Georgia Law Review

Volume 58 | Number 3 Article 8

6-3-2024

Automated Decision-Making and Review of Administrative Decisions

Margaret Allars
Sydney Law School, margaret.allars@sydney.edu.au

AUTOMATED DECISION-MAKING AND REVIEW OF ADMINISTRATIVE DECISIONS

Margaret Allars[*]

The use of automated decision-making (ADM) carries an enhanced risk of failure to meet administrative law standards. This Article identifies Australian federal statutory schemes for ADM and instances of non-statutory use of ADM, with a view to evaluating the scope for the risk to be realized. Express provisions for correction of error, internal review avenues, and external review by tribunals and courts may not deliver satisfactory solutions. Despite a promising start, review and reform of the regulation of ADM use has lagged. However, in 2023, the Report of the Royal Commission into Robodebt gave the issue renewed impetus, recommending statutory frameworks for ADM and independent monitoring. That was so notwithstanding that the damage done by Robodebt in raising overpayment debts against social security recipients, which resulted not from ADM per se, but from the encoding of an unlawful policy into the ADM system. The failure to meet administrative law standards was a deliberate and persistent product of human agency. This indicates that reform consisting of reviewing and monitoring the use of ADM needs to be capable of exposing such errors.

[*] Sydney Law School, The University of Sydney, NSW Bar. This Article would not have been written but for Professor Russell Weaver's convening the Administrative Law Forum, Paris, June 2023, which included the theme of automation of administrative decision-making. I am also indebted to the other contributors at the Forum for their comments on the Article, and to the excellent editorial team at the *Georgia Law Review*.

TABLE OF CONTENTS

I. INTRODUCTION

Administrative decision-makers have long been assisted by technology in developing and applying rules structuring the exercise of discretionary power and the performance of statutory duties. Automated decision-making (ADM) is not new in Australia. Rather, it is use of the expression "automated decision-making" that has gained recent currency, along with "artificial intelligence" (AI).[1] This Article focuses on ADM, which is understood to be a model for administrative decision-making in which rule-based formulae are deployed by computer programs to determine whether an individual meets criteria.[2] The computer program may guide the decision-maker through relevant facts, legislation, and policy, closing off irrelevant pathways and reducing, but perhaps not entirely eliminating, the scope for human agency. The making and application of rules to structure the exercise of statutory discretionary power have been encouraged by courts so that decision-makers may manage a high volume of cases, provided that the rule is valid and the manner of its application meets administrative law standards. On its face, ADM is not a radical departure from the traditional model for administrative decision-making. Where rules are made, the element of human agency in the exercise of discretion is reduced.[3] Even where rules are made, their application may require assessment of matters of degree,

---

[1] AI is a machine-based system that, for a set of human-defined objectives, can make predictions, recommendations, or decisions with respect to real or virtual situations, without guidance from a human being with respect to particular cases, and potentially using mathematical algorithms that enable a computer system to learn from text, images, and sounds. *See* OECD, OECD/LEGAL/0049, RECOMMENDATION OF THE COUNCIL ON ARTIFICIAL INTELLIGENCE 3, 7 (2019), https://oecd.ai/en/assets/files/OECD-LEGAL-0449-en.pdf [https://perma.cc/CEZ6-UATA] (defining an AI system as "a machine-based system that, for explicit or implicit objectives, infers, from the input that it receives, how to generate outputs such as predictions, content, recommendations, or decisions" and acknowledging that AI systems "vary in their levels of autonomy").

[2] *See* Ulrik B.U. Roehl, *Automated Decision-Making and Good Administration: Views from Inside the Government Machinery*, 40 GOV. INFO. Q. 1, 2–3 (2023) (defining ADM systems).

[3] COMMONWEALTH OMBUDSMAN, AUTOMATED DECISION-MAKING BETTER PRACTICE GUIDE 5 (2004) ("The key feature of such systems is the use of pre-set logical parameters to perform actions, or make decision, without the direct involvement by a human being at the time of decision.")

estimation, or prediction.[4] However, ADM is likely to impose a more radical reduction in the scope for such human choice in the making of individual decisions.[5]

ADM undoubtedly offers benefits—in particular efficiency and consistency in decision-making.[6] However, ADM may not be appropriate for making decisions where human agency in evaluating evidence is required.[7] More generally, ADM presents real risks that the outcomes it generates are invalid or incorrect.[8] Rules encoded in a computer program for automated application may be *ultra vires* the relevant statute.[9] The process for ADM may facilitate institutionalized denials of procedural fairness.[10] ADM may apply rules inflexibly, shutting out whole classes of eligible applications, without a willingness to consider an application on its merits by listening to any argument as to why a particular case is exceptional.[11]

---

[4] *See* ADMIN. REV. COUNCIL, REPORT NO 46, AUTOMATED ASSISTANCE IN ADMINISTRATIVE DECISION MAKING 36 (2004) [hereinafter ARC REPORT] (noting the importance of the "skills and qualifications of people who design expert systems" in "ensuring that the systems properly represent the law").

[5] *See* NSW OMBUDSMAN, THE NEW MACHINERY OF GOVERNMENT: USING MACHINE TECHNOLOGY IN ADMINISTRATIVE DECISION-MAKING 14 (2021) (noting that ADM systems "once developed, run with limited or no human involvement, and whose output can be used to assist or even displace human decision-making . . . .").

[6] *See* DEP'T OF INDUS., SCI. & RESOURCES, POSITIONING AUSTRALIA AS A LEADER IN DIGITAL ECONOMY REGULATION 3 (2022) (noting that "ADM is increasingly being deployed across government and the private sector to improve efficiency with which relatively routine decisions can be made and the effectiveness of the outcome").

[7] *See* ARC REPORT, *supra* note 4, at 15 (concluding 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").

[8] COMMONWEALTH OMBUDSMAN, *supra* note 3 (highlighting the key risks of ADM as "algorithmic bias, inaccurate (or less accurate) decisions being produced by an automated systems and unclear reasons for decisions").

[9] The general principle is stated in *Green v Daniels* (1977) 51 ALJR 463, 466 (Austl.), although the case did not involve an automated letter. Refusal to accept and process applications by sixteen-year-old school-leavers for unemployment benefits, despite their eligibility under the statute, was based on an *ultra vires* policy designed to tackle perceived abuse of the social security system. *Id.*

[10] *See* ARC REPORT, *supra* note 4 (describing how expert systems can deny procedural fairness by having inherent bias or by skewing the value of probative evidence).

[11] For the classic case on this principle, see again *Green v Daniels* (1977) 51 ALJR 463, 466–67 (Austl.), which found the phrase "as a general rule" inflexible and without room for consideration of exceptional cases.

Rather than introduce ADM in a haphazard manner, criteria need to be developed as to the types of powers and duties suitable for its use. Where the ADM route is taken, it is critical to ensure that it is undertaken within frameworks designed to eliminate, or reduce so far as possible, failure to meet administrative law standards and to correct them when they come to light. This Article aims to evaluate the frameworks or lack thereof, with a view to identifying cases where the risks have been realized. Part II describes statutory schemes for ADM that have been introduced in Australia at the federal level, including the facilities for correction of decisions. Part III seeks to expose cases where ADM is operating in the absence of a statutory scheme and the implications for tribunal review or judicial review as a means for providing relief in respect of legal error. Examination in Part IV of steps underway in Australia regarding regulation of ADM and AI schemes, provides a background to preliminary conclusions in Part V as to the comparative benefits and risks of statutory and non-statutory ADM schemes.

II. STATUTORY SCHEMES

From about 2000, statutory schemes for ADM have been introduced in relation to decision-making that is of a technical nature, or that requires objective criteria to be met, or which involve outcomes favorable to an applicant. Such schemes now exist in parts of the sectors of migration and citizenship;[12] social security;[13] veterans' entitlements and military compensation;[14] intellectual

[12] *See Migration Act 1958* (Cth) s 495B(1) (Austl.) (introducing statutory schemes for ADM in relation to decision-making of a technical nature in the field of migration and citizenship); *see also Australian Citizenship Act 2007* (Cth) ss 48, 49 (Austl.) (same).

[13] *See Social Security (Administration) Act 1999* (Cth) s 6A (Austl.) (allowing computerized decision-making in the context of social security law).

[14] *See Veteran's Entitlements Act 1986* (Cth) s 4B (Austl.) (allowing computerized decision-making in the context of veteran's entitlements); *see also Military Rehabilitation and Compensation Act 2004* (Cth) s 4A (Austl.) (same in the context of military rehabilitation and compensation); *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) s 3A (Austl.) (same in the context of defense-related claims).

property;[15] health, safety, biosecurity and food;[16] and business names registration.[17] Across these sectors the statutory schemes share many features but are by no means uniform. The reasons for the differences are not clear.

A. POWER TO ESTABLISH AN ADM SCHEME

Generally, there is a statutory provision empowering an agency or specific statutory office-holder, such as a Minister or agency head (who may be called "the arranger"), to establish the ADM scheme. For example, "[t]he Minister may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Minister may or must take administrative action under" specified provisions of the statute.[18] This is not a power to delegate. It is a statutory clarification that it is lawful to adopt a procedure by which a computer program is used for the purposes of the arranger's exercise of a power or discharge of a duty. The use of the computer program may extend to any power or duty under the

---

[15] *See Patents Act 1990* (Cth) s 223A (Austl.) (allowing computerized decision-making in the context of patent laws); *see also Trade Marks Act 1995* (Cth) s 222A (Austl.) (same in the context of trademark laws); *Designs Act 2003* (Cth) s 135A (Austl.) (same in the context of designs); *Plant Breeder's Rights Act 1994* (Cth) s 76B (Austl.) (same in the context of plant breeder's rights).

[16] *See Fisheries Management Act 1991* (Cth) ss 163A–163E (Austl.) (allowing computerized decision-making in the context of fisheries management); *see also Imported Food Control Act 1992* (Cth) s 20A (Austl.) (same in the context of imported food controls).

[17] For computerized decision-making in the context of business names registration, see *Business Names Registration Act 2011* (Cth) s 66, ASIC being the power-holder. In 2020 the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth) (Austl.) inserted section 62F into the Act to give to the Registrar of the Australian Business Registry Service (a new office to which the Commissioner of Taxation was appointed) power to arrange for use of computer applications and systems to assist decision-making for any purpose for which the Registrar may make decisions, with the automated outcome deemed to be a decision of the Registrar and power of the Registrar to substitute a decision if "satisfied that the initial decision is incorrect." *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth) s 62F (Austl.).

