THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

AGRICULTURE LEGISLATION AMENDMENT
(STREAMLINING ADMINISTRATION) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture,
Senator the Hon. Bridget McKenzie)
AGRICULTURE LEGISLATION AMENDMENT (STREAMLINING ADMINISTRATION) BILL 2019

GENERAL OUTLINE

The Agriculture Legislation Amendment (Streamlining Administration) Bill 2019 (the Bill) will make amendments to the Biosecurity Act 2015 (the Biosecurity Act) and the Imported Food Control Act 1992 (the Imported Food Control Act) in order to strengthen Australia’s biosecurity and food systems through a number of measures.

The Bill will:

- ensure that there is a clear statutory basis for applications of automated decision-making under the Biosecurity Act
- enable wider use of automated decision making to issue biosecurity directions and notices for imported food control certification
- enable the Director of Biosecurity to determine by a legislative instrument which biosecurity officer decisions under the Biosecurity Act may be made by operation of a computer program
- authorise the Secretary to arrange for automated decision making for certain sections of the Imported Food Control Act.

These changes will improve the efficiency and effectiveness of the Biosecurity Act and Imported Food Control Act to ensure Australia’s biosecurity system continues to keep pace with the changing biosecurity environment.

Automated entry processing and release of imported goods was expressly provided for in section 56 of the Quarantine Act 1908. At present, automated decision-making is expressly authorised for three sections in the Biosecurity Act and is not expressly authorised for any sections of the IFC Act.

The Department of Agriculture (Department) processes an average of 45,000 commercial cargo referrals each month. It dedicates intensive resources to prevent incursion of high risk pests and diseases, such as African Swine Fever Virus (ASFV). ASFV poses a significant biosecurity threat to Australia as it is a highly contagious disease that spreads rapidly through domestic and wild pigs, killing up to 80 per cent of the pigs it infects. As of September 2019, ASFV had reached the shores of our near neighbour East Timor. Other high risk pests include the Brown Marmorated Stink Bug (BMSB), Khapra beetle and the continued threat posed by foot and mouth disease.

In this environment, automated decision-making is crucial for biosecurity and food import control because it allows risk identification and management across a large number of goods and conveyances. Automated decision-making can reduce the burden on importers by enabling fast accurate clearance of goods and conveyances. Further, automated decision-making provides flexibility to ensure the optimisation of resources to respond effectively to existing and emerging risks.

The Administrative Review Council (ARC)’s 2004 Report Automated Assistance in Administrative Decision Making (ARC Report) drew distinctions between the use of expert systems to make non-disccretionary decisions, the use of expert systems to assist decision
makers (while not touching the discretion points in the decision making process), and fully automating the exercise of discretion. The ARC concluded that expert systems should not automate the exercise of discretion, and that attempting to do creates the risk of inappropriate fettering of discretion.

Under both the Biosecurity Act and the Imported Food Control Act, most decisions – whether made by a person or by application of a computer program – 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. In this context fettering of discretion is appropriate because:

- The kind of decisions that are envisaged to be made by computer programs all involve the identification, and management if necessary, of biosecurity or food safety risks. Such an assessment is a technical and scientific process based on objective data and information, for example, what the relevant goods are, what are the associated diseases or pests of concern, whether there are current outbreaks or prevalence of the disease and their locations.
- In most cases, it is desirable to stakeholders in this regulatory context that identical information inputs should not lead to different outcomes.
- The operational environment of high volumes of goods and people entering Australia, and the potential for immensely negative impact on Australia’s agriculture, environment and economy if biosecurity risk or food safety is not effectively identified and managed, mean that it is necessary to provide automated decision-making.

It is intended, during implementation of the automated decision making scheme, that the principles set out in the ARC Report *Australian Government* are considered and taken into account to the extent consistent with maintaining biosecurity and food health and safety standards.

**FINANCIAL IMPACT STATEMENT**

The Bill will have no financial impact on the Australian Government Budget.

