



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

13 February 2020

The Hon David Littleproud MP
Minister for Agriculture, Drought and Emergency Management
Parliament House
Canberra ACT 2600

Via email: David.Littleproud.MP@aph.gov.au

CC: DLO-MO@agriculture.gov.au


Dear Minister,

Export Control (Sheepmeat and Goatmeat Export to the European Union Tariff Rate Quotas) Order 2019 [F2019L01564]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice about this matter.

Automated decision-making

Section 34 of the instrument provides for the use of automated decision-making by allowing the secretary to arrange for the use of computer programs for making decisions under the instrument. Subsections 19(4) and 20(7) require the secretary to make discretionary decisions regarding tariff rate quota certificates which require the determination of 'appropriateness'. In addition, subsection 23(2) requires the secretary to make discretionary decisions according to the consideration of certain listed matters but not any specifically defined criteria.

The committee is concerned that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error.

In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where

the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

While section 31 provides for independent merits review of these decisions, the committee does not consider this an adequate safeguard to redress the risk of error created by enabling computer programs to make discretionary decisions under subsections 19(4), 20(7) and 23(2), nor does it rationalise the appropriateness of this form of decision-making.

In this regard, the committee draws your attention to the requirements of the best practice principles identified in the Administrative Review Council report, *Automated Assistance in Administrative Decision Making*, which suggests that discretionary decisions should not be made through automated decision-making.

The committee would therefore appreciate your advice as to:

- **why it is considered necessary and appropriate to provide for automated decision-making in the decision-making process;**
- **what safeguards are in place to ensure that the decision-maker exercises their discretionary powers personally and without fetter; and**
- **whether the automated assistance in the decision-making process complies with the Administrative Review Council's ['best practice principles for automated assistance in administrative decision making'](#), and, if not, why not.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

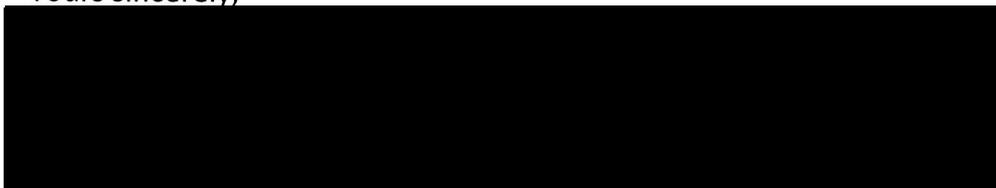
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **27 February 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



The Hon. David Littleproud MP
Minister for Agriculture, Drought and Emergency Management
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MC20-001131

3 MAR 2020

Senator the Hon. Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter of 13 February 2020 relating to scrutiny concerns with the Export Control (Sheepmeat and Goatmeat Export to the European Union Tariff Rate Quotas) Order 2019 (the Order). I appreciate the time you have taken to bring this matter to my attention.

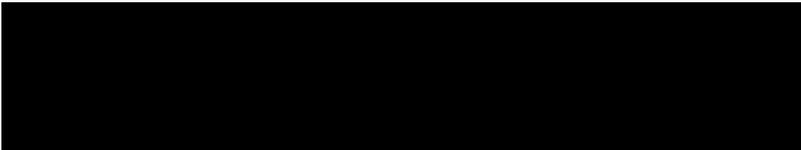
With regard to decisions under the Order, subsections 19(4), 20(7) and 23(2) are not made using computer programs for the express purpose of preventing the issues you have raised. The use of computer programs to make automated decisions are limited to non-discretionary decisions within the Order.

Subsection 34(1) of the Order states that "the Secretary may arrange for the use, under the Secretary's control, of computer programs for making decisions under this instrument." The explanatory statement of the Order states that section 34 "provides the Department with the ability to use computer systems where suitable". Decisions under subsections 19(4), 20(7) and 23(2) of the Order are not suitable for being made by computer due to their discretionary nature, and this is reflected in policy and practice.

The computer programs used by the Department of Agriculture, Water and the Environment in administering tariff rate quotas (TRQs) under the Order are not used to make these decisions and are not capable of doing so. This has been a consistent approach taken by the department for over 10 years in using computer programs to support the administration of the TRQs. This ensures that the decision-maker makes such decisions personally. As the computer programs are also not used as automated assistance in the decision making process the decision-maker is not fettered in making a decision.

Thank you for raising this matter.

Yours sincerely



DAVID LITTLEPROUD MP



3 April 2020

The Hon David Littleproud MP
Minister for Agriculture, Drought and Emergency Management
Parliament House
CANBERRA ACT 2600

Via email: David.Littleproud.MP@aph.gov.au
CC: Minister.Littleproud@agriculture.gov.au
DLO.MO@agriculture.gov.au

Dear Minister,

Export Control (Sheepmeat and Goatmeat Export to the European Union Tariff Rate Quotas) Order 2019 [F2019L01564]

Thank you for your response of 3 March 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument. The committee considered your response at its private meeting on 1 April 2020.

The committee remains concerned about the scrutiny issue outlined below, and has resolved to seek further information in relation to this matter.

Automated decision-making

The committee welcomes your acknowledgment that decisions made under subsections 19(4), 20(7) and 23(2) of the instrument are not suitable to be made by computer due to their discretionary nature, and your advice that current departmental policy and practice reflects this position.

In light of your advice, it remains unclear to the committee why the instrument itself does not expressly prohibit the use of computer programs to make discretionary decisions, noting that policy and practice can change over time without parliamentary oversight. In particular, the committee is concerned that while the computer programs currently used by the department are not capable of being used to make discretionary decisions, technological developments could make this possible in the future, and this would not be subject to any legislative limitations or prohibition.

The committee therefore requests that the instrument be amended to clarify that decisions made under subsections 19(4), 20(7) and 23(2) of the instrument cannot be made by computer programs due to their discretionary nature, consistent with current departmental policy and practice.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

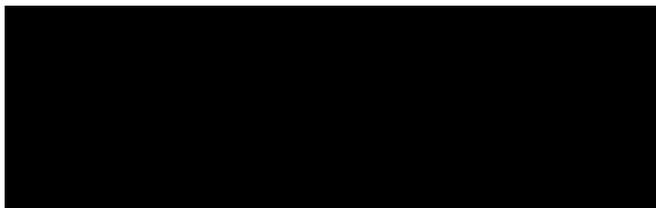
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **17 April 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation