Agriculture Legislation Amendment (Streamlining Administration) Bill 2019

Claire Petrie
Law and Bills Digest Section

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House: Senate

Portfolio: Agriculture

Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at February 2020.
Purpose of the Bill
The purpose of the Agriculture Legislation Amendment (Streamlining Administration) Bill 2019 (the Bill) is to amend the Biosecurity Act 2015 (Cth) and the Imported Food Control Act 1992 (Cth) to enable computer programs to make decisions and exercise certain powers under those Acts.

Background
Automated decision-making
The term ‘automated system’ is broadly used to describe a computer system that automates significant parts, or all, of an administrative decision-making process.¹ Such systems are increasingly being used to automate Government decision-making to varying degrees.

In a 2004 report, the Administrative Review Council (ARC) considered the administrative law implications of computerised decision-making.² The ARC concluded that expert systems could assist in administrative decision-making, by potentially reducing inaccuracy and human prejudice in the interpretation and application of complex rules and policy and ‘providing the opportunity for making more accurate, consistent, efficient and transparent decisions’.³ However, the ARC also noted the potential risks which may arise, acknowledging that ‘the use of expert systems in administrative decision-making process is a developing area in which a mistake in the design or operation of such a system has the potential to affect many people’.⁴

The report identified 27 best-practice principles to ensure that decision-making undertaken with the assistance of automated systems was consistent with administrative law values of lawfulness, fairness, rationality, openness and efficiency. These principles included:

• expert systems that make a decision are generally suitable only for decisions involving non-discretionary elements—they should not automate the exercise of discretion
• the use of an expert system to make a decision should be legislatively sanctioned to ensure it is compatible with the legal principles of authorised decision making
• expert systems must be constructed to comply with administrative law standards and disclosure requirements, including requirements associated with giving reasons
• systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy
• systems should provide a comprehensive audit trail and
• agencies should have the capacity to conduct internal reviews of decisions where appropriate, and external reviews should be done manually in accordance with the relevant tribunal or court procedures and practices.⁵


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2. Administrative Review Council (ARC), Automated assistance in administrative decision making, Report to the Attorney-General, 46, ARC, Canberra, November 2004.
3. Ibid., pp. 9, 34–36.
4. Ibid., p. 48.
5. Ibid., pp. viii–xi.
Information Management Office, sought to guide the practical application of the ARC principles by Government agencies and departments.\(^6\)

The increased use of computerised decision-making by government agencies has generated concern and debate about the design of such systems, the circumstances in which they should be used, and the protections in place. Federal Court of Australia Justice Melissa Perry has highlighted potential implications of the use of pre-programmed systems in decision-making, particularly with regards to decision-maker discretion, noting:

> It is not difficult to envisage that the efficiencies which automated systems can achieve and the increasing demand for such efficiencies may overwhelm an appreciation of the value of achieving substantive justice for the individual. In turn this may have the consequence that rules-based laws and regulations are too readily substituted for discretions in order to facilitate the making of automated decisions in place of decisions by humans. The same risks exist with respect to decisions which ought properly to turn upon evaluative judgments. Legislative amendments directed towards facilitating greater automation by requiring the application of strict criteria in place of the exercise of a discretion or value-based judgment, should therefore be the subject of careful scrutiny ...\(^7\)

**Recent developments**

In April 2019, the Minister for Industry, Science and Technology released a discussion paper as part of a consultation into the Government’s approach to artificial intelligence (AI) ethics in Australia.\(^8\) The paper considered the use of AI in government decision-making and acknowledged that while automated decision systems can limit issues associated with human bias, due care must be taken with the data used by the systems and the ways they assess what is fair or safe. The paper noted:

> The number of decisions driven by AI will likely grow dramatically with the development and uptake of new technology. When used appropriately, automated decisions can protect privacy, reduce bias, improve replicability and expedite bureaucratic processes. Australia’s challenge lies in developing a framework and accompanying resources to aid responsible development and use of automated decision technologies.\(^9\)

Considering issues of transparency, accountability, delegation and liability, the paper concluded ‘existing legislation suggests that for government departments, automated decisions are suitable when there is a large volume of decisions to be made, based on relatively uniform, uncontested criteria’. It echoed earlier conclusions of the ARC that where discretion is required, automated systems ‘are best used only as a tool to assist human decision makers—or not used at all’.\(^10\)