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The full Statement of Compatibility with Human Rights is at the end of this explanatory memorandum.
NOTES ON CLAUSES

Clause 1: Short title
Clause 1 of the Bill provides for the short title of the Act to be the *Agriculture Legislation Amendment (Streamlining Administration) Act 2019*.

Clause 2: Commencement
Clause 2 provides for the commencement of each provision in the Act, as set out in the table.

Item 1 in the table provides that the whole of the Act will commence on the day after the Act receives the Royal Assent.

Subclause 2(2) provides that any information in column 3 of the table is not part of the Act. It also clarifies that information may be inserted in column 3 of the table, or information in it may be edited, in any published version of the Act.

Clause 3: Schedules
Clause 3 provides that legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Bill has effect according to its terms.
Schedule 1—Amendments

Biosecurity Act 2015

Item 1: After section 541

Item 1 inserts new section 541A. New section 541A provides the power for the Director of Biosecurity to arrange for decisions to be made by a computer program. Allowing a computer program to make certain decisions is intended to improve the administrative efficiency for stakeholders, including importers, as well as for the Government. This section is further intended to provide for flexibility in taking advantage of developments in technology that may assist computerised decision making and flexibility in responding to threats.

Subsection 541A(1) provides that the Director of Biosecurity may arrange for the use, under the Director of Biosecurity’s control, of computer programs for any purpose which a biosecurity officer may or must:

a) make a decision under a relevant provision of this Act specified in a determination made under subsection (2); or

b) exercise any power or comply with any obligation related to making a decision referred to in paragraph (a); or

c) do anything else related to making a decision referred to in paragraph (a), or related to exercising a power or complying with an obligation referred to in paragraph (b).
Under paragraph 541A(1)(a) only a decision made under a relevant provision, which has been specified in a determination made for the purpose of subsection 541A(2), can be subject to automated decision-making. A determination will be a disallowable legislative instrument and therefore subject to Parliamentary scrutiny. Providing for a determination specifying the decisions subject to automated decision-making provides flexibility to take into account rapid changes in technology and changes in risks, while striking a balance by ensuring that Parliament retains scrutiny of the determination.

The Note at the end of subsection 541A(1) directs the reader to subsection 541A(9) for the meaning of “relevant provision”. Subsection 541A(9) specifies provisions under the Act which are relevant provisions for the purpose of this section.

Subsection 541A(2) provides that the Director of Biosecurity may, by legislative instrument, determine the kinds of decisions that may be made by the operation of a computer program under an arrangement made under subsection 541A(1), as well as the classes of persons that may use such a computer program and the conditions of that use.

The types of decisions under relevant provisions that are intended to be determined by legislative instrument under subsection 541A(2) are those based on a technical and scientific identification of biosecurity risk, such as, a direction to provide information or answer questions (section 126), require production of documents (section 127), move goods under (section 128 or section 132).

The classes of persons that are intended to be determined by a legislative instrument under subsection 541A(2) are those who would otherwise be authorised to carry out biosecurity activities under the Biosecurity Act. For example, biosecurity industry participants that operate under an approved arrangement as provided under Chapter 7 of the Biosecurity Act are a class of persons intended to be determined by legislative instrument under subsection 541A(2). A biosecurity industry participant is required to meet specific training and accreditation requirements under the conditions of an approved arrangement.

Further, persons who operate a computer program are not the decision makers, as the information that is input into the computer program enables an electronic decision to be made by the computer program utilising business rules.

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).

Subsection 541A(3) provides that the Director of Biosecurity must take reasonable steps to ensure that decisions made by the operation of a computer program under an arrangement made under subsection 541A(1) are consistent with the objects of the Biosecurity Act. Section 4 of the Biosecurity Act outlines its objects, which includes to provide for the management of biosecurity risk and to give effect to Australia’s international rights and obligations.
Subsection 541A(4) provides that the Director of Biosecurity must take reasonable steps to ensure that an electronic decision is based on grounds on the basis of which a biosecurity officer could have made that electronic decision. However, an electronic decision may be made without any state of mind being formed in relation to a matter to which the decision relates.