[18] *National Health Act 1953* (Cth) s 101B(1) (Austl.).

statute,[19] or it may extend only to those specified,[20] sometimes in part by a legislative instrument made under the statute.[21]

Frequently the computer program may be used to do "anything else related to" exercising the relevant power or performing the relevant duty.[22] The making of the arrangement is itself a decision of an administrative character and sometimes is expressly described as not being a legislative instrument.[23]

In some sectors, the discretionary power to enter an arrangement is structured in that the arranger "must take all reasonable steps to ensure that decisions made by the operation of a computer program under an arrangement . . . are correct",[24] or "take reasonable steps to ensure that decisions . . . made by the operation of a computer program under an arrangement . . . are consistent with the object[s]" of the statute.[25] These duties appear to apply not just to the original decision to enter an arrangement, but to be continuing, providing for a form of monitoring. In many schemes, the power may be

---

[19] *See, e.g.*, *Business Names Registration Act 2011* (Cth) pt 9 div 2 s 66(1) (Austl.); *Social Security (Administration) Act 1999* (Cth) pt 1 s 6A(1) (Austl.).

[20] *See, e.g.*, *Veteran's Entitlements Act 1986* (Cth) pt 1 s 4B(1A) (Austl.); *Military Rehabilitation and Compensation Act 2004* (Cth) ch 1 s 4A(1A) (Austl.); *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) pt 1 s 3A(1A) (Austl.); *Fisheries Management Act 1991* (Cth) pt 9 div 1 s 163B(1) (Austl.); *Imported Food Control Act 1992* (Cth) s 20A(1) (Austl.).

[21] *See, e.g.*, *Migration Act 1958* (Cth) pt 9 div 2 s 495B(3) (Austl.); *Biosecurity Act 2015* (Cth) ch 10 pt 2 s 541A(2) (Austl.).

[22] For examples of the use of this phrase in legislation related to the use of computer programs in exercising power, see *Imported Food Control Act 1992* (Cth) s 20A(1)(c) (Austl.); *Biosecurity Act 2015* (Cth) s 541A(1)(c) (Austl.); *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sch 1 ch 5F(1)(c) (Austl.); *Migration Act 1958* (Cth) s 495A(1)(c) (Austl.); *Australian Citizenship Act 2007* (Cth) s 48(1)(c) (Austl.); *Patents Act 1990* (Cth) s 223A(1)(c) (Austl.); *Trade Marks Act 1995* (Cth) s 222A(1)(c) (Austl.); *Designs Act 2003* (Cth) s 135A(1)(c) (Austl.); *Plant Breeder's Rights Act 1994* (Cth) s 76B(1)(c) (Austl.); *Veterans' Entitlements Act 1986* (Cth) s 4B(1)(c) (Austl.); *Military Rehabilitation and Compensation Act 2004* (Cth) s 4A(1)(c) (Austl.); *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) s 3A(1)(c) (Austl.).

[23] *See, e.g.*, *Australian Citizenship Act 2007* (Cth) s 48(6) (Austl.) (stating that arrangements under the Act are "not . . . legislative instrument[s]"); *Fisheries Management Act 1991* (Cth) s 163B(4) (Austl.) ("An approval made under this section is not a legislative instrument.").

[24] *See, e.g.*, *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sch 1 ch 5F(1B) (Austl.) (explaining the proper oversight mechanisms for the use of computer programs).

[25] *Imported Food Control Act 1992* (Cth) s 20A(3) (Austl.); *Biosecurity Act 2015* (Cth) s 541A(3) (Austl.).

delegated under the arranger's general statutory power to delegate, without any special restriction.[26]

B. DEEMING THE ADM OUTCOME A "DECISION"

In most of the schemes, the automated decision, which is a use of the computer program for the relevant purposes, "is taken to be" an exercise of the power or performance of the duty.[27]

That is, the outcome the computer program produces is deemed to be the arranger's decision. Some provisions state that the use of the computer program is "to assist decision-making" for the relevant purposes.[28] Curiously, the deeming provision is also used where the use of the computer program is expressly limited to "assisting" decision-making.[29] Interpreted in that context, the inclusion of the words "to assist" does not limit the role of the computer program in exercising the power or performing the duty.[30]

The deeming provision in the *Biosecurity Act 2015* (Cth) goes further. 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

---

[26] *See, e.g.*, *Social Security (Administration) Act 1999* (Cth) s 234 (Austl.) (explaining the Secretary's ability to "delegate . . . all or any of the powers of the Secretary under the social security law").

[27] *See, e.g.*, *Business Names Registration Act 2011* (Cth) s 66(2) (Austl.) (codifying that a decision made by a computer program is "taken to be a decision made by ASIC"); *see also, e.g.*, *Australian Citizenship Act 2007* (Cth) s 48(2) (Austl.) (noting that a decision made by a computer program is "taken to be" a decision taken by the Minister); *Patents Act 1990* (Cth) s 223A(2) (Austl.) (same); *Trade Marks Act 1995* (Cth) s 222A(2) (Austl.) (same); *Designs Act 2003* (Cth) s 135A(2) (Austl.) (same); *Plant Breeder's Rights Act 1994* (Cth) s 76B(2) (Austl.) (same); *Social Security (Administration) Act 1999* (Cth) s 6A(2) (Austl.) (same); *Veterans' Entitlements Act 1986* (Cth) s 4B(2) (Austl.) (same); *Military Rehabilitation and Compensation Act 2004* (Cth) s 4A(2) (Austl.) (same); *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) s 3A(2) (Austl.) (same); *Fisheries Management Act 1991* (Cth) s 163B(2) (Austl.) (same); *Business Names Registration Act 2011* (Cth) s 62F(2) (Austl.) (same).

[28] *See, e.g., Business Names Registration Act 2011* (Cth) s 62F(1) (Austl.).

[29] *See, e.g.*, *id.* s 62F(2).

[30] *Id.* s 62F(1)

relates."[31] A similar provision is included in the *Imported Food Control Act 1992* (Cth).[32] These provisions may be responsive to a difficulty that has arisen in the contexts of non-statutory ADM schemes, of identifying whether a decision has been made in the absence of any human mental process, as discussed below.[33]

C. CORRECTION OF ERRORS

Some ADM schemes contain express provision for the correction of errors.[34] That may be done by force of the statute. An automated decision may be deemed to be of no effect to the extent that it is inconsistent with an earlier decision (other than an automated decision) made in relation to the same subject matter by an authorized officer under the statute.[35] This provision appears to be directed to correction of slips, where the ADM is unnecessary because a decision by human agency has already been made. This contemplates that the ADM scheme could be operating alongside ordinary administrative decision-making outside the scheme, possibly for cases that are urgent or need special attention. It also seems to preclude consideration under the ADM scheme of a second application with the same subject matter. The first assumption raises the question whether, once an ADM scheme is arranged, it must be used for all applications. The second assumption may incorrectly preclude the implied statutory power from re-exercising a power, or reconsidering its exercise, particularly where the applicant has obtained fresh evidence, or circumstances have changed. The first assumption suggests that the ADM scheme will not bring the benefits of consistency in decision-making. The second assumption suggests that the ADM scheme will enforce undue rigidity and encoding routine constructive jurisdictional error by

---

[31] *Biosecurity Act 2015* (Cth) s 541A(4) (Austl.).

[32] *Imported Food Control Act 1992* (Cth) s 20A(4) (Austl.).

[33] *See infra* section III.B.

[34] *See, e.g., Safety, Rehabilitation and Compensation (Defence-Related Claims) Act 1988* (Cth) s 3A(1A)(3) (Austl.) (providing that "[t]he MRCC may . . . make a decision or determination in substitution for a decision . . . if the MRCC is satisfied that the decision or determination made by the operation of the computer program is incorrect").

[35] *See id.* s 20A(6) ("An electronic decision made . . . is of no effect to the extent that it is inconsistent with an earlier decision (other than an electronic decision) made . . . under this Act.").

reason of refusal to entertain a competent application properly enlivening the exercise of a power.

Most provisions for correction of ADM outcomes involve human intervention following human detection of error. An authorized officer may be empowered to substitute a different decision where the automated decision is inconsistent with the object of the statute or the different decision is "more appropriate in the circumstances."[36] A time limit may apply for the substitution to be done, such as sixty days.[37] This may be accompanied by a requirement that the different decision cannot be made by a computer program. On the face of it, this appears to be equivalent to internal merits review of the automated decision by human agency, without the need for an applicant to make a formal application for internal review.

In some ADM schemes, the power to substitute a new decision arises simply where the arranger "is satisfied that the decision made by the operation of the computer program is incorrect."[38] The

---

[36] *See, e.g.*, *Biosecurity Act 2015* (Cth) s 541A(7) (Austl.) (requiring that an officer change a decision if inconsistent with the purpose of the Act, or if another decision is more appropriate for the situation); *Imported Food Control Act 1992* (Cth) s 20A(5) (Austl.) (same).

[37] *See, e.g., Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sch 1 cl 5F(4) (Austl.) ("[T]he substituted decision may only be made before the end of the period of 60 days beginning on the day the initial decision is made.").

[38] *See, e.g.*, *Patents Act 1990* (Cth) s 223A(3) (Austl.) (providing that "[t]he Commissioner may substitute a decision for a decision the Commissioner is taken to have made . . . if the Commissioner is satisfied that the decision made by the operation of the computer program is incorrect"); *Trade Marks Act 1995* (Cth) s 222A(3) (Austl.) (noting that "[t]he Registrar may substitute a decision for a decision the Registrar is taken to have made . . . if the Registrar is satisfied that the decision made by the operation of the computer program is incorrect"); *Designs Act 2003* (Cth) s 135A(3) (Austl.) (same); *Plant Breeder's Rights Act 1994* (Cth) s 76B(3) (Austl.) (same); *Veteran's Entitlements Act 1986* (Cth) s 4B(3) (Austl.) (outlining that "[t]he Commission may . . . make a decision in substitution for a decision the Commission is taken to have made . . . if the Commission is satisfied that the decision made by the operation of the computer program is incorrect"); *Military Rehabilitation and Compensation Act 2004* (Cth) s 4A(3) (Austl.) (same); *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) s 3A(3) (Austl.) ("The Commission may . . . make a decision in substitution for a decision the Commission is taken to have made . . . if the Commission is satisfied that the decision made by the operation of the computer program is incorrect."); *Business Names Registration Act 2011* (Cth) s 62F(3) (Austl.) ("The Registrar may substitute a decision for a decision (the initial decision) the making of which is assisted by the operation of such a [computer] process . . . if the Registrar is satisfied that the initial decision is incorrect.").

word "incorrect" is not defined but should be interpreted to cover both legal and factual error.

