

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity (Entry Requirements – Human Coronavirus with Pandemic Potential) Determination 2023

Purpose

The Biosecurity (Entry Requirements – Human Coronavirus with Pandemic Potential) Determination 2023 (Entry Requirements Determination) imposes entry requirements on passengers to provide proof of a negative test for COVID-19 taken within a 48 hour period prior to boarding a flight that has commenced from the People’s Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory.

These requirements are intended to prevent or control the entry, emergence, establishment or spread of COVID-19 in an Australian territory or part of an Australian territory.

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

Authority

Entry Requirements Determination

Subsections 44(1) and 44(2) of the *Biosecurity Act 2015* (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 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 Entry Requirements 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 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 Act provides that a section 44 determination may specify one or more requirements relating to, among other matters, a requirement for an individual to be

screened (whether by requiring the individual to be screened by equipment, by providing a declaration, or in any other way).

If a person fails to comply with the entry requirements, they may contravene a civil penalty provision in the 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 Act.

Commencement

The Entry Requirements Determination will commence at the start of 5 January 2023.

Consultation

The Department has consulted with the Department of Prime Minister and Cabinet, the Department of Home Affairs, the Department of Education, Skills and Employment, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, and the Department of Foreign Affairs and Trade.

Other

A provision by provision description of the Entry Requirements Determination is contained in the Attachment.

Details of the Biosecurity (Entry Requirements – Human Coronavirus with Pandemic Potential) Determination 2023

Part 1—Preliminary

Section 1 provides that the name of the Entry Requirements Determination is the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023*.

Section 2 provides that the Entry Requirements Determination commences at the start of 5 January 2023.

Section 3 states that the authority for making the Entry Requirements Determination is subsection 44(2) of the Act.

Section 4 sets out the definitions used in the Entry Requirements Determination. A note to section 4 provides that a number of expressions used in the Entry Requirements Determination are defined in the Act including ‘Agriculture Department’, ‘Australian territory’, ‘landing place’ and ‘passenger’.

A reference to the ‘Act’ in the Entry Requirements Determination means the *Biosecurity Act 2015*.

The definition of ‘COVID-19’ means the coronavirus known as COVID-19.

The ‘Home Affairs Department’ means the Department administered by the Minister administering the *Australian Border Force Act 2015*.

A ‘Home Affairs SES employee’ means an SES employee in the Home Affairs Department (noting that SES employee has the same meaning as in the *Public Service Act 1999*).

A ‘NAAT test’ means a test that uses nucleic acid amplification technology as the testing method. A note to the definition provides examples of these tests, such as a polymerase chain reaction test, a transcription mediated amplification test or a loop-mediated isothermal amplification test. This does not include lateral flow tests (also known as rapid antigen tests).

A ‘relevant official’ for the Entry Requirements Determination means any one of the following:

- a biosecurity officer;
- a chief human biosecurity officer;
- a human biosecurity officer;
- an APS employee in the Agriculture Department;
- an APS employee in the Home Affairs Department.

An APS employee is defined in the *Public Service Act 1999*.

Part 2—Negative test requirements—passengers

Section 5 sets out what will be considered evidence of negative test results for the purposes of the Entry Requirements Determination.

Subsections 5(1) and (2) provides that section 5 applies to an individual who is entering Australian territory at a landing place (in accordance with Division 2 of Part 4 of Chapter 4 of the Act, relating to entry points for aircraft that intend to land in Australian territory) and as a passenger of an aircraft on a direct or indirect flight that has commenced from the People’s Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory, unless any of the following applies:

- an exemption set out in section 8 of the Entry Requirements Determination applies to the individual; or
- an exemption was granted to the individual under section 9 of the Entry Requirements Determination before the flight arrives in Australian territory; or
- an exemption granted under section 10 of the Entry Requirements Determination before the flight arrives in Australian territory applies to the individual; or
- an exemption was granted under section 11 for the flight before it arrives in Australian territory; or
- the flight is an Australian Government facilitated flight.