Subsection 541A(5) provides that the Director of Biosecurity is taken to have:

a) made a decision; or

b) exercised a power or complied with an obligation; or

c) done something else related to the making of a decision or exercise of a power or compliance with an obligation;

that was made, exercised, complied with or done by the operation of a computer program under an arrangement made under subsection 541A(1), as if the Director of Biosecurity were a biosecurity officer.

This provision ensures that there is a decision-maker for purposes of judicial, internal or Administrative Appeals Tribunal review.

This provision also ensures that there is a decision-maker who will have the responsibility for any requirement under section 13 of the Administrative Decisions (Judicial Review) Act 1977 or under any similar provision of this or any other Act to provide a statement of reasons for an electronic decision.

This is consistent with ARC Report Principle 9 that “Expert systems should comply with administrative law requirements – in particular, requirements associated with … statements of reasons”.

By declaring that the provision is to operate “as if the Director of Biosecurity were a biosecurity officer”, this provision clarifies the operation in relation to electronic decisions made under provisions of the Biosecurity Act which refer to decisions of biosecurity officers and decisions of the Director of Biosecurity.

Subsection 541A(6) provides that a decision that the Director of Biosecurity is taken to have made because of subsection 541A(5) is not a decision made by the Director of Biosecurity personally for the purposes of section 576 or 578.

The Note at the end of subsection 541A(6) refers to sections 576 and 578 which deal with review of reviewable decisions.

Sections 576 and 578 apply in relation to “reviewable decisions” within the meaning of section 574 of the Biosecurity Act. Some of the provisions of the Act which are relevant provisions which can be made subject to automated decisions under section 541A are also “reviewable decision” provisions.

Section 576 provides that a relevant person for a reviewable decision may apply to the Director of Biosecurity for review of the decision, unless the decision was made by the Director of Biosecurity personally. Section 578 provides that an application may be made to the Administrative Appeals Tribunal (AAT) for review of a reviewable decision made by the
Director of Biosecurity personally, or for review of an internal review decision under section 576.

Subsection 541A(6) has the effect that where the Director of Biosecurity is taken to have made an electronic decision which is a reviewable decision, the decision is subject to internal review under section 576. As with other reviewable decisions made by biosecurity officers, no application for review by the Administrative Appeals Tribunal of an electronic decision which is a reviewable decision can be made under section 578 until there has been internal review under section 576.

Subsection 541A(7) provides that a biosecurity officer may make an electronic decision in substitution for a decision made by a computer program if a biosecurity officer is satisfied that the electronic decision made by the computer program is not consistent with the objects of the Act, or another decision is more appropriate in the circumstances.

This allows biosecurity officers to respond to any system or data input errors and ensure that decisions remain consistent with the objects of the Biosecurity Act. It also ensures that a decision is able to be substituted where another decision would be more appropriate in the circumstances. The circumstances may include changed circumstances or new information becoming available after the electronic decision was made.

If a substituted decision is a reviewable decision, then internal review under section 576 will be available in relation to the substituted decision and – depending on the outcome of the internal review – AAT review may be available under section 578 in relation to the internal review decision. Further explanation is given in relation to subsection 541A(6) above.

Principle 6 of the best practice principles outlined in the ARC Report recommended that before any decision is made to override a decision made by an expert system, the primary decision maker should contact a senior officer. The reason for authorising biosecurity officers to substitute a decision for an electronic decision without requiring that there be consultation with a senior officer is that in this sector, importers, operators of ships and aircraft and related ground transport operators value responsiveness and quick decision-making, and it may not always be practically feasible in this operational environment to always require a senior officer be consulted.

In addition, electronic decision arrangements can only be put in place for decisions which could be made by a biosecurity officer, either because a provision empowers a biosecurity officer to make the decision or where the relevant power or function is delegated to biosecurity officers. A person can only be authorised to be a biosecurity officer if the person satisfies the training and qualification requirements under section 545. Accordingly, biosecurity officers are suitable persons to make substitute decisions.

On some occasions, the basis for the biosecurity officer substituting the decision will be that the operator seeking clearance has provided more information. Under subsection 541A(7), it is open to a biosecurity officer to consult a more senior officer. However, it is not considered appropriate to require that such consultation always take place.