Some schemes provide for the arranger to substitute a different decision for the automated decision if the computer program "was not functioning correctly."[39] A narrower criterion applies in the ADM provisions applying to migration powers and duties in the high volume area of the grant of visas to enter or remain in Australia.[40] Here, where a computer program "was not functioning correctly" the arranger may substitute a different decision for the automated decision, that is "more favourable to the applicant."[41] The expression "functioning correctly" is defined to mean that: (a) outcomes from the operation of the program comply with the statute and regulations made under it; and (b) those outcomes would be valid if they were made by the Minister otherwise than by the operation of the computer program.[42] An authorized officer has power to issue a certificate stating whether or not a specified computer program was "functioning correctly" at a specified time or in relation to specified outcomes from its operation, and the certificate is prima facie evidence of the matters stated in it.[43] In the ADM scheme for applications for citizenship, a certificate or notice of this kind may only be issued for the purposes of court proceedings relating to an application.[44]

This definition of "functioning correctly" is intended to provide a reverse and abstract test as to when a computer is "not functioning correctly." It rests upon a notional judicial review standard to be

---

[39] *See Fisheries Management Act 1991* (Cth) s 163C (Austl.) (applying instructions for when "a computer program was not functioning correctly"); *Migration Act 1958* (Cth) s 271(1)(*l*) (Austl.) (same).

[40] *See Migration Act 1958* (Cth) ss 541A, 495B (Austl.) (excepting s 48B which is a power to lift a particular bar on making an application for a protection visa); *id.* pt 2 div 13 s 257A (power to require a person to provide personal identifiers).

[41] *Id.* s 271(1)(*l*); *see also Australian Citizenship Act 2007* (Cth) s 48(3) (Austl.) (allowing the Minister to substitute a decision more favorable to the applicant).

[42] *See Migration Act 1958* (Cth) s 271(3) (Austl.); *Australian Citizenship Act 2007* (Cth) ss 49(1), (4) (Austl.) (defining and applying the term "functioning correctly).

[43] *See id.* s 271(1)(*l*), (m) (describing the procedure and effect of a Minister's signed statement including whether the computer was working); *Australian Citizenship Act 2007* (Cth) ss 49(1)–(3) (Austl.) (allowing a person or class of persons is authorized by the Minister to issue notices stating whether or not a computer program was functioning correctly).

[44] *See Australian Citizenship Act 2007* (Cth) s 49(1) (Austl.) (stating that notices of this kind may only be signed in proceedings relating to applications for citizenship).

applied by an authorized officer to an automated decision, being a counterfactual question as to validity. The officer must imagine that the automated reasons were provided manually by the Minister and then apply administrative law standards to see if the reasons show legal error. If "valid" is understood in the administrative law sense, there is no scope to substitute in a case of factual error.

A more considered approach is taken in the *Fisheries Management Act 1991* (Cth) (FM Act). A computer program is "not functioning correctly" if the electronic decision made by the program "is not the same as the decision that [the Australian Fisheries Management Authority (AFMA)] would have made if an employee of AFMA had made the decision."[45] Beneath this provision there is an "example," which is an operation affected by a computer virus or a typographical error made when data was entered.[46] While the examples are helpful, they are not intended to, and indeed could not, exhaust the range of possible kinds of factual error where the automated decision is "not the same as" the decision an AFMA employee would have made.[47] Giving the expression "not the same as" its ordinary English meaning, it is capable of covering factual error that is not a data entry error, but error in information supplied by the affected individual, error in factual assumptions made in the program, or a failure to update either kind of factual information. The examples are unhelpful in that they do not point to errors that are not tied to incorrect evidence. These include legal error in the automated decision. An employee may make a decision that is "not the same as" (or that is different from) the automated decision because the employee chooses not to apply an invalid policy written into the computer program or chooses to exercise a discretion by listening to what appears to be an exceptional case.

Although the words "not functioning correctly" are defined in the FM Act, a "computer function notice" signed by the CEO of AFMA must be issued to provide prima facie evidence that the relevant computer program was not functioning correctly in relation to a

---

[45] *Fisheries Management Act 1991* (Cth) s 163C(2) (Austl.).

[46] *See, e.g.*, *id.* ("A computer program may not be functioning correctly because of a computer virus or because of a typographical error that was made when data was entered into the computer.").

[47] *Id.*

specified automated decision at the specified time.[48] Notwithstanding that the words "not functioning correctly" have been defined, there is also a definition as to when a computer program is "functioning correctly." A computer program is "functioning correctly" if the automated decision is the same as the decision that the AFMA would have made if an employee of the AFMA had made the decision.[49] At first glance, the definitions appear to offer a harmless tautology. However, they may be flawed in assuming a binary universe. On what basis is the counterfactual question to be answered? Is it necessary to show that all employees would have made the same decision as the automated decision, or is it sufficient that only one employee would have done so? What happens when there are distinct elements to the decision, so that an employee would have made the same decision as the automated decision regarding one element, but not regarding another element. Is it necessary to establish that the incorrect element in the automated decision was material to the overall outcome? Application of the test for identifying incorrectness may be challenging, involving intensive human agency.

D. PROCEDURE FOR APPLYING FOR CORRECTION

Ordinarily, the schemes lack any provision indicating how to initiate consideration as to whether a computer program was not functioning correctly or whether to substitute a decision. Even though the citizenship ADM scheme provides for giving notice that the computer program was not functioning correctly and empowers the Minister to substitute a decision more favorable to the applicant, the scheme expressly provides that the Minister may do nothing in response. The relevant section states that"[t]he Minister does not have a duty to consider whether to exercise the power [to substitute] in respect of any decision, whether [the Minister] is requested to do so by the applicant or by any other person, or in any

---

[48] *See Fisheries Management Act 1991* (Cth) ss 163D(1)–(2) (Austl.) (stating that a computer function notice used as prima facie evidence must state whether a computer program was functioning correctly "in relation to a specified electronic decision" and "at a specified time").

[49] *See id.* s 163D(3) ("A computer program is functioning correctly if an electronic decision that the computer program makes is the same as the decision that AFMA would have made if an employee of AFMA had made the decision.").

other circumstances."[50] Reconsideration is therefore not enforceable by mandamus. The provision resembles other "dispensing provisions," or personal non-compellable powers of the Minister that feature in the *Migration Act* and potentially pose an obstacle to judicial review.[51]

The FM Act demonstrates that there are better ways to draft such provisions. The AFMA may revoke an automated decision on its own initiative or on the written application of the applicant who made the application that produced the automated decision, giving the applicant notice of the revocation and the new decision along with reasons for the decision.[52] This offers a transparent procedure for enlivening internal review on the ground that the computer program was not functioning correctly.

E. CORRECTION PROCEDURES AND INTERNAL REVIEW

ADM schemes often sit within statutes that provide for internal review of specified decisions, which may be combined with the availability of full merits review of the internal review decision by the independent and external Administrative Appeals Tribunal (AAT).[53] This internal and external review is full merits review where the power of review is re-exercised de novo, on the basis of the most recent evidence and submissions, and with procedural fairness.[54]

The relationship between the avenues for internal and external review and the ADM scheme facility for correction, is sometimes

---

[50] *Australian Citizenship Act 2007* (Cth) s 48(4) (Austl.).

[51] *See Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 (Austl.) (finding that mandamus was unavailable to compel the Minister to consider exercising their power under ss 46A and 195A of the *Migration Act* as both subsections indicate that the Minister does not have a duty to make such consideration); *Plaintiff S10-2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 647 (Austl.) (describing "common features affecting the exercise of the power" conferred by "dispensing provisions," including that "the Minister does not have a duty to consider whether to exercise the power").

[52] *See Fisheries Management Act 1991* (Cth) ss 163C(3–5) (Austl.) (describing the procedure for revocation and replacement of an electronic decision by AFMA).

[53] *See* Margaret Allars, *The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal,* 41 FED. L. REV. 197, 213–14 (2013) (outlining the relationship between internal review provisions and AAT full merits review).

[54] *See* Allars, *supra* note 53, at 197 (describing the "de novo exercise of administrative power" in the AAT's review function).

expressly addressed. It may be provided that use of computer programs is not to extend to decisions reviewing other decisions.[55] The facility for making a substituted decision may be expressed not to limit any provision in the statute for internal review or other reconsideration.[56] Where there is provision for substitution of a decision by the arranger on the basis that the operation of the computer program has produced a decision that is incorrect, the substituted decision may be expressly identified to be the reviewable decision for the purposes of AAT review (rather than the initial automated decision).[57] This means that a substituted decision utilizing the correction facility replaces internal review. It is understandable that only the operational decision (in this case the substituted decision) should be reviewed by the AAT. However, the ADM scheme appears to replace the usual form of internal review with an inferior facility for correction, where the review test remains murky.

F. SIGNIFICANCE OF AUTOMATED OUTCOME IN EXTERNAL REVIEW

Where the outcome of ADM appears to be wrong or irrational, fault need not lie with the computer processing. Use of ADM under the *Business Names Registration Act* 2011 (Cth) produced an outcome where the business name "Cairnscrete Pumping" was not identical or nearly identical to the registered name "Cairns Concrete Pumping" and therefore was an available name for registration.[58] The computer program was encoded with the

---

[55] *See Business Names Registration Act 2011* (Cth) s 62F(1) (Austl.) (promulgating that "[t]he Registrar *may* arrange for the use . . . of processes to assist decision making . . . for any purposes for which the Registrar may make decision in the performance or exercise of the Registrar's functions or powers . . ." (emphasis added)).

[56] *See, e.g.*, *Veteran's Entitlements Act 1986* (Cth) s 4B(4) (Austl.) (rejecting limitations on reconsideration and review of determinations); *Military Rehabilitation and Compensation Act 2004* (Cth) s 4A(4) (Austl.) (same); *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) s 3A(4) (Austl.) (same).