In October 2019, the federal Government announced it would provide $31.8 million for the establishment of a research centre to investigate ‘responsible, ethical and inclusive’ automated decision-making. The Centre of Excellence for Automated Decision-Making and Society will be

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10. Ibid., p. 37.
based at RMIT University, with an additional $39.3 million in funding provided by academic and industry partner organisations from Australia, Europe, Asia and America.\footnote{11}{D Tehan (Minister for Education) and K Andrews (Minister for Industry, Science and Technology), \textit{Improving automated decision making}, media release, 9 October 2019; S Easton, ‘Way beyond robodebt: new $70m research centre to improve automated decision-making’, \textit{The Mandarin}, 14 October 2019.}

**Human rights and technology project**

As part of its current project examining human rights and technology, the Australian Human Rights Commission (AHRC) is considering the use of AI in decision-making, both in the public and private sectors. In a \textit{discussion paper} released in December 2019, the AHRC noted that the use of AI to make decisions, when properly deployed, can improve some forms of decision-making by making it ‘faster, more data-driven and efficient’. However, it also pointed to the ‘significant risks to human rights’, which vary according to the design of the system and the role, if any, of a human in the decision-making process.\footnote{12}{Australian Human Rights Commission (AHRC), \textit{Human rights and technology: discussion paper}, AHRC, Sydney, December 2019, p. 69.}

In the context of government decision-making and administrative law, the AHRC noted the ‘difficult, novel issues’ that arise, including the question of the reviewability of a ‘decision’ which is entirely made by a computer program.\footnote{13}{Ibid., p. 80.} The Commission noted that matters such as transparency, ‘explainability’ and liability, important for ensuring accountability in decision-making, also face technical, commercial and legal obstacles in the context of AI-informed decisions.\footnote{14}{Ibid., pp. 80–90.} Identifying a range of existing legislative provisions which enable the use of a computer program to support government decision-making in a range of areas, it suggested:

> The progress in AI-informed decision making since the early 2000s could not have been contemplated by lawmakers at that time. The possibility of full automation of AI-informed decision making, for example, is now a realistic prospect. This means that older legislation dealing with this issue should be reviewed. Technological development necessitates a new approach to ensure AI-informed decision making is accountable.\footnote{15}{Ibid., p. 91–92.}

The AHRC suggested that the use of AI-informed decision-making should be expressly provided for in law, with legal rules underpinning its use in each specific context.\footnote{16}{Ibid., pp. 91–92.} It also proposed a range of broader measures to support government use of AI, including:

- a requirement that the Government undertake a cost-benefit analysis and public consultation with affected groups before deploying an AI-informed decision-making system
- legislation to require that an individual is informed where AI is materially used in a decision that has a legal, or similarly significant, effect on their rights
- legislation providing for a person’s right to a non-technical explanation of an AI-informed decision (where they would be entitled to reasons for the decision if made by a human), as well as a technical explanation that can be assessed and validated by a person with relevant technical expertise, to enable the person to understand the basis of the decision and any grounds on which it should be challenged and
- legislation which creates a rebuttable presumption that the legal person who deploys an AI-informed decision-making system is liable for the use of the system.\footnote{17}{Ibid., pp. 80–90.}
The AHRC also proposed the Government engage the Australian Law Reform Commission to conduct an inquiry into the accountability of AI-informed decision-making, to consider reform or other change needed to protect the principle of legality and the rule of law, and promote human rights.\textsuperscript{18} The AHRC is currently undertaking further public consultation on the proposals and questions set out in its discussion paper, with a submission deadline of 10 March 2020.\textsuperscript{19} A final report is due in 2020.\textsuperscript{20}

**Agriculture and computerised decision-making**

Automated systems have been used in agricultural decision-making for some time. The 2004 ARC report noted the use of the Australian Quarantine and Inspection Service Import Management System (AIMS) to make decisions on whether imported commodities should be subject to inspection at the border and to provide advice on the appropriate tests to apply. The report also pointed to a number of other expert systems in use, including a Phyto Internet-Grains/Horticulture Expert System and Live Animal Exports System, used to make decisions to permit or reject an export under the *Export Control Act 1982*, and risk assessment tools such as the Ballast Water Decision Support System and Vessel Monitoring System.\textsuperscript{21}

The Agriculture Department currently uses a version of the AIMS (now the Agriculture Import Management System) to record and track goods that are imported into Australia and subject to quarantine and imported food restrictions. The system provides directions to manage biosecurity risks, records the Department’s decision-making process, and communicates this information to the importer or broker.\textsuperscript{22}

Another system in use is the **Biosecurity Import Conditions system** (BICON), launched in 2015, which provides Departmental staff and importers with details of the biosecurity import conditions for more than 20,000 plants, animals, minerals and biological products.\textsuperscript{23} In its 2016–17 Annual Report, the Department explained:

> Importers can apply, track and manage BICON import permits online through a registered user account. The system is also used to notify registered users when published conditions change, ensuring importers are aware of the most current import conditions.