Subsection 541A(7) provides that an electronic decision in relation to a thing is of no effect to the extent that it is inconsistent with an earlier decision (other than an electronic decision)
made in relation to the thing by a biosecurity officer or the Director of Biosecurity under the Act. This subsection ensures that electronic decisions do not contradict earlier, human-made decisions. Excluding electronic decisions from earlier decisions is intended to ensure that a new electronic decision is not bound by previously made erroneous electronic decisions, to avoid perpetuating the error.

Subsection 541A(9) provides the relevant provisions for which the Director of Biosecurity may determine for the use of a computer program to make a decision under subsection 542(2).

Subsection 541A(9) provides that for the purposes of this section, each of the following is a relevant provision of this Act:

   a) subsections 49(4) and (5) (negative pratique);

   b) a provision of Chapter 3 (managing biosecurity risks: goods) (other than section 154, subsection 157(1) or paragraph 162(1)(a));

   c) a provision of Chapter 4 (managing biosecurity risks: conveyances) (other than subsection 192(6), paragraph 218(1)(a) or section 223 or 229);

   d) a provision of Chapter 5 (ballast water and sediment) (other than section 280 or 303);

   e) section 557 (permission to engage in certain conduct);

   f) sections 600 and 602 (withholding goods that are subject to charge);

   g) a provision of an instrument made for the purposes of a provision covered by any of paragraphs (a) to (f) of this subsection.
There is no intention to make determinations in relation to all relevant provisions. The intention is to develop determinations for decisions under provisions where there is a pressing need or compelling benefits for using automated decision-making. See explanation above on the kinds of decisions which are likely to be subject to a determination.

Paragraphs 162(1)(a) and 218(1)(a) are excluded from the definition of relevant provision because there is already provision for automated electronic system decision-making each of those provisions. See section 163 (for paragraph 162(1)(a)) and in section 219 (for paragraph 218(1)(a)).

Section 280 is excluded from the definition of relevant provision because there is already provision for decisions under this section to be made using computer programs. See subsection 280(4).

Sections 154, 157, 223, 229 and subsection 192(6) are excluded from the definition of relevant provision because each of those sections provides for the making of legislative instruments by the Director of Biosecurity. Even though each of those powers can be subdelegated to a biosecurity officer in accordance with section 542, it is not appropriate for legislative instruments to be generated by computer decision-making.

Section 303 is excluded from the definition of relevant provision because that section can only operate in relation to unusual circumstances for which it is unlikely that business rules could be written and because it is dependent on formation of a view that there are clear grounds for believing that an offence has been committed.

**Item 2: Subsection 542(3) (heading)**

Item 2 inserts the word “powers” after “and functions” in the heading to subsection 542(3), which is currently “Powers that must not be subdelegated”. This is a consequential amendment because item 6 inserts new item 26A to the table under 542(3). Item 2 clarifies that subsection 542(3) refers to powers as well as functions that must not be subdelegated.

**Item 3: Subsection 542(3)**

Item 2 inserts the words “or a function” after “However, a power” in subsection 542(3).

This is a consequential amendment because item 6 which inserts new item 26A to the table under 542(3). Item 3 clarifies that subsection 542(3) provides for powers as well as functions that must not be subdelegated.

**Item 4: Subsection 542(3) (table heading)**

Item 3 inserts the words “and functions” into the table heading under subsection 542(3), after “Powers”. The table heading currently provides “Powers that must not be subdelegated”. This is a consequential amendment because item 6 inserts new item 26A to the table under 542(3). Item 4 clarifies that the table under subsection 542(3) lists powers as well as functions that must not be subdelegated.

**Item 5: Subsection 542(3) (table, heading to column headed “Power”)**
Item 5 repeals the heading “Power” at the column currently headed thus in the table under subsection 542(3) and inserts the new heading “Powers and functions”. This is a consequential amendment because item 6 inserts new item 26A to the table under 542(3). Item 5 clarifies that the relevant column in the table under subsection 542(3) lists powers as well as functions that must not be subdelegated.

