

REPLACEMENT EXPLANATORY STATEMENT

Issued by Authority of the Director of Biosecurity

Biosecurity Act 2015

Biosecurity (Electronic Decisions) Determination 2023

Legislative Authority

The *Biosecurity Act 2015* (the Act) provides the regulatory framework for managing the risk of pests and diseases entering Australian territory and gives effect to Australia's relevant international rights and obligations.

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

- make a decision under a relevant provision of the Act specified in a determination made under subsection 541A(2) of the Act; or
- exercise any power or comply with any obligation related to making a decision referred to in paragraph 541A(1)(a) of the Act; or
- do anything else related to making a decision referred to in paragraph 541A(1)(a) of the Act, or related to exercising a power or complying with an obligation referred to in paragraph 541A(1)(b).

Subsection 541A(2) of the Act provides that the Director of Biosecurity may, by legislative instrument, determine:

- each relevant provision of the Act under which a decision may be made by the operation of a computer program under an arrangement made under subsection 541A(1) of the Act; and
- the classes of persons that may use a computer program under such an arrangement for any purposes referred to in subsection 541A(1) of the Act; and
- the conditions of the use of the computer program.

The *Biosecurity (Electronic Decisions) Determination 2023* (the Determination) is made under subsection 541A(2) of the Act.

Purpose

For the purposes of subsection 541A(2) of the Act, the Determination provides the relevant provisions of the Act under which a decision may be made by the operation of a computer program under an arrangement made under subsection 541A(1) of the Act, the classes of persons that may use a computer program under an arrangement made under subsection 541A(1) of the Act and the conditions of that use.

Background

The *Agriculture Legislation Amendment (Streamlining Administration) Act 2021* amended the Act to insert section 541A.

Subsections 541A(1) and (2) are summarised above. Relevantly, the Director of Biosecurity may arrange for the use, under the Director of Biosecurity's control, of computer programs for any purposes for which a biosecurity officer may or must (amongst other things) make a decision under a **relevant provision** of the Act specified in a determination under subsection 541A(2) of the Act.

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

- subsections 49(4) and (5) (negative pratique);
- a provision of Chapter 3 of the Act (managing biosecurity risks: goods) (other than section 154, subsection 157(1) or paragraph 162(1)(a));
- a provision of Chapter 4 of the Act (managing biosecurity risks: conveyances) (other than subsection 192(6), paragraph 218(1)(a) or section 223 or 229);
- a provision of Chapter 5 of the Act (ballast water and sediment) (other than section 280 or 303);
- section 557 (permission to engage in certain conduct);
- sections 600 and 602 (withholding goods that are subject to charge);
- a provision of an instrument made for the purposes of a provision covered by any of paragraphs (a) to (f) of subsection 541A(9).

As such, the Director of Biosecurity may only determine, for the purposes of subsection 541A(2) of the Act, a **relevant provision** under which a decision may be made by the operation of a computer program (as well as the classes of persons that may use such a computer program and the conditions of such use). Provisions that do not fall within the scope of the definition of **relevant provision** may not be included in an instrument made under subsection 541A(2) of the Act. The provisions included in the Determination are all **relevant provisions** for the purposes of subsection 541A(9).

Impact and Effect

The Determination enables electronic decisions to be made under specified relevant provisions as provided for in the Determination. Certain classes of persons are specified in the Determination and such classes of persons will be able to use authorised computer programs for the purposes of:

- making a decision under a relevant provision of the Act; or
- exercising any power or complying with any obligation related to making a decision under a relevant provision of the Act; or
- doing anything else related to making a decision under a relevant provision, or related to exercising a power or complying with an obligation related to making a decision under a relevant provision of the Act.

Such classes of persons must use computer programs for these purposes in accordance with the conditions of use specified in the Determination.

Consultation

The Agriculture Department regularly meets with persons affected by the Determination, including those who use the authorised computer program under this Determination, and has designed the computer program with the assistance of industry.

The Attorney-General's Department was consulted in the making of the Determination.

The Office of Impact Analysis (OIA) was consulted in the making of the Determination and advised that an Impact Analysis is not required (OIA23-04595).

Details/ Operation

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Determination commences on the seventh day after the instrument is registered on the Federal Register of Legislation.

Details of the Determination are set out in Attachment A.

Other

The Determination is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full Statement of Compatibility with Human Rights is set out in Attachment B.

Details of the *Biosecurity (Electronic Decisions) Determination 2023*

Section 1 – Name

This section provides that the name of the instrument is the *Biosecurity (Electronic Decisions) Determination 2023* (the Determination).

Section 2 – Commencement

This section provides that the Determination commences on the seventh day after the instrument is registered on the Federal Register of Legislation.

The note below the table provides that the table relates only to the provision of the Determination as originally made. It would not be amended to deal with later amendments of the Determination. The purpose of this note is to clarify that the commencement of any amendments is not reflected in this table.

Section 3 – Authority

This section provides that the Determination is made under subsection 541A(2) of the *Biosecurity Act 2015* (the Act).