At paragraph 5(1)(c), a direct or indirect flight means a flight that originates in the People’s Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory, booked using the same Passenger Name Record (PNR). This means, section 5 will apply to flights booked using the same PNR, whether or not one or more flights occur within the same booking. For example, section 5 would apply to an originating flight from the People’s Republic of China that ends in Australian territory but goes via Singapore.

Subsection 5(3) provides that the individual must be able to produce, to a relevant official, evidence in the form specified in subsection 5(4), that in the period mentioned in subsection 5(6) the individual was tested for COVID-19 using a test specified in subsection 5(5) or a rapid antigen test conducted in accordance with subsection 5(7) and the result of the test was negative.

Subsection 5(4) provides that the evidence must be in the form of:

- for subparagraph 5(3)(a)(i) – the results of the test specified in subsection 5(5); or
- for subparagraph 5(3)(a)(ii) – a certificate provided by a medical practitioner that includes the matters specified in subsection 5(8).

Subsection 5(5) provides that, for the purposes of subparagraph 5(3)(a)(i), the following tests are specified:

- a NAAT test;
- a test approved under section 6 for a country or region, if the individual was in the country or region in the period mentioned in subsection 5(6) and the approval was in force at the beginning of that period.

Subsection 5(6) provides that, for the purposes of subsection 5(3) and subparagraph 5(5)(b)(i), the period for an individual to whom an exemption does not apply under section 7 is the period of 48 hours before the day the individual is scheduled to depart from the People’s Republic of China or the Special Administrative Region of Hong Kong or

Macau. The period for an individual to whom an extension applies under section 7 is the period specified in the extension.

Subsection 5(7) provides, for the purposes of subparagraph 5(3)(a)(ii), a rapid antigen test is conducted in accordance with this subsection if the specimen for the test is collected, and the test is carried out, by or under the supervision of a medical practitioner.

Subsection 5(8) provides, for the purposes of paragraph 5(4)(b), that the following matters are specified for a certificate for a rapid antigen test:

- the date and time of the test;
- the name of the individual tested;
- the type of test conducted;
- the brand and make of the test;
- that the specimen for the test was collected, and the test was carried out, by or under the supervision of a medical practitioner
- the result of the test;
- the signature of the medical practitioner providing the certificate.

Subsection 5(9) provides that the requirements in section 5 of the Entry Requirements Determination apply at the landing place. There are four notes under this subsection:

Note 1 to this subsection provides that an individual who fails to comply with a requirement that applies to the individual under this section may contravene a civil penalty provision (see section 46 of the Act).

Note 2 to this subsection provides that a person may commit an offence or contravene a civil penalty provision if the person provides false or misleading information or documents (see sections 137.1 and 137.2 of the *Criminal Code* and sections 532 and 533 of the Act).

Note 3 to this subsection notes that protections for children or incapable persons who are subject to the requirements in subsection (3) are set out in Subdivision B of Division 2 of Part 1 of Chapter 2 of the Act.

Note 4 to this subsection provides that Part 2 of Chapter 11 of the Act deals with confidentiality of personal information collected under the Act.

Section 6 sets out the circumstances in which tests other than NAAT tests may be approved.

Subsection 6(1) provides that for the purposes of paragraph 5(5)(b) the Director of Human Biosecurity may approve a kind of test for COVID-19 for a country or region (including the People's Republic of China or the Special Administrative Region of Hong Kong or Macau) if a NAAT test is not reasonably available in the country or region.

Subsection 6(2) provides that an approval under subsection 6(1) must be in writing.

Section 7 sets out when an extension of the period for testing, in which a person must return a negative COVID-19 test result, may be granted.

Subsection 7(1) provides that the Director of Human Biosecurity may extend the period for being tested as mentioned in paragraph 5(5)(b) for a class of individuals if it is not

reasonably practicable for that class of individuals to be tested and receive test results within a period of 48 hours.

