3 June 2022

Law Council
OF AUSTRALIA

ent

Professor Glyn Davis AC
Secretary
Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

By online form: https://www.pmc.gov.au/domestic-policy/digital-technology-taskforce/positioning-australia-leader-digital-economy-regulation-automated-decision-making-ai-regulation

Dear Professor Davis

POSITIONING AUSTRALIA AS A LEADER IN DIGITAL ECONOMY REGULATION – AUTOMATED DECISION MAKING AND AI REGULATION

The Law Council of Australia (**Law Council**) thanks the Department of the Prime Minister and Cabinet for the opportunity to make a submission on its Issues Paper, 'Positioning Australia as a leader in digital economy regulation – Automated decision making and AI regulation'.

The Law Council is grateful for the assistance of the following of its constituent bodies and Sections to the **attached** submission:

- the Law Society of South Australia;
- the Law Institute of Victoria;
- the Law Society of New South Wales;
- the Queensland Law Society;
- the following Business Law Section committees: the Intellectual Property Committee; the Competition and Consumer Committee; the Digital Commerce Committee; the Privacy Committee; the Media and Communications Committee;
- the following Federal Litigation and Dispute Resolution Section committees: the Migration Law Committee; and the Administrative Law Committee; and
- the Personal Injuries and Compensation Committee of the Legal Practice Section.

If you would like to discuss this matter further, please do not hesitate to contact Matthew.Wood@lawcouncil.asn.au, in the first instance.

Yours sincerely

Tass Liveris

Mr Tass Liveris
President

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Law Council
OF AUSTRALIA

Positioning Australia as a leader in digital economy regulation – Automated decision making and AI regulation – Issues Paper

Digital Technology Taskforce, Department of the Prime Minister and Cabinet

3 June 2022

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia **4**
Acknowledgement **5**
Executive Summary **6**
Context and approach **8**
Digital Economy Strategy 8
The Issues Paper 8
What is AI and ADM? 9
Regulation of public sector use of ADM and AI **10**
The potential offered by AI and ADM 10
The Thodey Review 10
Data sharing in government 12
Case example – the Department of Home Affairs 13
Global Digital Platform 13
Permissions Capability 15
The need for a regulatory response 16
Introduction 16
Snapshot of present use 17
Sufficiency of supports presently available to officials 18
Commonwealth Ombudsman's Guide 18
Digital Service Standard 18
AI Ethics Principles 19
Applicable international guidance 19
There is a need for harmonising reform 19
Lawfulness and rationality 20
The law as it stands 20
Authority 22
Accurate decision making 23
Suitability assessment 23
All arrangements must be subject to ongoing governance requirements 30
Cases demonstrating the need for reform to ensure lawfulness 32
Transparency and fairness 36
All arrangements should be published 36
Cases demonstrating the need for reform to ensure transparency and fairness 42
The case for a regulator? 44
Regulation of private sector use of ADM and AI **46**
Question 5 46
Question 7 47
Data laws 47

Personal injury liability 48
Question 8.....49
Question 9.....49
Question 10.....51

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000[1] lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

1 Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council of Australia (**Law Council**) acknowledges the input of the following entities to this submission:

- the Law Society of South Australia;
- the Law Institute of Victoria (**LIV**);
- the Law Society of New South Wales;
- the Queensland Law Society (**QLS**);
- the following committees of the Business Law Section:
    - the Intellectual Property Committee;
    - the Competition and Consumer Committee;
    - the Digital Commerce Committee;
    - the Privacy Committee; and
    - the Media and Communications Committee;
- the following committees of the Federal Litigation and Dispute Resolution Section:
    - the Migration Law Committee; and
    - the Administrative Law Committee; and
- the Personal Injuries and Compensation Committee of the Legal Practice Section.

In the course of consulting the legal profession on the Law Council's submission, the QLS provided submissions which set out several reform measures, including possible intellectual property law reform to foster and incentivise research and development in AI.

In the time available, the Law Council was not in a position to form and express its own view on these issues. However, if Digital Technology Taskforce is interested in the Law Council's position on these matters, the Law Council would be happy to further consider them and to provide its views and advice.

The input of the QLS is otherwise drawn on throughout the submission.

The QLS submission is attached in full at Attachment C.

Executive Summary

1. The Law Council is grateful for the opportunity to make a submission in relation to 'Positioning Australia as a leader in digital economy regulation – Automated decision making and AI regulation – Issues Paper' (**Issues Paper**), published by the Digital Technology Taskforce in the Department of Prime Minister and Cabinet.

2. The Law Council's submission is divided into two parts:

   - it first addresses the issues which arise from regulating the use of artificial intelligence (**AI**) and automated decision making (**ADM**) by government agencies performing functions and powers under Commonwealth legislation; and

   - then considers issues that arise from regulation which applies or is relevant to the use of AI and ADM by private entities.

3. In relation to public sector use of AI and ADM, increasingly, new and amended Commonwealth Acts are empowering a senior Commonwealth official to arrange for the use of computer programs to exercise statutory powers and functions, including to make, and assist in making, administrative decisions, in the stead of officials.

4. The Law Council considers that there are evident public benefits in the increased deployment of AI and ADM, where this is done appropriately and judiciously. Those benefits can include increased efficiency, consistency, and accountability in decision-making by government agencies. However, the Law Council considers that the threshold objective of regulation in relation to public sector use of AI and ADM is to ensure that it is employed consistently with administrative law principles which underpin lawful decision making – lawfulness, fairness, rationality, and transparency.

5. The Law Council considers that comprehensive regulatory reform is required to ensure that Commonwealth legislation which authorises the use of ADM and AI to exercise statutory powers is consistent with administrative law principles. Specifically, the Law Council recommends that:

   (a) the Australian Government commission an audit of all current or proposed use of AI and automation to make or assist in making administrative decisions by or on behalf of Government agencies;

   (b) legislative amendments be made to ensure that where it is intended that a statutory power be exercised by using ADM or AI, the statute expressly authorises the use of ADM or AI;

   (c) all legislation which authorises the use of ADM and AI to exercise, or assist in the exercise, of statutory powers should:

      (i) be consistent with regard to types of powers which may be exercised by ADM or AI, and employ standard statutory language for expressing the power to use ADM or AI;

      (ii) require an assessment be undertaken of the suitability of the proposed automated system to exercise the statutory power, as a precondition to making arrangements for use of AI or ADM;

      (iii) require that all arrangements for the use of ADM be subject to ongoing governance requirements by a multidisciplinary team to ensure they

remain lawful and up-to-date, including auditing, testing and reporting obligations;

(iv) require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it, including sufficient information to enable a broad understanding of how AI or ADM operates to produce lawful administrative decisions;

(v) require that any affected individual must be notified where there is significant use of automation, including AI, in making an administrative decision;

(vi) require that an automated decision must be capable of being reduced to a statement of reasons explicable by a human, produced by a full audit trail of the decision-making path**,** for the purpose of enabling it to be reviewed by a tribunal or court, and the person affected by the decision should have a right to request such reasons; and

(vii) provide for the automated decision to be subject to review, preferably review by a human internal to the agency, and the person affected by the decision must be informed of that review avenue; and

(d) the Digital Technology Taskforce should:

(i) investigate the possible use of an algorithmic impact assessment to perform the suitability assessment referred to in [6(c)(ii)]; and

(ii) consider models for a regulatory body to oversee the proposed regulatory framework.

6. In relation to the regulation of private sector use of AI and ADM, the Law Council makes the following observations, assisted by the submissions of its constituent bodies and specialist committees:

- it generally supports technology neutrality as a key principle to underpin any new regulation regulating the use of AI by private entities;
- it notes that there are opportunities to make clear the obligations and risks arising from commercially dealing with data in the review of the *Privacy Act 1988* (Cth) (**Privacy Act**), the 'consumer data right' and legislative reform associated with electronic communication and data protection;
- it emphasises the critical importance of a harmonised approach being taken across regulators to ensure consistency, avoid duplication, and avoid fragmentation of regulation;
- it suggests, as a general principle, that regulatory frameworks applied to the use of AI by private entities require the use of AI which affects individual rights to be transparent and subject to human oversight and review; and

- any approach to regulation of private sector use of AI must be consistent with internationally recognised guidelines and frameworks where appropriate in Australia's circumstances.[2]

Context and approach

Digital Economy Strategy

7. The Australian Government has, through its Digital Economy Strategy,[3] set an objective for Australia to be a top 10 digital economy and society by 2030.

8. The Digital Economy Strategy defines 'digital economy and society' as including 'all activity reliant on, or significantly enhanced by, the use of digital inputs', including by businesses, consumers and government.[4] The Law Council has proceeded, therefore, on the basis that both private and public (government) entities form part of the 'digital economy and society' and thus come within the purview of the Digital Economy Strategy.

9. That activity includes 'regulatory frameworks that oversee the efficient, safe and reliable functioning of the digital economy, including the standards that underpin the operation of digital technologies and infrastructure'.[5]

10. The Digital Economy Strategy charts a number of indicators against which Australia's objective to be a world leading digital economy and society can be measured.[6] These include, relevantly to the present inquiry:[7]

> *Government services will all be easily and safely accessible online, saving people and businesses time and money. Government service delivery will by supported by better public data availability and sharing that is used by a highly-skilled public service to deliver more targeted policy and programs.*

The Issues Paper

11. The Issues Paper focusses specifically on AI and ADM. The Issues Paper, through the ten questions on page 12, seeks feedback on how regulatory settings and systems can enable the responsible use of AI and ADM, while managing the risks and challenges it could pose.

12. The Issues Paper describes:

- the 'opportunities' as including enhancing productivity, economic growth and living standards and improvements in health, environmental protection and defence and national security capabilities; and

- the risks and challenges as including uncertainty and complexity, failure regularly to update programs, global competition, loss of public trust and confidence,

---

[2] Particularly EU Data Protection laws - *Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data* (General Data Protection Regulation) [2016] OJ L 119/1 and the Data Protection Act (UK).
[3] Commonwealth of Australia, Department of the Prime Minister and Cabinet, 'Digital Economy Strategy 2030 (2021), https://digitaleconomy.pmc.gov.au/sites/default/files/2021-07/digital-economy-strategy.pdf.
[4] Ibid, 10.
[5] Ibid.
[6] Ibid, 11.
[7] Ibid.

potential for bias and discrimination, lack of transparency, and need for attention to the exercise of discretion, and privacy.

13. It appears that consultation on the Issues Paper will inform two separate pieces of work:

- a discussion paper identifying possible reforms and action, which is expected to be published in the second half of 2022;
- the development of an overarching Digital Age Policy Framework, which will provide principles, guidance, and best practice to inform future digital regulation.

What is AI and ADM?

14. It is helpful at this point to define terms. In the main, the Law Council adopts the definitions in the Issues Paper, which are set out in full for reference:[8]

> ***What is artificial intelligence?***
>
> *AI is a collection of interrelated technologies that can be used to solve problems autonomously and perform tasks to achieve defined objectives. In some cases, it can do this without explicit guidance from a human being. AI is more than just the mathematical algorithms that enable a computer to learn from text, images or sounds. It is the ability for a computational system to sense its environment, learn, predict and take independent action to control virtual or physical infrastructure.*
>
> ***What do we mean by automated decision making?***
>
> *ADM refers the deployment of technology to automate a decision making process – in whole or part. This extends from the use of a simple rules-based formula to affirm if someone meets objective criteria, to the use of predictive algorithms, which encompass a variety of techniques including rules, but where a computer learns a model to make a decision through machine learning capabilities, rather than being programmed to execute a decision making process in a specified way.*

15. Bagaric, Hunter and Stobbs usefully expand on the distinction between algorithms and AI:[9]

> *In crude terms, current data-driven artificial intelligence systems synthesize large amounts of data involving prior action or behavior [sic] to make predictions about future behavior [sic]. The way in which the data is processed is the key to the efficacy and integrity of AI. The data is processed by a formula, termed an algorithm.*
> *…*
> *Artificial intelligence uses algorithms to process and synthesize vast amounts of information and provide answers to problems. Thus, there is an inextricable connection between algorithms and artificial intelligence. All artificial intelligence systems are based on algorithms, however, most algorithms do not operate within the context of an artificial intelligence construct.*

[8] Ibid, 3.
[9] Mirko Bagaric, Dan Hunter, and Nigel Stobbs, Erasing the Bias Against Using Artificial Intelligence to Predict Future Criminality: Algorithms are Color Blind and Never Tire, 88 U. Cin. L. Rev. 103741 (2020) Available at: https://scholarship.law.uc.edu/uclr/vol88/iss4/3.

Regulation of public sector use of ADM and AI

16. The Law Council considers the following questions to be particularly applicable to the public sector use of AI and ADM (that is, it has not addressed questions 2-6 in the context of public sector use of AI and ADM):

    1. *What are the most significant regulatory barriers to achieving the potential offered by AI and ADM? How can those barriers be overcome?*

    7. *Is there a need for new regulation or guidance to minimise existing and emerging risks of adopting AI and ADM?*

    8. *Would increased automation of decision making have adverse implications for vulnerable groups? How could any adverse implications be ameliorated?*

    9. *Are there specific circumstances in which AI or ADM are not appropriate?*

    10. *Are there international policy measures, legal frameworks or proposals on AI or ADM that should be considered for adoption in Australia? Is consistency or interoperability with foreign approaches desirable?*

17. This submission considers these questions together given that any new amendments required to assist with 'achieving the potential' of public sector use of AI and ADM must be undertaken mindful of, and responsive to, the risks of employing such technologies and processes.

18. Specifically, the Law Council has addressed these questions by examining, in turn:

    - the *potential* offered by public 'sector use of AI and ADM; and
    - whether there is a need for legislative reform to give effect to that 'potential' while managing risks.

The potential offered by AI and ADM

19. Increasingly, new and amended Commonwealth Acts are empowering agencies to arrange for the use of computer programs to exercise statutory powers, including to make, and assist in making, decisions in place of individual human decision-makers.

The Thodey Review

20. On 4 May 2018, the Australian Government commissioned a review to 'examine the capability, culture and operating model of the APS [Australian Public Service] … [and] … make practical recommendations to ensure the APS is ready, over the coming decades, to best serve Australia' in various fields, including 'driving innovation and productivity in the economy' and 'delivering high quality policy advice, regulatory oversight, programs and services'.[10]

21. The review culminated in a report, 'Our Public Service, Our Future – Independent Review of the Australian Public Service', published by the review panel chaired by David Thodey AO, in November 2019 (**Thodey Review Report**).

[10] David Thodey AO et al, 'Our Public Service, Our Future – Independent Review of the Australian Public Service' (November 2019), 14.

22. The Thodey Review Report envisaged that a greater use of automation is one of the 'megatrends' which will 'shape the future operating environment of the APS'.[11] It stated:[12]

> *One of the key drivers of change is automation. Powerful new automation technologies such as machine learning, artificial intelligence and advanced robotics are already transforming the Australian economy, workplaces, education systems and communities. These technologies present an enormous opportunity for the APS's capacity to serve Australians. Modelling conducted for this review on the opportunities and challenges presented by automation found the following:*
>
> - *Approximately 40 per cent of APS employee time is currently spent on highly automatable tasks such as data collection and processing. By 2030, assuming reasonable adoption of automation, 18 per cent of tasks will be automated. Such tasks include reviewing licence or permit applications; collecting deposits; payments or fees; maintaining financial or account records; and preparing documentation for contracts, transactions or regulatory compliance.*
> - *Although many tasks within service delivery are likely to be automated by 2030, there is a clear opportunity to improve service delivery standards by refocusing employees from back-office to frontline roles, for example from payroll to complex case management.*
> - *As automation and other trends significantly re-shape APS tasks over the next decade, the APS will need to embrace a culture of lifelong learning. Even employees in high-growth technological roles (for example, business analysts) will need to retrain to maintain relevant skills.*

23. The Thodey Review Report advocated for the development of a 'data-driven culture' 'where leaders and staff care about data quality and usability, and are meticulous when collecting, buying and handling data'.[13] It stated that a 'data-driven culture means continually finding new ways to use data — encouraging curiosity and critical thinking and building on intuition and experience to inform evidence-based decisions'.[14] It noted that '[b]uilding a data-driven culture will require overcoming the culture of risk aversion and legislative barriers that prevail in the APS'.[15]

24. The Thodey Review Report made a number of relevant recommendations, including:

    - 'improve funding, structure, and management of digital functions across the APS' (**Recommendation 13**), with, relevantly:[16]
        - the Digital Transformation Agency (**DTA**) to be given authority to enforce Commonwealth digital policies and advise on risks; and
        - agencies to retain accountability for their own digital capability, systems and delivery;
    - 'build data and digital expertise across the service by applying the professions model and creating centres of excellence' (**Recommendation 15**), with, relevantly:[17]

[11] Ibid, 47
[12] Ibid, 189.
[13] Ibid, 175.
[14] Ibid.
[15] Ibid.
[16] Ibid, 314.
[17] Ibid, 316.

- priority to be given to 'attracting specialists in visualisation, advanced analytics, automation, gamification, cyber security and artificial intelligence';

- 'adopt common enabling tools and services to support efficiency, mobility, and collaboration' (**Recommendation 17**) including to, relevantly:[18]

  - 'trial and scale-up across the APS the use of artificial intelligence, automation, data analytics and other technologies to deliver better and more efficient enabling services and tools'; and

- 'share and protect data for better services and policies, and make data open by default' (**Recommendation 18**), including by:[19]

  - legislating 'a data sharing and release framework to enable data-sharing across the APS and with trusted partners'; and

  - prioritising investment in the Office of the National Data Commissioner and Data Integration Partnership for Australia to support effective and contemporary data governance and infrastructure and build data analytics capability'.

Data sharing in government

25. Historically, data sharing between government agencies has been regulated by stand-alone legislation administered by specific government departments.

26. For example, the Australian Taxation Office (**ATO**) collects data on active and newly granted visas for the Department of Home Affairs (**DHA**) under the powers in the *Taxation Administration Act 1953* (Cth)[20] (**Tax Administration Act**) for the purpose of identifying and addressing taxation risks.[21] Data is also shared by the ATO with the DHA under separate powers in that Act to detect breaches of immigration law and enforce compliance with visa requirements.[22]

27. However, earlier this year, Recommendation 18 of the Thodey Review Report was addressed by the *Data Availability and Transparency Act 2022* (Cth) (**Data Act**). The Data Act authorises Commonwealth bodies that 'control' public sector data to share that data with an accredited user.[23] An entity may be accredited by a newly established National Data Commissioner or the Minister on satisfaction of certain criteria, which include in relation to the entity's data management and governance policies, its ability to minimise the risk of unauthorised access and whether it has the necessary skills and capability to ensure the privacy, protection and appropriate use of data.[24]

28. Under the Data Act, sharing is for a permitted 'data sharing purpose' (including government service delivery, informing government policy and programs, or research

[18] Ibid, 318.
[19] Ibid, 319.
[20] Clause 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).
[21] Australian Taxation Office, 'Department of Home Affairs visa – October 2015 to 2022-23 financial years', (website), https://www.ato.gov.au/General/Gen/Department-of-Home-Affairs-visa---October-2015-to-2022-23-financial-years, accessed on 25 May 2022.
[22] Department of Home Affairs (**DHA**), 'The temporary skilled visas data matching program with the ATO' (undated), https://www.homeaffairs.gov.au/commitments/files/data-matching-program-ato.pdf.
[23] Section 13 of the *Data Availability and Transparency Act 2022* (Cth).
[24] Ibid, section 77.

and development),[25] and must be consistent with five data sharing principles[26] and the terms of the arrangement must be recorded in a data sharing agreement.[27]

29. Aside from the accreditation function, the role of the Commissioner is to provide advice and advocacy, as well as oversee, investigate and enforce compliance.[28]

30. The Law Council has not undertaken a detailed analysis of the Data Act for the purpose of this submission. Instead, it notes the submissions it provided to the Senate Finance and Public Administration Legislation Committee for the purpose of that committee's inquiry into the then Data Availability and Transparency Bill 2020 (Cth) and the Data Availability and Transparency (Consequential Amendments) Bill 2020 (Cth).[29]

Case example – the Department of Home Affairs

31. As discussed in Attachment B, DHA already uses ADM to auto-grant several classes of visas. However, for at least the last six years, DHA has been looking into ways to tap into the potential offered by AI and ADM as it addresses an increasing demand for visa services. The considerable ambition of DHA demonstrates the potential of AI, flags its significant expected uptake, including for more complex tasks, and thus emphasises the need for a robust regulatory framework.

Global Digital Platform

32. In 2016-2017, the then Department of Immigration and Border Protection set about testing 'the capability, capacity and willingness of the private sector to provide a privately funded and constructed single integrated visa application and processing workflow tool – the Global Digital Platform – to support the Department's core function of receiving and processing visa applications'.[30]

33. The Department's Secretary, Mr Michael Pezzulo, stated, by way of explanation:[31]

> *We are in the high-volume business. This year, I think we are tracking something like 7½ million visa applications. It is analogous, say, to high-volume organisations that operate at similar scales like banks and the like. How do you provide a fast and more efficient service using modern digital technology—everything from online forms, which are more intuitively able to be used by people around the world who are becoming increasingly digitally native? How does that then create processing benefits, in terms of our officers being able to quickly triage and look at the cases that need more attentive human interaction rather*

[25] Ibid, section 15.
[26] Ibid, section 16.
[27] Ibid, section 18.
[28] Ibid, Division 1 of Part 4.2.
[29] Law Council of Australia (**LCA**), 'Data Availability and Transparency Bill 2020 and Data Availability and Transparency (Consequential Amendments) Bill 2020', submission to the Senate Finance and Public Administration Legislation Committee (17 March 2021), https://www.lawcouncil.asn.au/publicassets/961b4094-398c-eb11-943a-005056be13b5/3978%20-%20Data%20Availability%20and%20Transparency%20Bills%202020.pdf and LCA, 'Data Availability and Transparency Bill 2020 and Data Availability and Transparency (Consequential Amendments) Bill 2020', letter to Senator Claire Chandler Chair Senate Finance and Public Administration Legislation Committee (22 April 2021),https://www.lawcouncil.asn.au/publicassets/ef25066d-bea7-eb11-943c-005056be13b5/3995%20-%20Data%20Availability%20and%20Transparency%20Bills%202020.pdf.
[30] Department of Immigration and Border Protection (**DIBP**), Submission No 28 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the impact of changes to service delivery models on the administration and running of Government programs*, undated, 5.
[31] Commonwealth, *Senate – Legal and Constitutional Affairs Committee – Estimates*, 5 May 2016, 155 (Mr Michael Pezzullo).