Section 4 – Definitions

The purpose of this section is to provide the definitions for the Determination, including the *Act* and *authorised computer program*.

The definition of *Act* as the *Biosecurity Act 2015* is included for clarification as the Determination makes a number of references to the Act. Further, section 4 also includes a note stating that the expressions *Agriculture Department*, *biosecurity officer*, *conveyance* and *person in charge* are used in the Determination and have the same meaning as set out in the Act. As such, the definition of *Act* also provides clarification as to the meaning of these expressions when used in the Determination.

The *Agriculture Department* is defined in section 9 of the Act as the department administered by the Agriculture Minister.

A *biosecurity officer* is defined in section 9 of the Act as a person who is authorised under section 545 of the Act to be a biosecurity officer.

Person in charge is defined in section 22 of the Act. Relevantly for this instrument, subsection 22(2) of the Act provides that *person in charge* of a conveyance means the person in charge or command of the conveyance, but does not include a ship's pilot.

Conveyance is defined in section 16 of the Act and means any of the following:

- an aircraft;
- a vessel;

- a vehicle;
- a train (including railway rolling stock);
- any other means of transport prescribed by the regulations.

The Regulations currently do not prescribe other means of transport for the purpose of section 16.

The definition for *authorised computer program* in section 4 of the Determination is a signpost definition which refers the reader to subsection 5(1) of the Determination.

Section 5 – Use of computer programs to make decisions

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

- make a decision under a relevant provision of the Act specified in a determination made under subsection 541A(2) of the Act (paragraph 541A(1)(a)); or
- exercise any power or comply with any obligation related to making a decision referred to in paragraph 541(1)(a) of the Act (paragraph 541A(1)(b)); or
- do anything else related to making a decision referred to in paragraph 541A(1)(a) of the Act, or related to exercising a power or complying with an obligation referred to in paragraph 541A(1)(b) of the Act (paragraph 541A(1)(c)).

Subsection 541A(2) of the Act provides that the Director of Biosecurity may, by legislative instrument, determine:

- each relevant provision of the Act under which a decision may be made by the operation of a computer program under an arrangement made under subsection 541A(1) of the Act (paragraph 541A(2)(a)); and
- the classes of persons that may use a computer program under such an arrangement for any purposes referred to in subsection 541A(1) of the Act (paragraph 541(2)(b)); and
- the conditions of that use (paragraph 541A(2)(c)).

Subsection 541A(9) of the Act provides relevant provisions for the purposes of section 541A of the Act, which includes subsections 195(2), 195(3), 200(1) and 201(1).

As such, the Director of Biosecurity may only determine, for the purposes of subsection 541A(2) of the Act, a *relevant provision* under which a decision may be made by the operation of a computer program (as well as the classes of persons that may use such a computer program and the conditions of such use). Provisions that do not fall within the scope of the definition of *relevant provision* may not be included in an instrument made under subsection 541A(2) of the Act.

Section 5 of the Determination provides the list of relevant provisions of the Act under which a decision may be made by the operation of computer program (an authorised computer program under an arrangement made under subsection 541A(1) of the Act), the classes of persons who may use an authorised computer program, and the conditions of that use.

Subsection 5(1)

Subsection 5(1) of the Determination provides, for the purposes of paragraph 541A(2)(a) of the Act, the relevant provisions of the Act under which a decision may be made by the operation of a computer program under an arrangement made under subsection 541A(1) of the Act. The Determination sets out the following provisions of the Act under which a decision may be made by the operation of an authorised computer program:

- subsection 195(2) or (3);
- subsection 200(1);
- subsection 201(1).

These provisions enable decisions to require a person to provide information or documents where the biosecurity officer suspects, on reasonable grounds, that the person holds the information or documents.

The provisions included in the Determination are all ***relevant provisions*** for the purposes of subsection 541A(9).

The decisions under the provisions determined in subsection 5(1) are predominantly decisions relating to movement of conveyances. Biosecurity officers in the Agriculture Department assess a large number of conveyances entering Australian territory each month to identify biosecurity risks and prevent the incursion of high-risk pests and diseases. In practice, most of the decisions are made in the course of the clearance process for conveyances that are subject to biosecurity control. It is necessary and appropriate for directions/decisions made under these provisions to be made electronically to enable faster biosecurity clearance across a large number of conveyances. Making electronic decisions by the operation of an authorised computer program allows the Agriculture Department to allocate biosecurity officers in a way that better targets higher risk pests and diseases. The Determination will enhance the maritime clearance process, improve the Agriculture Department's administration of the Act, and achieve resource optimisation, without compromising the robust and appropriate processes already in place to assess and manage biosecurity risk.

These decisions are discretionary in nature, in that each provision provides that a biosecurity officer *may* do certain things on reasonable grounds. Nevertheless, operationally, it is suitable and appropriate for decisions under these provisions to be made through the operation of an authorised computer program because:

- decisions under these provisions do not involve highly subjective elements and can be made electronically through a technical and scientific process based on objective data and information without evaluative judgement;
- highly specific and explicit business rules are developed based on applicable policy and legislative requirements and are built into the authorised computer programs to enable the issuing of directions/decisions under these provisions. Any data entry errors will not meet the criteria of rules and will not be processed automatically;
- business rules are reviewed and validated to ensure they remain accurate, current and relevant, and that the rule-based systems accurately and consistently reflect the relevant legislation.

The decisions listed in subsection 5(1) of the Determination have been carefully identified and considered suitable for being made electronically by the operation of a computer program (as authorised under an arrangement made under subsection 541A(1) of the Act (paragraph 541A(2)(a)). These are routine decisions that are less complex in nature, where particular facts are reliably established without the need for subjective assessment and consideration to interpret or evaluate evidence.

The provisions listed in subsection 5(1) of the Determination require the formation of a state of mind in making a decision under that provision. However, subsection 541A(4) provides that an electronic decision may be made without any state of mind being formed in relation to a matter to which the decision relates. As such, a computer may make decisions under these provisions without forming any state of mind.

All complex decisions are not intended to be made by a computer program and will be made by human decision-makers. For example, decisions that require the application of expert knowledge in evolving situations; decisions that require the exercise of discretion over more complex facts and further assessments of information, such as where fact finding or weighing evidence is required; and decisions that require the written approval or consent of the Director of Biosecurity.

The provisions listed in subsection 5(1) of the Determination provide for civil penalty and/or offence provisions in the Act should a person contravene the relevant provision, for example a person may commit an offence or contravene a civil penalty provision if the person is required to answer questions or give information to a biosecurity officer under subsection 195(2) and the person does not comply with that requirement. The provisions that provide for civil penalty and/or offence provisions are listed below:

- subsections 195(2) and (3) – fault-based offence (2 years, 120 penalty units or both) and civil penalty provision (120 penalty units);
- subsection 200(1) – civil penalty provision (300 penalty units); and
- subsection 201(1) – civil penalty provision (300 penalty units).

The requirements to provide information, answer questions or produce documents pursuant to subsections 195(2), 195(3), 200(1) and 201(1) of the Act enable biosecurity officers to have access to the necessary information to make an accurate and timely assessment of biosecurity risk associated with a conveyance based on the information provided by the operator of the conveyance. For example, a biosecurity officer may ask questions or seek information about the previous movements of the conveyance to determine whether the conveyance has been in a location known to have specific pests or diseases that pose biosecurity risks.

Once the information gathering process is complete, a biosecurity officer assesses the information and documentation and may decide to exercise additional powers under the Act. Those decisions are not made through the operation of the computer program. As those decisions are critical to the management of biosecurity risk, the accuracy of information provided by persons inputting information into the computer is critical. Such persons are on notice of the requirement to provide information or documents and have the ability to update that information at any stage. Any decision to pursue penalties for the provision of false or misleading information is not subject to automation and the imposition of any civil penalty or the conviction for an offence can only occur through judicial processes.

With respect to subsections 195(2), 195(3), 200(1) and 201(1), the nature of decisions made under those provisions does not lend them to an independent merits review process. This is because the requirement for information or documents in the context of assessing biosecurity risk does not, in and of itself, affect the rights and obligations of individuals. Rather, it is a preliminary decision that facilitates and leads to the making of a substantive decision. The Administrative Review Council's 1999 guide *What decisions should be subject to merits review* posits that a factor that may justify excluding merits review is whether or not the decision is of a preliminary nature. In this instance, the relevant decisions are preliminary to substantive decisions about how to manage any biosecurity risk that is identified, therefore merits review of these preliminary decisions is not required.

Making electronic decisions under subsections 195(2), 195(3), 200(1) and 201(1), by the operation of an authorised computer program allows the Agriculture Department to allocate biosecurity officers more effectively to target higher risk pests and diseases. The Determination will enhance the clearance process, improve the Agriculture Department's administration of the Act and achieve resource optimisation.

The relevant computer program and its operation

The computer program subject to the arrangement under subsection 541A(1) is used by commercial vessel masters and shipping agents to submit a pre-arrival report (PAR) and subsequently receive Biosecurity Status Documents which provide advice to a commercial vessel operator, vessel master or shipping agent. The computer program is the only method of electronically reporting pre-arrival requirements for all international commercial vessels seeking entry into Australian territory.

The computer program incorporates a series of business rules to determine whether the provision of extra information, answers to questions or production of documents is required in order for further decisions to be made (that are not made by a computer). The business rules are based on technical and scientific criteria for the assessment of biosecurity risk, for example, the level of biosecurity risk associated with a pest or disease in a particular country or region, at a particular point in time. These criteria are the same as a human decision-maker would consider to make the decision.

There are several instances where the computer program or a biosecurity officer may request additional information or answers to questions (subsection 195(2)) or the production of documents (subsection 195(3)). For example, once the operator of a vessel submits a PAR under section 193 of the Act, the computer program utilises a series of 'seasonal pest criteria' to determine whether the operator of a vessel will be required to complete a Seasonal Pest Questionnaire (SPQ).