Subsection 7(2) provides that an extension under subsection 7(1) must be in writing.

Section 8 sets out, for the purposes of section 5, general exemptions to the requirement to produce evidence of a negative test for COVID-19.

Subsection 8(1) sets out that an exemption for the purposes of section 5 applies in five circumstances set out in the subsection, which are described below. A person will not be required to 'apply' for such an exemption, provided they meet the relevant requirements set out in section 8.

An exemption applies to an individual who was less than 12 years old on the day the individual was scheduled to depart from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau.

An exemption applies to an individual who is carrying evidence, provided by a medical practitioner within 30 days before the day the individual was scheduled to depart from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau, that the individual has a medical condition that prevents the individual from taking a test for COVID-19.

An exemption applies to an individual who is carrying a certificate, provided by a medical practitioner within 30 days before the day the individual was scheduled to depart from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau, that includes the matters mentioned in subsection 8(2), regarding certificates for recovered individuals.

An exemption applies to an individual who is a passenger of an aircraft on a flight departing from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau that is an emergency medical evacuation flight and who meets the requirement mentioned in subsection 8(3).

An exemption applies to an individual who is a passenger of an aircraft on a flight departing from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau that is an emergency medical evacuation flight and who is accompanying and supporting an individual (the patient) mentioned in paragraph 8(1)(d) of the Entry Requirements Determination (described in the paragraph above) because of the patient's medical condition.

Subsection 8(2) provides that the matters that are required to be included in a certificate (provided by a medical practitioner within 30 days before the day the individual was scheduled to depart from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau for an exemption paragraph 8(1)(c) to apply) are 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 7 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 8(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.

Subsection 8(3) provides the requirement for an exemption to apply to an individual (referred to as the patient in this subsection), or an individual accompanying and supporting the patient, who is a passenger of an aircraft on a flight departing from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau that is an emergency medical evacuation flight.

The requirement is that the patient (or an individual accompanying and supporting the patient) is carrying evidence, provided by a medical practitioner, that:

- the patient has a serious medical condition; and
- the patient requires emergency management or an effective treatment of the medical condition that is available in Australian territory, and was not reasonably available, in time to benefit the patient, in the People's Republic of China or the Special Administrative Region of Hong Kong or Macau; and
- the lack of the management or treatment mentioned above caused an immediate exacerbation of the patient's medical condition and the need for the patient to enter Australian territory within 48 hours.

Section 9 sets out, for the purposes of section 5, when an exemption may be granted to an individual in relation to the requirement to produce evidence of a negative test for COVID-19.

Subsection 9(1) provides that a relevant official may grant an exemption for the purposes of section 5 to an individual in exceptional circumstances.

Subsection 9(2) provides that exceptional circumstances are demonstrated by the individual providing a compelling reason for not complying with requirement in subsection 5(3).

Subsection 9(3) provides that an exemption under subsection 9(1) must be in writing.

Section 10 sets out, for the purposes of section 5, when an exemption to the requirement to produce evidence of a negative test for COVID-19 may be granted to a class of individuals.

Subsection 10(1) provides that the Director of Human Biosecurity may grant an exemption for the purposes of section 5 to a class of individuals if no test for COVID-19 is reasonably available to that class of individuals.

Subsection 10(2) provides that an exemption under subsection 10(1) must be in writing.

Section 11 sets out, for the purposes of section 5, when an exemption to the requirement to produce evidence of a negative test for COVID-19 may be granted to a flight.

Subsection 11(1) provides that the Director of Human Biosecurity, a chief human biosecurity officer, a human biosecurity officer, or a Home Affairs SES employee may grant an exemption for the purposes of section 5 for a flight in exceptional circumstances.

Subsection 11(2) provides that an exemption made under subsection 11(1) must be in writing.