HWL EBSWORTH
LAWYERS

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL DAY

Thursday 4 March 2021

Professional Development and Networking for the
In-House Legal Community

**Automated decision-making and administrative law**

Presenters: Sophie Lloyd, Special Counsel and Hailey Musgrove,

Senior Associate

Some definitions:

- ***Artificial intelligence (AI):*** machines performing tasks that mimic human intelligence

- ***An algorithm:*** a set of steps/instructions that tell a computer how to complete a task

- ***Machine learning:*** a form of AI where a computer is trained to identify something new through the use of past examples. The computer can 'learn' and improve from experience, enabling it to generate predictions or reveal insights without being explicitly programmed to do so and without human intervention.

Types of automated decision-making

- Wholly automated **versus** partially automated
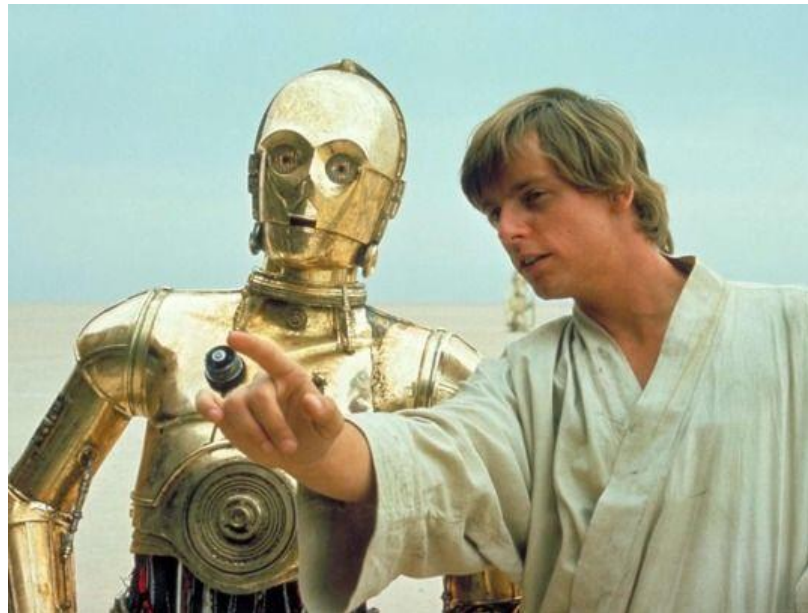
Advantages of automated decision-making

- Timeliness

- Efficient resourcing

- Reliability in relation to large volumes of data

- Innovative service delivery

- Consistency/impartiality

How is automated decision-making being used already?

Example of Department of Immigration Letter confirming visa – Example 1

10

Is there a source of power?

Social Security (Administration) Act 1999 (Cth)

6A   Secretary may arrange for use of computer programs to make decisions

(1) The Secretary may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Secretary may make decisions under the social security law.

(2) A decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by the Secretary.

Issues with automated decision-making

- Challenge of accurately encoding the law

- Potential lack of transparency and accountability

- Need for clear audit trails

- Risk of widespread replication of errors

- Necessity to constantly maintain and update

- Difficulties with discretions

- Risks of discriminatory application

- Behavioural implications: too much trust and lack of questioning of technology

- Potential for loss of institutional knowledge

- Influence on policy development?

Cth Ombudsman - Automated decision-making better practice guide 2019

"Automated systems must comply with administrative law principles of legality, fairness, rationality and transparency. They must also comply with privacy requirements and human rights obligations. As a matter of good public administration, they should be efficient, accessible, accurate and consider the needs of any vulnerable and non-digital ready users."

The three forms of opacity

1. Intentional secrecy

2. Technical illiteracy

3. Opacity arising from the characteristics of machine learning

Jenna Burrell, 'How the machine 'thinks': Understanding opacity in machine learning algorithms' (2016) 3 *Big Data & Society* 1

Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79; 108 ATR 31

General Interest Charge (**GIC**): charge imposed for late payment

Facts

- Appellant (**taxpayer**) applied for remission of General Interest Charge (**GIC**) and a payment arrangement

- Delegate "keyed in" information into a "template bulk issue letter", caused a letter to be issued to the taxpayer

- Letter indicated respondent (**Deputy Commissioner**) would accept significantly less than taxpayer's total liability for primary tax and GIC by lump sum payment

Issue

- Did the letter constitute a decision to remit (nearly) all GIC payable by the taxpayer if the taxpayer paid lump sum?