Receiving more than 1.8 million unique web hits a month, and with more than 15,000 registered importers, BICON has made it much easier for importers to comply with their biosecurity obligations. We have calculated that this will lead to an annual saving of more than $26 million in compliance costs and regulatory burden.\textsuperscript{24}

\textsuperscript{17} Ibid., pp. 90–99.
\textsuperscript{18} Ibid., p. 91.
\textsuperscript{19} AHRC, ‘Consultation now open: Australian Human Rights Commission discussion paper on human rights and technology’, AHRC Human Rights and Technology website.
\textsuperscript{20} AHRC, ‘Human rights and technology—our work’, AHRC Human Rights and Technology website.
\textsuperscript{21} ARC, *Automated assistance in administrative decision making*, op. cit., p. 57.
Committee consideration

_Rural and Regional Affairs Committee_

The Senate Standing Committee on Rural and Regional Affairs and Transport issued its report on the Bill in January 2020. The Committee recommended the Bill be passed. It pointed to the benefits of automated decision making in the biosecurity context—including in allowing more efficient clearance processes and reducing the administrative burden on both importers and biosecurity officers—and concluded that the Bill provided a number of safeguards against any potential inappropriate use.

_Senate Standing Committee for the Scrutiny of Bills_

The Scrutiny of Bills Committee has not reported on the Bill at the time of writing.

Policy position of non-government parties/independents

No non-government parties or independents have commented on the Bill at the time of writing.

Position of major interest groups

The Queensland Department of Agriculture and Fisheries made a submission to the Senate inquiry. It expressed general support for the changes proposed by the Bill, and made a number of recommendations for addressing the possible biosecurity risks in the context of automated decision-making. These included the implementation of regular and frequent spot audits on automated decisions; not using automated decision making for high risk pathways; and recording or tracking the destination of high risk imported goods to enable trace-back to the source approval process.

No other interest groups or stakeholders appear to have commented on the Bill at the time of writing.

Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact on the federal Budget.

Statement of Compatibility with Human Rights

As required under Part 3 of the _Human Rights (Parliamentary Scrutiny) Act 2011_ (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.
Parliamentary Joint Committee on Human Rights
The Parliamentary Joint Committee on Human Rights has not reported on the Bill at the time of writing.

Key issues and provisions
The Bill proposes inserting provisions into the Biosecurity Act and Imported Food Control Act to provide an express statutory basis for the use of computer systems to make decisions. The Explanatory Memorandum suggests that automated decision-making in the context of Australia’s biosecurity system is crucial, as it:

• allows risk identification and management across a large number of goods and conveyances
• reduces the burden on importers by enabling fast, accurate clearance and
• provides flexibility in responding to existing and emerging risks.31

The Explanatory Memorandum further states that it is intended the principles set out by the ARC will be taken into account during implementation of the automated decision-making scheme, ‘to the extent consistent with maintaining biosecurity and food health and safety standards’.32 However, it suggests that there are circumstances in which expert systems may appropriately ‘fetter’ discretion, noting that most decisions in the biosecurity context:

... involve the application of detailed business rules where ordinarily the exercise of discretion is not expected by, and is not in the interest of, entities seeking fast and predictable clearance.33

Biosecurity Act
Currently, the Biosecurity Act provides for the use of automated systems in specific contexts—that is, for:

• the making of decisions regarding exemptions in relation to the discharge of ballast water34 and
• the issuing of a notice releasing goods and conveyances from biosecurity control.35

Item 1 inserts proposed section 541A into the Biosecurity Act. This provides the Director of Biosecurity (the person who is, or who is acting as, the Secretary of the Agriculture Department)36 with the power to arrange for the use of computer programs for any purposes for which a biosecurity officer may or must:

• make a decision under a relevant provision of the Act, as specified in a determination made under proposed subsection 541A(2) (discussed below)
• exercise a power or comply with an obligation related to the making of such a decision or
• do anything else relating to the making of such a decision, exercising such a power or complying with such an obligation.