**Item 6: Subsection 542(3) (after table item 26)**

Item 6 inserts new item 26A to the table under subsection 542(3) to provide that the power to arrange for the use of a computer program is not to be subdelegated. New item 26A provides:

<table>
<thead>
<tr>
<th>26A To arrange for the use of computer programs for purposes related to making certain decisions under this Act and any other power or function conferred by section 541A</th>
<th>Section 541A</th>
</tr>
</thead>
</table>

Subsection 542(1) provides that the Director Biosecurity may, in writing, delegate any or all of the Director’s functions or powers under this Act, to an SES employee, or an acting SES employee, in the Agriculture Department. The functions or powers that may be delegated under this subsection excludes the power to make a determination under section 308A, and the functions and powers under 541(1) and 618(2).

Subsection 542(2) provides that if, under subsection 542(1), the Director of Biosecurity delegates a function or power to an SES employee or an acting SES employee in the Agriculture department, the employee may, in writing, subdelegate the functions or powers to certain persons, including a person who is a biosecurity officer.

Subsection 542(3) provides that however, a power under a provision of this Act referred to in the table under this subsection must not be subdelegated under subsection 542(2).

By inserting new item 26A into the table under subsection 542(3), item 6 ensures that the power to arrange for the use of a computer program, and other powers and functions conferred by new section 541A inserted by item 1, may not be delegated below the level of an SES employee.

**Item 7: Subsection 576(1) (at the end of the note)**

Item 7 adds, at the end of the note after subsection 576(1), “A decision that the Director of Biosecurity is taken to have made because of subsection 541A(5) is not a decision made by the Director of Biosecurity personally (see subsection 541A(6)).”

This draws the reader’s attention to subsection 541A(6) for clearer legislation purposes.
Item 8: Subsection 578(1) (note)

Item 8 repeals the term “Note” and inserts “Note 1” at the end of subsection 578(1). This is a consequential amendment because item 9 inserts new Note 2 at the end of subsection 578(1).

Item 9: At the end of subsection 578 (1)

Item 9 adds a second note that clarifies the decision made by a Director of Biosecurity to be that as made under subsection 541A (5).

Imported Food Control Act 1992

Item 10: At the end of section 7A

Item 5 adds a new sentence to section 7A to provide further explanation in the simplified outline of Part 2 of the Act.

Item 11: At the end of Part 2

Item 11 inserts new Division 4 at the end of Part 2 of the Act.

Division 4 — Other Matters

Section 20A Computerised decision-making

New section 20A provides power for the Secretary to arrange for decisions to be made by a computer program. Allowing a computer program to make certain decisions is intended to improve the administrative efficiency for food importers and the Secretary, and recognises changes that have taken place in technology to assist Australia’s imported food systems.

Computerised decision-making will enhance the operation of the Imported Food Control Inspection Scheme (the Scheme) by enabling routine decisions to be made by a computer programs and allowing allocation of authorised officers towards imported food that may pose a risk to public health and safety.

Subsection 20A(1) provides that the Secretary may arrange for the use, under the Secretary’s control, of computer programs for any purpose which an authorised officer may or must make a decision or exercise a power under section 12, subsection 14(1) or subsection 20(2), (3) or (4) of the Imported Food Control Act.

Section 12 of the Imported Food Control Act provides for the issue of a food control certificate for examinable food under the Scheme. Examinable food receives a food control certificate whether or not it is required for inspection. Enabling the decision to issue a food control certificate to be made by a computer program allows for greater administrative efficiencies. This will be achieved by issuing automated food control certificates for all food not required to be inspected under the Scheme. Foods that are required to be inspected will continue to receive a food control certificate from an authorised officer.

Subsection 14(1) provides for imported food inspection advices, while subsections 20(2), (3) and (4) provide for notice that food is to be treated, destroyed or re-exported. These
provisions may be automated for computer programs to make a decision as computer program technology develops. There is no current intention to automate these provisions.

This is consistent with ARC Report Principle 5 which states that the use of an expert system to make a decision should be legislatively sanctioned to ensure that it is compatible with the legal principles of authorised decision making.