[57] *See, e.g.*, *Patents Act 1990* (Cth) s 223A(3) (Austl.) (authorizing substitute decisions on review at arranger's request); *Trade Marks Act 1995* (Cth) s 222A(4) (Austl.) (same); *Designs Act 2003* (Cth) s 136(1A)(c) (Austl.) (same); *Plant Breeder's Rights Act 1994* (Cth) s 77(1A) (Austl.) (same); *Veterans' Entitlements Act 1986* (Cth) pts IX, X (Austl.) (same).

[58] *See B & L Whittaker Pty Ltd and Australian Securities and Investments Commission* [2014] AATA 302 (Austl.) (Hack DP).

provisions of the Act and the words "identical" and "nearly identical" were defined in the Business Names Registration Act to have a meaning according to a legislative instrument made under the Business Names Registration Act.[59] The legislative instrument consisted in a rule which did not list "concrete" in the item that grouped similar words, and so the word did not figure in the computer-based comparisons of names.[60] The rule encoded into the computer program left no room for comparison of words that were not listed.[61] The automated outcome was deemed to be the decision of the power-holder, the Australian Securities and Investments Commission (ASIC).[62] On review, the AAT believed that it had no discretion but to apply the rule in the same way as the computer, notwithstanding that it was an absurd outcome, and complained of the inadequacy of the rule, not of ADM itself:

> It is all well and good to seek to save costs by using a computer program to determine the availability of names but the humans who draft the documents that inform the application of that program must give more attention to detail than is apparent from the terms of this [legislative instrument].[63]

---

[59] *Id.* at [8], [10]–[12].

[60] *See id.* at [11] ("Curiously, the expression 'concrete' is absent from that formulation.").

[61] *See id*. at [13] (suggesting that had the word "concrete" been listed, the outcome would have been avoided).

[62] *Id.* at [14].

[63] *B & L Whittaker Pty Ltd and Australian Securities and Investments Commission* [2014] AATA 3023, [18] (Hack DP) (Austl.). The same reasoning, reluctantly affirming an automated outcome which appeared to lack common sense, was followed in: *Smith and Australian Securities and Investments Commission* [2014] AATA 192, [2], [17] (Senior Member McCabe) (affirming the automated outcome that "Central Coast Surf School" was not nearly identical to "Central Coast Surf Academy"); *Boyce and Australian Securities and Investments Commission* [2015] AATA 768, [2], [3], [67] (Senior Member Cotter) (Austl.) (affirming an automated decision that "Rainbow Beach Plumbing Services Pty Ltd" was not nearly identical to "Rainbow Beach Plumbing"); *Perth Martial Arts Academy and Australian Securities and Investments Commission* [2018] AATA 3664, [1], [2], [39]–[40] (Senior Member Evans) (Austl.) (affirming an automated decision that "Perth Martial Arts Centre" was not nearly identical to "Perth Martial Arts Academy"); *Decorative Imaging Pty Ltd and Australian Securities and Investments Commission* [2018] AATA 4668, [16]–[25] (Hanger DP) (Austl.) (explaining that

In an earlier decision made under the same ADM scheme, a different AAT member had affirmed the automated decision notwithstanding that it lacked common sense, sheeting home the blame simply to the inappropriate use of ADM in this context:

> Computers do not do well with examples: while they work more quickly (and presumably more cheaply) than the registry clerks of fond memory, they do not yet have the capacity to analogise from a list of examples. They prefer clear instructions capable of certain application. Computers don't 'do' nuance, and they are not open to persuasion.[64]

In other words, the discretion of ASIC could not be eliminated by the rule. It is true that, rather than the operation of the ADM, the rule had much to answer for. In neither case did the AAT interrogate the issue as to whether the power "to make rules for determining whether a name is identical or nearly identical to another name" is a power to determine that matter exhaustively for every word that might appear in a collocation of words in a name.[65] It may not be possible to do so, and a rule purporting to do so may be *ultra vires* the power.[66] However the decisions are partly

---

the statutory scheme required affirming an automated determination that "Deco" is nearly identical to "De.Co Pty Ltd"); *Re Hazeldine and Australian Securities and Investments Commission* [2019] AATA 366, [1], [44]–[45] (Cowdroy DP) (Austl.) (affirming an automated determination that "Northern Beaches Tutoring Services" was not nearly identical to "Northern Beaches Private Tutoring Service"); *Australian Appaloosa Association Ltd and Australian Securities and Investments Commission* [2019] AATA 2195, [3], [4], [53]–[55] (Member Frost) (Austl.) (affirming an automated determination that "Appaloosa Association of Australia" and "Appaloosa Australia" were not nearly identical to "Australian Appaloosa Association Ltd"). For a discussion of the AAT's change of position in New South Wales Ombudsman, see STATE OF NEW SOUTH WALES, THE NEW MACHINERY OF GOVERNMENT: USING MACHINE TECHNOLOGY IN ADMINISTRATIVE DECISION-MAKING 72–73 (2021).

[64] *Smith and Australian Securities and Investments Commission* [2014] AATA 192, [14] (Senior Member McCabe) (Austl.).

[65] *B & L Whittaker Pty Ltd and Australian Securities and Investments Commission* [2014] AATA 3023, [8], [16] (Hack DP) (Austl.).

[66] *See Elevate Education Pty Ltd and Australian Securities and Investments Commission* [2023] AATA 84, [125]–[129] (Senior Member Kirk) (Austl.) (holding that the AAT did not have jurisdiction to review the validity of the rule, its function instead being merits review of the internal review decision, not the making of the legislative instrument, and not being judicial review).

explicable by the clouding of the function of the AAT within the scheme for review of automated decisions.[67] Where an internal review decision has been made, it is not identified as the reviewable decision by the AAT. An internal review was not constrained by ADM, but merits review by the AAT, functioning as a re-exercise of the power to make the initial decision, was arguably constrained by ADM.[68]

Later AAT decisions reached a different view, that the words "may use" in the statutory provision for use of ADM indicated that this was a capacity, such that ADM need not be utilized on every occasion, even where an application was made online.[69] This conclusion seems to overlook the fact that once the arrangement to use ADM has been made, in every case the automated outcome is deemed to be the initial decision. Side-stepping of the automated outcome and exercise of discretion can occur in internal review and should also occur in AAT review. A third alternative was to construe the rule as providing a non-exhaustive or non-final answer only to

---

[67] *See Business Names Registration Act 2011* (Cth) s 56 (Austl.) (defining a "reviewable decision"); *id.* s 57(1) (allowing for reviewable decisions); *id.* s 58(1) (permitting for AAT review of decisions); *id.* s 66(1) (excluding ADM from making an internal review decision). The Business Names Registration Act expressly provided that an internal review decision made by ASIC was not to be made by ADM. Ordinarily, a provision is made that obtaining internal review of an agency's decision is a precondition to seeking an AAT review, and it is the internal review decision, being the operative decision, that is reviewable by the AAT. The Business Names Registration Act does not. It simply provides for review of an initial decision by internal review by ASIC, and by external review by the AAT. There was the potential for two reviews of the initial decision to be pursued. Save in the case of *G C Swinburne and FJ McFarlane and Australian Securities and Investments Commission* [2014] AATA 602, [8] (Alpins DP) (Austl.), where apparently the applicants did not seek internal review, and directly sought AAT review of the initial decision.

[68] Allars, *supra* note 53, at 197.

[69] *See G C Swinburne and FJ McFarlane and Australian Securities and Investments Commission* (2014) 144 ALD 397, [86]–[94] (Alpins DP) (Austl.) (holding that the names "Melbourne Child Psychology" and "Melbourne Child Psychology Services" were nearly identical to "Melbourne Children's Psychology Clinic," setting aside the automated outcome which had been affirmed on internal review and substituting a different decision, refusing to register the names). For a different account of *G C Swinburne*, see Duncan Kerr, *Foreword* to THE AUTOMATED STATE: IMPLICATIONS, CHALLENGES AND OPPORTUNITIES FOR PUBLIC LAW vi–viii (Janina Boughey & Katie Miller eds., 2021).

the question whether names are "identical."[70] The discretion of the power holder in applying the vague and open-textured words "nearly identical" survived the making of the rule. This also does not account for the fact that the automated outcome, which involves no exercise of discretion, is deemed to be the initial decision.

III. NON-STATUTORY ADM

A. LONG-STANDING USE

Various forms of automated decision-making have operated for a long period of time in Australia without being identified as ADM and without any statutory scheme for the use of computer programs in making decisions.[71] There is no constitutional or statutory impediment to the use of such processes in public administration.[72] It is fair to include here the use of templates maintained in word-processing programs, used to write reasons for decision. The Australian Taxation Office (ATO) has long utilized a computerized

---

[70] The AAT has made orders setting aside and substituting decisions on the basis that the rule, properly construed, only defined "identical" and not "nearly identical," so that the automated outcome was only a partial initial determination of the comparison of names to be undertaken in response to the application, with ASIC exercising discretion in completing the exercise of power. *See, e.g.*, *Stasiw and Australian Securities and Investments Commission* [2015] AATA 328, [42]–[46], [53] (Nicholson DP) (Austl.); *George and Australian Securities and Investments Commission* [2021] AATA 3615, [103], [107] (Senior Member O'Connell) (Austl.) (surveying case law). A contrary decision in *Elevate Education Pty Ltd and Australian Securities and Investments Commission* [2023] AATA 84 (Senior Member Kirk) (Austl.), was based on the view that the removal of the words "when comparing" from several clauses of the rule by amendment in 2015 left the rule an exhaustive definition of "nearly identical" as well as "identical," so that ASIC had no discretion in the making of the initial decision. *Id.* at [120]–[123]. This conclusion must be correct on the more fundamental basis that the automated outcome is deemed to be the initial decision of the powerholder.

[71] *See* Yee-Fui Ng, *The Rise of Automated Decision-Making in the Administrative State: Are Kerr's Institutions Still 'Fit for Purpose'?,* AUSTL. PUB. L. (Aug. 20, 2021), https://www.auspublaw.org/blog/2021/08/the-rise-of-automated-decision-making-in-the-administrative-state-are-kerrs-institutions-still-fit-for-purpose [https://perma.cc/B2KC-CX9N] ("As early as 2003 . . . a large range of major federal government agencies, including Comcare, the Department of Defence, the Department of Veterans' Affairs, and the Australian Taxation Office . . . were making use of automated systems in governmental decision-making. ").