The seasonal pest criteria will depend on the vessel type, the type of seasonal pest and the incursion season date range that is of a biosecurity concern, for example, the Brown Marmorated Stink Bug (BMSB) would be a seasonal pest of biosecurity concern if a vessel would be arriving in Australian territory:

- within a designated time period (that is, between 1 September 2022 – 30 April 2023);
- from a target risk country—namely, a country that has the relevant pest or disease that is of biosecurity concern.

If a vessel meets these objective criteria and its operator intends for the vessel to enter Australian territory during BMSB season, the computer program will make a decision to send the SPQ to the operator of the vessel requiring additional information under subsection 195(2) and/or the production of documents under subsection 195(3) to the Agriculture Department. This information or these documents will enable an accurate assessment of the biosecurity risks by a biosecurity officer prior to the vessel entering an Australian port.

The computer program may also direct the master of the vessel to provide information or answers to questions (subsection 200(1)) or require the production of documents (subsection 201(1)) using a similar process of objective criteria, for the purpose of assessing the level of biosecurity risk associated with a vessel that has entered Australian territory and is subject to biosecurity control. The computer program has been designed to enable the provision of answers to questions under subsection 200(1) and production of documents under subsection 201(1).

For example, the computer program may require the provision of information (subsection 200(1)) relating to the health of travellers (that is, in the form of information to be supplied on the Human Health Questionnaire), in accordance with the below criteria and process. If vessel masters or shipping agents become aware of any additional travellers on board the vessel with signs or symptoms of a listed human disease (as prescribed by the *Biosecurity (Listed Human Diseases) Determination 2016*), they must notify the Agriculture Department as soon as practicable. This is done by submitting a Human Health Update.

When a Human Health Update has been submitted, and signs or symptoms of a listed human disease are declared, the computer program will then make a decision about whether to send the human health related questions (in the form of a Human Health Questionnaire) to the vessel operator or agent and will require production of specified documents (for example, medical log and/or testing results). This information will enable a biosecurity officer to effectively assess the level of biosecurity risk associated with the reporting of the listed human disease. The effective assessment of biosecurity risk is crucial to ensure that the biosecurity risk is properly managed.

Safeguards

Subsection 541A(3)

The Act includes safeguards. For example, subsection 541A(3) of the Act requires that the Director of Biosecurity must take reasonable steps to ensure that electronic decisions made by the operation of a computer program are consistent with the objects of the Act. These objects are set out in section 4 of the Act and are, in brief:

- to provide for managing biosecurity risks, the risks of contagion of human diseases, the risk of a human disease entering, emerging, establishing itself or spreading in Australian territory, risks relating to ballast water and biosecurity and human biosecurity emergencies; and
- to give effect to Australia's international obligations.

The Director of Biosecurity has taken reasonable steps to ensure that the decisions to seek information or documents that are made by the computer program are consistent with the objects of the Act and to ensure that any electronic decisions are based on grounds on the basis of which a biosecurity officer could have made a decision.

Broadly, these steps include ensuring that the arrangement made under subsection 541A(1) provides for measures and processes for electronic decisions that would lead to the effective assessment and management of biosecurity risk. This includes arranging for the computer system to be updated with technical and scientific criteria based on biosecurity risk.

Further, the arrangement provides for appropriate and accurate business rules so that the relevant computer system takes into consideration the same grounds on the basis of which a biosecurity officer could have made that decision.

The business rules that underpin the computer program include rule parameters and safeguards, and are designed to ensure that decisions made are consistent with the objects of the Act. These parameters and safeguards include formulas that weigh different factors that assist with automated decision-making, the mechanisms used to identify errors in automated decision-making, and measures to correct errors based on those safeguards. An audit trail of decisions can be made available to a biosecurity officer to assist in identifying errors in decision outcomes and subsequently rectifying such errors.

The Agriculture Department has control processes, governance and security procedures to ensure that reasonable and practical steps are taken, and safeguards are in place to maintain the integrity of electronic decision-making, particularly in circumstances where a person does not comply with a decision made under any of the above provisions which carry civil penalties and/or are fault-based offences. These include:

- user access control requirements, monitoring and maintenance;
- careful design of business rules;
- regular review and validation of rules and programming to ensure they remain accurate, current and relevant;
- proper mechanisms to identify data-entry errors or other incorrect inputs to ensure data quality and integrity;
- communications and training material to ensure authorised computer program users understand the relevant legislation and are able to explain a decision to the affected person;
- record keeping and the ability to generate decision-making audit trail to enable review of decisions;
- careful selection of suitable and eligible provisions of the Act under which decisions are to be made electronically, reserving all complex, non-routine, controversial decisions under other provisions for human decision-makers.

The Agriculture Department has the ability to audit the decision-making outcomes to enable review of the decisions made by the computer program to which the Determination relates and has procedures in place to do so. Routine reviews and audits of the automated decisions are undertaken to:

- ensure the decisions reflect the legal requirements and legislative criteria for decisions; and
- ensure the decisions are operating consistently with the relevant business rules.

