “of which of” with the words “of which one of” in subsection 6(6) to clarify the language.

Item 2

Item 2 inserts the following words after the word “Administration” “(whether or not the individual has also received a booster dose of an accepted COVID-19 vaccine)” in subparagraph 6(6)(a)(i). Section 6(6) deals with one of the matters to be covered in passenger statements, namely the passenger’s vaccination status. This amendment clarifies that a passenger is not required to declare they have received a booster vaccination in addition to a course of vaccinations in accordance with a schedule for receiving those vaccines accepted by the Therapeutic Goods Administration (TGA).

Item 3

Item 3 repeals subsections 7(2) to (4) and substitutes the following:

Ability to attest to non-exposure

- (2) The individual must be able to attest that in the 3 days before the day the relevant international flight was scheduled to commence, the individual had not been exposed, without adequate personal protective precautions, to a person who tested positive for COVID-19 in that period.

Attesting in writing on request

- (3) The individual must attest to the matter mentioned in subsection (2) in writing if a relevant official asks the individual to do so.

Subsections 7(2) to (4) deal with the requirement for individual crew to produce evidence of a statement made before boarding a relevant international flight that:

- (2) The individual must be able to produce, to a relevant official, evidence that, before the individual boarded the aircraft, the individual made a written statement:
 - (a) using an electronic system maintained by the Home Affairs Department; or
 - (b) if exceptional circumstances prevented the individual from using an electronic system maintained by the Home Affairs Department—in paper form;
that included:
 - (c) a declaration that in the 3 days before the day the relevant international flight was scheduled to commence, the individual had not been exposed, without adequate personal protective precautions, to a person who tested positive for COVID-19 in that period; and
 - (d) for a statement made in paper form—a declaration that exceptional circumstances prevented the individual from using an electronic system maintained by the Home Affairs Department.

Note: The following are examples of exceptional circumstances for paragraphs (2)(b) and (d):

- (a) the electronic system was not available to the individual;
- (b) the electronic system was not available to the individual in a language that the individual understands.

Providing statements made in paper form

- (3) If the individual made a statement as mentioned in subsection (2) in paper form, the individual must provide the statement to a relevant official.

Producing evidence of electronic statements on request

- (4) If the individual made a statement as mentioned in subsection (2) electronically, the individual must produce evidence that the individual made the statement if a relevant official asks the individual to do so.

New subsection 7(2) requires crew staff to attest that in the 3 days before the day the relevant international flight was scheduled to commence, the individual crew member had not been exposed, without adequate personal protective precautions, to a person who tested positive for COVID-19 in that period. New subsection 7(3) requires this attestation to be made in writing if requested by a relevant official. This amendment reduces the administrative burden of requiring crew to produce evidence of a statement made before boarding (including statements made in paper form) relating to these exposure related requirements, and also recognises that international air crew

are subject to a range of mitigation measures separate to those applied to passengers, including different on-arrival identification processes and visa classes.

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

Item 4

Item 4 amends subparagraph 14(2)(d)(i) by replacing “14” with “7”. Subsection 14(2) sets out the matters that are required to be included in a certificate (provided by a medical practitioner within 30 days before the day the relevant international flight was scheduled to commence) for an exemption under this section to apply, including the following:

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

The intention of 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. The amendment of 14 days to 7 days in subparagraph 14(2)(d)(i) ensures consistency with the identical requirements contained in section 14(2)(d)(i) in the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022*.

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

Item 5

Item 5 repeals subsections 6(2) and (3). Subsections 6(2) and (3) deal with an exemption from the requirement in section 5 for persons not to travel outside Australian territory. Subsection 6(2) provides an exemption for a person who:

- (a) is travelling directly to New Zealand; and
- (b) intends to travel from New Zealand only to return to Australia; and
- (c) has been only in either or both of Australia and New Zealand for at least 14 days immediately before the day the flight or voyage of the outgoing aircraft or vessel commences.

Subsection 6(3) provides an exemption for a person who:

- (a) is travelling directly to New Zealand; and
- (b) does not intend to return to Australia; and

(c) has been only in either or both of Australia and New Zealand for at least 14 days immediately before the day the flight or voyage of the outgoing aircraft or vessel commences.

These sections are repealed as they are no longer required in Australia's ongoing response to the COVID-19 pandemic, in a context where the outgoing travel ban has already been amended to permit vaccinated Australia citizens and permanent residents to travel overseas.

Item 6

Item 6 replaces the heading of subsection 6(4) from "*Fully vaccinated persons*" to "*Persons who have received an accepted course of vaccinations*". Section 6(4) deals with an exemption from the requirements of section 5, being the prohibition on travelling outside Australian territory. The change in heading is designed to avoid any confusion or uncertainty over the meaning of "fully vaccinated persons", and to make it clear that the exemption from the requirements in section 5 applies to persons who have received a course of vaccinations with an accepted COVID-19 vaccine in accordance with a schedule for receiving that vaccine that is accepted by the Therapeutic Goods Administration (TGA), regardless of whether the person has received a booster vaccination.

Item 7

Item 7 amends paragraph 6(4)(a) by replacing the words "an accepted COVID-19 vaccine in accordance with a schedule for receiving that vaccine", with the words "one or more accepted COVID-19 vaccines in accordance with a schedule for receiving that course of vaccinations". Section 6(4) provides an exemption to the requirements in section 5 (prohibiting travel outside Australian territory) applies to a person if:

- (a) the person has received a course of vaccinations with an accepted COVID-19 vaccine in accordance with a schedule for receiving that vaccine that is accepted by the Therapeutic Goods Administration; and
- (b) the person received the last vaccination in the course of vaccinations at least 7 days before the day the flight or voyage of the outgoing aircraft or vessel commences; and
- (c) the person is carrying evidence of the matters mentioned in paragraphs (a) and (b) and
- (d) the person shows the evidence mentioned in paragraph (c):
 - (i) to a Home Affairs employee if requested to do so by a Home Affairs employee; or
 - (ii) to a member of the staff of the operator of the aircraft or vessel if requested to do so by a member of the staff of the operator of the aircraft or vessel.

The amendment to 6(4)(a) is designed to make it clear that the exemption from the requirements in section 5 applies to persons who have received a course of vaccinations in accordance with a schedule for receiving those vaccines that is accepted by the Therapeutic Goods Administration (TGA), regardless of whether it is a course of the same COVID-19 vaccinations, or a combination of different COVID-

19 vaccinations, and regardless of whether the person has also received a booster vaccination. This amendment also ensures consistency with section 6(6)(a)(i) of the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022*.

Item 8

Item 8 amends paragraph 6(4)(a) to add after the word “Administration” the words “(whether or not the person has also received a booster dose of an accepted COVID-19 vaccine)”. This amendment is designed to make it clear that the exemption from the requirements in section 5 applies to persons who have received a course of vaccinations in accordance with a schedule for receiving those vaccines that is accepted by the Therapeutic Goods Administration (TGA), regardless of whether the person has also received a booster vaccination. This amendment also ensures paragraph 6(4)(a) is consistent with subparagraph 6(6)(a)(i) of the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2022*.

Schedule 2—Repeals

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

Item 1 provides that the whole of the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2020* will be repealed upon the commencement of the Determination.

This instrument is being repealed as it is no longer required in Australia’s ongoing public health response to the COVID-19 pandemic.