> *than matters that can be dealt with through automated processes? Then sitting behind all of that decision-making process—if I can use this in this open forum—it is analogous, say, to how banks might detect, through very sophisticated algorithms, potential patterns that might suggest fraud, for instance, or other forms of noncompliance with our law—how we build those back-end, very sensitive and very sophisticated algorithms. When you put all of that together, it is the sort of transformation that many other high-volume enterprises are going through.*
>
> *…*
>
> *In some of our visa sectors we are experiencing double digit growth to do with tourism-skilled migration and the rest of it, and you cannot possibly deal with those sorts of future volumes with the current model.*
>
> *…*
>
> *The government's intention—which speaks to the other end of the process, which is how we make decisions—is wherever possible to streamline complexity; reduce red tape that could potentially imply fewer visa classes, more streamlined visa classes, so there would be more channels to come at us through digital devices and the like; and more streamlined processes for our officers to focus on those visa applications of highest risk where there is a high probability of fraud or national security concern or law enforcement concern; then—subject, of course, to what a future parliament might do in terms of potential amendments to the Migration Act—a more streamlined suite of visa products. Hopefully, that will give you a sense of the sweeping program that we have ahead of us.*

34. The Department later noted that:[32]

> *'current visa service delivery arrangements are increasingly unable to keep pace with continued strong growth in visa applications, which is expected to see 35 per cent growth to over 13 million applications per annum over the decade to 2028-29. Current processing arrangements are resource intensive and dependent on ageing information technology infrastructure. Manual processing of large volumes of applications increases the risk of errors being made, as well as of fraud.*

35. In June 2017, DHA published a market consultation paper, 'Delivering visa services for Australia', which related to building a new visa processing platform. The proposed platform included using algorithmic assessments to perform subjective decision-making functions to assess genuineness, fraud, character concerns, and health assessment – with security assessment remaining with DHA.[33]

36. The 'Delivering visa services for Australia' proposal was considered by the Senate Legal and Constitutional Affairs References Committee (**Committee**) in its inquiry, 'Impact of changes to service delivery models on the administration and running of Government programs', on which it reported in February 2020.

37. The Committee ultimately recommended the project not proceed. The Committee's concern related primarily to the outsourcing of the system to a private entity to design, build and administer the system.[34] It found that the international experience was that service quality and/or higher fees would result as such entities sought to maximise

[32] DIBP, n 28, 6.
[33] DIBP, 'Delivering visa services for Australia – Market Consultation Paper (June 2017), https://immi.homeaffairs.gov.au/immigration-reform-subsite/files/delivering-visa-services-for-australia.pdf, 12.
[34] The Senate, Legal and Constitutional Affairs References Committee, *Impact of changes to service delivery models on the administration and running of Government programs* (February 2020), [3.90].

their profits.[35] It expressed concern about 'procurement risk, data security, and equitable access to data and information for potentially vulnerable cohorts'[36] and suggested DHA 'fund and further explore options for developing an in-house solution that does not require the government to ostensibly 'hand over' control of the processing functionality and data management to private entities'.[37]

Permissions Capability

38. On 20 March 2020, one month after the Committee report, the Hon Alan Tudge MP, then acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, announced DHA had terminated the Request for Tender process for its proposed Global Digital Platform.[38] Instead, DHA would conduct a market consultation process 'seeking industry engagement and insights into the best way to deliver large-scale workflow processing capability for visa and citizenship applications', an approach the then Minister described as in line with the Australian Government's response to the Thodey Review.

39. On 17 October 2020, in a joint statement with the Hon Stuart Robert, Minister for Government Services, former acting Minister Tudge provided further details around what had since been named the Permissions Capability, which would be sourced and delivered by DHA and DTA.[39] The development would begin with a new Digital Passenger Declaration and a 'simple digital visa product to test the integration capabilities of the system', following which it was 'envisaged that other visas would be progressively digitised on the new system, making them easier to access, more secure and have greater integrity'.[40] The Ministers announced that 'new permissions platform will then enable further digitisation and simplification of how people access services across government, such as permits, accreditations, licences and registrations'[41] – that is, other 'permissions' overseen by the Australian Government.[42]

40. According to an information paper produced by DHA and DTA, the Permissions Capability system will be publicly funded and operated with government agencies at all times retaining 'control of, and responsibility and accountability for, process design and implementation as well as all decision making',[43] replacing the private service delivery model for visas envisaged by the previous proposal.

---

[35] Ibid, [3.91].
[36] Ibid, [3.95].
[37] Ibid, [3.96].
[38] The Hon Alan Tudge MP, 'New approach to technology capability acquisition and delivery' (Media Release, Australian Government), 20 March 2020, https://minister.homeaffairs.gov.au/alantudge/Pages/new-technology-capability-acquisition-delivery.aspx.
[39] The Hon Alan Tudge MP, 'Joint media release with Hon Stuart Robert MP - Preparing Australia for reopening to the world: a smarter, easier, more secure national border' (Media Release, Australian Government), 17 October 2020, https://minister.homeaffairs.gov.au/alantudge/Pages/preparing-australia-for-reopening-to-the-world.aspx
[40] Ibid.
[41] Ibid.
[42] Commonwealth, *Senate – Legal and Constitutional Affairs Committee – Estimates*, 19 October 2020, 10 (Mr Michael Pezzullo).
[43] DHA, 'Permissions Capability Industry Information paper Delivery of a Permissions Capability for government services (October 2020) https://immi.homeaffairs.gov.au/programs-subsite/files/permissions-capability-industry-information-paper.pdf, 3.

41. The Department has indicated that 'the Commonwealth will at all times retain control of, and responsibility and accountability for, process design and implementation of the Whole of Government program, as well as all decision making'.[44]

42. In its 2021-22 Corporate Plan, DHA notes:[45]

> *Greater efficiency and enhanced accessibility in service delivery has been a defining characteristic of the COVID-era. Likewise, the Department will support the enduring online transition of economic, educational and social activity through stronger cyber protections and proactive management of emerging and critical technologies. Moreover, we will ensure our own delivery of citizenship, humanitarian and immigration services incorporate new technologies and digital systems to meet client expectations, improve efficiency and strengthen integrity measures*.

The need for a regulatory response

Introduction

43. To address the language in question 1 of the Issues Paper, the Law Council considers that a significant regulatory 'barrier' to achieving the benefits offered by the public sector use of AI and ADM in the context of government services is ensuring that such use is consistent with administrative law principles which underpin lawful decision making – lawfulness, fairness, rationality, and transparency, descriptors involving the exercise of judgement.

44. As the technological capabilities of AI and ADM expand, lawmakers are presented with the challenging question of how to regulate the use of AI and ADM in a way which yields the benefits anticipated by the Thodey Review consistent with administrative law principles.

45. It is accepted that automated decision-making can be beneficial to administrative law outcomes. In particular, there are types of decisions based on objective criteria where automated processes can enhance administrative outcomes by permitting a large number of decisions to be consistently decided in a short period of time, creating overall efficiency across the system of the kind envisaged by DHA.

46. However, it has generally been accepted that there may be certain kinds of decisions which may be less amenable to being made by using a computer program – in particular, decisions which involve a weighing up of evidence to reach factual conclusions and the exercise of human discretion and judgement.

47. Statutory powers are generally granted by the legislature to human officials. In forming a view about whether a decision-maker acted within power in judicial review proceedings, a court will often consider the state of mind of the decision maker, including whether the decision-maker: (a) provided procedural fairness; (b) only considered relevant matters; (c) was biased; (d) did not unduly limit powers involving the exercise of discretion; and (e) made a reasonable decision.

---

[44] Tom McIlroy, ''Back from the dead': Canberra to fund and run visa processing 2.0', *Australian Financial Review,* (Australia, 24 February 2021), https://www.afr.com/politics/federal/back-from-the-dead-canberra-to-fund-and-run-visa-processing-2-0-20210224-p575bw.

[45] DHA, Corporate Plan 2021-22, 15.

48. Automated decision-making presents a challenge to the application of these principles and the systems that support them. The more a decision requires inherent *human* characteristics of reason and judgement, the less amenable it may be to automation.

49. The kinds of difficulties which automated systems may pose in relation to compliance with those administrative law principles were addressed in the Law Council's submission to the Australian Human Rights Commission (**AHRC**) for the purpose of its *Human Rights and Technology: Discussion Paper* (2019).[46] They include:

- where statutory discretion is to be exercised, this of its nature requires human judgement;
- the risk of programming errors arising from failing to:
    - properly map the legislation or the substance of particular terms;
    - capture the nuances of common law principles;
    - keep up to date with legislative amendments; or
    - make changes following judicial findings and changes in factual circumstances;
- providing for procedural fairness (or natural justice) – i.e. to give the person affected a reasonable opportunity to present a case, and to not have an appearance of bias;
- complying with other administrative law principles, such as ensuring that relevant considerations are taken into account, and irrelevant considerations are not;
- ensuring discretionary powers are not unduly fettered; and
- the capacity to produce with an automated decision coherent reasons for the decision.

Snapshot of present use

50. In order to address the question of whether regulatory reform is required, it is useful to understand what regulation exists with respect to the use of ADM and AI by government agencies.

51. In Attachment A, the Law Council has set out a snapshot of the prevailing regulatory framework. Presently, legislation which expressly empowers official to authorise the use of ADM and AI to exercise statutory powers, and regulates such use, is piecemeal and addressed in similar but distinct ways in different Acts. Some Acts do not address it at all.

52. It is clear from the analysis in Attachment A that while there is some commonality in the general model used to regulate the use of ADM by government agencies, there are differences in key details of these schemes – unless inserted into existing legislation by the same amending Act, no scheme is the same as any other.

[46] Law Council of Australia, 'Human Rights and Technology' (21 April 2020), <link>, [26]-[31].

53. In Attachment B, the Law Council has set out some examples of how government agencies are using, or may use, these powers – the examples in the attachment are drawn on in the discussion below.

Sufficiency of supports presently available to officials

54. The capability of ADM technology is developing rapidly and the ambitions of government agencies with respect to the use of ADM and AI are changing as a result. Given the regulatory framework currently affords a broad discretion to public officials to arrange for the use of ADM in Australia, without much if any regulation circumscribing the way in which those powers may be exercised, the questions become:

- how can officials determine what a responsible use of ADM is in relation to a particular function, power or decision;
- how to ensure that officials use their powers responsibly; and
- how to ensure that those programming the database do not unduly fetter the exercise of discretionary powers requiring the exercise of judgement.

55. A useful starting point involves consideration of best practice principles which apply to Commonwealth agencies and the extent to which they fill the gaps in the regulatory schemes.

Commonwealth Ombudsman's Guide

56. The Commonwealth Ombudsman's 'Automated decision-making better practice guide' (**Ombudsman's Guide**) provides 'practical guidance for agencies aimed to ensure compliance with administrative law and privacy principles, and best practice administration' in the use of automated decision-making.[47]

57. The Ombudsman's Guide suggests that, as guiding principles, automated decision-making systems should:

- comply with administrative law principles of legality, fairness, rationality and transparency, with privacy requirements, and with human rights obligations; and
- as a matter of good public administration, should be efficient, accessible, accurate and consider the needs of any vulnerable and non-digital ready users, and not undermine public confidence in government administration.

58. The Ombudsman's Guide directs users to apply the Digital Service Standard and the Artificial Intelligence Ethics Principles (**AI Ethics Principles**).

Digital Service Standard

59. The Digital Service Standard established by the DTA is a set of best-practice principles for designing and delivering digital government services.[48]

[47] Commonwealth Ombudsman, 'Automated decision making better practice guide', <https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide>, accessed 25 May 2022.
[48] Digital Transformation Agency (**DTA**), 'About the Digital Service Standard', <link>, accessed on 20 May 2022.

60. The Digital Service Standard is presented as mandatory for certain government services; however, it does not appear to be enforced with the weight of any legislation, nor do there appear to be any consequences arising under law for non-compliance.

61. The Digital Service Standard criteria[49] address the user experience, matters of governance and administration, risk management matters, and transparency.

AI Ethics Principles

62. The AI Ethics Principles established by the Department of Industry, Science, Energy and Resources are voluntary principles which apply to both business and government.[50]

63. The AI Ethics Principles are intended to be applied at each phase of the AI system lifecycle: design, data, and modelling (such as planning, data collection and model building); development and validation (such as training and testing); deployment; monitoring and refinement (including when fixing any problems that occur).

64. The Ombudsman's Guide, the Digital Service Standard and the AI Ethics Principles are all useful and commendable tools. However, while these tools are generally consistent with each other, they appear to be managed separately by different entities and none of them are legally enforced. (Having said that, non-compliance with these resources may increase the risk of unlawful decision-making and call into question whether officials who arranged for, and managed the performance of, the automated system in question applied a best practice approach in reliance on these materials.)

65. Further, of the three, only the Ombudsman's Guide directly addresses automated decision-making systems (and the challenge they pose to principles of administrative law) – the other tools have a general application. At this stage, it is not clear that there is any intent to bring these tools together, and limited public information apparent about the extent of their take up and use.[51]

Applicable international guidance

66. It is also worth noting that Australia is an adherent to the Recommendation of the Council of Artificial Intelligence made by the Organization for Economic Co-Operation and Development (**OECD Recommendation**).[52] OECD recommendations are not legally binding, but 'represent a political commitment to the principles they contain and entail an expectation that [a]dherents will do their best to implement them'.[53]

67. Under the OECD Recommendation, adherents are recommended to promote and implement a number of principles for responsible stewardship of trustworthy AI.

There is a need for harmonising reform

68. As a general principle, the Law Council considers that the framework of complex decision-making ought to be harmonised to ensure that a consistent and principled best practice approach is taken across government agencies and to reduce the

[49] DTA, 'Digital Service Standard criteria', <link>, accessed on 20 May 2022.
[50] Department of Industry, Science, Energy and Resources, 'Australia's Artificial Intelligence Ethics Framework' (website), <link>, accessed on 25 May 2022.
[51] The DTA has published Digital Service Standard assessment reports on its website, although it is not clear whether these comprise all applications of the Standard by government agencies: DTA, Assessmentg reports' (webpage), https://www.dta.gov.au/help-and-advice/digital-service-standard/assessment-reports, accessed on 2 June 2022.
[52] OECD, 'Recommendation of the Council of Artificial Intelligence' (22 May 2019), <link>.
[53] OECD, 'OECD Legal Instruments', <link>.

potential for unintended or unnecessarily complex deviations in the law governing the use of ADM and AI to exercise statutory powers. As technology is constantly developing, and legislation must be sufficiently technologically neutral and forward-thinking to keep pace.

69. The Law Council's view is that comprehensive regulatory reform is required to ensure that Commonwealth Acts which authorise the use of ADM and AI are consistent with the administrative law principles of lawfulness, fairness, rationality, and transparency.

Lawfulness and rationality

The law as it stands

70. It is helpful to start with the Full Federal Court decision of *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41 (***Pintarich***), in which the Federal Court considered the lawfulness of an administrative decision purportedly made using an automated process.

71. In *Pintarich*, the question was whether a letter produced and sent as a result of data inputted by a human delegate into a computer-based 'template bulk issue letter' amounted to a decision of the Deputy Commissioner of Taxation to remit a general interest charge (**charge**) under section 8AAG of the Tax Administration Act.

72. The question arose in circumstances where human delegate was found[54] not to have decided whether to remit the charge and did not intend to suggest that he had,[55] and the letter advising of the remission was apparently sent as a result of some kind of error or malfunction in the computer-based program.

73. The majority held that in order for there to be a decision there needed to be both:

- a mental process of reaching a conclusion; and
- an objective manifestation of that conclusion.[56]

74. Their Honours found that only the second of their conditions had been met, as the human delegate had not reached a conclusion as to whether to remit the charge.[57]

75. Kerr J dissented, holding that a decision had been made. His Honour did not accept the majority's two-part test for an administrative decision. He held that while that test is a fair statement of what is *generally* involved in making a decision, there can be circumstances in which a person makes a decision without any explicit mental engagement or where a person makes a decision which is 'not coincident with his or her actions'.[58]

76. His Honour held that the rise of AI in administrative decision-making may be rendering the expectation that there will be a human mental process in each decision a thing of the past. It is worth stating this aspect of His Honour's reasons in full:

> *46. The hitherto expectation that a 'decision' will usually involve human mental processes of reaching a conclusion prior to an outcome being expressed by*

[54] *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79 at [140] (Moshinsky and Derrington JJ).
[55] Ibid, at [19] (Kerr J).
[56] Ibid, [140] and [143] (Moshinsky and Derrington JJ).
[57] Ibid, [153] (Moshinsky and Derrington JJ).
[58] Ibid, [41]-[42] (Kerr J).

an overt act is being challenged by automated 'intelligent' decision making systems that rely on algorithms to process applications and make decisions.

47. What was once inconceivable, that a complex decision might be made without any requirement of human mental processes is, for better or worse, rapidly becoming unexceptional. Automated systems are already routinely relied upon by a number of Australian government departments for bulk decision making. Only on administrative (internal or external) and judicial review are humans involved.

77. His Honour went on to hold:

49. The legal conception of what constitutes a decision cannot be static; it must comprehend that technology has altered how decisions are in fact made and that aspects of, or the entirety of, decision making, can occur independently of human mental input.

78. His Honour presented an alternative flexible test – holding that the determination of whether an administrative decision has been made:

52. … requires close assessment of whether the circumstances in which the conduct said to be, or not to be, a decision arose was within the normal practices of the agency and whether the manifestation of that conduct by an overt act would be understood by the world at large as being a decision.

79. In relation to the facts of the case, where the overt act has been conducted and understood by the recipient as manifesting an administrative decision on the basis of the material before the decision-maker, Kerr J stated that it would 'undermine fundamental principles of administrative law' if a decision could be renounced 'simply by asserting there was a distinction between their mental processes and the expression of those mental processes in the overt act'.[59]

80. An application for special leave to appeal *Pintarich* was refused for want of sufficient prospects of success.[60] The majority's judgment in *Pintarich* has also been followed by the Federal Court as standing for the proposition that the decision-maker must apply a 'mental process' to the decision-making process in order for an administrative decision to be said to have been made, albeit in a matter which did not involve an automated decision.[61]

81. Nevertheless, the Law Council considers the judgment of Kerr J to be persuasive – it is clearly the case Australian Government agencies will increasingly seek to use ADM to make complex decisions.

82. In a 2020 article, Yee-Fui Ng et al suggested that in its judgment in *Pintarich*, the Full Federal Court has cast doubt on whether fully automated decisions are reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).[62] The authors suggest amendments to the ADJR Act and the *Administrative Appeals Tribunal Act 1995* (Cth) (**AAT Act**) to make clear that a 'decision' includes an automated decision:[63]

[59] Ibid, [55]-[56] and [64], (Kerr J).
[60] Pintarich v Deputy Commissioner of Taxation [2018] HCASL 322 (17 October 2018), [1] (Gageler and Keane JJ).
[61] *Friday v Minister for Primary Industry and Resources* [2021] FCA 794, [163] (Reeves J).
[62] Yee-Fui Ng et al, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *University of New South Wales Law Journal*, 1058.
[63] Ibid, 1075.

> *The ADJR Act could be amended to expand section 13 explicitly to require AI to be designed in a manner that requires reasons for decisions to be captured by the automated system. In addition, where machine learning is utilised to automate decisions, the ADJR Act could require accurate documentation of the decision logic, including the principles behind the machine learning model, training and testing processes; and a statement of reasons is logged for all predictions or decisions at the point in time that they are made. An equivalent provision could be included in section 25 the AAT Act.*

83. The Law Council suggests this uncertainty should be addressed by comprehensive legislative response which ensures all ADM is lawful and subject to judicial review.

Authority

84. The Law Council considers that the use of an automated system to perform a function or exercise a power, including to make decisions, which the legislature has granted to a public official, should be expressly authorised by that official. That authorisation should itself be enabled by law.

85. Justice Perry of the Federal Court of Australia, expressed this position in an address made in 2019, after the *Pintarich* judgment:[64]

> *Equally, if an automated system is being utilised to make part or all of a decision, the use of that system must be authorised.*
>
> *It cannot be assumed that a statutory authority vested in a senior public servant which extends by implication to a properly authorised officer, will also extend to an automated system; nor that authority to delegate to a human decision-maker will permit 'delegation" to an automated system. Authority to use such systems should be transparent and express*.

86. Her Honour noted that legislation is addressing the question of who is the 'decision-maker' of an automated decision by 'deeming a decision made by the operation of a computer programme to be a decision made by the human decision-maker', but that 'such deeming provisions require acceptance of highly artificial constructs of decision-making processes … and [m]ore sophisticated approaches may need to be developed as these issues come to be litigated in the courts and these provisions fall to be construed and applied'.[65]

87. Attachment A supports this observation – the Law Council found that where it is intended that a computer program be used to perform statutory powers and functions, the Act conferring the relevant power generally authorises a relevant senior decision-maker (eg the Minister or a regulatory body) to make an arrangements for such use, with the effect that the arranger is taken to have performed the relevant function or power.

88. However, there are differences in the nature of powers which can be exercised. Some Acts simply authorise an arrangement to be made for a computer program to be used to make a decision. Other Acts authorise an arrangement to be made for a computer program to be used to exercise *any* powers or comply with *any* obligation in general, not just decision-making powers.

89. It is not clear whether these distinctions are faithfully adhered to in practice. A common construction of the power to authorise the use of ADM and AI is required to ensure

[64] The Hon Justice Melissa Perry, iDecide: Digital Pathways to Decision, Law Council of Australia 2019 CPD Immigration Law Conference, 21 – 23 March 2019, Canberra.
[65] Ibid, 5.

clarity as to the exact bounds of the authority granted. That power should be consistent in relation to the types of powers which may be exercised by AI and ADM, and employ standard statutory language for expressing the power to use ADM or AI.

90. The requirement for there to be clear statutory authority to use AI or ADM to make an administrative decision or exercise a statutory power may assist to address the uncertainty in *Pintarich.* It is important to note that, unlike a number of other Commonwealth Acts (as discussed in Attachment A), it does not appear that the Tax Administration Act contains an express power authorising a public official to arrange for the use of a computer program to perform functions or powers in their stead.

91. Noting this, the benefits of AI and ADM in public administration anticipated by the Thodey Review may not be fully realised if officials are not given the power to authorise the use of an automated system to perform statutory functions or powers in their stead.

92. In its *Human Rights and Technology – Final Report 2021* (**AHRC Report**), the AHRC recommended that the Australian Government commission an audit of all current or proposed use of AI-informed decision making by or on behalf of Government agencies to inform present use.[66] Such an audit could establish categorically which Commonwealth Acts contain powers to authorise the use of a computer to perform a statutory function or power and whether such a power is required by officials who do not previously possess it.

Recommendation

- **The Australian Government commission an audit of all current or proposed use of AI and automation to make or assist in making administrative decisions by or on behalf of Government agencies;**
- **Legislative amendments be made to ensure that any statutory powers which an official exercises, or intends to exercise, through the use of ADM or AI are expressly stated to include power to use ADM or AI;**
- **Statutory provisions under which the use of AI and ADM may be authorised should:**
  - **be consistent in relation to the types of powers which may be exercised by AI and ADM; and**
  - **employ standard statutory language for expressing the power to use ADM or AI.**

Accurate decision making

Suitability assessment

The case for a legislated suitability assessment

93. It is also critical to assure lawfulness in decision-making produced by the automated systems.

[66] Australian Human Rights Commission (**AHRC**), '*Human Rights and Technology – Final Report 2021*', 61-62.