The Agriculture Department undertakes routine reviews of the decisions made by the computer program and, when required, updates the business rules of the computer program to ensure the automated decisions remain authorised by legislation and supported by settled policy and/or procedures. The audit and review of decisions also includes routine verification

that information provided by users into the computer program is true and correct and ensures the conditions of use are met.

The Agriculture Department also retains a comprehensive set of computer program business rules to ensure there is capability to access earlier versions of the business rules at a given point in time providing transparency around the historical decisions made by the computer program. This includes an audit trail of all decisions that the computer program makes electronically, and where an electronic decision is substituted with a decision made by a biosecurity officer.

As discussed in more detail below, subsection 5(3) of the Determination provides the conditions of use of an authorised computer program. A person in a class of persons who may use an authorised computer program under subsection 5(2) of the Determination, must:

- be satisfied on reasonable grounds that information entered into the computer program by the person for the purpose of enabling decisions to be made by the operation of the computer program is true and correct; and
- ensure that the information is accurately entered into the computer program.

These conditions of use will be supported by the processes, procedures and safeguards outlined above. For example, proper mechanisms will be in place to identify data-entry errors or other incorrect inputs. Any data entry errors will mean that the system will not process the decision automatically. This ensures that data entered into an authorised computer program is true and correct, and accurately entered. It is critical to ensuring that computer programs which make electronic decisions do so on the basis of true, correct and accurate information, and that any discrepancies, missing data, and/or data entry errors are identified and escalated for investigation immediately. This will offer robust mitigation against the risk that a person may be liable for a civil penalty provision or a fault-based offence where an electronic decision has been made on the basis of inaccurate, incorrect or incomplete data.

Subsection 541A(4)

A safeguard is also provided by subsection 541A(4), which requires the Director of Biosecurity to take reasonable steps to ensure that an electronic decision is based on grounds on the basis of which a biosecurity officer could have made that decision. The safeguard provides that decisions, whether made by a person or through the operation of a computer program, involve the application of the same specific business rules and the detailed scientific and technical assessment process based on objective data and information where the exercise of discretion is not ordinarily expected. Thus, in most cases, the identical information inputs should not lead to different assessment outcomes.

Subsections 541A(7) and 541A(8)

Subsection 541A(7) of the Act provides an important safeguard in that it provides that a biosecurity officer may make a decision in substitution for an electronic decision if a biosecurity officer is satisfied that the electronic decision is not consistent with the objects of the Act, or another decision is more appropriate in the circumstances. Furthermore, subsection 541A(8) provides that an electronic decision made in relation to a thing is of no effect to the extent that it is inconsistent with an earlier decision (other than an electronic decision) made in relation to the thing by a biosecurity officer or the Director of Biosecurity under the Act. These subsections provide important safeguards. They ensure that:

- a biosecurity officer may always, if appropriately satisfied, make a decision in substitution for an electronic decision, thus ensuring adequate and appropriate human oversight over decisions made by a computer program; and
- electronic decisions cannot be inconsistent with an earlier decision made in relation to the same thing by a biosecurity officer or the Director of Biosecurity. In effect, this ensures that, where decisions of persons and electronic decisions have been made in relation to the same thing, the decision of a person takes precedence and the electronic decision is deemed to be of no effect.

In the event that an audit and review of an electronic decision identifies an incorrect decision has been made by an authorised computer program, where necessary, a biosecurity officer has the capacity to substitute a decision, and the Director of Biosecurity or their delegate may amend the business rules of the authorised computer program to ensure the correct decision is made to manage biosecurity risks.

For example, under subsection 193(2) of the Act to achieve the legitimate objective of ensuring PARs are provided by commercial operators, it is a mandatory requirement for the operator of the vessel to provide information relating to the health status of passengers or crew to enable a biosecurity officer to assess human health biosecurity risks (section 47 of the *Biosecurity Regulation 2016*).

Pursuant to subsection 194(1A) of the Act, if the operator of the vessel becomes aware that the type of information included in the report made under subsection 193(2) of the Act is incorrect, it is a requirement for the operator of the vessel to update that information. If the operator of the vessel becomes aware of any travellers or crew on board the vessel having signs or symptoms of a listed human disease (as prescribed by the *Biosecurity (Listed Human Diseases) Determination 2016*), they must notify the Agriculture Department as soon as practicable. This is done by submitting a Human Health Update in the computer program.

When a Human Health Update has been submitted by the operator of the vessel, and signs or symptoms of a listed human disease are declared, the computer program will then make a decision under subsection 200(1) of the Act to send a Human Health Questionnaire to the operator of the vessel or agent and will require production of specified documents such as the vessel's medical log and where necessary test results) pursuant to subsection 201(1) of the Act. This information and documentation will enable a biosecurity officer (not the computer) to effectively assess the level of biosecurity risk associated with the sick passengers or crew.