[72] *See id.* ("Australian law currently does not contain any specific requirements regarding automated decision-making . . . .").

system of self-assessment for income tax purposes, with the possibility of audit, also initiated on a computerized basis, targeting particular classes of taxpayers.[73] Template letters have been issued with the assistance of computerized processes in response to various kinds of migration, social security, and other applications.[74] Decisions made in this way have been assumed by courts to be decisions made by the power-holder, delegate, or authorized officer whose name appears in the printed signature panel of the letter.[75] In judicial review there will be admitted into evidence the documents that were before the decision-maker and any internal advice or briefing taken into account, but the court does not ordinarily inquire as to the extent to which a computer program assisted in producing the final outcome.[76]

B. DECISION IN *PINTARICH*

This changed in *Pintarich v Deputy Commissioner of Taxation.*[77] A taxpayer applied for remission of all general insurance charges (GIC) payable by him in respect of his outstanding tax liabilities and then entered into negotiations with the ATO in an attempt to obtain a more favorable decision.[78] The delegate of the Deputy Commissioner of Taxation told the taxpayer that he required the primary tax to be paid in full while he considered the question of remission of GIC.[79] The taxpayer then received a letter from the ATO, generated by an ADM process, stating that the ATO agreed to accept a lump sum payment which was "inclusive of an estimated [GIC]."[80] The taxpayer was delighted because the lump sum amount

---

[73] *See* ARC REPORT, *supra* note 4, at 58–59; *Pintarich v Deputy Comm'r of Tax'n* (2018) 262 FCR 41 at [47] (Kerr J) (Austl.).

[74] ARC Report, *supra* note 4, at 57–64.

[75] *See O'Reilly v State Bank of Victoria Comm'rs* (1983) 153 CLR 1 at 11, *applying Carltona Ltd v Comm'r of Works* [1943] 2 All ER 560 at 563.

[76] *See* ARC REPORT, *supra* note 4, at 47 ("[O]ften there is nothing on the face of the decision to alert the affected person or a tribunal or court to the fact that the decision was computer generated or assisted.").

[77] *Pintarich*, (2018) 262 FCR 41.

[78] *See id.* at [92] ("[T]he taxpayer's accountant . . . wrote to the [ATO] on the taxpayer's behalf seeking a full remission of GIC.").

[79] *See id.* at [97] (recounting the delegate's testimony).

[80] *Id.* at [101].

was only slightly higher than the primary tax liability.[81] The taxpayer relied on the letter as evidence that the ATO had decided to remit almost all of the GIC. The delegate claimed that the letter was sent accidentally by the computer.[82] The taxpayer contended that once the power to remit GIC had been exercised, it could not be re-exercised.[83]

The limited evidence as to how the letter came to be generated was consistent with the operation of a partial non-statutory ADM system for making the relevant decision. The delegate had inputted data into a number of fields and the template bulk issue letter had been generated and sent out from another part of the ATO without the delegate seeing it at the time it was created.[84] By majority, the Full Federal Court held that for there to be an exercise of the statutory discretion to remit GIC, there needed to be "a mental process of reaching a conclusion" and an overt or objective manifestation of that conclusion.[85] In this case there was no mental process of deliberation, assessment, or analysis by the Deputy Commissioner or his delegate, so no decision had been made to remit.[86]

There was a dissenting opinion that recognized the realities of non-statutory ADM.[87] An officer may decide "without any explicit mental engagement" and may make a decision which is "not coincident with his or her intentions."[88] It is recognized that a purported decision which is actually infected by jurisdictional error may have a practical effect until it is set aside in judicial review.[89] The use of ADM "challenges the expectation that a decision will

---

[81] *See id.* at [80] ("The amount specified in the letter was slightly greater than the taxpayer's primary tax liability . . .").

[82] *See id.* at [101] (discussing the delegate's testimony that he "had 'keyed in' certain information into a computer-based 'template bulk issue letter.'").

[83] *See id.* at [120] (noting the taxpayer's argument that the ATO's letter exercised the power to remit GIC).

[84] *See id.* at [101] (stating that the delegate testified that he "had not read the letter before it was despatched").

[85] *Id.* at [140].

[86] *See id.* at [140]–[145] (explaining the finding that no decision to remit GIC was made).

[87] *Id.* at [46]–[49].

[88] *Id.* at [42].

[89] *See id.* at [44] ("[M]any merely purported decisions continue to have practical effect unless and until set aside on judicial review after an application by a party with a sufficient interest to take that step.").

usually involve human mental processes of reaching a conclusion prior to expression of an outcome by an overt act."[90] The legal concept of what constitutes a decision has been altered by technology. A decision-maker does not have the ability to renounce as "not a decision" an overt act, here a computer generated letter, simply by asserting that the overt act does not align with his or her subjective intentions or intended conclusion.[91] It had to be inferred from the evidence that, acting within the normal practices in the ATO, the delegate had deliberately selected the letter from the hundreds of template letters on the ATO's computer system that are designed to be produced, printed, and sent to taxpayers.[92] The dissenting opinion is persuasive. The majority failed to engage with the reality of the use of ADM and what a decision is when ADM is employed. However, the High Court refused special leave to appeal from the decision in *Pintarich* and it remains authoritative.[93]

Pintarich is a surprising decision. Settled case law had established that reasons for decisions produced in part by an automated process are not on that account infected by legal error.[94] Nor does the court ordinarily have a role of inquiring into the precise part that a computer program played in the preparation of the reasons. This is consistent with cases where decisions assisted by ADM have been held to involve procedural unfairness or *ultra vires*, applying administrative law principles.[95] For example, a computer-generated letter might contain a decision that is narrow *ultra vires* because it is inconsistent with the relevant statutory provisions.

---

[90] *Id.* at [46].

[91] *See id.* at [55] (noting there is "no requirement that to be a decision the overt manifestation of the decision must align with the subjective intention of, or the conclusion intended by, the decision maker").

[92] *See Pintarich*, 262 FCR at [62] (describing the evidence in the case).

[93] *See id.* at [52], [62] ("[W]e do not consider that either of the taxpayer's appeal grounds . . . is made out."); *Pintarich v Deputy Comm'r of Tax'n* [2018] HCASL 322 (17 Oct. 2018) 1 (Austl.) (refusing application for special leave to appeal); *see also Friday v Minister for Primary Industry and Resources* [2021] FCA 794 (July 13, 2021) (following the majority decision in *Pintarich* as to the two components of a decision in a case not involving ADM).

[94] *See LVR (WA) Pty Ltd v Admin. Appeals Trib.* (2012) 203 FCR 166 ("The principles that have been applied are that at a general level there is no legal error in the use of standard paragraphs.").

[95] *See Pintarich*, 262 FCR at [120] (referring to the taxpayer's contention in the proceedings, that the Commissioner's later decision attempting exercise the power to remit GIC less favorably to him, was *ultra vires*).

The circumstances in *Pintarich* did not fall within these categories of legal error. The taxpayer had been given a hearing, and the decision conveyed in the letter was within the power to remit the GIC.[96] In *Pintarich*, the letter communicated reasons in short form, but the majority approached it differently. It was not a matter of the letter containing a decision infected by legal error. It was not even a decision.[97] Without referring to the broader context of the case law, the majority articulated only one justification for its conclusion. The officer vested with power to make the decisions had claimed that the computer generated the letter accidentally, and that it did not reflect any decision he had made, as he was still considering how to exercise his discretion.[98] However, he had keyed in data to a computer program which was designed to assist, and which generated, the outcome.[99] *Pintarich* is a flawed decision, and it will be unsurprising if a later Full Federal Court asked to follow it looks for a way to distinguish it.

C. ROBODEBT

In July 2016, the Department of Human Services introduced a new method for raising and recovering debts by overpayment of social security benefits, called an "online compliance intervention" (OCI).[100] The OCI program came to be described as "Robodebt," and for good reason. The Department accessed the ATO records of social security recipients to ascertain their annual taxable income for a period going back to 2010.[101] By an automated process applying the

---

[96] *Id.* at [84]–[86].

[97] *See id.* at [84] ("[I]n circumstances where, at the relevant time, neither the Deputy Commissioner nor any delegate of the Deputy Commissioner had reached a conclusion as to the application for remission of GIC, it is not established that a decision was made to remit GIC.").

[98] *See id.* at [18]–[19] (setting out the explanation given by the officer, and accepted by the court, as to how the letter came to be issued).

[99] *See id.* at [18] ("His evidence was that he had inputted data into a number of fields and the letter had then been generated and sent out from another place. He said that he had not seen the letter at the time it was created.").

[100] *See* ROYAL COMM'N INTO THE ROBODEBT SCHEME, REPORT xxxi (2023) (Austl.) [hereinafter ROBODEBT REPORT] (showing July 2016 as the OCI implementation date).

[101] *See id.* at xxiv (stating that the Department of Human Services accessed income information).

OCI method, the annual income was averaged into twenty-six equal fortnightly components.[102] For each recipient of benefits, the program compared this figure with the fortnightly income that the recipient had reported to Centrelink whilst receiving the benefit.[103] A recipient whose average OCI figure exceeded the recorded income for a particular fortnight was sent an automated letter requesting updated information.[104] If the recipient was unable to provide complete information about earnings for relevant fortnights or failed to respond, the OCI generated information was assumed to be correct.[105] In many cases, the automated process calculated a debt, sent the recipient a letter of demand and later commenced recovery proceedings.[106]

This data exchange and matching was supported by statutory powers and inter-agency protocols, but at times, in certain respects, it was non-compliant with privacy and secrecy laws, and generally lacked proper governance, controls and risk management measures.[107] There existed a statutory ADM scheme in which the Secretary of the Department of Human Services was empowered to make an arrangement for the use of computer programs, for any purpose for which a decision may be made under the social security law, with an automated decision made under such an arrangement deemed to be a decision made by the Secretary.[108] The statutory

---

[102] *See id.* (describing income averaging).

[103] *See id.* at 170 (stating that the ATO data was compared with Centrelink data to find discrepancies).

[104] *See id.* at xxiv (stating recipients were required to explain discrepancies).

[105] *See id.* (stating that income averaged data was "applied automatically where alternative information was not provided and accepted").

[106] *See id.* at 473 (describing the debt notice process).

[107] *See id.* at 457–62 (reporting "lack of proper governance, controls and risk management measures in place under the Scheme"). The *Data Availability and Transparency Act 2022* (Cth) pt 2.2 (Austl.) now makes general provision for authorizing Commonwealth agencies that control public sector data to share that data with an accredited user for a permitted data sharing purpose.

[108] *Social Security (Administration) Act 1999* (Cth) s 6A (Austl.). Section 6A was inserted into the Act in 2001 and amended in 2020. There are scattered references to the use of computer programs in relation to specific kinds of exercise of power, including deeming the automated outcome to have been done by the Secretary where it is for reasons for which the Secretary could exercise the power by determination. These are powers to increase or decrease the rate of a payment or cancel or suspend a payment; to transfer a recipient to a

ADM scheme was not capable of underpinning the data exchange and matching in the OCI scheme.[109]

The relevant statutory test for income for the purpose of eligibility for benefits worked on the basis of actual fortnightly income, not averaged fortnightly income as under the OCI system that assumed regular income throughout the year.[110] In addition, the statute placed a practical onus upon the federal government to prove the existence of a debt to the Commonwealth.[111] Encoded in the ADM system were two rules that were invalid, as they were directly inconsistent with the statute. The OCI system for the calculation of whether income exceeded the statutory eligibility amount was narrow *ultra vires*. Secondly, the letter requesting the recipient to provide evidence that the assumed fortnightly income was incorrect reversed the onus which the statute placed on the government to prove the debt.

The rules infected by legal error were made and automatically applied in an environment where they could do great harm. A typical recipient had been in temporary or casual employment with earnings that fluctuated and poor records of fortnightly income.[112] It was also typical that a recipient who received benefits only for a short time changed address without informing the Department of

---

different social security payment; to cancel for failure to respond to a notice, or to cancel a concession card because the holder ceases to be qualified for it; and to cancel or reduce a social security payment. *Id.* ss 83–84, 88, 103. The general requirement that an officer's decision must be in writing is clarified by a deeming provision that a decision is taken to be in writing if it is made, or recorded, by means of a computer. *Id.* s 236.

[109] *See* ROBODEBT REPORT, *supra* note 100, at 483 ("These deficiencies indicate that s 6A of the SS (Admin) Act may not be well adapted to an automated, near real-time Data Exchange Process.").

[110] *See Social Security Act 1991* (Cth) s 1068-A1 (referring to the fortnightly rate for the purposes of calculation of jobseeker payments); *see also* ROBODEBT REPORT, *supra* note 100, at 8 n.38, n.41, 14.

[111] *Social Security Act 1991* (Cth) s 1222A(a)–(b) (which provides that "[i]f an amount has been paid by way of social security payment . . . the amount is a debt due to the Commonwealth if, and only if: a provision of this Act . . . expressly provides that it is . . . or the amount: (i) should not have been paid . . . ."). The Secretary is required to establish that the condition stated in s 1222A(a) or 1222A(b)(i) is met, in order to engage the section, so that the amount is a debt due to the Commonwealth. *See McDonald v Director-General of Social Security* (1984) 1 FCR 354, 358 (Woodward J), 369 (Jenkinson J); Terry Carney, *The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?* UNSW L.J.F. 1 (2018).

[112] ROBODEBT REPORT, *supra* note 100, at chs. 10, 11.

the new address, as there is no duty to do so.[113] It was inevitable that in many cases the letter requesting evidence of fortnightly income and the letter of demand did not reach the recipient, who became aware of the debt later when an expected income tax refund from the ATO was garnished by the Department.

An investigation by the Commonwealth Ombudsman in 2017 proved fruitless in that it failed to expose the legal error.[114] Several recipients succeeded in AAT review of the letters demanding payment of overpaid benefits, with the AAT finding that the OCI income averaging system was an invalid policy. However, this was "first-tier" AAT review, where the reasons were not published. Wedded to the system, the Commonwealth treated the AAT cases as confined to the merits of each particular case and did not appeal. This avoided exposure of the legality of OCI income averaging to the scrutiny of the Federal Court and published reasons. A Federal Court proceeding commenced in 2019 demanding repayment of overpaid benefits also became futile when the Commonwealth recalculated and concluded that there was no overpayment.[115] Similar proceedings brought later in 2019—challenging the lawfulness of, and seeking restitution for, the Department's decision that a recipient was overpaid in 2012, the additional imposition of a recovery fee, and the garnishment of a tax refund—were ultimately settled in favor of the social security recipient when the Commonwealth again recalculated to find no overpayment.[116] However, these proceedings did not become futile, possibly because of an outstanding dispute as to whether the recipient was entitled

---

[113] *See id.* at 328 (noting the failure in ADM scheme "to account for the likelihood that past recipients might have changed their address").

[114] COMMONWEALTH OMBUDSMAN, CENTRELINK'S AUTOMATED DEBT RAISING AND RECOVERY SYSTEM (2017); ROBODEBT REPORT, *supra* note 100, at 580, 586, 588–91, 595–99. For the background to the Ombudsman, AAT, and judicial review proceedings, see generally Carney, *supra* note 111; Terry Carney, *Vulnerability: False Hope for Vulnerable Social Security Clients?,* 41 UNSW L.J. 783 (2018); Terry Carney, *Artificial Intelligence in Welfare: Striking the Vulnerability Balance?,* 46 MONASH U. L. REV. 32 (2020); Peter Hanks, *Administrative Law and Welfare Rights: A 40-year Story from* Green v Daniels *to 'Robot Debt Recovery'—Closing the Chapter*, 103 AUSTL. INST. ADMIN. L.F. 19, 21 (2021); Joel Townsend, *Better Decisions? Robodebt and the Failings of Merits Review*, *in* THE AUTOMATED STATE, *supra* note 69, at 52.

[115] *See* Hanks, *supra* note 114, at 24 (noting the Commonwealth's dismissal of a recipient's debt by finding no debt owed).

[116] *See id.* at 26 (outlining the Amato case against the Commonwealth).

to interest on the garnished money.[117] Instead, the Federal Court found for the recipient, to which the Commonwealth consented, declaring that the OCI policy was invalid.[118] Soon after, the Department stopped raising debts on the basis of OCI income averaging.[119]

But the Robodebt saga was not over, with many other decisions in need of review. Over time, the Commonwealth had raised debts totaling $1.763 billion against approximately 433,000 recipients.[120] It had also recovered approximately $751 million from about 381,000 of them.[121] A class action on behalf of 648,000 recipients was then brought and settled in mid-2021.[122] The Court ordered the Commonwealth to pay $112 million in restitution for unjust enrichment and legal costs, further stating that Robodebt constituted "a shameful chapter in the administration of the Commonwealth social security system and a massive failure in public administration."[123] Following the election of a new government in late 2022, the Royal Commission into the Robodebt Scheme was established to uncover who was responsible for the design and implementation of the scheme, whether questions were raised as to its legality and fairness, how complaints about the scheme were handled, when the government knew that debts were

---

[117] *See id.* at 27 (describing the dispute as "whether [Amato] was entitled to interest on the money taken from her tax refund").

[118] *See Amato v Commonwealth* [2019] FCA 6 (27 November 2019) (Austl.) (stating that, because the Commonwealth's decision to give a garnishee notice was invalid, Amato was entitled to recover interest owed).

[119] *See* Paul Farrell, *Government Halting Key Part of Robodebt Scheme, Will Freeze Debts for Some Welfare Recipients*, ABC NEWS, (Nov. 19, 2019, 8:27 AM), https://www.abc.net.au/news/2019-11-19/robodebt-scheme-human-services-department-halts-existing-debts/11717188 [https://perma.cc/C6C6-6BXL] (describing the Commonwealth's response to litigation involving the Robodebt Scheme).

[120] *See* Hanks, *supra* note 114, at 30 n.10 (discussing the background behind the future *Prygodicz* claim).

[121] *Id.*

[122] *Id.* at 30.

[123] *Prygodicz v Commonwealth (No 2)* [2021] FCA 634 (11 June 2021) 2. For the order granting leave to amend the original complaint, see *Prygodicz v Commonwealth* [2020] FCA 1454 (17 September 2020). For a subsequent order concerning the assessment of legal fees in this case, see *Prygodicz v Commonwealth (No 3)* [2022] FCA 826 (23 March 2022).

not lawfully raised, the impact of the scheme on vulnerable individuals, and its cost to government.[124]

On July 7, 2023, the Robodebt Royal Commission reported that OCI was unlawful, that the Department of Human Services had legal advice to that effect as early as 2014,[125] and recommended reform measures.[126] In relation to ADM, the Robodebt Report recommended the establishment of a consistent statutory framework for the operation of ADM, and an independent statutory authority empowered to monitor and audit the use of ADM and its technical and human impacts.[127] Consistently with the OECD AI Principles, where ADM is utilized, it should offer a clear path for those affected to seek review; its use should be identified on the relevant agency website, with an explanation in plain language as to how the process works; and business rules and algorithms should be available, to enable independent expert scrutiny.[128]

The Robodebt Scheme is much cited in discussions of ADM and AI in Australia.[129] It is important to recognize that although ADM was used to implement the OCI method, ADM was not the reason for its unlawfulness and unfairness. The encoding of the computer program that applied the OCI method of income averaging, identified discrepancies with benefits paid, and generated the

---

[124] *See* ROBODEBT REPORT, *supra* note 100, at x–xi (providing the reasons behind the Commission and its responsibilities).

[125] *See id.* at 588 ("The 2014 DSS legal advice, given prior to the commencement of the Scheme, indicated that income averaging used in the way proposed was unlawful.").

[126] *See id.* at xiii–xxi (listing recommendations).

[127] *See id.* at 485–87 (noting that human oversight of the system is needed to mitigate the risk of error).

[128] *See id.* at 269 ("[I]ncome averaging provided insufficient evidence of debts alleged under the Robodebt Scheme, there being no statutory scope for substitution of a notional average fortnightly income for actual fortnightly income.").