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32. Ibid., p. 3.
33. Ibid., p. 3.
34. Biosecurity Act 2015 (Cth), subsections 280(6), (7).
35. Biosecurity Act, sections 163 (in relation to goods) and 219 (in relation to conveyances).
Which decisions?

Proposed subsection 541A(9) sets out the provisions of the Biosecurity Act which are relevant provisions for the purposes of computerised decision-making. These include:

- most provisions relating to the managing of biosecurity risks for goods under Chapter 3 of the Act—this could include, for example, decisions requiring goods to be destroyed, or moved or treated in a particular way, and decisions relating to the unloading of goods from an aircraft or vessel
- most provisions relating to the managing of biosecurity risks for conveyances under Chapter 4 of the Act—this could include, for example, decisions requiring a conveyance to be secured or moved to another place, or requiring biosecurity measures to be taken in respect of the conveyance
- provisions relating to the granting of pratique (that is, permission to land or enter a port, and to disembark and unload cargo) for an incoming aircraft or vessel which complies with certain requirements
- most provisions relating to the ballast water and sediment of vessels under Chapter 5 of the Act
- the granting of permission under section 557 to engage in conduct which would otherwise contravene the Act
- sections 600 and 602, which relate to the withholding of goods subject to an unpaid cost-recovery charge
- any provision of an instrument which is made under a relevant provision of the Act.

This captures a broad range of decisions which vary in terms of their complexity and the level of decision-maker discretion involved. However, in order for computer programs to be used to make decisions under any of these relevant provisions, proposed subsection 541A(2) provides that the Director of Biosecurity may first determine via legislative instrument that this can be done in relation to the specific provision. The Explanatory Memorandum states that it is intended that this instrument will specify decisions which are based on a technical and scientific identification of biosecurity risk, such as a direction to provide information or answer questions, require production of documents, or move goods. It further provides:

Decisions which require the written approval or consent of the Director of Biosecurity are not intended to be determined as decisions suitable for a computer program to decide. For example, a decision to require treatment of high value goods at subsection 133(1) of the Biosecurity Act or a direction to require the destruction of high value goods at section 136(1). 38

However, there is nothing in the text of the Bill which would prevent such matters being brought within the scope of the computerised decision-making powers.

The Director may also, by legislative instrument, determine the classes of persons that may use computer programs for this purpose and the conditions of use. 39 A legislative instrument made by the Director of Biosecurity will be subject to parliamentary disallowance.

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37. Biosecurity Act, subsections 49(4), (5); the requirements for the granting of pratique under section 49 are set out in the Biosecurity (Negative Practique) Instrument 2016 (Cth); also see: DOA, ‘Pratique’, DOA website, last reviewed 4 November 2019.
39. Biosecurity Act, proposed subsection 541A(2).
Obligations of the Director of Biosecurity

The Director of Biosecurity must take reasonable steps to ensure that decisions made by a computer program under proposed subsection 541A(1):

- are consistent with the objects of the Biosecurity Act; and
- are based on grounds on the basis of which a biosecurity officer could have made that decision.

The Director may delegate their powers and functions in relation to computerised decision-making to an SES employee or acting SES employee in the Agriculture Department. These powers and functions must not be sub-delegated.

Imported Food Control Act

The Imported Food Control Act provides for the inspection and testing of imported food, to ensure that it complies with Australian food standards (as contained in the Australia and New Zealand Food Standards Code) and with public health and safety requirements. When a consignment of imported food is referred for inspection, this will usually involve a visual and label assessment and may also include sampling the food for the application of analytical tests. The inspection rate and types of tests performed, depend on the food’s risk classification.

Food which does not meet the applicable standards, or which is found to pose a risk to human health, is classified as ‘failing food’ and may be required to be destroyed or treated to bring it into compliance.

Which decisions?

Item 11 of the Bill inserts proposed section 20A into the Imported Food Control Act, which provides that the Secretary of the Agriculture Department may arrange for the use of computer programs for any purposes related to the following matters:

- the issuing of food control certificates under section 12
- the issuing of written advice following the inspection and analysis of food under section 14—such advice includes information as to whether the food is identified as ‘failing food’ and how the food is to be dealt with and
- decisions regarding the treatment of ‘failing food’ under section 20, including requiring the owner to treat the food in a specified manner, destroy the food or re-export the food.