If the operator of a vessel arriving into Australian territory experiences a telecommunications outage, the outage would prevent the operator of the vessel from providing updated information into the computer system within a timely manner. This would result in the computer program making a decision under subsections 200(1) or 201(1) of the Act not to request further information or documents respectively. In this circumstance, a biosecurity officer may substitute an existing decision made by the computer program to enable the biosecurity officer to assess or manage biosecurity risks associated with any sick passengers or crew. This manual intervention by the biosecurity officer to substitute an original decision made by the computer program ensures an appropriate decision is made consistent with the objects of the Act to manage the relevant biosecurity risks.

Other safeguards

Subsection 541A(5) of the Act ensures that there is a decision-maker (the Director of Biosecurity) who will have the responsibility for any legislative requirements to provide a statement of reasons for an electronic decision. Nothing in these amendments affects a person's right to seek judicial review of a decision made under the Act.

The Agriculture Department has a policy in place relating to automated decision-making under section 541A of the Act, which contains guidance on best practice. As a matter of policy, all departmental staff must comply with guidance provided in this policy.

The policy ensures that appropriate control arrangements, risk mitigation measures and safeguards are in place to effectively:

- satisfy the Director of Biosecurity that the objects of the Act are being met;
- manage legal risks;
- satisfy the Director of Biosecurity that electronic decisions made by the operation of a computer program conform with best practice principles of lawful administrative decision-making.

The business rules, departmental policy and relevant instructional material have been designed with consideration to the Commonwealth's Ombudsman's Automated Decision-making Better Practice Guide and were considered by the Director of Biosecurity prior to the making of the arrangement.

Subsection 5(2)

Subsection 5(2) of the Determination provides that, for the purposes of paragraph 541A(2)(b) of the Act, each of the following is a class of persons who may use an authorised computer program for a decision referred to in subsection 5(1):

- persons who are a biosecurity officer and hold a unique identifier issued by the Agriculture Department that enables the person to access the computer program;
- persons who are an APS employee of the Agriculture Department and hold a unique identifier issued by the Agriculture Department that enables the person to access the computer program;
- persons who are performing services for the Agriculture Department under a contract and hold a unique identifier issued by the Agriculture Department that enables the person to access the computer program.
- persons who are a registered agent (within the meaning of the *Shipping Registration Act 1981* (the Shipping Registration Act) in relation to a ship (within the meaning of the Shipping Registration Act) and have a unique identifier issued by the Agriculture Department that enables the person to access the computer program;
- persons who are a master (within the meaning of the *Admiralty Act 1988* (the Admiralty Act)) in relation to a ship (within the meaning of the Admiralty Act) and who have a unique identifier issued by the Agriculture Department that enables the person to access the computer program;
- persons who are an aircraft operator or airline (within the meaning of the *Aviation Transport Security Act 2004* (ATS Act) and have a unique identifier issued by the Agriculture Department that enables the person to access the computer program.

- persons who are in charge of a conveyance or acting on behalf of a person in charge of a conveyance and have a unique identifier issued by the Agriculture Department that enables the person to access the computer program.

Section 3 of the Shipping Registration Act provides the definition for **registered agent** and **ship**. **Registered agent** means, in relation to a ship that is registered in the General Register or International Register, means the person whose name and address are entered in the relevant register in respect of that ship under section 64 under that Act.

Under section 3 of the Shipping Registration Act, **ship** means any kind of vessel capable of navigating the high seas and includes:

- a barge, lighter or other floating vessel;
- a structure that is able to float or be floated and is able to move or be moved as an entity from one place to another; and
- an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water,

but does not include a vessel, structure, vehicle or craft declared by regulations made under the Shipping Registration Act, not to be a ship for the purposes of the definition in section 3 of the Shipping Registration Act.

Section 3 of the Admiralty Act provides the definitions for **master** and **ship**. **Master** means, in relation to a ship, a person who has command or charge of the ship.

Under section 3 of the Admiralty Act, **ship** means a vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved, and includes:

- a barge, lighter or other floating vessel;
- a hovercraft;
- an off-shore industry mobile unit;
- a vessel that has sunk or is stranded and the remains of such a vessel,

but does not include a seaplane, an inland waterways vessel or a vessel under construction that has not been launched.

Section 9 of the ATS Act provides the definitions for **aircraft operator** and **airline**. **Aircraft operator** means a person who conducts, or offers to conduct, an air service.

Under section 9 of the ATS Act, **airline** has the meaning given by subsection 134(2) of that Act, which provides that **airline** means a person engaged in the provision of air services.

Any person specified in a class of persons set out in subsection 5(2) of the Determination may use an authorised computer program for all decisions listed in subsection 5(1) of the Determination. The classes of persons listed are, in effect:

- either employees or officers of the Agriculture Department, or consultants or contractors who are performing services for the Agriculture Department, who hold a unique identifier issued by the Agriculture Department; or

- registered agents or masters of a ship, or aircraft operators or airlines, or persons in charge of a conveyance or acting on behalf of a person in charge of a conveyance who hold a unique identifier issued by the Agriculture Department.