94. As Her Honour Justice Perry notes:[67]

> *Computer programmers effectively assume responsibility for building decision-making systems that translate law and policy into code. Yet computer programmers are not policy experts and seldom have legal training. How can we be sure that complex, even labyrinthine, regulations are accurately transposed into binary code?*
>
> *…*
>
> *Further, laws are interpreted in accordance with statutory presumptions, and meaning is affected by context. These are not necessarily simple questions and the potential for coding errors or distortions of meaning is real.*
>
> *…*
>
> *Added to this, the law is dynamic. Agencies must constantly and vigilantly ensure that automated systems are up to date to reflect policy changes and legislative amendments in a timely and accurate manner, as the failure to do so again risks decisions being unlawfully made. Such systems also need to be kept up to date while maintaining the capacity to apply the law as it stands at previous points in time for decisions caught by transitional arrangements*

95. It is necessary to ensure that an ADM system is capable of reliably making, or assisting in making, lawful decisions taking into account the matters raised by Justice Perry. The question is how this should be done.

96. The Law Council recommends that legislation which authorises an official to make an arrangement for the use of ADM and AI require the official to perform an assessment of suitability of the proposed automated system to perform the statutory function or power in question. The essential purpose of a suitability assessment is to ensure that the automated system is capable of exercising the official's statutory functions or powers lawfully.

97. The power to make the arrangement should be subject to the official being satisfied that based on the suitability assessment the automated system will produce lawful decisions. This includes compliance with legislative requirements and applicable common law principles that are not excluded by the Act, such as procedural fairness. The arranger should ensure, for example, that the system has the capacity to appraise and assess input provided by the subject of the decision (or to refer that material to a human decision-maker).

98. This would be a substantive reform – as discussed in Attachment A, most Acts do not require the official to make any kind of assessment before arranging for the use of ADM to exercise a statutory function or power.

The discretion question

99. A question arises as to whether AI should be able to be used to exercise a statutory discretion.

100. The Administrative Review Council Report No. 46, 'Automated Assistance in Administrative Decision-making' (**2004 ARC Report**) took the view that decision-making systems 'would generally be suitable only for decisions involving non

[67] The Hon Justice Melissa Perry, iDecide: Digital Pathways to Decision, Law Council of Australia 2019 CPD Immigration Law Conference, 21 – 23 March 2019, Canberra, 6.

discretionary elements'[68] and 'should not automate the exercise of discretion'[69] but can be used as an administrative tool to assist an officer in exercising his or her discretion.[70] The 2004 ARC Report considered that it is 'fundamental to administrative decision making' that a decision maker exercise a discretion personally[71] and that 'automation of discretion is not in accordance with the administrative law values of lawfulness and fairness because it could fetter the decision maker in the exercise of their discretionary power'.[72]

101. Justice Perry has outlined the risks that automated discretionary powers could result in injustice. It is worth setting out Her Honour's analysis in full (emphasis added):[73]

> *Automated decision-making systems are grounded in logic and rules-based programs that apply rigid criteria to factual scenarios. Importantly, they respond to input information entered by a user in accordance with predetermined outcomes. By contrast, many administrative decisions require the exercise of a discretion or the making of an evaluative judgment. For example, whether a person is "of good character", or whether they pose a "danger to the Australian community".*[74]
>
> *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 evaluative judgment, should therefore be the subject of careful scrutiny in order to protect against the risk that the removal of discretionary or evaluative judgments may result in unfair or arbitrary decisions****.*

102. However, as Her Honour goes on to acknowledge, increasingly, not all automated decision-making systems <u>are</u> grounded in logic and rule-based programs. In a webinar hosted by the Australian Law Reform Commission (**ALRC**), Professor Dan Hunter of the ARC Centre of Excellence for Automated Decision-Making and Society indicated that the technology underpinning automated decision-making systems has 'changed profoundly' over the last seven to eight years.[75] Professor Hunter distinguished between two types of automated decision-making systems:

- symbolic systems – systems where issues, such as calculating social security benefits, are represented by way of *rules*. As these systems operate in accordance with rules, such systems could come up with the correct answers according to administrative law and explain why they had made those decisions;

---

[68] Administrative Review Council Report No. 46, 'Automated Assistance in Administrative Decision-making' (November 2004), Principle 1.
[69] Ibid, Principle 2
[70] Ibid, Principle 3.
[71] Ibid, [3.2].
[72] Ibid. [3.2.4].
[73] The Hon Perry, iDecide: Digital Pathways to Decision, Law Council of Australia, 7.
[74] *Migration Act 1958* (Cth), ss 501(6)(c), 36(1C)(b).
[75] Professor Dan Hunter, oral statement given to the Automated Decision Making and Administrative Law webinar (10 August 2020), audio file and summary of statement available at https://www.alrc.gov.au/news/automated-decision-making-and-administrative-law-a-nationwide-conversation-on-law-reform/, accessed on 25 May 2025.

- data-driven machine learning – these are systems which are *trained* to achieve certain outcomes through data inputs. Professor Hunter emphasised the importance of ensuring the data upon which such systems are taught is not discriminatory. He also noted that these systems are bad at explaining decisions and effectively operate as 'black boxes'.

103. Justice Perry commends the following description of machine learning systems provided by Professor Lyria Bennett Moses:[76]

> *The computer "learns" from correlations and patterns in historic data. This can be done through supervised learning, where a human provides the machine with outputs for a set of inputs in a "training set", or through unsupervised learning, where the computer alone identifies clusters and regularities within data. Once correlations, patterns or clusters are identified, the computer is able to classify new inputs (for example, into high and low risk categories), provide outputs for new inputs (for example, risk scores …) or place new data into established clusters (for example, different types of offenders or documents). Machine learning acts intelligently in the sense that it learns over time, and can thus be responsive to feedback, and in the sense that the patterns learnt yield useful predictions or insights. However, machine learning does not follow the same logical inference paths as would a human expert making the same prediction; its logic differs from doctrinal reasoning*

104. Former High Court Chief Justice French has raised the possibility that data-driven machine learning systems may ultimately be capable of making discretionary decisions.[77]

> *A machine with a deep learning neural network of a kind which is able to learn to predict or determine outcomes by the application of some kind of self-generated algorithm developed from exposure to a large database of cases might also be capable of exercising a kind of discretionary function. The steps leading to a decision based on that kind of machine learning would not readily be accessible. They may be no more translatable into logic and reasoning than the mental processes of the human decision-maker where logic is exhausted and only discretion remains.*

105. However, Justice Perry notes that 'while potentially equipped to make such decisions, the question must still be asked as to the appropriateness of employing that technology in the particular context and the extent to which humans should still be in the loop'.[78] Her Honour also notes that machine learning is also subject to bias (footnotes removed):[79]

> *While it may seem odd to speak of bias in the context of machines, "[p]rogrammers can build matching algorithms that have biased assumptions or limitations embedded in them. They can unconsciously phrase a question in a biased manner." Furthermore, biases may become embedded and reinforced through the process of machine learning.*

106. It is noted that contributors to this submission provided different views as to whether ADM should be authorised for discretionary decisions. The Law Society of NSW, for example, expressed the view that discretionary powers should not be the subject of

[76] Lyria Bennett Moses, 'Artificial Intelligence in the Courts, Legal Academia and Legal Practice' (2017) 91 *Australian Law Journal* 561, 563, cited in the Hon Justice Perry, The Hon Justice Melissa Perry, iDecide: Digital Pathways to Decision, Law Council of Australia, 8.
[77] The Hon Robert French AC, 'Rationality and Reason in Administrative Law – Would a Roll of the Dice be Just as Good?' (29 November 2017), <link>, 4.
[78] Hon Justice Perry, , iDecide: Digital Pathways to Decision, Law Council of Australia, 7.
[79] Ibid, 8.

complete automation, but rather, automated processes may be used as an administrative tool to assist an official make a decision.[80]

107. The LIV suggested that relevant legislation or policy must specifically articulate an obligation for manufacturers and organisations to avoid ADM algorithms which lack the ability to assess or test the amount of unconscious, conscious, or other bias in its decision-making. It also suggested that legislation and related regulatory policy should control the exercise of discretion where weight is given to specific factors in a decision process, to mitigate potential bias.

108. LIV members raised an example of an HIV positive individual applying for a visa. A medical officer would ordinarily consider the implications of an individual's health status, including the imposition on the Australian community, and exercise discretion and allocate weight to relevant considerations in making a decision as to whether this diagnosis should impact the visa application. In the event that decisions akin to this are delegated to automated processes or AI, it will remain important to ensure there is transparency regarding the weight given to different factors, and that there is no disproportionate bias incorporated by the computerised process.

109. To balance the potential for adverse impacts on the interests of the community, subject to the use of automated decision making, the Law Council takes the preliminary view that the capacity of an automated system to make a discretionary decision should be considered in any initial suitability assessment. That is, if a system is being designed to exercise a discretionary power, the suitability assessment will need to consider whether the automated system is capable of exercising that discretion rationally, logically and consistently. It is expected that this would require user and system testing, and the input of technical and legal expertise.

How to mandate a suitability assessment

110. There are various ways in which the suitability assessment may be imposed.

Option 1: statutory checklist

111. The Ombudsman's Guide, which is a policy, recommends that officials complete a checklist before commencing the operation of an ADM system. The Ombudsman's Guide states that automation of any part of a process is not suitable where it would:

- *Contravene administrative law requirements of legality, fairness, rationality and transparency.*
- *Contravene privacy, data security or other legal requirements (including human rights obligations).*
- *Compromise accuracy in decision-making.*
- *Significantly undermine public confidence in government administration*

112. The checklist in the Ombudsman's Guide includes a number of matters which relate to the lawfulness of the decision, including:

- whether the system will uphold the administrative law values of legality and fairness;

[80] Citing European Commission, 'A Definition of AI: Main Capabilities and Disciplines', April 2019, < https://ec.europa.eu/futurium/en/ai- alliance-consultation>.

- engage a multidisciplinary team to assess the system made up of legal; policy owners; architecture, data and other information technology experts; program managers; service delivery professionals.
- undertake a risk assessment (of administrative law and privacy risks);
- undertake testing and verification of rules to ensure decisions are legal, accurate, fair and consistent; and
- assess and deliver training needs for staff in using the system.

113. Such a checklist could take the form of a set of statutory criteria which the public official must consider before reaching the state of satisfaction that use of an automated system is appropriate.

Option 2: human rights impact assessment

114. An option recommended in the AHRC Report was that legislation should require that a human rights impact assessment (**HRIA**) be undertaken before any department or agency uses an AI-informed decision-making system to make administrative decisions. The AHRC states:[81]

> *An HRIA should include public consultation, focusing on those most likely to be affected. An HRIA should assess whether the proposed AI-informed decision-making system:*
>
> *(a) complies with Australia's international human rights law obligations;*
>
> *(b) will involve automating any discretionary element of administrative decisions, including by reference to the Commonwealth Ombudsman's Automated decision-making better practice guide and other expert guidance;*
>
> *(c) provides for appropriate review of decisions by human decision makers; and*
>
> *(d) is authorised and governed by legislation.*

115. As discussed below, the Law Council considers that (c) and (d) should be a mandatory feature of a legislative scheme, rather than a matter to consider.

Option 3: algorithmic risk assessment

116. The Canadian Directive on Automated-Decision-Making (**Canadian Directive**) is a policy direction issued to government agency heads under the code of conduct for Canadian public servants.[82]

117. The Canadian Directive requires the person responsible for an ADM system to conduct an Algorithmic Impact Assessment prior to the production of such a system based on a graduated scale of kinds of decisions to determine suitability for ADM.

118. The Algorithmic Impact Assessment is a questionnaire designed to inform an assessment of the risk of the impact of an Automated Design System on the following affected interest areas:[83]

---

[81] AHRC, '*Human Rights and Technology – Final Report 2021*', 55.

[82] [82] See cl 2.1 of the Canadian Directive, <link>. For consequences of non-compliance see cll 7.1 and 7.2 of the Canadian Directive.

[83] Government of Canada, 'Algorithmic Impact Assessment Tool' (website) <link>, accessed on 5 November 2021.

- the rights of individuals or communities;
- the health or well-being of individuals or communities;
- the economic interests of individuals, entities, or communities;
- the ongoing sustainability of an ecosystem.

119. The Algorithmic Impact Assessment assesses risk factors and mitigation strategies to produce an overall impact score. The risk factors include:[84]

- project related risks;
- system capabilities;
- transparency of the algorithm;
- kind of decision which is being automated;
- duration, reversibility and area impacted; and
- nature, provenance and security classification of data used to automate decision.

120. The mitigation factors include:[85]

- consultation with experts (e.g. privacy and legal experts);
- processes to ensure that data is representative and unbiased, as well as transparency measures related to those processes;
- procedural fairness matters, such as procedures to audit the system and its decisions, as well as the recourse process; and
- privacy safeguards.

121. The Algorithmic Impact Assessment will ultimately produce an impact assessment level of the Automated Decision System on the affected interest areas – from little to no impact (with impacts which are 'reversible and brief') to very high impact (with impacts which are irreversible and are perpetual).[86]

122. Critically, the impact assessment level attributed to an Automated Decision System will determine the Impact Level Requirements imposed to regulate the system. For example, the greater the impact assessment the more onerous should be the requirements relating to:[87]

- peer review;
- obligation to give notice to affected person and the content of such notices, with higher impact systems requiring plain language notices as well as publicly available documentation about how the automated decision system works;
- human involvement, with higher impact systems requiring human intervention points and a final decision made by a human;
- explanation for a decision;
- training; and
- contingency planning.

123. For example, a discretionary decision is more likely to be classified as high impact, thus tightening the regulatory controls to ensure it produces transparent and

[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.

explicable decisions. Such an approach allows agencies to form a view as to the benefits of expending costs to produce a complex system which meets those controls against the benefits of automation.

Comment on the options

124. Through input provided to the Law Council for the purpose of this submission, the Law Society of NSW expressed support for the algorithmic impact assessment approach, and the Law Council suggests that the Digital Technology Taskforce may wish to further investigate its possible use.

125. Under each of these options, the assessment would be performed by the official responding for authorising the use of the computer program.

126. However, a key benefit of the algorithmic impact assessment approach is consistency – each automated system is assessed in the same way by an independently-produced framework, which may ensure rigour, and safeguard against poor or erroneous executive decision-making. Further, if something akin to the Canadian Directive model is adapted, the graduated scale of regulation should mean that administrative and regulatory impost on the official responsible for the automated system is commensurate to risk. The algorithmic impact assessment could be made by a legislative instrument in accordance with certain criteria. It may be subject to regular review to ensure it remains fit for purpose.

127. Whichever model arises, a question arises as to whether a body is required to regulate the making of the initial suitability assessment – this is addressed further below.

Recommendation

- **All legislation which authorises the use of ADM and AI to exercise statutory powers should require an assessment be undertaken of the suitability of the proposed automated system to perform the statutory function or power in question, as a condition to the power to arrange for such use.**
- **The Digital Technology Taskforce investigate the possible use of an algorithmic impact assessment to perform that suitability assessment, based on a graduated scale**

All arrangements must be subject to ongoing governance requirements

128. The Law Council also recommends that the regulatory framework require that all arrangements for the use of ADM be subject to ongoing governance requirements, including

    - monitor their performance on a continual basis, including for developing bias and to ensure ongoing accuracy, with the results to be published; and
    - ongoing testing by a multidisciplinary team to ensure they remain fit for purpose.

129. This approach is consistent with, and would enshrine, the recommendation made by the Commonwealth Ombudsman that officials 'establish a sustainable and ongoing monitoring and review cycle to ensure decisions are legal, accurate, fair and consistent'. It is also consistent with the AI Ethics Principles, which provides that those

responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI systems. It is also consistent with the OECD Recommendation which provides that organisations which deploy AI should include a risk management approach to address risks related to AI systems, including privacy, digital security, safety and bias. As discussed in Attachment A, presently Commonwealth legislation provides for the substitution of an automated decision which in varied circumstances, including if the computer program is not 'functioning correctly' or the arranger is satisfied the *decision itself* is incorrect.[88]

130. In either approach, there is an obligation that a human decision-maker retains control of the computer program and is sufficiently technologically literate to identify and ensure the program is operating correctly. However, there is a significantly different threshold to the point at which the human becomes involved in the decision-making process and the reviewability of a decision made under each of those regimes given by example.

131. The manner in which a determination that a decision is 'incorrect' may be brought about is not identified in any case. Nor is there reference in these Acts to there being a power to review the merits of that decision. The reference to 'correct' and 'incorrect' is amenable to application in data-based or objective decisions – where there is only a right or wrong decision, in fact. It is less suitable where the decision is discretionary, particularly in relation to fact finding, and 'correctness' may be a matter on which reasonable minds may differ.

132. The Law Council suggests that governance requirements should include contemporaneous auditing of automated decisions to determine their legal validity, and thus enable decisions to be substituted, as necessary, in a fair and timely way.

133. In designing such a governance scheme, reference may be had to Article 24 of General Data Protection Regulation (**GDPR**) passed by the European Union, which imposes obligations on the data controller in relation to the management of the data system. Specifically, it provides:

> *Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation.*

Recommendation

- **All legislation which authorises the use of ADM and AI to exercise statutory powers should require that all arrangements for the use of ADM be subject to ongoing governance requirements by a multidisciplinary team to ensure they remain lawful and up-to-date, and to include auditing, testing, and reporting obligations.**

[88] Subsection 62F(3) of the BNR Act, subsection 135A(3) of the Designs Act, subsection 223A(3) of the Patents Act, subsection 76B(3) of the PBR Act, subsection 222A(3) of the Trade Marks Act, subsection 4A(3) of the MRC Act, subsection 3A(3) of the SRCDC Act, subsection 4B(3) of the Veterans' Entitlements Act and cl 5F(3) of the Schedule to the AgVet Code Act once item 36 of Schedule 1 the AgVet Amendment Act commences.

Cases demonstrating the need for reform to ensure lawfulness

134. The following matters demonstrate the need for legislated suitability assessments to ensure the use of automated systems will be lawful.

Centrelink's online compliance scheme

135. Centrelink's online compliance intervention (**OCI**) program (commonly known as 'Robodebt') is an example of an arrangement made by a government agency for the use of a computer which produced unlawful results, which arguably could have been avoided by a suitability assessment and ongoing governance requirements.

136. Social security payments are based, in part, on a calculation of a person's income in a fortnight.[89] A recipient is required to report changes in expected income over a fortnight.[90] Where it is found that a recipient has incorrectly reported their fortnightly income, and the correct amount would have affected their entitlement to a payment, a debt may be raised.[91]

137. The OCI matched income tax data declared to the Australian Taxation Office (**ATO**) records held by Centrelink. Critically, the algorithm used by the online portal to compare these amounts estimated that the income was earned evenly across the financial year. Where there was a discrepancy between the income declared to the ATO and Centrelink's records, a letter was automatically generated that asked recipients to use an online portal to update their details.

138. In some cases, a person updating their details resolved the discrepancy between the two sets of data. Where the discrepancy was still not resolved by any data entered by the person into the online portal, recipients were advised that an overpayment had occurred and a purported debt had been raised against them.[92]

139. Centrelink had been matching its data against ATO data for several years. What changed was that Department of Human Services (**DHS**) officials no longer undertook manual checks of any discrepancies raised by the initial data matching. Previously, a debt was raised only after 'every possible means of obtaining the actual income information had been attempted and failed under this process'.[93] Under the OCI program, the debt would result if the affected person did not enter data which acquitted the discrepancy.

140. The OCI program was ultimately found not to be lawful.[94] In the Federal Court proceeding *Deanna Amato v The Commonwealth of Australia*,[95] the Commonwealth agreed to orders which conceded that debts raised by the OCI program using the data matching technique were not lawful as the information before the decision-maker was not capable of satisfying the decision-maker that a debt was owed.[96]

---

[89] Community Affairs References Committee, Parliament of Australia, '*Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative'* (Report, June 2017), [2.3].
[90] Ibid, 2.4.
[91] Ibid, 2.4.
[92] Ibid, 2.28.
[93] Community Affairs References Committee, Parliament of Australia, '*Centrelink's compliance program''* (Second interim report, September 2020), [1.23]-[1.24].
[94] The Law Council raised a number of legal concerns in its 2019 Senate Committee submission - see [42]-[89].
[95] *Deanna Amato v The Commonwealth of Australia* (Federal Court of Australia, VID611/2019), 27 November 2019).
[96] Ibid, order of Davies J.

141. The Court made similar orders in the class action matter of *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634.[97] The Court in that matter held:[98]

> *The evidence shows that the Commonwealth unlawfully asserted such debts, totalling at least $1.763 billion against approximately 433,000 Australians. Then, including through private debt collection agencies, the Commonwealth pursued people to repay these wrongly asserted debts, and recovered approximately $751 million from about 381,000 of them.*

142. The Senate Community Affairs References Committee, in its Second interim report into the OCI program stated that it has:[99]

> *serious concerns that the fact that the Income Compliance Program continued to operate unlawfully for such a long period and with such a negative ongoing impact on individuals shows broader critical failings in policy, design and implementation from Services Australia.*

The use of algorithms in immigration detention

143. The need for transparency in the use of AI and algorithm-informed ADM is critical in immigration detention. The following example illustrates the need for strong governance requirements when ADM is used in contexts involving vulnerable people or which engages their basic rights.

144. In Australia, both the Commonwealth Ombudsman and the AHRC have raised concerns about the algorithm underpinning the Security Risk Assessment Tool (**SRAT**) managed by DHA's detention service provider, Serco. DHA has described the SRAT 'as a tool that uses 'a series of mathematical calculations based on known, factual information" to arrive at a number of different risk ratings'.[100]

145. The SRAT determines a risk rating for a detainee based on inputs from staff on the number and type of incidents,[101] to produce a series of 'behavioural risk indicators',[102] with a weighting assigned to each.[103] This process takes into account 'a range of factors, including behaviour in detention, criminal history, risk of self-harm, community safety, safety of staff and treating practitioners, and opportunities to escape or offend'.[104]

146. The final output is one of seven risk ratings.[105] A detainee's risk rating in turn contributes to 'the use of mechanical restraints and other restrictions'[106] and has a 'significant bearing on the placement of a detainee within the network'.[107] The risk rating can be overridden at any time by a human official in the context of transport or escort activities.[108]

---

[97] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, Annexure C – Declarations, [1].
[98] Ibid, [4] (Murphy J).
[99] Community Affairs References Committee, Parliament of Australia, '*Centrelink's compliance program''* (Second interim report, September 2020), [3.75].
[100] AHRC, Use of Force in immigration detention, [2019] AusHRC 130, link, [96].
[101] Ibid, [96]-[97].
[102] Ibid, [98].
[103] Ibid, [101].
[104] AHRC, 'Risk management in immigration detention' (2019), 21. See also, AHRC, Use of Force in immigration detention, [2019] AusHRC 130, [75].
[105] Ibid, [102].
[106] Commonwealth Ombudsman, Review of the Ombudsman's activities in overseeing immigration detention, January to June 2019, (February 2020), link, [5.39].
[107] Ibid, [5.40].
[108] AHRC, Use of Force in immigration detention, [2019] AusHRC 130, [104].

147. Both the Commonwealth Ombudsman and the AHRC have raised concerns that the SRAT:[109]

- is disproportionately influenced by offending history and does not adequately consider the severity of the offence;
- does not consider the passage of time since the offence;
- does not sufficiently account for a detainee's behaviour since the offence (including positive behaviour), or the programs or other mitigation or rehabilitation programs they have since completed; and
- does not account for established sociological and psychological assessments of violent behaviours, or the likelihood of reoffending.