Subsection 20A(2) provides that the decision made by the computer program is taken to be a decision made by the Secretary. This provision ensures that there is a decision-maker for purposes of judicial, internal or Administrative Appeals Tribunal review of an electronic decision. This provision also ensures that there is a decision-maker who will have the responsibility for any requirement under section 13 of the Administrative Decisions (Judicial Review) Act 1977 or under any similar provision of this or any other Act to provide a statement of reasons for an electronic decision.

This is consistent with ARC Report Principle 9 that “Expert systems should comply with administrative law requirements – in particular, requirements associated with … statements of reasons”.

Subsection 20A(3) provides that the Secretary must take reasonable steps to ensure that electronic decisions made by the operation of a computer program under an arrangement under subsection 20A(1) are consistent with the object of the Act. Section 2A of the Imported Food Control Act provide that the object of the Act is to provide for the compliance of food imported into Australia with Australian food standards and the requirements of public health and safety.

Subsection 20A(4) also provides the safeguard that the Secretary must take reasonable steps to ensure that an electronic decision is based on grounds on the basis of which an authorised officer could have made that decision. However, this provision also confirms that an electronic decision may be made without any state of mind being formed in relation to a matter to which the decision relates.

Subsection 20A(5) provides that an authorised officer may make a decision in substitution for an electronic decision if an authorised officer is satisfied either that the electronic decision is not consistent with the object of this Act or that another decision is more appropriate in the circumstances.

Principle 6 of the ARC Report recommended that before any decision is made to override a decision made by an expert system that the primary decision maker should contact a senior officer. The reason for providing that authorised officers may substitute a decision for an electronic decision without requiring that there be consultation with a senior officer is that this sector value responsiveness and quick decision-making.

The power to substitute decisions is available if any fault in the operation of the computer decision process is identified. The Secretary is an authorised officer under the Act and can “step in” if it is considered appropriate or necessary for him or her to do so.

However, it is expected that on most occasions, the basis for the authorised officer substituting a decision will be that the business seeking clearance has simply provided more
information. Under subsection 20A(5) it is open to an authorised officer to consult a more senior officer. But it is not considered appropriate to require that such consultation always take place.

Subsection 20A(6) provides that a decision in relation to goods or a conveyance by the operation of a computer program under subsection 20A(1) is of no effect to the extent that it is inconsistent with a decision made in relation to the food by an authorised officer under the Act.

**Item 12: Section 41**

Item 12 inserts the number “(1)” before “The Secretary” in section 41. This is to provide clarity and number subsection 41(1) in the Act, and is consequential to item 14.

**Item 13: Section 41**

Item 13 omits the words “The Secretary” in substitution of the words “Subject to subsection (2) the Secretary”. This is to provide clarity for new subsection 41(2) in the Act.

**Item 14: At the end of section 41**

Item 14 inserts new subsection 41(2) to provide for the delegation of the Secretary’s powers and functions under new section 20A only to an SES employee, or acting SES employee in the Department.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Agriculture Legislation Amendment (Streamlining Administration) Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

OVERVIEW OF THE BILL

The purpose of the Agriculture Legislation Amendment (Streamlining Administration) Bill 2019 (the Bill) is to amend the Biosecurity Act 2015 (Biosecurity Act) and Imported Food Control Act 1992 (the Imported Food Act) to further strengthen Australia’s biosecurity framework.

The Bill will:

- ensure that there is a clear statutory basis for applications of automated decision-making under the Biosecurity Act
- enable wider use of automated decision making to issue biosecurity directions and notices for imported food control certification
- enable the Director of Biosecurity to determine by a legislative instrument which biosecurity officer decisions under the Biosecurity Act may be made by operation of a computer program
- authorise the Secretary to arrange for automated decision making for certain sections of the Imported Food Control Act.

CONCLUSION

The measures in the Bill are compatible with the human rights recognised or declared in the international instruments in section 3 of the Human Rights (Parliamentary Scrutiny) Act, as the Bill does not engage any human rights issues.

(Circulated by authority of the Minister for Agriculture, Senator the Hon. Bridget McKenzie)