The Explanatory Memorandum states it is intended that computer programs will be used to issue automated food control certificates for all foods not required to be inspected—foods requiring inspection will continue to receive a food control certificate from an authorised officer. It also states that despite proposed section 20A providing for the use of automated systems for decisions

40. Biosecurity Act, proposed subsection 541A(3).
41. Biosecurity Act, proposed subsection 541A(4). However, an electronic decision may be made without any state of mind being formed in relation to the matters to which the decision relates (for example, the computer system does not need to be ‘satisfied’ of a certain matter, even though this might be required for an officer making a decision under the same provision).
42. Biosecurity Act, proposed table item 26A in subsection 542(3) (inserted by item 6).
44. DOA, ‘Imported food inspection scheme’, op. cit.
45. Imported Food Control Act, sections 3 (definition of failing food) and 20; DOA, ‘Failing food reports’, DOA website, last reviewed 13 January 2020.
under sections 14 and 20 of the *Imported Food Control Act*, there is no intention for this to be done before computer program technology further develops.\(^{46}\)

**Obligations of the Secretary**

The Secretary must take reasonable steps to ensure that decisions made by a computer program:

- are consistent with the object of the *Imported Food Control Act*\(^ {47}\) and
- are based on grounds on which an authorised officer could have made that decision.\(^{48}\)

The Secretary may delegate the power to arrange for computer programs to make decisions, but only to a Senior Executive Service (SES) employee or acting SES employee in the Department.\(^ {49}\)

**Substituting decisions**

The proposed computerised decision-making provisions under both the *Biosecurity Act* and *Imported Food Control Act* provide that a biosecurity officer or authorised officer (respectively) may override an electronic decision with a new decision where satisfied:

- the electronic decision is inconsistent with the object(s) of the relevant Act or
- another decision is more appropriate in the circumstances.\(^ {50}\)

Additionally, amendments to both Acts provide that a decision made by a computer program will be of no effect if it is inconsistent with an earlier decision made by a person under the relevant Act.\(^ {51}\)

**Review of decisions**

Decisions made or powers exercised by a computer program under the proposed provisions, will be taken to have been made or exercised by the Agriculture Secretary (for matters under the *Biosecurity Act*, this will be in the Secretary’s capacity as the Director of Biosecurity).\(^ {52}\)

This means that decisions made by a computer program will be subject to merits and judicial review in the same way as decisions made by an officer under the relevant provision. Both Acts provide for a two-step process of merits review which involves firstly, internal review of a decision\(^ {53}\) and subsequently, a right of appeal to the Administrative Appeals Tribunal (AAT).\(^ {54}\)

Decisions may also be the subject of judicial review by the courts, under the *Administrative Decisions (Judicial Review) Act 1977*.\(^ {55}\)

Proposed subsection 541A(6) of the *Biosecurity Act* provides that while a decision made by a computer program will be taken to have been made by the Director of Biosecurity, it will not be

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46. Explanatory Memorandum, Agriculture Legislation Amendment (Streamlining Administration) Bill 2019, pp. 11–12.
47. *Imported Food Control Act*, proposed subsection 20A(3).
48. *Imported Food Control Act*, proposed subsection 20A(4). However, an electronic decision may be made without any state of mind being formed in relation to the matters to which the decision relates (for example, the computer system does not need to be ‘satisfied’ of a certain matter, even though this might be required for an officer making a decision under the same provision).
49. *Imported Food Control Act*, proposed subsection 41(2).
50. *Biosecurity Act*, proposed subsection 541A(7); *Imported Food Control Act*, proposed subsection 20A(5).
51. *Biosecurity Act*, proposed subsection 541A(8); *Imported Food Control Act*, proposed subsection 20A(6).
52. *Biosecurity Act*, proposed subsection 541A(9); *Imported Food Control Act*, proposed subsection 20A(2).
54. *Biosecurity Act*, section 578; *Imported Food Control Act*, subsections 42(1) (definition of reviewable decision) and 42(11).
taken to be a decision made by the Director personally. The effect of this is to clarify that such a decision will still be subject to an initial internal review, rather than going straight to the AAT.\textsuperscript{55}

\textsuperscript{55} Biosecurity Act, subsections 576(1) and 578(1)—items 7 and 9 amend or insert notes to these subsections, respectively, referring back to proposed subsection 541A(6).