148. The Ombudsman observed that the 'SRAT is structured in such a way that an inexperienced analyst is unlikely to identify some of the idiosyncrasies that generate an automatic (and, at times, unwarranted) escalation'[110] and that there was a 'tendency for analysts to include inaccurate information'.[111] The AHRC noted that staff conducting the assessment may not consider or have access to all of the relevant information.[112]

149. The Ombudsman noted:[113]

> *[w]here the risk assessment is inaccurate, or is applied without consideration of individual circumstances, there is a significant risk of detainees being placed in inappropriate locations within facilities and across the network.*

150. The AHRC similarly noted:[114]

> *Inaccurate risk assessments may result in people being subject to restrictive measures that are not necessary, reasonable or proportionate in their individual circumstances. They may also hamper efforts to identify and manage individuals who do pose a genuine risk to the safety of others, potentially placing other people in detention at risk of harm.*

151. The Ombudsman made a number of recommendations to mitigate that risk:[115]

> *We recommend that the department, in conjunction with its service providers:*
>
> *a. review the Security Risk Assessment Tool and associated algorithm to ensure that, as far as possible, it does not unfairly skew the risk rating of detainees*
>
> *b. ensure intelligence analysts are empowered to make recommendations relating to the reduction or escalation of the initial risk assessment of a detainee within their initial 28 days in detention*

---

[109] Commonwealth Ombudsman, Review of the Ombudsman's activities in overseeing immigration detention, January to June 2019, (February 2020), [5.37] and Use of Force in immigration detention, [2019] AusHRC 130, [536]-[542].
[110] Ibid, [5.38]
[111] Ibid, [5.39].
[112] Use of Force in immigration detention, [2019] AusHRC 130, 22
[113] Commonwealth Ombudsman, Review of the Ombudsman's activities in overseeing immigration detention, January to June 2019, (February 2020), , [5.40].
[114] Use of Force in immigration detention, [2019] AusHRC 130, 22
[115] Commonwealth Ombudsman, Review of the Ombudsman's activities in overseeing immigration detention, January to June 2019, (February 2020), Recommendation 11

c. *ensure a quality assurance program of the information (both historical and current) used to inform the Security Risk Assessments is undertaken prior to any risk assessment being applied to a detainee*

d. *ensure a security, flight or behaviour risk rating of High or Extreme is only applied where there is substantiated evidence to support such a rating*

e. *review and substantiate High or Extreme security risk assessments prior to the rating being used to: (i) support the use of mechanical restraints; or (ii) inform any other activity where a detainee will be placed in restraints, where such placement will cause public embarrassment, or cause the detainee to decline to participate in medical or mental health treatment.*

152. DHA, in response, indicated that it had already engaged a consultant to undertake an independent review of the SRAT, which it anticipated 'may allow for assessments to be more nuanced'.[116] It also noted that the 'service provider manages a quality assurance program ensuring information contained in security risk assessments is accurate and appropriate to the detainee', with assessments reviewed monthly, reviews performed after incidents involving detainees, and a trend analysis on incident patterns undertaken, which together it considered to be appropriate.[117]

153. In the following report, the Commonwealth Ombudsman acknowledged that response, but indicated it was 'yet to see evidence of any substantive change to the outcomes produced by the updated SRAT':[118]

> *We continue to identify errors in individual risk assessments where detainees are recorded as the offender rather than the victim, undue weighting is placed on offences committed 15 or 20 years ago, or mitigating circumstances (such as being incident free since arrival in immigration detention) are not being taken into account. Intelligence analysis staff onsite are guided to use the SRAT as the definitive tool and not supported to exercise judgement to adjust the assessment, even where it may no longer represent the actual risk posed by the detainee.*

154. In the United States, algorithmic risk assessments have also underpinned immigration detention decisions made by United States Immigration and Customs Enforcement (**ICE**). Specifically, by assisting ICE officers to decide whether or not to detain noncitizens by predicting whether they would pose a flight risk or a danger to the community.[119]

155. In 2017, the algorithm was altered so that it could only recommend detention or referral to a supervisor – it could no longer recommend release. Hausman found this change reduced the chance of release and while there was a slight increase in officers overriding decisions to detain with a decision to release, supervisors counteracted this, by becoming more likely to overrule officers' release decisions.[120]

156. Hausman drew three conclusions from this result:

(a) The simplest way that algorithms can perpetuate human bias is by humans intentionally rigging them. He noted that scholars have found that while algorithms may outperform human judges' predictive judgments in many contexts, including predictions about flight risk and recidivism in the bail context, those tools may fall prey to the biases, racial and otherwise, that inform data on

[116] Ibid, 31.
[117] Ibid.
[118] Commonwealth Ombudsman, 'Monitoring Immigration Detention July to December 2019', (2020), 42.
[119] Hausman, David, The Danger of Rigged Algorithms: Evidence from Immigration Detention Decisions (June 30, 2021). Available at SSRN: https://ssrn.com/abstract=3877470 or http://dx.doi.org/10.2139/ssrn.3877470, 1.
[120] Ibid.

which they are trained. However, in this case, the bias was intentionally introduced.

(b) Secondly, humans may do little to calibrate their reliance on algorithms' predictions and recommendations.

(c) Thirdly, that algorithmic rigging was employed as a form of policy change, evidenced through the practice of supervisors overriding line-level decisions to depart from the algorithm's recommendation.

Transparency and fairness

157. The Law Council considers that in order to be compliant with the principles of transparency and fairness, each use of ADM and AI to make, or assist in making, an administrative decision should operate in a way which renders the use of that technology in that decision capable of human review.

158. These systems should be adapted to ensure they are accessible to and understood by all potential users of the system.

159. This assessment should consider the circumstances of the users. There is a risk of technology driving regulation may exacerbate the adverse impacts on vulnerable people by reducing the fairness of the system and limiting the opportunity to tailor decisions to individual circumstances. This can occur where regulations are designed to be administered automatically, with a preference for rules at the expense of fairness. Where decisions involve vulnerable people (especially those relating to social security and some immigration decisions), government agencies must ensure that services are accessible to those groups.

160. Many individuals seeking decisions made by social security or migration bodies may be vulnerable, low-income earners or people from culturally and linguistically diverse communities. Similarly, elderly people or vulnerable groups seeking access to health or insurance information with limited technological literacy are likely to be adversely impacted by negative automated decisions, particularly where the review process is inaccessible or also predicated on technology. Ultimately, it is important that decisions made by automated processes are correct and transparent in order to support access to justice, or the review process is easily accessible and timely, particularly for those demographics which may be unable to easily seek legal assistance.

161. A number of regulatory features are required to ensure that objective.

All arrangements should be published

162. Consistent with the administrative law principle of transparency, the Law Council recommends that the regulatory scheme should require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it. Presently, as set out in Attachment A, under regulatory framework Commonwealth agencies are not required to publish arrangements made to use such systems, nor report on that use, which effectively protects them from scrutiny as to how the system functions and the governance set up around it.

163. An issue arises as to the kind of information which should be required to be published and, in particular, whether this should include technical information about the system itself.

164. The Ombudsman's Guide states that:

> *The underlying business rules of an automated system must be readily understandable and information about automated systems should be publicly available.*

165. The Digital Service Standard criteria include:

- build using open standards and common government platforms where appropriate;[121] and
- make source code open.[122]

166. This approach would also be consistent with the AI Ethics Principles, which include that people should understand when an AI system is engaging with them.[123] It is also consistent with the OECD Recommendation, which provides that organisations deploy automated systems should 'foster a general understanding of AI systems' and 'be accountable for the function of an automated system'.

167. Under the Canadian Directive, the requirement to publish information about the system differs depending on the algorithmic impact assessment. Systems producing high or very high impacts on rights, health, economic interests on ecological sustainability are required to

> *publish documentation on relevant websites about the automated decision system, in plain language, describing:*
>
> - *How the components work;*
> - *How it supports the administrative decision;*
> - *Results of any reviews or audits; and*
> - *A description of the training data, or a link to the anonymized training data if this data is publicly available.*

168. The Law Council considers a proactive approach to sharing information on how a decision to use algorithmic processes is made, the algorithm itself and the business case behind the development and implementation of automated decision-making processes are critical to ensuring accountability of government as well as scrutiny of a system. Such an approach ensures competing interests are appropriately balanced between efficiency gains and the interests of the community, in particular those impacted by automated decisions. These considerations should be at the forefront of decision making regarding the use and implementation of automated decision-making processes.

169. The Law Council understands that issues may arise with respect to publishing commercial-in-confidence and other sensitive information about a system. These concerns may be mitigated by using open standards and common government platforms, as recommended by the Digital Service Standard, otherwise they may need to be managed in a way which still permits the public to understand the operation of the system.

---

[121] DTA, 'Digital Service Standard criteria – 7. Use open standards and common platforms', <link>, accessed on 31 May 2022.
[122] DTA, 'Digital Service Standard criteria – 8. Make source code open', link, accessed on 31 May 2022.
[123] Department of Industry, Science, Energy and Resources, n 46.

Recommendation

- **All legislation which authorises the use of ADM and AI to exercise statutory powers should require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it, including sufficient information to enable a broad understanding of how the automated system operates to produce lawful administrative decisions.**

The automated decision should be comprehensible

170. The Law Council recommends that the regulatory framework should require the following features to ensure that an affected person understands an automated decision.

171. It is noted that the following features are consistent with the Ombudsman's Guide[124] and the AI Ethics Principles,[125] but the Law Council considers they should be legislated to ensure consistency and best practice in every case.

Notification of an automated decision

172. Firstly, any affected individual must be notified where automation, including AI, is materially used in making an administrative decision. This is consistent with recommendation 3 of the AHRC Report and the OECD Recommendation, which provides that an organisation deploying AI should inform a person that he or she has been subject to an automated decision. In explaining the reason for its recommendation, the AHRC stated (footnotes removed):[126]

> *Stakeholders noted that a lack of transparency about the use and operation of AI-informed decision-making systems can make it difficult for individuals to enforce their rights. This restricts the ability of an individual to challenge a decision and therefore goes against fundamental values of administrative law. Transparency regarding the use of AI in decision making can also build public trust, and address historical breaches of that trust.*
>
> *Some considered that simply notifying affected individuals that AI has been used in a decision-making process may be insufficient. It was suggested that notification should be accompanied by additional information—such as how to challenge the decision or seek a remedy, or more specific detail regarding how the decision-making process relied on AI. Notification that does little to inform individuals in a meaningful way, or is simply 'default information', may just cause 'notice fatigue'.*

[124] Commonwealth Ombudsman, n 43, https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide. See heading: 'Automated systems should be understandable'.
[125] Particularly, the following principles:

- *Transparency and explainability* – people should understand when an AI system is engaging with them and reasonable justifications for AI systems outcomes and key factors used in decision making should be clear.
- *Contestability* – people should be able to challenge the use or outcomes of the AI system, with sufficient access to the information available to the algorithm, and inferences drawn, to make contestability effective.

[126] AHRC, 'Human Rights and Technology – Final Report 2021', 60.

173. Presently, no legislative scheme which authorises the use of ADM requires the subject of a decision to be notified that the decision was produced by an automated system.

Explicable statement of reasons

174. Secondly, the automated decision must be able to be reduced to a statement of reasons explicable by a human, for the purpose of enabling it to be reviewed by a tribunal or court, and the subject of the decision should have a right to request such reasons. This statement should explain how the decision was made, using what information and reasoning. This report should enable an affected citizen to interrogate the results and identify errors (rather than, for example, incomprehensible 'raw data' which would require expert knowledge to interpret).

175. Regulation is required to avoid a 'black box' issue of advanced AI using machine learning where the reasoning behind decisions cannot be traced or adequately explained. Decisions being made by opaque algorithms without explanation is 'analogous to evidence offered by an anonymous expert, whom one cannot cross-examine'.[127]

176. This 'black box' issue is discussed in *Re Adam Schouten and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 365, in which the applicant's rate of Youth Allowance (**YA**) was initially reduced using an ADM. The decision was affirmed by an internal (human) review and was ultimately affirmed by the Administrative Appeals Tribunal (**AAT**). However, the AAT noted that neither the original automated decision nor the internal review decision disclosed the basis for the decision, and it wasn't until evidence was given by a human expert in the hearing that the applicant was provided with a plain English explanation of the complex and multi-step process employed to determine the rate of YA'.[128]

177. The AAT commented:[129]

> *This case highlights the difficulty where Government agencies make "automated decisions" and the decision is complex. The citizen will not understand and therefore be unable to challenge a decision about which they feel aggrieved unless provided with a plain English explanation of the basis for the decision. As in this case, the initial decision-maker is sometimes unable to provide that explanation. The Administrative Review Council in its report to the Attorney Attorney-General, "Automated Assistance in Administrative Decision-Making Report No 46" noted that care was needed to ensure that the values of transparency and external scrutiny are not compromised where automated decision-making is employed: see principle 24. A major challenge for government agencies dealing with citizens is to ensure that their decisions are instructive, informative and enlightening. In this case, Centrelink has not met that challenge. I recommend that the Secretary review the explanation provided to YA claimants about how their rate of allowance has been determined.*

178. The Commonwealth Ombudsman suggests that this statement of reasons may incorporate an audit trail of the decision-making process in the case in question. It states:[130]

---

[127] Michael Brooks, Artificial Ignorance (2017) 238 (3146) *New Scientist*, 28–33; Frank A. Pasquale Glyn Cashwell, Four Futures of Legal Automation (2015) 63 *UCLA Law Review Discourse*, 26–48.
[128] *Re Adam Schouten and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 365, [38].
[129] Ibid, [39].
[130] Commonwealth Ombudsman, n 43, https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide. See heading: 'Automated systems should be understandable'.

Disclosure and exposure to audit are important expressions of the transparency and accountability policy of government, and contribute significantly to confidence in public administration.

To ensure that the appropriate law, policy and procedure have been correctly applied to individual circumstances, an automated system should be able to automatically generate a comprehensive audit trail of the decision-making path.

The audit trail should be derived from the underlying business rules of the automated system, and the interaction between the rules and the facts of the case. In some cases, this enables the decision-maker to check or review the determination made via the automated system before finalising the decision. It also enables external scrutiny of the administrative decision.

179. Again, this is consistent with recommendations made in the AHRC Report and the OECD Recommendation, which provides that an organisation deploying AI should 'enable a person affected by a decision to understand the outcome'. In support of these recommendations, the AHRC provided the following statement which reflects the crux of why explicability in decision making is a necessary feature to comply with administrative law principles:[131]

A failure to provide reasons for an administrative decision can make it difficult, or even impossible, to know whether the decision was fair, reasonable, accurate or even lawful. This can result in an unaccountable exercise of government power, and can be an affront to the rule of law.

By contrast, reasons for an administrative decision:

- *allow the affected individual to understand why the decision was made, putting them in a position to decide whether the decision involved an unwarranted finding of fact, or an error of law, that is worth challenging*
- *assist a court in determining whether a reviewable error of law has occurred*
- *promote real consideration of the issues, increasing 'public confidence in, and the legitimacy of, the administrative process'.*

Where the use of AI causes an administrative decision to be more opaque, by obscuring the reasons for which the decision was made, this is a barrier to achieving these desirable outcomes. The Commission has concluded that where a right to reasons exists in Australian law, it should not be diluted or undermined simply because AI was used in the process of making an administrative decision.

180. The AHRC suggested that:[132]

… relevant legislation including s 25D of the Acts Interpretation Act 1901 (Cth) should be amended to provide that:

(a) for the avoidance of doubt, the term 'decision' includes decisions made using automation and other forms of artificial intelligence

(b) where a person has a right to reasons the person is entitled also to a technical explanation of the decision, in a form that could be assessed and validated by a person with relevant technical expertise

(c) the decision maker must provide this technical explanation to the person within a reasonable time following any valid request.

181. As demonstrated in Attachment A, there is presently no express obligation to produce a statement of reasons for an automated decision, and as discussed by Yee-Fui Ng

[131] AHRC, 'Human Rights and Technology – Final Report 2021', 66.
[132] Ibid, 62.

et al,[133] there is doubt as to whether the Acts which ordinarily require it by way of default apply to automated decisions. The Law Council considers there should be a bespoke statutory obligation to produce an explicable statement of reasons, which, as suggested by the Commonwealth Ombudsman, is informed by a comprehensive audit trail of the decision-making path.

182. In addition, it is important there be clarity surrounding freedom of information (**FOI**) applications and transparency of the ADM process by government agencies. The factors considered by an automated process or details around the weight attributed to different factors and any other relevant information should be able to be made available to an individual on approval of an FOI application.

183. Yee-Fui Ng et al also suggested three key amendments to the *Freedom of Information Act 1982* (Cth) which would 'enhance its ability to provide transparency in relation to AI-based decision-making':[134]

    1. *Extending its scope so it applies to 'information' rather than 'documents' as does the Freedom of Information Act 2000 (UK).*
    2. *Providing an exception to the trade secrets/commercial information exemption in section 43 for information that is necessary to shed light on algorithms used to make decisions that affect individuals.*
    3. *Including in its proactive disclosure requirements a general description of automated decision-making technology that an agency uses to make decisions about persons.*

184. While the Law Council agrees with the principle behind these amendments (and those proposed by Yee-Fui Ng et al to the ADJR Act and AAT Act referred to above)[135] it has not formed a view on the exact nature of the amendments which could be made, and it may depend on the type of reform which is undertaken.

Availability of review

185. Finally, the automated decision should be subject to review, preferably internal human review, and the subject of the decision must be informed of that review avenue.

186. This approach is again consistent with the Ombudsman's Guide,[136] the AI Ethics Principles,[137] the OECD Recommendation and the AHRC Report.[138]

187. The LIV submitted that the process for accessing or obtaining a review of an ADM or AI decision must be simple, timely, and easily accessible, particularly for vulnerable groups.

---

[133] See above at [82] - Yee-Fui Ng et al, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *University of New South Wales Law Journal*, 1058.
[134] Ibid, 1076.
[135] Yee-Fui Ng et al, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *University of New South Wales Law Journal*, 1075.
[136] Commonwealth Ombudsman, 'Automated decision making better practice guide', , https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide. See heading: 'Review of decisions'.
[137] Particularly, the following principle:

- **Contestability:** When an AI system significantly impacts a person, community, group or environment, there should be a timely process to allow people to challenge the use or outcomes of the AI system.

[138] AHRC, 'Human Rights and Technology – Final Report 2021', 68-72.

Recommendation

- **All legislation which authorises the use of ADM and AI to exercise statutory powers should require that:**
  - **any affected individual must be notified where automation, including, AI is materially used in making an administrative decision;**
  - **the automated decision must be able to be reduced to a statement of reasons explicable by a human, produced by a full audit trail of the decision-making path, for the purpose of enabling it to be reviewed by a tribunal or court, and the subject of the decision should have a right to request such reasons**
  - **the automated decision should be subject to review, preferably internal human review, and the subject of the decision must be informed of that review avenue**

Cases demonstrating the need for reform to ensure transparency and fairness

Centrelink's online compliance scheme

188. In its report on the OCI program, the Ombudsman report found that: 'risks could have been mitigated through better planning and risk management arrangements at the outset that involved customers and other external stakeholders in the design and testing phases'.[139] The Senate Committee heard considerable evidence from people who had difficulty communicating as they tried to understand the task required of them and how to traverse the online portal.[140]

189. As noted in the Ombudsman's Guide, special consideration and support should be given to vulnerable people, to ensure they are not disadvantaged by the application of an automated decision-making system. As raised by the Law Council in the 2019 Senate Committee submission, the Justice Project[141] reviewed in detail, from an access to justice perspective, the situation of such people. The submission stated:[142]

> *In many instances, multiple barriers and points of disadvantage may compound and greatly increase the difficulties that vulnerable people face in responding to a possible debt or a complex and unfamiliar process such as the Online Compliance System. The Justice Project outlined common barriers which may be expected amongst many income support recipients to a greater or lesser extent. These included language difficulties experienced by migrants, literacy and education barriers, common experiences of trauma and family violence, poverty including periods of homelessness, disability and mental health conditions. These barriers may greatly increase the challenges in understanding and responding to an Online Compliance System debt notice.*

[139] Commonwealth Ombudsman, 'Centrelink's automated debt raising and recovery system' (April 2017), <link>, [4.1]. See also, [3.52].
[140] Community Affairs References Committee, Parliament of Australia, '*Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative'* (Report, June 2017), [3.1].
[141] Law Council of Australia, The Justice Project, final report published August 2018, https://www.lawcouncil.asn.au/justice-project/final-report.
[142] Law Council of Australia, 2019 Senate Committee submission, [106].

190. Further, the system was not *explicable and transparent* – the Senate Committee heard evidence that individuals receiving notices did not have the information needed to understand how the purported debt was calculated[143] or to seek a review. In its reviewed conducted in 2017, while the program was on foot, the committee stated:[144]

> *The committee considers that the current process of review is opaque. It is clear that many individuals remain unaware of their rights when dealing with the department. The committee considers that considerable work could be done to clearly promote an individual's rights of review and right to request a pause while the purported debt is reviewed.*

191. Notably, Freedom of Information requests seeking material in relation to the algorithmic decisions concerning the OCI program have been resisted by Services Australia.

192. Specifically, Justin Warren, an AI expert, has sought the release of the algorithm and business cases underpinning OCI program. In 2019, the Office of the Australian Information Commissioner (**OAIC**) set aside a decision of Services Australia that a number of these documents were exempt from discussion under the FOI Act and substituted it with a decision that the documents could be disclosed.[145] Services Australia had previously decided they were exempt on the basis of being cabinet documents and/or disclosure would reveal a confidential source of information, and/or conditionally exempt of the basis that disclosure would disclose deliberative processes involved in the functions of the agency and/or prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency.[146]

193. Services Australia sought review of the OAIC decision by the AAT[147] and that review awaits a decision.[148] It has been reported that Mr Warren has argued that 'there is "profound" public interest in release because they may shed light on what went wrong with the scheme'.[149]

194. This matter, in which information about the operation of the system is tied up in a cabinet process, reinforces the need to ensure timely and transparent commitment to the provision of information about the operation of schemes under which automated decisions are produced. A commitment to the release of information relating to algorithmic decisions arguably assists to minimise the risk of harm to the community by enabling scrutiny of the operation of a system which affects a person's rights and interests.

195. Clear availability of independent review could have improved the operation of that service and reduced the magnitude of its harm. The impact of restricting access to

---

[143] Community Affairs References Committee, Parliament of Australia, '*Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative'* (Report, June 2017), [3.67].
[144] Ibid, [4.104].
[145] Justin Warren and Services Australia (Freedom of information) [2019] AICmr 70 (11 November 2019).
[146] Ibid, [1].
[147] Luke Henriques-Gomes, 'Robodebt: government fights to keep secret documents that may show 'what went wrong'', Guardian Australia, (23 June 2021), https://www.theguardian.com/australia-news/2021/jun/23/robodebt-government-fights-to-keep-secret-documents-that-may-show-what-went-wrong.
[148] Administrative Appeals Tribunal matter No 2019/7870.
[149] Luke Henriques-Gomes, 'Morrison government tells tribunal robodebt documents must stay secret to prtect cabinet processes', Guardian Australia, (23 December 2021), https://www.theguardian.com/australia-news/2021/dec/23/morrison-government-tells-tribunal-robodebt-documents-must-stay-secret-to-protect-cabinet-process and David Escourt, 'Fight for secret documents behind 'rob-debt' decision' (23 December 2021), https://www.smh.com.au/national/fight-for-secret-documents-behind-robo-debt-decision-20211223-p59jqz.html.

administrative law forums is evident in the eroding of public trust that resulted from that program. The costs associated with implementing accountability will ultimately result in better systems and processes.

The use of algorithms in immigration detention

196. In relation to the SRAT system, the AHRC has noted that detainees 'have a limited understanding of the risk assessment process'[150] and typically reported to the AHRC 'that they had not been given information about the risk assessment process and were not formally made aware of their risk ratings'.[151] The AHRC considered that detainees should be 'informed of their risk rating and of the reasons for this rating, unless doing so would present an unacceptable risk'.[152]

197. These decisions have consequences consequential for a person's rights and lawful status. It is noted that the Administrative Appeals Tribunal has considered a 'high' risk rating produced by a security risk assessment to be material to a finding that a person posed a recidivist risk and thus a risk to the community for the purposes of the character test in section 501 of the Migration Act.[153] Further, the Federal Court has held that a high-risk rating produced by a security risk assessment has been material to a decision to move the detainee between detention centres.[154]

The case for a regulator?

198. The Law Council does not have a concluded position at this stage on the possible role of a regulatory body to oversee the regulatory framework described above. It might depend, for example, on what steps are (or have been) taken to strengthen the role of the DTA, as recommended in the Thodey Review Report.

199. It may also depend on whether the Australian Government acts on the recommendation in the AHRC Report that the Australian Government establish an 'AI Safety Commissioner', with the following functions:[155]

- work with regulators to build their technical capacity regarding the development and use of AI in areas for which those regulators have responsibility;
- monitor and investigate developments and trends in the use of AI, especially in areas of particular human rights risk, including the impact of the development and use of AI on vulnerable and marginalised people in Australia
- provide independent guidance and expertise relating to AI and human rights for Australian policy makers; and
- draw on diverse expertise and perspectives including by convening an AI advisory council.

200. The Law Society of South Australia was supportive of this recommendation, noting such an approach would promote regulation, standards, statements of principles, practice and criteria for how an AI system should be developed and used.

---

[150] AHRC, 'Risk management in immigration detention' (2019), 22
[151] Ibid, 23
[152] Ibid, Recommendation 2, 23.
[153] *GYNQ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 443, [100].
[154] *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1520, [141].
[155] AHRC, 'Human Rights and Technology – Final Report 2021', 128.

201. By way of example, it might be helpful to consider how a regulator might operate if the algorithmic impact assessment outlined above was adopted.

202. Under the 'no regulator' model something akin to the following could apply:

- a Commonwealth Minister would make the algorithmic impact assessment instrument and the DTA would be responsible for maintaining the back-end operation of the assessment tool;
- DHA would self-assess against that instrument, be obliged to consult with the DTA, and ultimately only proceed if risks had been appropriately managed in accordance with the assessment; and
- Departments would be required to notify the relevant Minister of their periodic reports, who would present them to Parliament.

203. Under a regulator model, a single stand-alone entity would have responsibility for all of those matters. That is, it would need to approve the algorithmic impact assessment made by the agency, it would receive and assess periodic reports on the performance of the system, and it would be empowered to issue directions about use of the automated system, including, in the most serious cases, prohibiting its commencement or ordering its decommissioning.

204. The Law Society of NSW suggested a single regulator should have responsibility for approval of use of ADM, and the issuing of reports and directions, including reports to Parliament, noting that there may be a need for suitably narrow exemptions from this form of regulation (such as in the fields of defence, intelligence, and foreign policy matters).

205. The Law Society of South Australia also expressed support for an independent and effective oversight body for ADM with responsibility for:

- developing a framework which includes a set of principles for organisations developing AI-enabled products and services and overseeing an organisation's implementation, compliance and enforcement of the framework; and
- reviewing whether machine-readable laws match legislation and other rules built into systems underpinning automated decision making.

206. The Law Society of South Australia noted this approach would:

- reduce the risks of such ADM being challenged (or successfully challenged) as a result of failing to meet the requirements of administrative law;
- promote transparency in relation to the reasons for ADM;
- reduce the potential for computer-generated decisions which involve bias or discrimination inherent in the AI or ADM processes; and
- promote trust/confidence in AI and ADM.

207. The LIV suggests a regulatory body could be given powers similar to those given to the ATO to issue private rulings which apply to a particular tax scheme or circumstance. The ATO is legally bound by a ruling if the scheme is implemented in the way set out in the private ruling (that is, there are no material differences between the scheme as described and in practice). If this strategy were imposed on ADM and AI processes, the relevant authority could operate within a principles-based

framework and hold enforcement powers, including the power to issue a private binding ruling. This would enable a regulatory approach which is flexible and industry-specific, to accommodate rapid developments in technology and AI processes.

208. More generally, the Law Society of NSW has stated that it is important that the DTA include a branch with expertise in public law and human rights, which is able to mediate between both digital technology specialists and policymakers, including the legal profession. The Law Society also notes that an oversight body such as the Information Commissioner or Ombudsman could assist by monitoring implementation of technologies in the public and private sectors.

209. The Law Society of NSW also notes that there will be resourcing implications in the form of additional Commonwealth funding to train and upskill the public service to understand the public law and human rights implications of automation, and to ensure informed policy innovation starts at the agency level (and is not isolated within the DTA).

Recommendation

- **The Digital Technology Taskforce consider models for a regulatory body to oversee the proposed regulatory framework.**

Regulation of private sector use of ADM and AI

210. The Law Council has only provided a response to some of these questions.

Question 5

5. *Are there opportunities to make regulation more technology neutral, so that it will apply more appropriately to AI, ADM and future changes to technology?*

211. The Law Council generally supports technology neutrality as a key principle to underpin any new regulation of AI. Given the rate of change in technological development, the objective should be to avoid technology/platform specific laws that become redundant or become only partially effective. Under such a regulatory framework, the question of *how* the analysis and/or decision is made or delivered is irrelevant, and it is the act of the analysis and/or decision made or delivered itself that is being regulated.

212. There are opportunities to make regulation more technology neutral in privacy and IP law reform. For example, an aspect of the potential reform to IP is to consider whether it is desirable to align Australia with any of its foreign counterparts, where appropriate to Australia's circumstances, such as with regard to recognising the value of data in both raw and usable form and balancing any such value against potential consequences and risks.

213. A relatively simple opportunity to make regulation clearer about the opportunities and risks associated with commercially dealing with data could be found in the review of the Privacy Act, the 'consumer data right' and more broadly in relation to legislative reform associated with electronic communication and data protection.

214. The Law Council is of the view that the review, and pending changes to the Privacy Act arising out of the review, present an opportunity to address the challenges and opportunities presented by the introduction and use of new AI technologies. There is

a need to balance collection and use of data for the operation of AI systems (e.g. credit scoring – see below), with the use of privacy enhancing technologies that can achieve privacy objectives in a data driven world. To that end, it is particularly important to reiterate that effective privacy protection will, in large part, depend on the ability of the legal framework to:

- ensure transparency and accountably for all types of uses and disclosures of personal information as defined;
- address the issue that many of the use cases presented by AI involve generating new data sets about or relating to individuals; and
- retain its technology neutral approach.

Question 7

7. *Is there a need for new regulation or guidance to minimise existing and emerging risks of adopting AI and ADM?*

215. As a general principle, the critical starting point for sound regulatory intervention is to establish a clear case for action before addressing a problem. A range of feasible options must be considered including self-regulatory, co-regulatory and non-regulatory approaches, adopting the option that generates the greatest net benefit for the community.

216. Further, the growth of the digital economy, and changes to the way in which businesses engage with their supply chain and end users, is driving regulators in several specialist areas to consider the effectiveness of their regulatory frameworks. It is critical that a harmonised approach is taken across regulators to ensure consistency, avoid duplication and avoid fragmentation of regulation.

Data laws

217. The objective should be to ensure an appropriate regulatory framework for AI and ADM so that risk/harm arising from any access is adequately managed. Lawmakers should consider the extent to which arrangements to access data held by private sector providers of AI-as-a-service offerings would assist to minimise the risks of adopting AI and ADM. Lawmakers should also take into account relevant legislative changes including any that may follow the Australia Competition and Consumer Commission's Digital Platforms Inquiry and related inquiries.

218. Consideration should be given to the potential suitability, applicability and appropriate form of a possible general copyright fair use exemption, which might play a role with respect to AI and ADM. Any such copyright fair use exemption would inevitably have broad application beyond AI and ADM and would therefore need to be considered carefully in that broader context. The Law Council's Intellectual Property Committee has previously provided submissions on the topic of copyright exemptions for fair use[156] and would welcome the opportunity to revisit the issues in the context of AI and

[156] See Intellectual Property Committee, Business Law Section, Law Council of Australia, 'Exposure draft Copyright Amendment (Access Reform) Bill', submission to the Department of Infrastructure, Transport, Regional Development and Communications, 24 February 2022, https://www.lawcouncil.asn.au/publicassets/e1212899-fa9f-ec11-944b-005056be13b5/4178%20-%20Exposure%20draft%20Copyright%20Amendment%20%20Access%20Reform%20%20Bill.pdf, and 'Copyright Modernisation Discussion Paper', submission to the Department of Communications and the Arts, 6 July 2018, https://www.lawcouncil.asn.au/publicassets/db0fb2d9-b4d5-e811-93fc-005056be13b5/3468%20-%20Copyright%20modernisation%20discussion%20paper.pdf.

ADM. Reference could be made to the consideration of AI and ADM by the Singapore government to replace its copyright legislation (its new Copyright Act came into force in November last year) to specifically cater for technological developments, including a computational data analysis exception to facilitate data mining.

Personal injury liability

219. Another area of risk that may require a regulatory response is personal injury liability for AI-driven products such as driverless cars. This issue in particular "is expected to significantly disrupt the motor vehicle insurance industry as these vehicles become more widely adopted".[157]

220. In the United Kingdom, a 'single insurer' option has been adopted in the *Automated and Electric Vehicles Act 2018* (UK). This legislation extends compulsory motor vehicle insurance to cover vehicles in autonomous mode. An alternative model is for regulators to transfer liability to the manufacturer. However, while this solves the issue of liability for personal injury arising from the operation of an autonomous vehicle, it raises uncertainty in instances where no identifiable human driver with full vehicle control or a completely driverless vehicle system exists. As one recent study found:

> *... it is clear that cooperation and collaboration between governments, manufacturers, insurance providers and technology companies will be essential if the journey to fully autonomous vehicles is to be hastened. For example, the European Commission recently stated that 'Europe must seize the opportunities presented by connected, cooperative, and automated mobility'[158] (CCAM) and recognized that this ambition was best realized through joint initiatives in research and innovation, and through other partnerships focusing on digital technologies. Moreover, collaboration was required to address matters such as harmonisation and coordination of relevant traffic rules, liability for automated vehicles and to ensure that the key digital enablers are in place - ... electronic components for mobility, network infrastructure, cloud-to-edge resources data technologies and governance as well as Artificial Intelligence*.[159]

221. Extending motor vehicle insurance to cover vehicles in autonomous mode raises tricky regulatory questions, such as who is being indemnified against what. Presumably there will still have to be an examination of how injury occurred and if there was a failure, who is to be indemnified for that failure (negligence).

222. Alternatively, transferring liability to the manufacturer seems to imply that all accidents involving a driverless vehicle or even one with partial human input must be due to some fault in manufacture or programming.

---

[157] Julie-Anne Tarr, AA Tarr and AJ George, 'Autonomous vehicles: regulatory, insurance and liability issues' (2021) 49 *Australian Business Law Review* 171.
[158] European Commission, Communication from the Commission to the European Parliament, the Council, The European *Economic and Social Committee and the Committee of the Regions, Sustainable and Smart Mobility* Strategy - *putting European transport on track for the future* (Brussels 9 December 2020, COM 789 Final) [57].
[159] Ibid, [67].

Question 8

8. Would increased automation of decision making have adverse implications for vulnerable groups? How could any adverse implications be ameliorated?

223. It is important that private entities are subject to an obligation to be transparent in their use of AI, to ensure accountability and transparency, and build public trust in ADM processes.

224. If any entity (public or private) engages in AI-related services which may result in a material adverse effect on a user (individual or other), the Australian legal framework should require it to have a documented, easy to understand and accessible design document. The contents of this document should conform with practices recommended by the Australian government. This disclosure document should answer, in layperson's terms, questions such as the following:

- What is the specification for the use of the AI system?
- What predictive outcomes is the AI system designed to achieve?
- What data is used for training?
- What data is used for testing?
- What data is used for validation?
- How are datasets sourced and selected?
- What principles are applied to data cleansing?
- What machine learning methods are used to build the statistical models for the training and testing processes?
- What post-processing (correction and adjustment) actions occur?
- What scope is there for human intervention?

225. The LIV has previously expressed concern that the implementation of the principle 'do no harm' in the Department of Industry, Innovation and Science's AI and Ethics Framework,[160] was overly narrow by simply requiring only that AI systems must not be designed to harm or deceive people and should be implemented in ways that minimise any negative outcomes. For example, the principle does not address harm caused by negligent or reckless design. As a result, significant risks remain in relation to accountability and liability for causing harm and the subsequent damage suffered by the consumer. Therefore, the LIV suggests that the 'do no harm' principle should be extended to cover negligent or reckless harm and be prioritised as the first principle, above the 'generate net benefit' principle.

Question 9

9. Are there specific circumstances in which AI or ADM are not appropriate?

226. As a general principle, it is advisable that ADM and AI processes of private entities which directly affect individual rights and liberties have some level of human oversight, the ability for a human decision-maker to intervene, and the opportunity for review by a human decision-maker.

227. ADM and AI may be inappropriate for use, where the impact on or outcome for humans may be severe. It suggests that autonomous military warfare, such as drones,

[160] LIV submission to the Department of Industry, Innovation and Science, 'Artificial Intelligence: Australia's Ethics Framework' (24 May 2019) < https://www.liv.asn.au/Staying-Informed/Submissions/submissions/May-2019/Consultation-on-Artificial-Intelligence-Australia->.

purport to make decisions more quickly and with greater accuracy yet are informed by human programmers and coding. This gives the impression of autonomy, through complex machine learning capabilities, while separating the liability for harm caused as a result of autonomous weapons from human programmers and limiting the ability for humans to intercede or control decisions.[161]

228. Similarly, decisions which require empathy and insight into the human experience, such as end of life decisions, should avoid the implementation of ADM and AI processes. The intersection of medicine, ethics and ADM creates risks for increased discrimination, the violation of individual privacy and self-determination in a medical context.[162]

229. Caution should also be taken in the use of ADM and AI processes in the justice system or Australian courtrooms, particularly where such use would impact on judicial discretion. The LIV expressed concern that ADM processes which rely on factors derived from historic data to predict future outcomes raise issues of the entitlement to procedural fairness and for a judgment to be based on the circumstances of the case.

230. The LIV also suggests that AI 'scoring' of citizens, in certain circumstances, is a fundamental violation of the right to privacy and reputation under the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).[163] In particular, the LIV suggests a violation of these rights would arise from individual scoring where a social, ethical or moral matrix is applied to citizens through AI surveillance and acting as a form of 'currency' to promote deemed 'social good'. Individual scoring of this kind has recently been used in the People's Republic of China.[164] Individual scoring can give rise to loss of autonomy, increased discrimination, and punishment without crime. The Ethics Guidelines for Trustworthy AI produced by the Independent High-Level Expert Group on Artificial Intelligence of the European Commission should be adopted in this regard.[165]

231. Along the same lines, the European Union's draft Artificial Intelligence Act would prohibit:[166]

> *the placing on the market, putting into service or use of AI systems by public authorities or on their behalf for the evaluation or classification of the trustworthiness of natural persons over a certain period of time based on their social behaviour or known or predicted personal or personality characteristics, with the social score leading to either or both of the following:*
>
> - *detrimental or unfavourable treatment of certain natural persons or whole groups thereof in social contexts which are unrelated to the contexts in which the data was originally generated or collected*

[161] Ross W. Bellaby (2021) Can AI Weapons Make Ethical Decisions?, Criminal Justice Ethics, 40:2, 86-107.
[162] Mökander, J., Morley, J., Taddeo, M. et al. Ethics-Based Auditing of Automated Decision-Making Systems: Nature, Scope, and Limitations. Sci Eng Ethics 27**,** 44 (2021).
[163] *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13.
[164] Amanda Lee, "What is China's social credit system and why is it controversial?' (9 August 2020) <https://www.scmp.com/economy/china-economy/article/3096090/what-chinas-social-credit-system-and-why-it-controversial>.
[165] European Commission, 'Ethics Guidelines for Trustworthy AI' (April 2019) <https://ec.europa.eu/futurium/en/ai-alliance- consultation>.
[166] European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Brussels, 21.4.2021 COM(2021) 206 final 2021/0106(COD), Article 5(1)(c), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206.

- *detrimental or unfavourable treatment of certain natural persons or whole groups thereof that is unjustified or disproportionate to their social behaviour or its gravity.*

232. However, the 'scoring' of individuals may be reasonable in certain circumstances whether it is authorised under a regulatory framework which balances an individual's right to privacy against the protection of other public interests. For example, presently, a person's 'credit score' is used to assist lenders to decide whether to give a person credit or lend them money.[167] Credit scores are produced by credit reporting bodies by entering certain personal information[168] into statistical algorithms.[169] The credit score indicates a person's 'creditworthiness', which is an assessment of a person's eligibility to get consumer credit, consumer credit history and capacity to repay an amount of credit that relates to consumer credit.[170] The use of this personal information in this way is regulated under Part IIIA of the Privacy Act, the Privacy (Credit Reporting) Code 2014 (Version 2.2) and the Privacy Regulation 2013.[171]

Question 10

10. *Are there international policy measures, legal frameworks or proposals on AI or ADM that should be considered for adoption in Australia? Is consistency or inter-operability with foreign approaches desirable?*

233. The Law Council, informed by submissions made to it, suggests there are benefits in the alignment of Australia's relevant legal principles with those of other countries that Australians transact with and whose legal systems largely reflects similar societal norms where appropriate in Australia's circumstances.

234. Australia should leverage off international lessons to ensure Australia maintains a fit for purpose regulatory regime which supports the domestic economy and facilitates cross border international trade.

235. Any approach to regulation must be consistent with internationally recognised guidelines and frameworks[172] to effectively position Australia as a leader in digital economy regulation. This would effectively decrease the regulatory burden imposed on new and existing businesses and organisations attempting to grow or expand within the Australian economy.

236. Regulatory efforts should consider the OECD/G20 AI principles as a principles-based and technologically neutral overarching guidelines for AI and ADM processes in Australia. It suggests that an internationally recognised overarching framework would ensure that Australian businesses and individuals are not hindered from participating

[167] Australian Securities and Investment Commission, 'Credit scores and credit reports' (webpage), https://moneysmart.gov.au/managing-debt/credit-scores-and-credit-reports, accessed on 31 May 2022.
[168] See Office of the Australian Information Commissioner (**OAIC**), 'Information on your credit report' (webpage), https://www.oaic.gov.au/privacy/credit-reporting/information-on-your-credit-report, accessed on 31 May 2022.
[169] See, for example, Experian, 'Experian Credit Scores' (webpage), https://www.experian.com.au/experian-credit-scores, accessed on 31 May 2022 and Equifax, 'Top 12 Questions We Get Asked About Equifax One Score' (webpage), https://www.equifax.com.au/knowledge-hub/risk-solutions/top-12-questions-we-get-asked-about-equifax-one-score, accessed on 31 May 2022.
[170] OAIC, 'Credit reporting terms' (webpage), https://www.oaic.gov.au/privacy/credit-reporting/credit-reporting-terms#CreditReportingBody, accessed on 31 May 2022.
[171] OAIC, 'What is a credit report?' (webpage), https://www.oaic.gov.au/privacy/credit-reporting/what-is-a-credit-report, accessed on 31 May 2022.
[172] Particularly EU Data Protection laws - *Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data* (General Data Protection Regulation) [2016] OJ L 119/1 and the Data Protection Act (UK).

in global markets, while international organisations will be encouraged to expand business operations in Australia.

237. Australia could benefit from stronger data protection and privacy laws to manage the data collected by automated systems. The EU Data Protection laws are cited as a best practice example by experts in the field.[173] However, careful consideration should be given to the potential utility of this regime in the ADM and AI setting, where appropriate, in the Australian context.

238. An example of legal confusion regarding the lack of alignment of Australia's relevant legal principles with those of other countries may be found in intermediaries involved in the collecting, using, storing and disclosing of datasets which include personal information: see *Facebook Inc v Australian Information Commissioner.*[174]

239. While larger entities may have the resources to withstand the time, expense and uncertainties of this litigious approach, many small to medium-sized Australian businesses do not.

240. In relation to privacy compliance, it is suggested that the law should be reviewed to provide greater clarity regarding the responsibilities of intermediaries, with the uncertainties revealed by other legal systems serving to inform lawmakers. To that end, the Law Council notes that under European Union and the United Kingdom data protection regimes, as a matter of law, require organisations to take responsibility for what organizations do with personal data. Organisations are required to have appropriate measures and records in place to be able to demonstrate compliance.[175]

[173] *Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data* (General Data Protection Regulation) [2016] OJ L 119/1.
[174] [2022] FCAFC 9.
[175] See https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/.

Attachment A – legislation which regulates the use of ADM by government agencies

Introduction

1. The following discussion:

    - considers the powers available to permit the use of ADM to perform statutory functions and powers and the controls which apply to such uses;
    - examines how those powers have been, and could be, applied in practice; and
    - considers the practical supports available to officials in excercising those functions and powers.

Powers to permit the use of ADM

2. The Law Council has considered a sample of fifteen Acts for the purpose of this submission, which is not all Acts which authorise the use of automated decision-making.[1]

3. At a high-level, the following model is generally used:

    (a) an agency head or Minister (**arranger**) is empowered to 'arrange for the use' under their 'control' of a computer program to perform statutory functions or powers;

    (b) the effect of the arrangement in all cases is that the arranger is taken to have performed the relevant function or power – that is, the computer program is taken to be the instrument through which the arranger has acted;[2]

    (c) there is a power to substitute the automated decision with a decision by the statutory office holder or a delegate.

4. However, there are key differences in the scope of the power to make the arrangement, the basis of what a decision may be substituted, and the functions and powers which may be subject to an arrangement.

---

[1] Sections 48-49 of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**); section 541A of the *Biosecurity Act 2015* (Cth) (**Biosecurity Act**), section 62F of the *Business Names Registration Act 2011* (Cth) (**BNR Act**), section 135A of the *Designs Act 2003* (Cth) (**Designs Act**); Division 1 of Part 9 of the *Fisheries Management Act 1991* (Cth) (**Fisheries Act**); section 20A of the *Imported Food Control Act* 1992 (Cth) (**Imported Food Control Act**), sections 495A-495B of the *Migration Act 1958* (Cth) (**Migration Act**); section 4A of the *Military Rehabilitation and Compensation Act 2004* (Cth) (**MRC Act**), section 223A of the *Patents Act 1990* (Cth) (**Patents Act**); section 76B of the *Plant Breeder's Rights Act 1994* (Cth) (**PBR Act**); section 3A of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) (**SRCDC Ac**t); section 6A of the *Social Security (Administration) Act 1999* (Cth) (**Social Security Administration Act**), section 222A of the *Trade Marks Act 1995* (Cth) (**Trade Marks Act**); section 4B of the *Veterans' Entitlements Act 1986* (Cth) (**Veterans' Entitlements Act**); subclause 5F(1) of the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (**AgVet Code Act)** once item 36 of Schedule 1 to the *Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Act 2021* (Cth) (**AgVet Amendment Act**) commences.