The computer program is a secure environment which can make decisions in relation to registered users only. Employees or officers of the Agriculture Department, or consultants or contractors who are performing services for the Agriculture Department must be issued a unique identifier in order to have specific role-based access to the relevant authorised computer program. In order to be issued such an identifier, a supervisor of respective work areas within the Agriculture Department must approve the issue of this identifier to the relevant person on the basis that the person is required to access the authorised computer program to perform their duties.

Registered agents or masters of a ship, or aircraft operators or airlines, or persons in charge of a conveyance or acting on behalf of a person in charge of a conveyance must be issued a unique identifier in order to access the relevant authorised computer program. Commercial registered users use the program to provide information and documents to the Agriculture Department when required, with access limited to this role. In order to be issued a unique identifier, which enables user access and action to be traced and reported on, a relevant officer within the Agriculture Department must approve the issue of this identifier to the relevant person on the basis that the person is required to access the authorised computer program to (amongst other things) provide data necessary to enable an authorised computer program to make a decision, as relevant, under subsections 195(2) and (3), 200(1) or 201(1). It is appropriate for these persons (who are external to the Agriculture Department) to be granted role-based user access to use authorised computer programs to submit PARs for all vessels and aircrafts intending to enter Australian territory which may then be used by a computer program in order to make decisions under subsections 195(2) and (3), 200(1) or 201(1). The Agriculture Department provides instructional and training material to vessel masters and shipping agents to ensure that they understand conditions of use of the program and the requirement to comply with those conditions; especially the need to ensure that information is accurately entered.

The Agriculture Department regularly meets with the persons using the computer program relevant for this Determination and those affected by the Determination to discuss maritime related biosecurity activities and supporting operational tasks, including updates to the relevant computer program and associated processes. The computer program subject to the Determination was designed with the assistance of industry over the course of 5 years. Automating decisions to require further information or documentation under the relevant provisions within the Determination provides efficiencies for industry and the Agriculture Department and supports timely decisions by biosecurity officers based on the information inputted into the computer program by the class of persons as outlined in the Determination.

The Agriculture Department has ensured there is a dedicated feedback mechanism for persons affected by decisions made by the computer program subject to the Determination and the arrangement made under subsection 541A(1). This mechanism allows a person to raise queries or concerns with decisions made by the computer program or to report problems with reporting information into the computer program. In such circumstances, a biosecurity officer can review a decision made by the computer program to identify if the decision is appropriate and substitute the decision if necessary. The types of factors that a biosecurity

officer would consider before substituting a decision made by a computer program would be unique to each particular case. These factors may include:

- the type of automated decision made by the computer program;
- the information made available to the biosecurity officer at the time;
- the accuracy of the information made available to the biosecurity officer at the time;
- the timeliness of a decision that is required to be made to either assess or manage biosecurity risks;
- whether there are any delays with a person providing information or documentation to a biosecurity officer to enable the assessment or management of biosecurity risks;
- whether the information or documentation exists or is capable of being given by a person at the time.

Subsection 5(3)

Subsection 5(3) of the Determination provides, for the purposes of paragraph 541A(2)(c) of the Act, the conditions of use of an authorised computer program. A person in a class of persons who may use an authorised computer program under subsection 5(2) of the Determination, must:

- be satisfied on reasonable grounds that information entered into the computer program by the person for the purpose of enabling decisions to be made by the operation of the computer program is true and correct; and
- ensure that the information is accurately entered into the computer program.

This provides assurance that data entered into an authorised computer program is to be true and correct, and accurately entered. It is critical to ensuring that computer programs which make electronic decisions do so on the basis of true, correct and accurate information and that any data entry errors and other incorrect inputs are identified investigated and addressed immediately. For example, the relevant teams within the Agriculture Department will strictly control the processes in relevant authorised computer programs through quarterly auditing and reporting to ensure any discrepancies or missing data will be flagged and escalated for investigation immediately.

Statement of Compatibility with Human Rights

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

Biosecurity (Electronic Decisions) Determination 2023

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

Overview of the Legislative Instrument

The *Biosecurity (Electronic Decisions) Determination 2023* (the Legislative Instrument) is made under subsection 541A(2) of the *Biosecurity Act 2015* (the Act) and provides the relevant provisions of the Act under which a decision may be made by the operation of a computer program. The Legislative Instrument also provides for the classes of persons that may use an authorised computer program and the conditions of that use.

The relevant provisions of the Act provided for by subsection 5(1) of the Legislative Instrument include provisions which provide for the power to require the provision of information, answers to questions or the production of documents (subsections 195(2) or (3), 200(1) and 201(1)).

Human rights implications

This Legislative Instrument may engage the following rights:

- the right to protection from arbitrary interference with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR); and
- the right to non-discrimination under Articles 2(1) and 26 of the ICCPR.

Right to the protection from arbitrary interference with privacy – Article 17 of the ICCPR

Article 17 of the ICCPR protects the right to be free from arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence. This right may be subject to permissible limitations where those limitations are provided by law and are non-arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to this purpose.