[129] *See, e.g.*, Anna Huggins, *Addressing Disconnection: Automated Decision-Making, Administrative Law and Regulatory Reform*, 44 UNSW L.J. 1048, 1056 (2021) (using Robodebt as an example for how automated systems create a risk of errors on a far larger scale than human decision-makers); Samuel White, *Authorization and Accountability of Automated Government Decisions Under Australian Administrative Law*, 102 AUSTL. INST. ADMIN. L.F. 84 (2021) (describing Centrelink's "Robodebt" initiative as the most obvious example as to why there are concerns with automated decision-making processes); Michelle Nemec, *Robodebt Illegality and How Expediting Automated Decision-Making Failed to Take the Bull by the Horns,* 23 UNSW L.J. STUDENT SERIES 1, 1, 18–20 (2023) (analyzing the takeaways from the "discredited" Robodebt Scheme).

letters requesting proof of fortnightly income and letters of demand, was based on misconstruction of the statutory provisions governing the social security programs.[130] The OCI method was *ultra vires*. Its use was the result of legal error, the product of human agency.[131] This was no error by technicians in the design of an algorithm. The government persisted with Robodebt in the face of internal and external legal advice that it was unlawful, received at a relatively early stage.[132] Nor can ADM be blamed for the ineffectiveness of tribunal and judicial review to bring to an end an unlawful government scheme that worked like an unstoppable juggernaut on a mass scale, causing harm to vulnerable people. It is likely that ADM has been used, and continues to be used, for remedial purposes, to manage the class action, the stopping of the Robodebt scheme, the process of refunding of debt amounts paid, and the restitution process.

IV. REFORM PROPOSALS

The Robodebt Report punctuated a dawdling and ramshackle response to the accountability questions posed by ADM and AI. An early appreciation of the administrative law implications of ADM was demonstrated by the Administrative Review Council (ARC) which in 2004 published a report, *Automated Assistance in Administrative Decision-Making*[133] (ARC Report). The ARC found that "[t]he main dangers associated with the introduction of expert systems for decision making will come from how the systems are used, rather than from the systems themselves."[134] The ARC recommended that automated systems that make a decision, as opposed to assisting in the making of a decision, are generally suitable only for exercises of power involving non-discretionary

---

[130] *See* ROBODEBT REPORT, *supra* note 100, at 269 ("[I]ncome averaging provided insufficient evidence of debts alleged under the Robodebt Scheme, there being no statutory scope for substitution of a notional average fortnightly income for actual fortnightly income.").

[131] *See id.* at 561–63 (finding that DHS chose to ignore AAT decisions holding that income averaging was unlawful).

[132] *See id*. at 557 (noting that tribunal decisions should have reinforced even earlier advice and caused DHS and DSS to reconsider the legality of the scheme).

[133] ARC REPORT, *supra* note 4.

[134] *Id.* at 11.

elements.[135] Alert to the administrative law requirement that administrators not be fettered in the exercise of discretionary powers,[136] the ARC recommended that ADM not be used to automate the exercise of discretion.[137] However, the ARC Report was concerned with ADM and not AI. Even in relation to ADM, its recommendations called for further refinement. The ARC left undeveloped what kind of discretion it had in mind as being out of bounds for ADM and AI. Some discretion is always exercised in administrative decision-making; most frequently, the Dworkinian sense of weak discretion as judgment, in weighing evidence to reach factual findings.[138] It is clear from the examples it gave that the ARC did not confine discretion to choice of standards, in the sense of Dworkinian strong discretion.[139] What is apparently weak discretion in applying vague or open-textured statutory language, of course, may collapse into an exercise of strong discretion.[140] Where the ARC drew the line allowing the appropriateness of ADM to making a decision remained as indeterminate as the definition of an exercise of power that does not involve discretion. Even at the time of the ARC Report, ADM was being used under statutory schemes to make decisions that involved such exercises of discretion, in the areas of social security and migration.[141] The ARC Report set out twenty-seven principles to guide the use of ADM, which were incorporated into an inter-departmental guide;[142] these did not halt or hinder its use in statutory schemes, as for example

---

[135] *See id.* at 12, 12–16 ("Council considers that using an expert system to *make* a decision—as opposed to helping or guiding a decision maker in making the decision—would generally be suitable only for decisions involving non-discretionary criteria.").

[136] *See id.* at 12 ("It is fundamental to administrative decision making that if a decision involves the exercise of discretion, the decision maker must exercise that discretion personally and not be fettered in doing so.").

[137] *See id.* at viii ("Expert systems should not automate the exercise of discretion.").

[138] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 20–23 (1986).

[139] *See* ARC REPORT, *supra* note 4, at 12 (outlining Principle 7); *see generally* DWORKIN, *supra* note 138.

[140] Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 365–66 (1975).

[141] *See* ARC REPORT, supra note 4, at 19 (explaining usage of ADM in social security and migration law).

[142] *See id.* at viii–xi (listing the twenty-seven principles).

under the Business Names Registration Act.[143] The ARC's Principle 7 was that the design and use of an ADM system must comply with administrative law standards in order to be legally valid.[144] Principle 10 was that an ADM system "should be designed, used and maintained in a way that accurately and consistently reflects the relevant law and policy."[145]

In 2016, a discrete unit known as the Digital Transformation Agency (DTA) was established within the federal Department of Finance, with the objects of leading digital and ICT transformation strategy, and developing a "whole of government" policy, including advising State and Territory governments.[146] DTA issued the Digital Service Standard, adapted from the UK Digital Service Standard, which are best-practice principles for designing and delivering digital government services.[147] Regulation of ADM and AI was not one of DTA's objectives and was not addressed in the Digital Service Standard. It was not until July 6, 2023, that the DTA announced that it had a role relating to the responsible use of AI by government agencies, having jointly produced with the Department an *Interim Guidance on Generative AI for Government Agencies*.[148]

The guide requires individual public servants to be registered to use generative AI platforms, such as ChatGPT, with any exceptions to be reported to the DTA.

---

[143] *See, e.g.*, *Business Names Registration Act 2011* (Cth) s 62F(1) (Austl.) (providing for use of ADM).

[144] *See* ARC REPORT, *supra* note 4, at viii (outlining Principle 7).

[145] *Id.* at ix.

[146] *See* DIG. TRANSFORM. AGENCY, ANNUAL REPORT 2016–17, at 90–91 (2017) (outlining these goals for the DTA).

[147] *Digital Service Standard v2.0,* DIGIT. TRANSFORM. AGENCY, https://architecture.digital.gov.au/digital-service-standard-v2-full-text [https://perma.cc/F4TP-G2VV] (outlining the Digital Service Standard policies and objectives).

[148] *See Interim Guidance on Generative AI for Government Agencies,* DIGIT. TRANSFORM. AGENCY (July 6, 2023), https://architecture.digital.gov.au/generative-ai [https://perma.cc/654F-FP5N] ("In embracing emerging technology, the government is delivering high quality services to Australians that maximise the benefits offered by new technologies."). To confuse the policy picture further, DTA has located the Interim Guide on a website called "Australian Government Architecture," containing various policies relating to digital matters, for which DTA may have some responsibility. *Id.* This does not bring together in one place all government policies providing guidance on the use of AI.

The statutory schemes discussed above were confined to particular areas of public administration and introduced from the early 2000s in an apparent policy vacuum. More generally, the use of ADM and AI in public administration proceeded apace, including the implementation of "Smartgate" at Australian international airports with use of a biometric passport; further development of automated processing of tax returns; and detection of mobile phone use when driving.[149] This was accompanied by a lull in review and reform reports concerning the regulation of such systems. Then a general review in 2018 of the operation of the Australian Public Service (Thodey Review Report) found that increased use of automation, including machine learning AI and advanced robotics would shape the future operating environment of public administration, and was to be encouraged.[150]

In May 2019, the Australian government signed the Organization for Economic Co-operation and Development's (OECD) *Principles on Artificial Intelligence* (OECD AI Principles).[151] The second and third of the seven OECD AI Principles state objectives to be adopted in the design of AI systems that reflect broad concepts familiar in the context of accountability through administrative law standards: respect for the rule of law, human rights, and democratic values and diversity. They add two principles specific to the use of AI: the inclusion of appropriate safeguards such as enabling human intervention where necessary to ensure a fair and just society; and transparency and reliable disclosure so that individuals understand when they are engaging with AI systems and can challenge outcomes. The intention appears to be that these objectives that should also be adopted in the design of ADM systems. In 2019, the federal Department of Industry,

---

[149] *See* Dep't of Prime Minister & Cabinet, *Positioning Australia as a Leader in Digital Economy Regulation: Automated Decision Making and AI Regulation* 4 (Issues Paper, March 2022) (Austl.) ("Implementation of SmartGate at ten Australian international airports has dramatically improved both customer service and security.").

[150] *See* AUSTL. PUB. SERV. REV. PANEL, OUR PUBLIC SERVICE, OUR FUTURE 47 (2019) ("The scenarios . . . highlight the necessity for the APS to transform for what could be a radically different future over the coming decades.").

[151] *See OECD AI Principles Overview*, OECD AI POL'Y OBSERVATORY, https://oecd.ai/en/ai-principles [https://perma.cc/UU2G-VK8Z] ("The OECD AI Principles promote use of AI that is innovative and trustworthy and that respects human rights and democratic values.").

Science and Resources issued the AI Ethics Principles based on the OECD AI Principles.[152]

However, the story so far neglects the work that was being undertaken by the Commonwealth Ombudsman to continue the work of the ARC. In February 2007, with the support of a cross-agency working group, the Ombudsman issued an update of the ARC's guiding principles,[153] with a further update in 2019,[154] and a final guide published in 2023 (Ombudsman 2023 Guide).[155] Directed to AI as well as ADM (treating the latter as an umbrella expression), the Ombudsman 2023 Guide accomplishes the following: assesses when the use of ADM is suitable; ensures that ADM complies with administrative law and privacy requirements; develops governance of ADM projects and quality assurance processes; and ensures transparency and accountability of ADM systems.[156] The Ombudsman 2023 Guide accepts as capable of exercise by ADM a range of kinds of discretion, including choice of standards and the application of tests such as "fit and proper person" or "in the public interest."[157] The focusing is on ADM in the form of a guide through the decision-making process, with prompts for determining each step in a logical order and links to applicable statutory provisions, policy, and evidence.[158] Because this form of ADM is confined to

---

[152] *See Australia's Artificial Intelligence Ethics Framework*, DEP'T OF INDUS., SCI. & RESOURCES (Nov. 7, 2019), https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework [https://perma.cc/RR5J-UH4G] ("Australia's 8 Artificial Intelligence (AI) Ethics Principles are designed to ensure AI is safe, secure and reliable.").

[153] COMMONWEALTH OMBUDSMAN, AUTOMATED DECISION-MAKING: BETTER PRACTICE GUIDE (2007).

[154] COMMONWEALTH OMBUDSMAN, AUTOMATED DECISION-MAKING: BETTER PRACTICE GUIDE (2019).