[2] Subsection 66(2) of the BNR Act; subclause 5F(2) of the Schedule to the AgVet Code Act once item 36 of Schedule 1 to the (AgVet Amendment Act) commences; subsection 6A(2) of the Social Security Administration Act

Arrangement to use a computer program

5. The making of an arrangement is itself a discretionary statutory power which must be exercised within any limits prescribed by the law. As the effect of the arrangement in all cases is that the arranger is taken to have performed the relevant function or power the arranger is constructively responsible for the operation of the computer program, performing the activity in their name.

6. For the most part, the Acts authorising these arrangements to be made do not set out any procedural or form requirements which limit the scope of the power.

7. In two Acts, the arrangement must be 'in writing'.[3] Two other Acts require the arranger to take 'reasonable steps' to ensure that decisions made by the operation of a computer program under an arrangement are 'consistent with the objects of the Act' and 'based on grounds on the basis of which [a responsible official] could have made that decision'.[4] In relation to the latter requirement, it is noted that '[h]owever, an electronic decision may be made without any state of mind being formed in relation to a matter to which the decision relates'.[5]

8. These exceptions aside, the arranger has full discretion as to the features of an arrangement and any measures within them to ensure the decisions made in their name are lawful.

9. The Law Council has not identified any statutory scheme in which there is a statutory obligation to consider the appropriateness of a particular computer program to be applied to exercise (or assist in exercising) a particular power or function.

Functions and powers performed by the computer program

10. An Act will either permit a computer program to be used to:

    - perform any statutory function or power; or
    - just be limiting to a decision-making power – either to make the decision itself or to also do something related to making the decision.

11. As will be seen in the discussion below, this latter kind – *assisting* in the making of a decision or the exercising of a power, rather make the decision or exercise the power in its entirety – is an important emerging use of automation. This has been referred to as 'algorithm in the loop'.

12. In several Acts, the arranger may arrange for the computer to be used to perform any power of function that a human may perform under the Act, both in the actual performance of the function or power *and* anything else related to that.[6] For example, the arranger may arrange for the use of a computer program:

> *for any purposes for which the Minister may, or must:*
> *(a) make a decision; or*
> *(b) exercise any power, or comply with any obligation; or*

[3] Subsection 48(1) of the *Citizenship Act* and subsection 163B(3) of the *Fisheries Act*.
[4] Subsections 20B(3) and (4) of the Imported Food Control Act and subsection 541A(3) and (4) of the Biosecurity Act.
[5] Ibid.
[6] Subsection 495A(1) of the Migration Act, subsection 48(1) of the Citizenship Act, subsection 135A(1) of the Designs Act, subsection 223A(1) of the Patents Act, subsection 76B(1) of the PBR Act, subsection 222A(1) of the Trade Marks Act.

(c) do anything else related to making a decision, exercising a power, or complying with an obligation.

13. Other Acts limit the scope of the arrangement power to matters to make a decision.[7]

14. The BNR Act authorises:

- ASIC to arrange for the use of a computer 'for any purposes for which ASIC may make decisions' under the Act – a wide scope;
- a Registrar to arrange for the 'use of processes to **assist** decision making (such as computer applications and systems) for any purposes for which the Registrar may make decisions' (emphasis added)[8] – the reference to 'assist' suggests a human will remain in control of the actual *making* of the decision.

15. Three Acts passed in 2021 introduced powers to enable an executive decision-maker to arrange for the use of a computer program to only perform statutory functions and powers ancillary to a decision (changes in red):[9]

> *for any purposes for which the Minister may, or must:*
> *(a) make a decision; or*
> *(b) exercise any power, or comply with any obligation [in/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), exercising a power, or complying with an obligation referred to in paragraph (b).*

16. The *Social Security (Administration) Act 1999* (Cth) (**Social Security Administration Act**) permits the Secretary to arrange for a computer program to be used for 'any purposes for which the Secretary or any other officer may make decisions under the social security law'.

The types of decisions which may be made by computer program

17. The Acts provide for varying levels and kinds of restrictions over which specific powers and functions, and/or decisions, may be given effect through ADM. Broadly speaking, there are three approaches to limiting the kinds of decisions which may be made by ADM:

(a) no express limit besides the discretion and good judgement of officials acting under policy in determining the appropriateness of a power to be exercised through ADM;

(b) a limit imposed by Parliament in the empowering Act;

(c) a standing power which permits to Minister or other executive entity to determine which powers may be subject to ADM through a legislative instrument.

---

[7] Subsection 163B(1) of the Fisheries Act.
[8] Subsection 62F(1) of the BNR Act.
[9] Subsection 20B(1) of the Imported Food Control Act, subsection 541A(1) of the Biosecurity Act and subclause 5F(1) of the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (**AgVet Code Act)** once item 36 of Schedule 1 to the *Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Act 2021* (Cth) (**AgVet Amendment Act**) commences.

No limit

18. A minority of Acts do not impose any limit on which decisions under the Act could be subject to an arrangement providing for them to be decided by a computer program. Notably, this includes the Social Security Administration Act, where there is no limit on the officer to whom the Secretary may delegate the power to make an arrangement – it could be an official of any SES or APS level.[10]

19. The four Acts into which were inserted near identical computerised decision-making schemes by the *Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Act 2018* (Cth) (the *Designs Act 2003* (Cth). *Patents Act 1990* (Cth), the *Plant Breeder's Rights Act 1994* (Cth) and the *Trade Marks Act 1995* (Cth) – together the **IP Australia Acts**) also do not impose any limit on the kinds of decisions which may be made by a computer program.[11]

20. These passages suggest that relevant the Department and Minister have not discounted the possibility that computer programs may ultimately be developed to decide 'complex decisions that require judgement'.

21. However, it is worth noting that, again, there is no limit in the relevant Acts on the power of the arranger in those Acts to delegate the power to make an arrangement to agency officials.[12] The decisions made under these Acts are analysed in Attachment B.

The Act imposes some limit on the use of ADM

22. The only power in the *Business Names Registration Act 2011* (Cth) (**BNR Act**) which may **not** be subject to arrangement providing for the use of a computer program is an internal review power.[13] The decisions which may be made under these Acts are analysed in Attachment B.

23. The *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**) enables arrangements to be made for a computer program to make decisions under all of the Act except for Subdivision C of Division 3 of Part 2, which authorises the Minister to make citizenship cessation determinations. The decisions which may be made under these Acts are analysed in Attacment B.

24. Powers authorising computerised decision-making were inserted into a number of Acts providing for military payments by the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Act 2017* (Cth).[14]

25. These Acts each listed provisions which could not be subject to an arrangement which permitted the powers within them to be exercised by a computer program. The Department of Veterans' Affairs provided an explanation for the approach to the Foreign Affairs, Defence and Trade Legislation Committee: [15]

> *Examples of the sorts of decisions that could be suitable for computerised decision-making include where the decision-making can be converted into an algorithm,*

[10] Section 234 of the Social Security Administration Act.
[11] That is, the Designs Act, the Patents Act, the PBR Act, and the Trade Marks Act.
[12] Section 124 of the Designs Act; section 206 of the Trade Marks Act; section 209 of the Patents Act; and section 59 of the PBR Act.
[13] Subsection 62F(1) and subsection 66(1) of the BNR Act.
[14] Specifically, the MRC Act, the SRCDC Act and the Veterans' Entitlements Act.
[15] Department of Veterans' Affairs, Submission No 2 to the Foreign Affairs, Defence and Trade Legislation Committee, *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*, 25 January 2017, 2, 3 and 4.

automatic granting of benefits in certain circumstances and where the decision can be generated based on information that is not subject to interpretation or discretion.

…

Computerised decision making may be used in a simple element of a larger and more complex decision that requires a human decision-maker in the final analysis, but will not be used where fact finding and weighing of evidence is required, such as interpretation/evaluation of medical evidence.

…

The language of the provisions in the Bill that would enable computerised decision-making under veterans' legislation is deliberately broad … [I]t is important that the Secretary of DVA has flexibility to apply computerised decision-making in appropriate circumstances as part of the Government's commitment to improve services and reduce claims processing times for veterans. As electronic capabilities and functions continue to exponentially improve, it is difficult to predict precisely which of the numerous decisions under veterans' legislation might be suitable for computerised decision-making. If the Government were to specifically list in the legislation those decisions to which computerised decision-making could be applied, it is likely that the legislation would need to be continuously amended as capabilities improve and either existing, or new types of, decisions need to be added to the list.

Limit determined by a legislative instrument

26. The *Migration Act 1958* (Cth) (**Migration Act**) enables arrangements to be made for a computer program to make decisions under 'designated migration law', which is made up of a number of subdivisions or sections of that Act and any provision of the Act or the *Migration Regulations 1994* (Cth) the Minister, by legislative instrument, determines to be part of the designated migration law.[16] An instrument of that kind is not subject to disallowance,[17] thus allowing the extension of the 'designated migration law' without formal Parliamentary scrutiny. .

27. Following amendments made in late 2021, the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (**AgVet Code Act**) will (once the amendments commence)[18] authorise the Agricultural Pesticides and Veterinary Medicines Authority (**APVMA**) to, by legislative instrument, determine kinds of decisions which may be made by a computer and conditions of use of a computer program.[19] That instrument is disallowable.[20]

28. Finally, the computerised decision-making regime inserted into the *Biosecurity Act 2007* (Cth) (**Biosecurity Act**) earlier this year includes effectively a two-step regime for determining the decisions which may be made by a computer program.

29. The Act itself lists a series of provisions which could be subject to an arrangement; however, in order to make an arrangement, the Director of Biosecurity must have made a legislative instrument which determines:[21]

[16] Subsection 495A(3) of the Migration Act.
[17] Item 20(a) of the table in regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth).
[18] See item 3 of the table in subsection 2(1) of the AgVet Amendment Act.
[19] Subclause 5F(1A) of the Schedule to the AgVet Code Act once item 36 of Schedule 1 the AgVet Amendment Act commences.
[20] See cl 163A of the Schedule to the AgVet Code Act, which will not be amended by AgVet Amendment Act.
[21] Subsections 541A(2) and 9 of the Biosecurity Act.

(a) each relevant provision under which a decision may be made by the operation of a computer program under an arrangement; and
(b) the classes of persons that may use a computer program under such an arrangement; and
(c) the conditions of that use.

Controls on the use of ADM

Substitution

30. Most of the Acts considered by the Law Council provide for a decision made by computer to be substituted by another decision.

31. Depending on the Act, this power may be available if:

- the computer program is not 'functioning correctly' – when 'functioning correctly' is defined as:
    - outcomes of the computer program comply with the Act and regulations and would be 'valid' if made by the Minister otherwise than by a computer program;[22] or
    - the same as the decision that would have been made had an employee made the decision;[23] or
- the arranger is satisfied the *decision itself* is incorrect.[24]

32. The automated decision-making scheme in the in the Schedule to the AgVet Code Act only permits a substituted decision to be made within 60 days of the initial decision.

33. The Biosecurity Act and the *Imported Food Control Act 1992* (Cth) permit a biosecurity officer to substitute a decision made by a computer program if satisfied that:[25]

- the electronic decision is not consistent with the objects of the Act; or
- another decision is more appropriate in the circumstances.

34. Under the second of these bases, these Acts appear to permit a human to decide to substitute a decision made by a computer program which may be correct in law, albeit that another decision is considered 'more appropriate'.

35. Unlike other Acts, the Migration Act and Citizenship Act confine the substitution power to only be used to make a more favourable decision for an applicant.

Review

36. As a decision made by a computer program is taken to be a decision of the arranger, it will likely be subject to the same review mechanisms as apply to a decision of the arranger. Most Acts are silent on this point. Further, most Acts do not address whether

[22] Subsection 271(5) of the Migration Act and subsection 49(5) of the Citizenship Act.
[23] Subsection 163C(2) of the Fisheries Act.
[24] Subsection 62F(3) of the BNR Act, subsection 135A(3) of the Designs Act, subsection 223A(3) of the Patents Act, subsection 76B(3) of the PBR Act, subsection 222A(3) of the Trade Marks Act, subsection 4A(3) of the MRC Act, subsection 3A(3) of the SRCDC Act, subsection 4B(3) of the Veterans' Entitlements Act and cl 5F(3) of the Schedule to the AgVet Code Act once item 36 of Schedule 1 the AgVet Amendment Act commences.
[25] Subsection 541A(7) of the Biosecurity Act and subsection 20A(5) of the Imported Food Control Act.

a substituted decision is reviewable. It is likely to be arguable that those decisions are new decisions made under the original powers and thus reviewable in the same way.

37. These differences can play out differently across the Acts, particularly those with internal review powers and which impose different review rights to personal decisions.

38. For example, under the BNR Act, only internal review decisions are reviewable by the Administrative Appeals Tribunal (**AAT**).[26] As the Act explicitly provides that a computer cannot be used for internal review decisions, this means that all automated decisions must be reviewed by a human as part of the internal review process and thus internal reviews are reviewable by the AAT.

39. Under the AgVet Code Act, a person may seek either internal or AAT review of an original decision, the amendments to that Act made but not yet commenced by the *Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Act 2021* (Cth) make clear that both a decision made by ADM which is taken to be APVMA and *a substituted* decision are both able to be subject to internal review or directly reviewed by the AAT.[27]

40. Some Acts with expressly permit a substituted decision to be reviewed by the Administrative Review Tribunal (**AAT**),[28] or include a 'for avoidance of doubt' type provision which implies that substituted decisions are merits reviewable in the same way an initial decision.[29]

Summary

41. It is worth making the following observations, in summary, about the Commonwealth laws (discussed above) which authorise arrangements to be made for the use of computer program to make administrative decisions:

- most Acts limit the provisions of the Act which may be performed by a computer program, ostensibly on the basis that there are some powers and functions which only suitable to be exercised by a human office-holder;
- most if not all Acts allow some decisions which are, on their face, discretionary to be made by a computer program;
- the explanatory material for most Acts demonstrates an awareness that only some administrative decisions may be amenable to be made by an automated process and indicates that, notwithstanding the power to make an arrangement for a computer program to exercise discretionary powers, it is envisioned or anticipated that arrangements will only be made in relation to decisions of a technical nature or subject to objective criteria or where a decision is made which is favourable to the applicant;
- none of the Acts explicitly require that only a certain *type* of decision (i.e. non-discretionary decisions) be made by the computer program or impose any requirements on the governance of these programs; and

[26] Subsection 58(1) of the BNR Act.
[27] See items 37-43 of Schedule 1 to the AgVet Amendment Act
[28] Subsection 136(1A) of the Designs Act, subsection 224(1A) of the Patents Act, subsection 77(1A) of the PBR Act, and subsection 222A(4) of the Trade Marks Act.
[29] Subsection 4A(4) of the MRC Act, subsection 3A(4) of the SRCDC Act and subsection 4B(4) of the Veterans' Entitlements Act.

- some explanatory memoranda imply that the power is left broad to accommodate developments in computer technology in the future.

Attachment B – Examples of present use of AI

Introduction

1. To a large extent, the way in which Commonwealth agencies use artificial intelligence (**AI**) and automated decision-making (**ADM**) is unclear – they are not required to publish arrangements made to use such systems, nor report on that use. Commonwealth agencies essentially appear, at least in the regulatory sense, free to form their own view as to whether a particular kind of computer system is able to properly exercise functions and powers.

2. In the following discussion, the Law Council considers, based on public information, the way in which AI and ADM have been used to make decisions under the *Business Names Registration Act 2011* (Cth) (**BNR Act**) and the *Migration Act 1958* (Cth) (**Migration Act**) and *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**).

3. It has also included a more holistic analysis produced, with thanks, by the Intellectual Property Committee in the Law Council's Business Law Section regarding the powers in the *Patents Act 1990* (Cth), *Plant Breeder's Rights Act 1994* (Cth), *Designs Act 2003* (Cth) and the *Trade Marks Act 1995* (Cth) (**IP Australia Acts**) which allow the Commissioner and Registrars to arrange for a computer program under their control to make decisions, exercise powers and comply with obligations under the legislation.[1] This analysis addresses risks, challenges, opportunities and benefits of employing ADM under the IP Australia Acts.

Business Name Register Act

4. The Australian Securities and Investments Commission (**ASIC**) appears to have made an arrangement for ADM to be used under the BNR Act in a context readily accepted to exemplify the benefits of AFM: to enable a large number of decisions based on objective criteria to be consistently decided in a short period of time, creating overall efficiency across the system.

5. The BNR Act requires ASIC to register a business name to an entity if, among other things, the name is available to the entity.[2] The name is available to an entity if, relevantly, the name is not identical or nearly identical to a business name registered to another entity.[3] The Minister has made rules which relevantly provide that a name will be identical or nearly identical, if after disregarding certain matters and considering certain words to be the same, the names are the same.[4]

6. Before the Administrative Appeals Tribunal (**AAT**), ASIC has submitted that it had arranged for a computer program to determine whether a name is identical or nearly identical to another name. Specifically:[5]

> *ASIC has implemented computer programs and has developed a business name search engine which utilises algorithms to check the availability of names in accordance with the provisions of the Act and the rules contained in the*

---

[1] Section 223A of the *Patents Act 1990* (Cth); section 76B of the *Plant Breeder's Rights Act 1994* (Cth); section 222A of the *Trade Marks Act 1995* (Cth); and section 135A of the *Designs Act 2003* (Cth).
[2] Subsection 24(1) of the BNR Act.
[3] Ibid, subparagraph 25(a)(i).
[4] Section 5A of *Business Names Registration (Availability of Names) Determination 2015* (Cth).
[5] *Boyce and Australian Securities and Investments Commission* [2015] AATA 768, [49].

> *Determination. The same algorithms are used by the automated system to test for availability of a proposed name for registration.*

7. The system operates using a traffic light system:[6]

> *If an application for registration of a business name is accepted, such will be signified by a "green result" generated by the program; if the availability of a name is doubtful, an "amber result" will be returned, thereby requiring the intervention of an officer. If the name is regarded as identical or nearly identical, the program will return a "red result", indicating its unavailability. Accordingly, the system is computer driven for the determination of business name availability, and thus registration. An officer only becomes involved if there is doubt concerning availability as flagged by the computer program.*

8. The intention to rely on a computer system for this function was anticipated in the Explanatory Memorandum for the bill which inserted the power to make arrangements for the use of computer programs to make decisions:[7]

> *Section 66 provides that other than for the decisions relating to the review of any decisions, ASIC may arrange for the use of computer programs under ASIC's control to make decisions. For example, it is intended that decisions regarding whether a proposed business name is identical or nearly identical to any of the hundreds of thousands of existing business name [sic] expected to be on the Register will be largely automated.*

9. ASIC gave evidence to the AAT that millions of name availability searches were conducted using the online system each year, with 90 per cent resolved by the computer.

10. A number of matters have arisen in the AAT in relation to whether 'identical or nearly identical' is a subjective or objective test. In those matters, the ASIC contended the latter construction. The AAT ultimately found, in the balance of cases,[8] that the scheme in the legislation for name is identical or nearly identical to another name was intended to be objective and thus permit the large number of business name requests to be handled by an automated scheme:[9]

> *The legislative scheme introduced by the BNR Act was intended by Parliament to displace, as far as possible, subjective considerations as to the identity or near identity of names, and to introduce instead an objective, computer-driven system for the registration of business names, regardless of anomalies that may result. The legislation was introduced to achieve nationwide uniformity and to cope with the anticipated large volume of applications for registration of business names. The use of computer programs is essential to the operation of the system introduced by the BNR Act, a fact clearly envisaged by its proponents.*

Present use of ADM and AI in making migration decisions

11. Under the Citizenship Act, the Minister is authorised to make an arrangement for a computer program to, amongst other decision-making powers, determine general eligibility criteria for conferral of citizenship in subsection 21(2) of that Act. Most of the

---

[6] *Hazeldine and Australian Securities and Investments Commission* [2019] AATA 366, [21].
[7] Explanatory Memorandum, Business Names Registration Bill 2011 (Cth), [10.5]. Section 66 has since been repealed and replaced by section 62F.
[8] *Boyce and Australian Securities and Investments Commission* [2015] AATA 768, Alzheimer's Association of Queensland Inc and Australian Securities and Investments Commission [2018] AATA 2403, *Hazeldine and Australian Securities and Investments Commission* [2019] AATA 366, *Australian Appaloosa Association Ltd and Australian Securities & Investments Commission* [2019] AATA 2195; cf *G C Swinburne and F J McFarlane and ASIC and Child Psychology Services Pty Ltd (Joined Party)* (2014) 144 ALD 397.
[9] *Hazeldine and Australian Securities and Investments Commission* [2019] AATA 366, [21].

criteria in that subsection are objective – however, paragraph 21(2)(h) requires the Minister to be satisfied that the person 'is of good character at the time of the Minister's decision on the application'. The phrase 'is of good character' is not defined. The Federal Court has found that it offers a wide discretion: [10]

> *I also note that the term good character is not defined in the Citizenship Act, which indicates that Parliament intended the term to be used in a broad way and allows the decision-maker to consider a range of events and conduct connected with the applicant.*

12. As far as the Law Council is aware, protection visa decisions and citizenship are all being decided by human delegates at the present time.[11] However, whether or not they are in the future is a matter for the Minister and any person to whom the Minister has delegated the power to make an arrangement for the use of ADM. The fact that there is some limit is imposed on the decisions which may be made through the use of a computer program under these suggests that a conscious decision has been made to leave this provision as capable of being determined by a computer program.

13. As noted, subsection 495A(1) of the Migration Act authorises the Minister to arrange for the use of a computer to make decisions under the designated migration law, which consists of various subdivisions and sections of the Act, along with a number of provisions determined by the Minister by non-disallowable legislative instrument.[12]

14. This scheme was introduced to the Migration Act in 2001.[13] The Explanatory Memorandum for the relevant bill stated, in part:[14]

> *In the migration context, a computer program will only be making decisions on certain visa applications where the criteria for grant are simple and objective. There is no intention for complex decisions, requiring any assessment of discretionary criteria, to be made by computer programs. Those complex decisions will continue to be made by persons who are delegates of the Minister.*

15. There are sections of the designated migration law which do not constitute 'simple and objective' criteria.

16. For example, the designated migration law includes section 36, which sets out the criteria for a protection visa.[15] Those criteria include, for example:

- *'that the applicant is not a person whom the Minister considers, on reasonable grounds, is a danger to Australia's security*';[16] and
- that the applicant for the visa is '*a non-citizen in Australia … in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence*

---

[10] *VFWQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 230, at [32].
[11] Department of Home Affairs (**DHA**), FOI Request - FA 21/07/01274, https://www.homeaffairs.gov.au/foi/files/2021/fa-210701274-document-released.PDF (8 November 2021).
[12] The Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018, made under this power, envelopes another submission of the Migration Act within the designated migration law.
[13] Schedule 2 to the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* (Cth).
[14] Explanatory Memorandum, Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001 (Cth), [8].
[15] As a provision within Subdivision A of Division 3 of Part 2.
[16] Subsection 36(1C) of the *Migration Act 1958* (Cth).

of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm'.

17. The designated migration law includes section 65,[17] which empowers the Minister to grant visas. This includes any criteria for the visa which have been prescribed by the Migration Act.

18. On 8 November 2021, in response to a freedom of information request,[18] the Department published the number of automated decisions made since 1 January 2010 and the proportion of visas decided by autogrant for each subclass in which it is used, compared to manual grants, refusals and withdrawals.[19] The Department's response to this request indicates that 'relevant Department systems cannot, by design, issue refusal decisions' – automated decisions are only made to grant visas.

19. According to this data, the following visas are currently subject to autogrants:

- Subclass 155 – Five Year Resident Return visas (currently around half of total finalisations);
- Subclass 417 – Working Holiday and Subclass 462 – Work and Holiday visas (with declining frequency as a proportion of all decisions – in 2020-21, 26 per cent and 15 per cent respectively of total finalisations);
- Subclass 485 – Temporary Graduate (for the first time in 2020-21, with four per cent of total finalisations per year resulting in autogrants);
- Subclass 500 – Student (for the first time in 2016-17, but only between 3 per cent and 9 per cent of total finalisations per year resulting in autogrants);
- Subclass 600 – Visitor visa (between 2 per cent and 10 per cent of total finalisations per year resulting in autogrants);
- Subclass 601 – Electronic Travel Authority (usually 100 per cent, although this dropped to 79 per cent of total finalisations in 2020-21 resulting in autogrants);
- Subclass 651 – eVisitor (usually over 80 per cent of total finalisations per year resulting in autogrants)
- Subclass 988 – Maritime Crew Visa (between 62 per cent and 73 per cent of total finalisations per year resulting in autogrants).

20. Practitioners have indicated to the Law Council that they are generally in favour of proper and responsible use ADM in making migration decisions, given its potential to provide greater efficiency in processing. However, this position is on the proviso that the use of ADM is transparent, accurate and fair.

21. Practitioners have also raised a concern as to whether sufficient risk management tools are put in place to manage the potential of fraud, particularly when ADM is used to grant visas which involve subjective criteria.

[17] Subdivision AC of Division 3 of Part 2
[18] Which was not made by the Law Council.
[19] DHA, n 11.

22. PAM3, the Department's policy manual which guides decision-making, provides detail on the way in which ADM is used in processing an application for a Subclass 417 Working Holiday visa:[20]

> *When a Working Holiday visa application is made via the internet, the department's eVisa system performs specific validation checks on the application. These include verifying the applicant's biodata and passport details against departmental systems, including MAL, ICSE, ISR and TRIPS. Only persons whom the system verifies as "eligible to apply" can proceed with their application.*

23. Once an application is then made, the system will assess whether any further information is needed from the applicant (**system assessment**). Depending on the outcome of that assessment will:

- proceed to autogrant – '[i]if the applicant satisfies all objective criteria, and are not required to undertake a health examination'; or
- proceed to delayed autogrant – '[i]f the only unresolved requirement after the application is made is the completion of health examinations'; or
- be referred to a processing officer for manual intervention – this may occur if there are requirements outstanding such as 'more information may be needed from the applicant (for example, inappropriate answers to declarations in the application form) or further investigation may be required (for example, due to MAL matches[21] or a Safeguards profile match)'.

24. The processing time data for Working Holiday visas published on the Department's website reflects this differentiated approach:

- *25% of applications: Less than 1 Day*
- *50% of applications: Less than 1 Day*
- *75% of applications: 17 Days*
- *90% of applications: 4 Months*

25. The reference to the system assessing that an applicant 'satisfies all objective criteria' and thus proceeds to autogrant, without a human delegate becoming involved, is interesting in light of some criteria for the Working Holiday visa seemingly requiring some kind of subjective assessment of an applicant's travel intentions.

26. For example, subclause 417.211(4) will be met if, relevantly:

> *(4) The Minister is satisfied that the applicant:*
>
> *(a) seeks to enter or remain in Australia as a **genuine visitor** whose principal purpose is to spend a holiday in Australia; and*

27. According to PAM3:[22]

> *'Genuine visitor' is generally considered to mean a person who intends to abide by the conditions of their visa, including the work and study limitations, and who will leave Australia before they are no longer able to remain lawfully.*

---

[20] DHA, PAM3, '[P Sch2.417-37] Validation of application by the eVisa system', accessed on 25 May 2022.
[21] According to PAM3, 'MAL', or Movement Alert List, is a 'database containing records of identities and travel documents of concern'. See DHA, PAM3, '[P Sch2.444-11] 11. Accountabilities and Responsibilities', accessed on 25 May 2022.
[22] DHA, PAM3, [P Sch2.417-18] Genuine visitor', accessed on 25 May 2022.

Applicants would generally satisfy the genuine visitor criterion, and would generally fail only if there was strong evidence they would breach the conditions on the visa.

28. It is unclear how the system assessment discerns or flags that 'strong evidence' – for example, whether or not the system is intelligent enough to appraise evidence or simply looks for the existence of any evidence at all.

29. The Law Council suggests that, if it is not already, the Department should review the rate of persons autogranted a Working Holiday visa who then overstay their visa to ascertain whether the automated system is operating effectively and with integrity.[23]

30. The Subclass 500 Student visa also contains a 'genuine temporary entrant' requirement, which is more extensive than the 'genuine visitor' requirement of the Subclass 417 visa.

31. Specifically, clause 500.212 of Schedule 2 to the *Migration Regulations 1994* (Cth) provides:

> *The applicant is a genuine applicant for entry and stay as a student because:*
>
> *(a) the applicant intends genuinely to stay in Australia temporarily, having regard to:*
>
> *(i) the applicant's circumstances; and*
>
> *(ii) the applicant's immigration history; and*
>
> *(iii) if the applicant is a minor—the intentions of a parent, legal guardian or spouse of the applicant; and*
>
> *(iv) any other relevant matter; and*
>
> *(b) the applicant intends to comply with any conditions subject to which the visa is granted, having regard to:*
>
> *(i) the applicant's record of compliance with any condition of a visa previously held by the applicant (if any); and*
>
> *(ii) the applicant's stated intention to comply with any conditions to which the visa may be subject; and*
>
> *(c) of any other relevant matter.*

32. This criterion requires decision-makers to be satisfied as to a person's *intentions* with respect to their travel to Australia. The Minister has issued a direction which applies to delegates determining the genuine temporary entrant requirement, to assist the task of weighing up those factors.[24] The direction directs delegates, in having regard to 'the applicant's circumstances', to consider circumstances in their home country – courses available in their home country, the extent of their personal ties, the economic situation in that country, military service commitments and political and civil unrest – and in Australia, including connection to Australia, relationship status, residence arrangements etc.

33. In the small percentage of Student visas subject to an autogrant, the finding with respect to the genuine temporary entrant requirement must be automated, but PAM3 does not make clear how that automation operates. One possibility is that the Department has

---

[23] It is noted that in report prepared for the Department in 2016 suggested that the extent to which working holiday makers over-stay their visa was a 'gap' and 'area for further research'. Hall and Partners, 'Experiences of Temporary Residents, REPORT, Research conducted for the Department of Immigration and Border Protection', (19 August 2016), https://www.homeaffairs.gov.au/foi/files/2018/fa180300984-document-released.pdf, 68.

[24] Direction number 69 – assessing the genuine temporary entrant criterion for student visa and student guardian visa applications.

created an automated system sophisticated enough to apply the facts of an applicant's case to the various limbs of clause 500.212 and the direction. Another possibility may that the system flags that there are applicants of a certain status or presenting certain facts who are taken, by virtue of that status or facts, to be a genuine temporary entrant.

34. Again, the Law Council suggests that, if it is not already, the Department should review the rate of persons autogranted a Student visa who are alternatively determined to not be a genuine temporary entrant and have their visa cancelled or breach their visa conditions in some way.

IP Australia Acts

Background

35. The Deputy Director General of IP Australia holds statutory roles under each of the four IP Australia Acts which empower that person to arrange for computer programs under their control to make decisions in their stead under those Acts.

36. As noted, there is no limit on which decisions may be subject to such an arrangement. The Explanatory Memorandum for the bill which inserted the arrangement power into the IP Australia Acts provided an explanation for this approach:[25]

> *219. Currently, the administration of the Acts and Regulations requires the Commissioner and Registrars to make a large number of decisions, which are delegated to employees of IP Australia. These decisions range from simple decisions that require no discretion to complex decisions that require judgement to be exercised.*
>
> *220. The use of computerised and computer-assisted decision making will improve the timeliness and accuracy of decision making and enable staff to deal with more complicated matters. Consequently, IP Australia intends to continue to explore and use new technologies to deliver a high standard of service, which includes the ability to make decisions by computer programs.*
>
> *221. To realise the full potential of these reforms, and provide IP stakeholders with the quickest and most accurate decisions possible, it is important that, in addition to the other measures in the Bill that simplify and streamline processes, some decision-making is also automated. In anticipation of planned business and ICT reforms to achieve this, legislative amendment is required to provide a sound legal basis for computerised decision-making.*
>
> *222. In terms of the implementation and safeguards, IP Australia will institute internal governance arrangements so that computerised decision-making will only be implemented for a decision with the direct approval of the Commissioner or the Registrar. It is proposed that the Commissioner and Registrars would not delegate this function to another employee. The internal governance arrangements will ensure that the power is used judiciously.*
>
> *223. Legislative amendments to provide the Commissioner and Registrars the power to enable computerised decision-making need to be broad. This is for two reasons.*
>
> *224. Firstly, it is important that the Commissioner and Registrars have the flexibility to apply computerised decision-making in appropriate circumstances. As computing capabilities and functions continue to exponentially improve, it is difficult to predict precisely which of the numerous decisions under the legislation might be suitable for computerised decision-making. If the legislation were to include a prescriptive list of those decisions to which computerised decisionmaking could be applied, it is likely that the legislation would need to be continuously amended as capabilities improve and either existing, or new types of, decisions need to be added to the list. Importantly, where the Commissioner or Registrar authorises the use of a computer program to make a decision, the decision made by a*

[25] Explanatory Memorandum, Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018 (Cth).

computer program must comply with all of the requirements of particular legislative provisions, in the same way that a person's decision would. This means that existing appeal mechanisms are in place.

37. It is clear from IP Australia's corporate material, that it is seeking to automate its processes to the extent possible:

> *To deliver this now and into the future, we will continue to invest in the modernisation of our digital platforms and environment to ensure continued support for our customers and our workforce through the provision of digital end to end services.*[26]
>
> *Rapid developments in device connectivity, computing power, artificial intelligence and data capacity are fuelling growth in digital technologies, with implications for IP functions and processes. Digital technologies provide us with options for more efficient administration, examination and monitoring of IP rights.*[27]

Introduction to the regulatory framework

38. The discussion which follows is thanks to the Intellectual Property Committee.

39. The only statutory protection in the IP statutes given in respect of ADM is the power of the Commissioner/Registrar to substitute any automated decision if satisfied that the automated decision is incorrect. The manner in which that determination may be brought about is not proscribed at all by the IP statutes or regulations.

40. It is clear that IP Australia makes a large number of decisions, ranging from administrative or at least relatively simple through to complex and often involving multi-factorial judgment.

41. There is no doubt scope for the consistency of IP Australia's decision-making to be improved by reducing variability arising from the idiosyncrasies inherent in decisions being made by different human Delegates at different times in different matters.

42. Improving the efficiency, timeliness and consistency of IP Australia's decision-making would benefit IP Australia and users of its services (both end users and their legal representatives), as well as third party observers (eg, interested competitors or licensees or partners etc of parties seeking registration of IP rights). There appears to be an opportunity for AI, automation or computerisation to play some role in pursuing these objectives.

Challenges to computerised decision making

43. The most immediate and significant challenges associated with introducing ADM to IP Australia's decision-making are:

    (a) Identifying decisions that IP Australia makes under legislation and regulations governing patents, trade marks, designs and plant breeder's rights which are amenable to automated or computerised decision-making, and which users, interested parties and the public might accept as being "made by a computer".

        (i) Many decisions relating to registrability and validity of IP rights, which are at the core of IP Australia's functions, appear (at least at first blush) ill-suited to fully-automated decision-making, given they turn on

[26] IP Australia, Corporate Plan 2021-22, <https://www.ipaustralia.gov.au/sites/default/files/ip-australia-corporate-plan-2021.pdf>, 3.
[27] Ibid, 5.

making evaluative judgments in light of information drawn from a range of sources and weighing them qualitatively – eg, (for patents) "*obvious to a person skilled in the relevant art in the light of the common general knowledge as it existed (whether in or out of the patent area) before the priority date of the relevant claim*"; (for trade marks) one mark being "*substantially identical with, or deceptively similar to*" another mark; or (for designs) "*if the design is new and distinctive when compared with the prior art base for the design as it existed before the priority date*". While AI has the potential to assist the (human) decision-maker in these contexts (for example, as a tool to assist in the assessment of substantial identity or deceptive similarity in the trade marks context), these decisions are unlikely to be the appropriate subject of computerised decision-making.

(ii) Some issues such as novelty for patents or designs, or overlap between the goods or services covered by two different trade mark registrations/applications, are perhaps more objective and therefore better suited to some level of automation. Indeed, AI may be able to search for, analyse and compare voluminous information more reliably or at least more consistently than human examiners, but the inputs into the automation will be critical. Particularly with respect to novelty, there must be confidence about the sources searched, the search parameters used, the analytical tools for evaluating the search results and assessing the novelty of the invention or design under consideration. The infinite sources of information make this challenging to define properly, but the same issues arise for human examiners considering novelty issues.

(iii) Many "administrative" decisions IP Australia makes involve discretionary factors, such as those relating to extensions of time (eg, based on errors or omissions). What is "fair" in such cases turns on the particular identified facts as well as broader circumstances. AI would need to be used cautiously but could, for example, analyse bodies of past decisions (and associated supporting applications and evidence) to identify similarities and differences and suggest an appropriate decision.

(iv) Some level of automation already appears to exist within IP Australia with respect to its simplest or most administrative decisions, such as the renewal of a patent, trade mark or design upon timely payment of prescribed fees, or the simple determination that a relevant date has passed.

(b) Identifying decisions that IP Australia makes for which, if AI is not to be delegated responsibility for decision-making, it could serve as a tool for informing decision-making by humans. For example, automated prior art or prior mark searching (of not only official registers but also the internet and subscription literature sources) and analysis before any involvement of a human examiner could speed up the examination of patents, designs and trade marks – subject to there being confidence and transparency about the sources being searched, the integrity and interpretability of the data extracted, and clear understanding of the limitations of the search and analysis when the human examiner becomes involved. Image searching and comparison software could assist with trade marks and designs, and indeed is apparently already being used in this way by IP Australia.

(c) Ensuring appropriate safeguards are introduced to ensure any automated decisions can be understood and analysed (how was the decision made, using what information and reasoning) and audited, and challenged and (if necessary) substituted in a fair and timely way. Existing proposals relating to including express explanations within IP Australia's written decisions of how and when AI has been used to assist with or even make a decision are essential.

(i) For example, if AI has been used to compare the specifications of a trade mark application and a prior trade mark registration, a bullet-point summary could be included to indicate on an exceptions basis the non-identical goods or services that have been deemed overlapping or not, to provide support for an examiner's reasoning and a basis for challenge by an unsuccessful applicant or a later opponent.

(ii) Consideration needs to be given to whether/how applicants and third parties might be able to challenge decisions which have been made by or with reliance upon AI. For many or even most such decisions, existing avenues of response, appeal or opposition will be sufficient, provided there has been transparency about when and how AI has been used in making the decision so that any apparent defects in the decision-making can be relied upon. Nevertheless, how a decision can be challenged, and whether amendment to applicable regulations is required, should be considered each time a new or adapted decision-making process involving AI is contemplated by IP Australia.

(iii) Regular internal audits of any automated decision-making introduced will assist IP Australia in monitoring whether the systems or algorithms it has introduced are functioning appropriately and whether/how they might be modified or updated (or, in an extreme case, abandoned).

(iv) Proposed safeguards regarding the non-delegable authority of Commissioners and Registrars to introduce any automation into any IP Australia decision-making process are appropriate provided they are understood as allowing the Commissioner or Registrar to consult with employees or consultants with appropriate technical and subject matter expertise to design and technically implement an appropriate algorithm, system or process.

(v) Privacy and confidentiality need to be preserved and, in particular, the use of AI ought not lead to improper publication of personal information or information which a party has designated as confidential.

(d) As with any system where the basis for making decisions is known by its user base, IP Australia should minimise the potential for any automated decision-making, or automated tools supporting decision-making, to be "gamed" by sophisticated users. This will involve striking an appropriate balance between publishing details of how decisions are made (such as the repositories and search parameters used) and not making it straightforward for applicants to exploit those processes improperly. Having said this, it seems appropriate for IP Australia to err on the side of transparency about how AI operates in its decision-making so that individual users can more readily accept the thoroughness, reasonableness and fairness of decisions that are made for or

against them using AI, and so that public confidence in automated decision-making can grow.

(e) Evaluating whether the complication and cost of introducing AI to any particular IP Australia decision-making process is worthwhile in terms of timeliness or efficiency gains. This will require analysis by IP Australia of which decisions occupy the most time of its human examiners and other personnel, and careful consideration of whether and how those decisions might be automated (wholly or in part).

(i) It is difficult to conceive of how ultimate decisions of registrability or validity could be automated, such that involvement of human examiners is inevitable and the question will be whether the initial steps undertaken by AI will make the human examiner's task easier or quicker.

(ii) For discrete aspects of the examiner's task involving gathering and comparing voluminous and complex information (prior art or prior mark searches), there is a clearer opportunity for time to be saved before the human examiner considers the information in a summary form, with outcomes suggested by the AI. This could even extend to consideration of other aspects of registrability informed by outcomes in other jurisdictions, such as patent examination reports or decisions in the European Patent Office or United States Patent and Trademark Office on grounds of sufficiency, support or clarity for patent applications in identical form to what is being applied for in an Australian patent application. For each of these examples, though, it will be crucial to state expressly that AI has been used to identify the relevant prior art or marks or specification similarities and for the human examiner then to set out a reasoned decision based on those matters.

(iii) The testing and calibration process to get any ADM processes satisfactorily implemented will inevitably be costly and time-consuming. These issues should be contemplated in light of the recommendations of the Patent Accessibility Review, for example.

44. It can reasonably be expected that the introduction (or broader adoption) of automated decision-making by IP Australia may create some initial backlash and perhaps results that many users and observers consider unsatisfactory – indeed, a good AI will make mistakes, but learn from them. No doubt it will be difficult for AI to learn from its mistakes when the question of what is a mistake is often in issue and quite subjective. How, one might ask, can an AI be expected to make the right decision when lawyers and judges are often at odds as to what is correct? How will the AI decide (or will it be permitted to decide) which of two or more competing lines of authority or public policy should be followed? A careful and transparent approach replete with safeguards is therefore essential. The technologies relating to AI are however likely to continually improve, and any automated decision-making systems would themselves be optimised as they are used over time.

45. It should also be borne in mind that inconsistency in decision-making (especially on substantive issues such as deceptive similarity) is something many practitioners believe they also experience with respect to IP decisions delivered by Australian courts. Accordingly, if AI is to be contemplated for supporting or even making decisions on the more substantive issues associated with the registration and validity of IP rights, careful consideration would need to be given to how those processes might sit with or lead into

equivalent approaches to court decisions. Otherwise, there is a material risk that parties will be exposed to potentially quite different processes during prosecution at IP Australia and in any appeal or post-registration revocation/cancellation proceedings in the Federal Court.

46. Finally, one must ask, is the cost in terms of time and money involved in creating, testing and calibrating AI and ADM for complex decision making regarding intellectual property rights worth the effort? It will be important, for example, for the likely initial set up costs not to be imposed on users of the system and thereby create further barriers to entry.

Are there international policy measures, legal frameworks or proposals on AI or ADM that should be considered for adoption in Australia?

47. The Committee does not know if of any international policy measures regarding the use of AI or ADM in respect of registrable intellectual property rights, although it appears that similar issues are presently being explored in other jurisdictions such as the US (for example, here) and EU (for example, see here and here). Plainly, however, to the extent the Commissioner/Registrars use decision-making processes from overseas in the examination of rights in Australia, it would be helpful to know to what extent they are already automated.

Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

10 May 2022

Our ref: SS:DPTIP

Confidential

[redacted]

[redacted]

Positioning Australia as a Leader in Digital Economy Regulation - Automated Decision Making and AI Regulation – Issues Paper

Thank you for the opportunity to provide feedback on the *Positioning Australia as a Leader in Digital* Economy *Regulation - Automated Decision Making and AI Regulation – Issues Paper* (**Issues Paper**). The Queensland Law Society (**QLS**) appreciates being consulted on the important issues discussed in the Issues Paper.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Data, Privacy, Technology and Intellectual Property Law Committee (**Committee**), whose members have substantial expertise in this area.

The submission has been structured around the ten questions posed in the Issues Paper. We have only provided answers to the questions relevant to the Committee's work.

1. *What are the most significant regulatory barriers to achieving the potential offered by AI and ADM? How can those barriers be overcome?*

   There are several key respects in which Australian laws do not provide a suitable legal framework. This limits the opportunities for achieving the potential offered by artificial intelligence (**AI**) and automated decision making (**ADM**). An optimal Australian legal framework reflecting stakeholders' interests in AI environments would include, at the least, the following features:

1. Liability risks: it would be clear about who in the AI services supply chain carries legal risks of liability for breach of the law.
2. Intellectual property (**IP**) law incentivisation: this issue requires clarity before regulatory changes are made. If IP rights are a determinative factor in AI development and adoption, changes will be necessary to ensure that AI-related innovations and investments are adequately facilitated by Australia's IP laws.
3. Global consistency: the principles would be aligned with like principles in ex-Australian laws, compliance with which is likely to be needed by Australian AI-related service providers doing business internationally.
4. Human rights protection: it would require a baseline protection for individuals affected by the direct and indirect aspects of AI and ADM.
5. Civil society accountability: it would require that, where AI services may have adverse impacts on users, they are preceded by guaranteed and transparent safeguards which citizens of civil societies are entitled to expect.
6. Access: it would ensure that, in terms of AI-related data and infrastructure, there is no centralisation of control in a small number of dominant players.

Our comments on the remaining questions illustrate some of the key aspects in which the Australian legal framework is deficient in relation to these matters.

2. *Are there specific examples of regulatory overlap or duplication that create a barrier to the adoption of AI or ADM? If so, how could that overlap or duplication be addressed?*

There is currently no unifying legal theory underpinning liability risk allocation amongst stakeholders in the AI service supply chain. The relevant stakeholders are those likely to play one or more of the following roles:

- Role 1: end users of AI products and services;
- Role 2: dataset providers;
- Role 3: computer program providers. Key computer programs are those which embody algorithms needed to generate predictive outcomes;
- Role 4: infrastructure providers; and
- Role 5: providers who offer end users (Role 1) AI products and services which involve supply from those undertaking Roles 2, 3 and 4.