Subsection 5(1) of the Legislative Instrument may engage this right. Subsection 5(1) provides the relevant provisions of the Act under which a decision may be made by the operation of a computer program. This includes decisions under subsections 195(2) or (3), 200(1) and 201(1). These provisions provide for the power to require information, answers to questions or the production of documents. By exercising powers to ask questions or require information or documents, a person may be required to incidentally provide personal information. The

power to ask questions or require a person to provide information or produce documents is limited to circumstances where it is reasonably suspected that the person has the relevant information or documents. These requirements are necessary for the legitimate objective of assessing the level of biosecurity risk associated with conveyances in, or intending to enter, Australian territory. Access to further information or documents is required in order to properly assess the level of biosecurity risk associated with conveyances and then to manage any biosecurity risks appropriately.

Under subsection 541A(3) of the Act, the Director of Biosecurity must take reasonable steps to ensure that electronic decisions made by the operation of a computer program are consistent with the objects of the Act. It is intended that all automated decisions made will be consistent with the objects of the Act. These objects are set out in section 4 of the Act and are, in brief:

- to provide for managing biosecurity risks, the risks of contagion of human diseases, the risk of a human disease entering, emerging, establishing itself or spreading in Australian territory, risk relating to ballast water and biosecurity and human biosecurity emergencies; and
- to give effect to Australia's international obligations.

As such, in making an electronic decision which requires a person to answer questions, or require information or documents from a person, it is intended that such a decision will be consistent with the objects of the Act. Upholding the objects of the Act is a legitimate objective and, therefore, to the extent any such decision limits the right to privacy, such limitation is reasonable and proportionate. Subsection 541A(3) acts as a reasonable constraint on the making of an electronic decision.

Further, subsection 541A(4) of the Act provides that the Director of Biosecurity must take reasonable steps to ensure that an electronic decision is based on grounds on the basis of which a biosecurity officer could have made that decision. However, an electronic decision may be made without any state of mind being formed in relation to a matter to which the decision relates. While a decision made by operation of a computer program would not involve the formation of a state of mind (as would be the case for decisions made by a biosecurity officer), subsection 5(3) of the Legislative Instrument provides that it is a condition of use that a person who is in a class of persons who may use an authorised computer program to be satisfied on reasonable grounds that information entered into the computer program by the person for the purpose of enabling decisions to be made by the operation of the computer program is true and correct. It is also a condition of use to ensure that the information is accurately entered into the computer program. This would ensure that an authorised computer program would have access to the same information that a biosecurity officer would in making a decision under a relevant provision of the Act. As such, legislative safeguards exist to ensure that the grounds for electronic decision-making are the same as those upon which a biosecurity officer may make a decision. Further, legislative safeguards exist to ensure that information upon which electronic decisions are made are true and correct, and entered accurately into the computer program which will make the decision. This ensures that, to the extent any electronic decision may limit the right to privacy, such limitation is reasonable and proportionate.

Additionally, Part 2 of Chapter 11 of the Act includes protections relating to the collection, storage and disclosure of protected information. This includes offences and a civil penalty for the unauthorised use or disclosure of protected information.

The limitations of the right to protection from arbitrary interference with privacy under Article 17 of the ICCPR are permissible as tests and protections apply to ensure the exercise of powers is reasonable and proportionate to achieving the legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

Right to non-discrimination (Articles 2(1) and 26 of the ICCPR)

Under Article 2(1) of the ICCPR, Australia has an obligation to respect and to ensure all individuals within its territory and subject to its jurisdiction respect the rights recognised in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of the ICCPR protects the right to equality and non-discrimination, and provides that the law shall protect against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.

Subsection 5(1) of the Legislative Instrument may engage this right. Subsection 5(1) provides the relevant provisions of the Act under which a decision may be made by the operation of a computer program. This includes decisions under subsections 195(2) or (3), 200(1) and 201(1). These provisions provide for the power to require information, answers to questions or the production of documents. The power to ask questions or require a person to provide information or produce documents is limited to circumstances where it is reasonably suspected that the person has the relevant information or documents. These requirements are necessary for the legitimate objective of assessing the level of biosecurity risk associated with conveyances in, or intending to enter, Australian territory. Access to further information or documents is required in order to properly assess the level of biosecurity risk associated with conveyances and then to manage any biosecurity risks appropriately.

The right to non-discrimination in Article 26 of the ICCPR, read with Article 2(1), may be engaged by the operation of subsection 5(1) of the Legislative Instrument.

Electronic decisions which may be made by a computer program under subsections 195(2) or (3), 200(1) and 201(1) will be made based on information and data entered into the relevant computer program. That information and data will be of a kind which is intended to provide relevant factors relating to the assessment of the level of biosecurity risk associated with conveyances. As such, electronic decision-making under these provisions will be on the basis of relevant information and data and will solely be aimed at managing biosecurity risks in the most appropriate manner for a legitimate purpose.

These measures therefore do not impose impermissible limitations and are compatible with the right to non-discrimination in Article 26 (read with Article 2(1)) of the ICCPR.

Conclusion

This Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.