Primary Judge (Tracey J)

- Letter did not constitute or manifest decision to remit GIC

- No consideration or determination of the application for remission (state of mind and surrounding circumstances)

Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79; 108 ATR 31

FCAFC Majority (Moshinsky and Derrington JJ)

- *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533:

    - [19] For present purposes I am prepared to hold that the making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion — as precludes the conclusion being revisited by the decision-maker at his or her option before the decision is to be regarded as final.

- Elements involved in the making of a decision: (1) mental process of reaching conclusion and (2) objective manifestation of conclusion

- Present case, conclusion reached on payment arrangement, but no conclusion reached on application for remission

- No mental process of reaching conclusion

Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79; 108 ATR 31

FCAFC Majority (Moshinsky and Derrington JJ)

- Administrative uncertainty?

  – [152] … the circumstances of this case are quite unusual. The letter resulted from [the delegate] 'keying in' certain information into a computer-based 'template bulk issue letter'. This produced a letter that, in some respects, did not reflect his intentions. This type of situation is unlikely to arise very often.

Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79; 108 ATR 31

FCAFC Minority (Kerr J)

- A person can make a decision (1) without any explicit mental engagement (2) which is not coincident with his or her intentions e.g. 'slip rule' (*Polo Enterprises Australia Pty Ltd v Shire of Broome* [2015] WASCA 201; 49 WAR 134)

- Statement in *Semunigus* may be rapidly becoming an artefact of the past:

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

- Analysis of whether a decision had been made must be fact and context specific

Deanna Amato v The Commonwealth of Australia VID611/2019 aka 'Robodebt'

- 2015 automatic debt-raising process
- Data matching algorithm:
  - ATO data (annual income) matched with Centrelink data (reported income)
  - measured income on annual basis and divided into fortnightly instalments
  - false assumption: total amount earned by applicant in financial year earned in equal fortnightly amounts
  - generated misleading data upon which subsequent decision-making based
- Order by consent (27 November 2019):
  - demand for payment of alleged debt not validly made
  - information not capable of satisfying decision maker a debt was owed

State of Wisconsin v Loomis 881 N.W.2d (Wis. 2016) and COMPAS sentencing software

- **COMPAS**: Correctional Offender Management Profiling for Alternative Sanctions

- Algorithmic risk assessment

- Supreme Court of Wisconsin held *partial* reliance on COMPAS did not violate right to due process

- No requirement for algorithm to be disclosed to defendant (or court)

- Potential for discrimination?

GDPR Article 22

Article 22 – Automated individual decision-making, including profiling

1) The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2) Paragraph 1 shall not apply if the decision:

   a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;

   b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or

   c) is based on the data subject's explicit consent.

3) In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

4) Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.

Relevant administrative law principles

- Identifying the wrong issue or asking the wrong question: *Craig v South Australia* (1995)184 CLR 163

- Potential for an error in interim steps to affect final decision: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321

- Failure to take into account relevant considerations/taking into account irrelevant considerations: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24

- Failure to take into account relevant and cogent evidence: *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99

- Need to provide adequate reasons and vulnerabilities if no reasons are provided: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437

- Potential unlawful fetter on discretion: *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634

Further reading

- Commonwealth Ombudsman - Automated decision-making better practice guide
  - https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide

- Department of Industry, Science, Energy and Resources – AI Ethics Framework
  - https://www.industry.gov.au/data-and-publications/building-australias-artificial-intelligence-capability/ai-ethics-framework

- Justice Perry, 'iDecide: Digital Pathways to Decision' (Paper presented at CPD Immigration law Conference, 21 March 2019)
  - https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20190321

- Zalnieriute, Monika; Moses, Lyria Bennett and Williams, George, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) *Modern Law Review*
  - *http://www5.austlii.edu.au/au/journals/UNSWLRS/2019/14.pdf*

- D. Hogan-Doran, 'Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making' (2017) 13 Judicial Review 345

Team Contacts

Sophie Lloyd

Special Counsel

P +61 2 9334 8539

E svlloyd@hwle.com.au

Hailey Musgrove

Senior Associate

P +61 2 6151 2177

E hmusgrove@hwle.com.au

This seminar and accompanying documentation is not intended to be legal advice and should not be relied upon as such.

The copyright of this material is and will remain the property of HWL Ebsworth Lawyers.

HWL EBSWORTH

LAWYERS

hwlebsworth.com.au

Adelaide

Brisbane

Canberra

Darwin

Hobart

Melbourne

Norwest

Perth

Sydney