Key AI-related legal liability risks which have featured in recent litigation include those under laws concerning:

- IP infringement;
- defamation;
- negligence;
- product and personal injury liability; and
- privacy.

Lack of clarity on risk allocation has significant potential to impede Australian-based AI investments, and fair and efficient AI outputs for Australian end-users.

This is particularly so as regards intermediary liability risks to be borne or passed on by those undertaking Roles 2–5 above. A 2020 review of this area concluded:

> Different doctrines in Australian law employ a range of different tests for determining when an actor will be liable for the actions of a third party. So far, these primarily include cases brought under the laws of defamation, racial vilification, misleading and deceptive conduct, contempt of court, and copyright. These bodies of law are conceptually different and derive from different historical contexts, and the courts have generally applied them in isolation. The [analysis in this chapter] shows that the basis on which third parties are liable for the actions of individuals online is confusing and, viewed as a whole, largely incoherent. The chapter shows how the principle limiting devices of liability across all of these schemes – intention, passivity, and knowledge – are ineffective in articulating a clear distinction for circumstances in which intermediaries will not be held liable. The result is a great deal of uncertainty. It is argued here that intermediary liability law should develop by focusing on the concept of responsibility, and that existing principles in tort jurisprudence and theory can help to guide and unify the different standards for liability.[1] [Emphasis added]

This conclusion has been underscored by 2021 and 2022 Australian court decisions regarding uncertainties with intermediary liability in the data context in *Facebook Inc v Australian Information Commissioner*[2] (about privacy law), *Fairfax Media Publications Pty Ltd v Voller*[3] (about defamation law), and *Hells Angels Motorcycle Corporation (Australia) Pty Ltd v Redbubble Ltd*[4] (about trade mark law).

This area warrants an aerial/cross-laws review by lawmakers to discern and develop some unifying concepts which can be part of all Australian laws on intermediary liability in the AI service supply chain.

Furthermore, specifically in relation to ADM, it is clear that the landscape and appetite for implementing ADM is expanding. As Kerr J held in *Pintarich v Deputy Commissioner of Taxation*:

> What was once inconceivable, that a complex decision might be made without any requirement of human mental processes is, for better or worse, rapidly becoming unexceptional. Automated systems are already routinely relied upon by a number of Australian government departments for bulk decision making. Only on administrative (internal or external) and judicial review are humans involved. This is not an entirely new phenomenon: see Administrative Review Council (Australia), *Automated assistance in administrative decision making: report to the Attorney-General* (2004) No 46. And, while yet still uncommon, some legislative schemes (see for example, s 66 of *the Business Names Registration Act 2011* (Cth)) already explicitly provide for computer programs to make decisions that stand as the decision of an agency of government.

---

[1] Kylie Pappalardo and Nicolas Suzor, 'Liability of Australian Online Intermediaries' *in Oxford Handbook of Online Intermediary Liability*, May 2020.
[2] [2022] FCAFC 9.
[3] [2021] HCA 27.
[4] [2019] FCA 355.

> This trend is not restricted to government. Automated share trading is at the heart of international commerce. Machines make contracts with machines.
>
> The legal conception of what constitutes a decision cannot be static; it must comprehend that technology has altered how decisions are in fact made and that aspects of, or the entirety of, decision making, can occur independently of human mental input.[5]

This landscape of complex decision-making ought to be harmonised so that there is a consistent approach to delegation that reduces the potential for unintended or unnecessarily complex deviations in the law governing ADM. In this regard, there are currently inconsistencies that exist with the delegation to computerised decision-making.[6] For example, in relation to citizenship decisions, a decision made by a computer may be substituted on receipt of specific notice that the computer program was not functioning correctly,[7] which can be juxtaposed against a substantially similar legislative provision for IP decisions which requires the Registrar to form a state of satisfaction that the decision by the computer program is incorrect.[8] In either approach, there is an obligation that a human decision-maker retains control of the computer program and is sufficiently technologically literate to identify and ensure the program is operating correctly. However, there is a significantly different threshold to the point at which the human becomes involved in the decision-making process and the reviewability of a decision made under each of those regimes given by example.

As an aspect of a harmonised approach to the language of legislation, enabling ADM ought to include specific provisions regarding external (merit and judicial) review and access to the underlying specification of any ADM process. It is also desirable to incorporate aspects of the European Union's *General Data Protection Regulation* as regards the parameters for use of ADM to ensure international harmonisation.

3. *What specific regulatory changes could the Commonwealth implement to promote increased adoption of AI and ADM? What are the costs and benefits (in general terms) of any suggested policy change?*

3.1 IP incentivisation

Before implementing regulatory changes, a preliminary issue requiring inquiry is whether IP protection actually performs an incentive function sufficient to warrant any change to or expansion of the current statutory regime.

The main Australian IP rights to which investors and others look to for adequate protection against misappropriation are copyrights, patents and confidential information. The rationale is that a market failure in creative output or inventions would occur if there were no such protection available, so a legislatively mandated IP system is justified.

---

[5] [2018] FCAFC 79 per Kerr J at [47] – [49].
[6] Angus Murray, 'Legal technology: Computer says no ...but then what' (2019) 39(8) *Proctor*, 48–49.
[7] See for example: s. 48(3) of the *Australian Citizenship Act 2007* (Cth).
[8] See for example: s. 222A(3) of the *Trade Marks Act 1995* (Cth).

In relation to patents, a number of recent studies conclude that IP protection's incentive function is questionable. Research by the Oxford Future of Humanity Institute shows that AI developers use a mix of patents, trade secrets and open-source licensing to protect their AI-related IP.[9] Developers are often under pressure to open-source their work, both to attract IT talent, and to build a sense of corporate social responsibility to attract customers.[10] Other studies suggest AI developers 'tend to rely strongly on market dynamics, such as economics of scale, first in the market advantages, brand recognition, rather than on patents.'[11] This has led some researchers to suggest the abolition of patentability for allegedly autonomous AI-generated inventions, given developers can rely on other strategies and imperatives to innovate.[12]

In the 2016 Productivity Commission report, *Intellectual Property Arrangements*,[13] the Commission noted an 'abundance' of evidence that showed patents were often unnecessary to promote innovation – at best, patents were useful to promote innovation for products that have large sunk research and development costs and are easy to imitate.[14] Patents may not be important in sectors where technology changes rapidly, is difficult to copy, or where innovation is incremental in nature.[15] As such, patents should only be granted if inventions would not have been developed or commercialised without them (that is, where there is 'additionality').[16] As yet, it is uncertain whether such additionality exists in relation to Australian AI development and inventions.

A related complication thrown up by the recent *Thaler v Commissioner of Patents*[17] litigation is that, if an owner/developer could patent an AI-generated invention, any incentivisation would only be indirectly tied to the invention the subject of the patent – particularly given the unpredictability of the nature of AI-generated inventions, as asserted by Thaler. Coase theory shows it is not owner/developers like Thaler but firms using AI to create new technologies (rather than software companies, programmers, or downstream parties) that would secure maximal economic efficiency.[18] Relevant benefits from patent ownership 'are most valuable when the patentee participates in the relevant marketplace'[19]

---

[9] Nathan Calvin and Jade Leung, 'Who owns artificial intelligence? A preliminary analysis of corporate intellectual property strategies and why they matter' (Working paper, University of Oxford Future of Humanity Institute, February 2020) 1 https://www.fhi.ox.ac.uk/wp-content/uploads/GovAI-working-paper-Who-owns-AI-Apr2020.pdf.

[10] Ibid 5.

[11] Alexandros Antoniou, Stavroula Karapapa, Eden Sarid, Lorna Woods, Ting Xu, 'Response to the UK IPO's Consultation' (University of Essex Law School academics, 30 November 2020) 3; Reto M Hilty, Jörg Hoffmann, Stefan Scheuerer, 'Intellectual Property Justification for Artificial Intelligence' (Max Planck Institute for Innovation and Competition Research Paper No. 20-02, undated).

[12] Shlomit Yanisky Ravid and Xiaoqiong (Jackie) Liu, 'When Artificial Intelligence Systems Produce Inventions: an alternative model for patent law in the 3A era' (2018) 39 *Cardozo Law Review* 2215, 2258.

[13] Productivity Commission, *Intellectual Property Arrangements* (Report No 78, 23 September 2016).

[14] Ibid 204.

[15] Ibid 4.

[16] Ibid 200.

[17] *Thaler v Commissioner of Patents* [2021] FCA 879; *Commissioner of Patents v Thaler* [2022] FCAFC 62.

[18] W Michael Schuster, 'Artificial Intelligence and Patent Ownership' (2018) 75 *Washington and Lee Law Review* 1945.

[19] Ibid 1987.

– and owner/developers are unlikely to do so; in fact, this situation could exacerbate patent troll activity. The transaction costs associated with assignment (to a participant in the marketplace) would decrease the value of the patent.[20]

Patent thickets and the stifling effect of litigation are also a concern. Larger developers accumulate patents aggressively, not for commercialisation and ultimate public benefit but to gain leverage in negotiations[21] or to "present the threat of a countersuit" if others sue. Historically, Apple and Google have spent more on litigation than research and development.[22]

Thus, it is less than clear whether expanding the range of patentable AI-related inventions would incentivise innovation, especially since AI commercial activity has experienced "massive growth and international investment" despite the uncertain status of patentability.[23] Researchers at the University of Oxford IP Research Centre observe that:

> Historically, patents have not been deemed essential to software innovation … It remains open whether patents are a powerful ex ante incentive to develop AI altogether. There is, however, room for concern that patents may stifle AI innovation [given the intensive litigation activity in the software field, and the potential for patent thickets].[24]

While Hilty et al observe that there is little theoretical justification for patenting AI applications, they acknowledge that AI-generated inventions might be an exception.[25] However, they recommend a thorough assessment of the balance between incentivisation and the complex economic costs that IP rights impose. '[C]onsiderable (in particular economic) research is still needed to identify these specific cases where IP protection is needed'.[26] In the United Kingdom, a recent consultation on AI and IP rights found that further research was indeed warranted, and recommended:

> … an economic study to enhance our understanding of the role the IP framework plays in incentivising investment in AI alongside other factors. This will draw together the international evidence. Additionally, engage with other government departments to gather emerging data and understanding of the drivers of the AI sector in the UK context. This will provide an evidence base on which to judge whether there is a rationale for further intervention in the area.[27]

---

[20] Ibid 1987-1991.
[21] Calvin and Leung (n 9) 4, noting Google's patent sharing arrangement is facilitating its entry into China.
[22] Ibid.
[23] Ibid 8.
[24] Alexandra Mogyoros, Marie White, Katarina Foss-Solbrekk, Caoimhe Ring, Katharina Behrend, Dev Gangjee, 'Submission for UK Intellectual Property Office' (Oxford Intellectual Property Research Centre) 1. See also Mark Summerfield, 'Can a patent be granted to a machine?' (InnovationAUS blog, 15 July 2021) https://www.innovationaus.com/can-a-patent-be-granted-to-a-machine/.
[25] Hilty et al (n 11) 27.
[26] Ibid.
[27] UK Intellectual Property Office, *Consultation Outcome: Government response to call for views on artificial intelligence and intellectual property* (23 March 2021), patents action point 3.

A further United Kingdom Intellectual Property Office consultation is presently investigating the more specific question of whether patent protection should be afforded to AI-devised inventions.[28]

We therefore recommend a priority review of the emerging Australian AI sector's reliance on and use of IP rights to establish whether, in fact, they perform the incentivisation function presently assumed. Close cooperation with jurisdictions such as the United Kingdom will progress a more harmonised approach globally.

3.2 Deficiencies in Australia's IP system

Necessary intangible inputs to AI services are:

- algorithms which perform predictive calculations;
- computer software embodiments of these algorithms and other functional information technology elements used to generate predictive outputs; and
- datasets: aggregated data in its "raw" form and in its "cleansed" form retaining only keys and fields of interest to the AI modeller's training, testing and validation purposes.

If IP right incentivisation is required, each of these areas is deficient in the AI context because their focus is generally on outputs rather than the investment in inputs. In other words, while each of these legal areas protect, to a greater or lesser extent, some AI-related elements, their reward is not directly for the investment which has been undertaken in developing AI models and relevant datasets.

Deficiencies in Australian copyright and patent law, and recognition of the need for law reform, have been judicially recognised at the highest levels.

In the copyright arena, the High Court of Australia in the *Ice TV* case considered how the absence of an Australian equivalent of the EU Database Directive[29] was material to its finding that the legal rights in the respondent's database were not sufficient under Australian law to afford protection against the appellant's derivations of that database.[30] In referring to this case in the later Federal Court of Australia proceedings in the *Telstra v Phone Directories* case,[31] Gordon J in the Federal Court of Australia (in a judgement which withstood appeal) stated in relation to the absence of the Australian equivalent of the EU Database Directive:

> As the High Court observes, there is no counterpart in Australian law. It is not open to me to ignore the express words of the Copyright Act to expand protection consistent with that set out in the Directive as summarised by the High Court. That is a matter for

[28] UK Intellectual Property Office, *Consultation: Artificial intelligence and intellectual property: copyright and patents* (29 October 2021).
[29] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p 20.
[30] *IceTV Pty Limited & Anor v Nine Network Australia Pty Limited* [2008] HCATrans 356 (16 October 2008) *IceTV Pty Limited & Anor v Nine Network Australia Pty Limited* [2008] HCATrans 358 (17 October 2008); *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 (22 April 2009).
[31] *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44 (8 February 2010).

> Parliament and, in my view, a matter which they should address without delay.[32] [Emphasis added]

In proceedings for leave to appeal in the *Telstra v Phone Directories* case, the High Court of Australia transcript of dialogue between Gummow J and counsel for the applicant includes the following:[33]

> GUMMOW J: I think your client really needs something like a database directive which you do not have at the moment.
>
> MR YOUNG: There is clearly none in Australia. There is, as your Honour knows, elsewhere.
>
> GUMMOW J: Exactly. It is a question then, your opponents say, why should you tweak the existing law to achieve the result which you should set about achieving by agitating the legislature. [Emphasis added]

As to the need for reform of the Australian *Patents Act 1990* (Cth), Allsop CJ in *Commissioner of Patents v Thaler* stated:[34]

> 119 ...in filing the application, Dr Thaler no doubt intended to provoke debate as to the role that artificial intelligence may take within the scheme of the *Patents Act* and *Regulations*. Such debate is important and worthwhile... In our view, there are many propositions that arise for consideration in the context of artificial intelligence and inventions. They include whether, as a matter of policy, a person who is an inventor should be redefined to include an artificial intelligence. If so, to whom should a patent be granted in respect of its output? The options include one or more of: the owner of the machine upon which the artificial intelligence software runs, the developer of the artificial intelligence software, the owner of the copyright in its source code, the person who inputs the data used by the artificial intelligence to develop its output, and no doubt others. If an artificial intelligence is capable of being recognised as an inventor, should the standard of inventive step be recalibrated such that it is no longer judged by reference to the knowledge and thought processes of the hypothetical uninventive skilled worker in the field? If so, how? What continuing role might the ground of revocation for false suggestion or misrepresentation have, in circumstances where the inventor is a machine?
>
> 120 Those questions and many more require consideration ... it would appear that this should be attended to with some urgency. [emphasis added]

There should be a priority review of Australia's IP regimes, including whether a new form of IP protection should be introduced into Australian law which rewards production versus output elements. Some learnings could be gained from the mechanical rights provided under the *Copyright Act 1968* (Cth) (which reward production versus directorship or

---

[32] Ibid, [30].
[33] *Telstra Corporation Limited & Anor v Phone Directories Company Pty Ltd & Ors* [2011] HCATrans 248 (2 September 2011).
[34] [2022] FCAFC 62, [119] – [120].

authorship in the film and sound recording industries, for example) and the EU Database Directive.

5. *Are there opportunities to make regulation more technology neutral, so that it will more apply more appropriately to AI, ADM and future changes to technology?*

   There are opportunities to make regulation more technology neutral and those opportunities are found in privacy and IP law reform. An aspect of the latter reform to IP is discussed above and it is highly desirable to align Australia with its foreign counterparts as regards to recognising the value of data in both raw and usable form. That value, however, ought to be measured against the potential consequences and risks associated with maintaining troves of information. A relatively simple opportunity to make regulation clearer about the opportunities and risks associated with commercially dealing with data could be found in the review of the *Privacy Act 1988* (Cth), the 'consumer data right' and more broadly in relation to legislative reform associated with electronic communication and data protection.

7. *Is there a need for new regulation or guidance to minimise existing and emerging risks of adopting AI and ADM?*

   Ensuring access to AI-related data and infrastructure is essential to minimising risks of adopting AI and ADM.

   The recently enacted *Data Access and Transparency Act 2022* (Cth) should assist in liberalising public sector data for the benefit of Australians. For the private sector, however, it is well recorded that AI-as-a-service offerings have already coalesced around Amazon, Microsoft and Google, each of which is also consolidating under one or more of the AI roles referred to in Question 2 above.

   The outcome of Australia's legislative response to the current Digital Platforms Inquiry should be required by lawmakers to provide workable access arrangements notwithstanding such market dominance.

   A general copyright for use exemption would play a significant role in ensuring Australia's copyright laws are more adaptable to the types of changes which AI and ADM present. This was a key consideration in the Singapore government's decision to replace its copyright legislation (its new Copyright Act came into force in November last year). In addition to a general fair use regime, Singapore's new law specifically caters for technological developments, including a computational data analysis exception to facilitate data mining. Reference can be made to this recent experience in the review under consideration.

   Another area of risk that requires regulatory action is personal injury liability for AI-driven products such as driverless cars. This issue in particular "is expected to significantly disrupt the motor vehicle insurance industry as these vehicles become more widely adopted".[35]

[35] Julie-Anne Tarr, AA Tarr and AJ George, 'Autonomous vehicles: regulatory, insurance and liability issues' (2021) 49 *Australian Business Law Review* 171.

In the United Kingdom, a 'single insurer' option has been adopted in the *Automated and Electric Vehicles Act 2018* (UK). This legislation extends compulsory motor vehicle insurance to cover vehicles in autonomous mode. An alternative model is for regulators to transfer liability to the manufacturer. However, while this solves the issue of liability for personal injury arising from the operation of an autonomous vehicle, it raises uncertainty in instances where no identifiable human driver with full vehicle control or a completely driverless vehicle system exists. As one recent study found:

> … it is clear that cooperation and collaboration between governments, manufacturers, insurance providers and technology companies will be essential if the journey to fully autonomous vehicles is to be hastened. For example, the European Commission recently stated that 'Europe must seize the opportunities presented by connected, cooperative, and automated mobility'[36] (CCAM) and recognized that this ambition was best realized through joint initiatives in research and innovation, and through other partnerships focusing on digital technologies. Moreover, collaboration was required to address matters such as harmonisation and coordination of relevant traffic rules, liability for automated vehicles and to ensure that the key digital enablers are in place – … electronic components for mobility, network infrastructure, cloud-to-edge resources, data technologies and governance as well as Artificial Intelligence.[37]

8. *Would increased automation of decision making have adverse implications for vulnerable groups? How could any adverse implications be ameliorated?*

Civil society accountability is essential for reducing adverse outcomes of ADM. The "Robodebt" litigation[38] concerned the wrongful recovery of $751 million from 381,000 welfare recipients. This case illustrated many shortcomings of the AI processes that are not accountable to standards which those in a civil society are entitled to expect. Fundamental problems arose because of dataset inputs employing two different formats (Centrelink's fortnightly figures and the Australian Taxation Office's annual income figures), crude predictive techniques (simple averaging), the cleansing of datasets to exclude highly relevant information (individuals' unique work history circumstances), and the lack of human oversight.

It is submitted that if any stakeholder (public or private) engages in AI-related services which may result in a material adverse effect on a user (individual or other), the Australian legal framework should require them to have a documented, easy to understand and accessible design document. The contents of this document should conform with practices recommended by the Australian government. This disclosure document should answer, in layperson's terms, questions such as the following:

- What is the specification for the use of the AI system?
- What predictive outcomes is the AI system designed to achieve?

---

[36] European Commission, Communication from the Commission to the European Parliament, the Council, The European *Economic and Social Committee and the Committee of the Regions, Sustainable and Smart Mobility* Strategy – *putting European transport on track for the future* (Brussels 9 December 2020, COM 789 Final) [57].
[37] Ibid, [67].
[38] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634.

- What data is used for training?
- What data is used for testing?
- What data is used for validation?
- How are datasets sourced and selected?
- What principles are applied to data cleansing?
- What machine learning methods are used to build the statistical models for the training and testing processes?
- What post-processing (correction and adjustment) actions occur?
- What scope is therefore human intervention to validate and adjust as appropriate predictive outcomes in isolated instances?

9. *Are there specific circumstances in which AI or ADM are not appropriate?*

   Adoption of AI and ADM tools should be promoted by government and others only after decision-making drawn from the various reviews and analyses suggested above and if the framework of laws outlined in this submission is in place. These steps would foster the use of these tools in a way calculated to maximise benefits to society.

10. *Are there international policy measures, legal frameworks or proposals on AI or ADM that should be considered for adoption in Australia? Is consistency or interoperability with foreign approaches desirable?*

    Given the borderless feature of AI innovation, assisting and incentivising stakeholders in AI processes should involve conceptual alignment of Australia's relevant legal principles with those of other countries that Australians transact with and whose legal systems largely reflected similar societal norms.

    A stark example of legal confusion regarding lack of such alignment concerns intermediaries involved in the collecting, using, storing and disclosing datasets which include personal information: see *Facebook Inc v Australian Information Commissioner*.[39] While the Facebook entities may have the resources to withstand the time, expense and uncertainties of this litigious approach, many small to medium-sized Australian businesses do not.

    In relation to privacy compliance, the law should, at a minimum, be reviewed to provide greater clarity regarding the responsibilities of intermediaries, with the uncertainties revealed by other legal systems serving to inform lawmakers.

    In terms of international measures to be considered by Australian legislators, we note the divergence in regulatory approach between the European Union and the United Kingdom.

[39] [2022] FCAFC 9.

While the European Union is progressing towards a comprehensive legislative framework for its Regulation (Artificial Intelligence Act),[40] the United Kingdom's National AI Strategy[41] takes a sectoral approach.

We note that the objective of an umbrella-style regulatory framework is laudable, however as the UK Strategy observes a sector-led approach may be preferable for several reasons:

(i) the boundaries of AI risks and harms are grey (the harms are often non-AI issues, and the boundaries of what constitutes an AI system are evolving);
(ii) use cases and impacts can be highly complex (the detail will 'always need to be dealt with at the level of individual harms and use cases');
(iii) regulators and industry are already starting to respond to the risks (working together in sectors to interpret existing regulations and consider further regulatory responses); and
(iv) AI is not the only ongoing technology change, and its impacts are often interlinked with other innovations and behaviour changes (increased connectivity, mobile workforce, dominance of major platforms, etc).[42]

[redacted]

Yours faithfully



Kara Thomson
President

[40] European Commission, *Regulation Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* (21 April 2021) https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence.
[41] United Kingdom Government, *National AI Strategy* (22 September 2021) https://www.gov.uk/government/publications/national-ai-strategy/national-ai-strategy-html-version.
[42] Ibid 52.