[155] *See* COMMONWEALTH OMBUDSMAN, AUTOMATED DECISION-MAKING: BETTER PRACTICE GUIDE 3 (2023) [hereinafter OMBUDSMAN 2023 GUIDE], https://www.ombudsman.gov.au/data/assets/pdf_file/0029/288236/OMB1188-Automated-Decision-Making-Report_Final-A1898885.pdf [https://perma.cc/27XK-7DJZ] (demonstrating the evolving versions of the guide). See also the recommendation for an audit of all current or proposed use of AI by federal agencies in AUSTL. HUM. RTS. COMM'N, HUMAN RIGHTS AND TECHNOLOGY 61–62 (2021) (recommending a mandatory audit of all current or proposed AI use in order to increase transparency regarding use of this technology in administrative decisions).

[156] *See* OMBUDSMAN 2023 GUIDE, *supra* note 155, at 7 (listing the guiding values that inform the guide's goals for an ADM plan).

[157] *Id.* at 9–10.

[158] *See id.* at 10 (outlining different measures for a properly designed ADM framework).

assisting, it is compatible with the exercise of discretion by the human actor.[159] Such ADM should comply with administrative law principles of legality and fairness, ensuring consistency with the statutory framework, ensuring accurate reflection of government policy, and ensuring consistency with transparency, privacy requirements, and human rights duties.[160] The Ombudsman 2023 Guide provides guidance at a more practical level than the AI Ethics Principles and is fully attuned to the risk that ADM may ignore or subjugate administrative law principles.[161]

Although the federal government was investing a large part of its budget on digitization across most sectors of public administration, initiative in relation to the regulation of ADM and AI was confined to the AI Ethics Principles, which was merely an endorsement of the *OECD AI Principles* and pitched at a high level.[162] The earlier iterations of the Ombudsman 2023 Guide had failed to trigger any general government endorsement.

In the meantime the New South Wales Ombudsman had issued an insightful report addressing the implications of ADM for administrative law accountability and institutional arrangements, including the advantages and disadvantages of statutory schemes for ADM.[163] It was not until 2022 that the Department of Prime Minister and Cabinet released an Issues Paper relating to appropriate regulatory responses to the use of ADM and AI in the public and private sectors.[164] Although submissions were requested by April 2022,[165] there followed a change of government and silence until June 1, 2023, when the Department of Industry, Science and

---

[159] *See id.* (emphasizing that a properly designed ADM system will simply support and enhance human discretion).

[160] *See id.* at 6, 9–10 (listing out the guiding principles of an effective ADM framework).

[161] *See id.* at 2 (asserting that the guide is meant to serve as a practical tool for agencies employing AI and ADM to remain consistent with administrative legal principles).

[162] *See* Huggins, *supra* note 129, 1072–73 (commenting that Australia's previous efforts amounted to simply adopting the AI Ethics Principles without further national legislation).

[163] NSW OMBUDSMAN, THE NEW MACHINERY OF GOVERNMENT: USING MACHINE TECHNOLOGY IN ADMINISTRATIVE DECISION-MAKING 70–79 (2021) (Austl.).

[164] Dig. Tech. Taskforce, *Positioning Australia as a Leader in Digital Economy Regulation: Automated Decision Making and AI Regulation* (Issues Paper, March 2022) (Austl.) The digital economy policy function is stated to have been transferred from the Department of Prime Minister and Cabinet to the Department of Industry, Technology and Science in March 2022.

[165] *Id.*

Resources issued a follow-up Discussion Paper (2023 Discussion Paper).[166] Allowing only an eight-week period for making submissions,[167] it contained a review of reforms in Europe, the United States, the United Kingdom, Canada and other countries, and asked a series of questions concerning risk-based AI.[168] The somewhat breathless questions posed by the 2023 Discussion Paper are focused on AI and disclose no interest in the comparative advantages and disadvantages of statutory and non-statutory ADM. Without admission, the 2023 Discussion Paper conveys a sense of urgency, that Australia is being left behind in the regulation of ADM and AI.[169] The urgency as to policy development may also have been prompted by the policy programs of a new government which made a substantial investment in the 2023–24 federal budget to support businesses to integrate quantum and AI technologies into their operations, with almost half allocated to supporting the responsible deployment of AI in the national economy.[170] Anticipation of the findings of the Robodebt Royal Commission may also have played a part. The Robodebt Report found that the OCI method fell short of the ARC's Principles 7 and 10.[171]

---

[166] Dep't of Indus., Tech. & Sci., *Safe and Responsible AI in Australia* (Discussion Paper, June 1, 2023) (Austl.) [hereinafter 2023 Discussion Paper]. For precursors to this report, see the 4 PRODUCTIVITY COMM'N, REP. NO. 100, 5-YEAR PRODUCTIVITY INQUIRY: AUSTRALIA'S DATA AND DIGITAL DIVIDEND REPORT (2023) (Austl.); GENEVIEVE BELL, JEAN BURGESS, JULIAN THOMAS & SHAZIA SADIQ, RAPID RESPONSE INFORMATION REPORT: GENERATIVE AI (2023) (Austl.).

[167] *See Supporting Responsible AI: Discussion Paper*, DEP'T OF INDUS., SCI. & RES., https://consult.industry.gov.au/supporting-responsible-ai (listing submissions as open between June 1, 2023 and August 4, 2023).

[168] *See* 2023 Discussion Paper, *supra* note 166, at 16–23, 35 (discussing international AI reforms).

[169] *See id.* at 3 (noting the need to keep up with other countries regulatory programs and the slow adoption of AI in Australia, which is partially due to the regulatory response of Australia).

[170] *Investments to Grow Australia's Critical Technologies Industries*, DEP'T OF INDUS., SCI. & RES. (May 12, 2023), https://www.industry.gov.au/news/investments-grow-australias-critical-technologies-industries (referring to a budget investment of $101.2 million to help business integration of quantum and AI technology, of which $41.2 million is allocated to the development of responsible AI).

[171] *See* ROBODEBT REPORT, *supra* note 100, at 480.

V. CONCLUSIONS

The statutory ADM schemes are a form of regulation of ADM. It would be impractical to prohibit the use of computer programs to assist in making decisions outside the statutory scheme. However, this means that it is optional regulation. The deeming provisions in the statutory schemes offer certainty that a decision has been made, overcoming any problem of justiciability of automated decisions derived from *Pintarich*.[172] This is supplemented by the provisions for dealing with error, allowing room for reconsideration and a substituted decision. However, the "not functioning correctly" basis for reconsideration, and the means for initiating a process for applying that test, remain murky.[173] There is a risk that internal review of original decisions, which is full merits review, is replaced by a much more limited reconsideration involving a hypothetical question. External review by the AAT then becomes a strange exercise of reviewing a decision as to whether the computer program was "not functioning correctly." Yet judicial review of the deemed decision remains an option and might extend to the original decision as well as the reconsideration decision.

Non-statutory ADM processes have flourished. In spite of the *Pintarich* decision, automated outcomes have been assumed to constitute decisions which are amenable to judicial review. What better example can be given than the three attempts at judicial review of particular Robodebt decisions.[174] The decisions were justiciable and would have proceeded to review on the grounds alleged but for the Commonwealth's litigation strategies. Ultimately, success in exposing the invalidity of the policy that was encoded in the ADM computer program was gained by a whisker in the class action, when a Federal Court judge recorded reasons for making consent orders setting aside the decisions.[175] *Pintarich*

---

[172] *See Pintarich v Deputy Comm'r of Tax'n* (2018) 262 FCR 41 at [140] ("[T]here needs to be both a mental process of reaching a conclusion and an objective manifestation of that conclusion.").

[173] *See supra* note 39 (giving examples of the "not functioning correctly" test in statutory ADM schemes).

[174] *See supra* note 123 (listing the three attempts to review Robodebt decisions).

[175] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634; *see also supra* note 123 and accompanying text.

arose in a very particular context of a claimed mistake in sending a letter. The majority's analysis of what constitutes a reviewable decision does not reflect the approach taken in the past to review of decisions conveyed in automated letters and may not prevail in the future.[176]

Reviews of ADM and AI in Australia have yet to evaluate the operation of existing statutory ADM schemes or grapple with their potential to undermine conformity with administrative law standards. There are multiple different and complex guides on the use of ADM, mostly expressed imprecisely and at a high level, with fractured or non-existent avenues of responsibility for compliance.[177] Robodebt, pursued in what was effectively a non-statutory ADM scheme, involved application of an *ultra vires* policy for years, causing significant harm chronicled in the Robodebt Report.[178]

The Robodebt Report recommended that ADM be used only within a statutory framework but rightly recognized that transparency, review, and monitoring mechanisms are also required.[179] Those mechanisms are a necessary supplement to existing avenues for internal and external review of administrative decisions, although they may in part expose the same errors.[180] Robodebt is not an indictment of non-statutory ADM, but of legal and ethical incompetence in deliberate adherence to a policy known to be *ultra vires*, and designed to recover from vulnerable persons

---

[176] *See supra* notes 87–94 and accompanying text.

[177] *See* discussion *supra* Part IV (evaluating and critiquing current ADM guides); *see also* OMBUDSMAN 2023 GUIDE, *supra* note 155, at 6–7 (listing high level principles for ADM and AI without specific proposals).

[178] *See* ROBODEBT REPORT, *supra* note 100, at 25, 25–33 (explaining the history of the Robodebt scheme and how "the government implemented, and continued, an unlawful scheme").

[179] *See id.* at 484–85 (proposing various mechanisms for increased transparency, review, and oversight).

[180] *See, e.g.*, *id.* at 486–87 (flagging potential issues with new oversight systems design and proposing various mechanisms to avoid pitfalls).

welfare benefits to which they were entitled.[181] ADM just allowed the governmental wrongdoing to be executed more efficiently.[182]

[181] *See id.* at 488 ("A strong theme in submissions received by the Commission . . . is that the rule of law must not be derogated from in the pursuit of efficacy through automaton. In designing and operating systems using automation, government must conform with the legal framework in place at the time. The not very startling proposition is that government programs must be lawful and lawfully administered." (footnote omitted)).

[182] *See id.* ("While the fallout from the Robodebt scheme was described as a 'massive failure of public administration,' the prospect of future programs, using increasingly complex and more sophisticated AI and automation, having even more disastrous effects will be magnified by the 'speed and scale at which AI can be deployed' and the increased difficulty of understanding where and how the failures have arisen." (footnotes omitted) (first quoting *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [5], and then quoting Dep't of Indus., Sci. & Res., *supra* note 166, at 8)).