THE ROBOT DID MY HOMEWORK

USE OF ALIN LEGAL PRACTICE

PRESENTED BY

DANIEL KILEY | PARTNER

MATT KEARINS | ASSOCIATE

FEBRUARY 2025



Acknowledgement of Country

HWL Ebsworth would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

GENERATIVE AI WHY IT'S IMPORTANT

- The use of technology is an integral part of efficient modern legal practice
- At the frontier of technological advances in legal practice and the conduct of litigation is the use of Al
- Whilst the use of AI tools offer opportunities for legal practitioners, it also comes with significant risks
- Generative AI does not relieve the responsible legal practitioner of the need to exercise judgment and professional skill in reviewing the final product to be provided to the court

Judge A. Humphreys, Dayal [2024] FedCFamC2F 1166



GENERATIVE AI THE FUTURE OF LAW?

"To a degree, the future must remain unknown. Artificial intelligence and its effect on Courts, the profession and the law will change the landscape of life in ways we cannot predict."

The Hon James Allsop AC, Former Chief Justice of the Federal Court of Australia



GENERATIVE AI THE FUTURE OF LAW?

"Artificial intelligence (AI) is revolutionising the arena of professional services. Lawyers are chief among those gaining opportunities and facing disruption from the emergence of generative AI tools – which process language and generate useful text outputs.

The ability to generate content – including client correspondence, contract terms, pleadings, legal advice memos and other documentation – represents an incredible opportunity for the legal profession to safely, securely and responsibly speed up routine legal work."

Clayton Noble, Head of Legal, Microsoft Australia and New Zealand



GENERATIVE AI THE FUTURE OF LAW?

Generative AI tools trialled by 50% of legal practitioners across ANZ with in-house lawyers leading the way

LexisNexis, 17 April 2024



GENERATIVE AI HORROR STORIES

Australian lawyer caught using ChatGPT filed court documents referencing 'non-existent' cases \$5,000

Lawyers submitted bogus case law created by ChatGPT. A judge fined them \$5,000

Canada lawyer under fire for submitting fake cases created by AI chatbot

An international law firm has blocked general access to several artificial intelligence (AI) tools after it found a "significant increase in usage" by its staff.

In an email seen by the BBC, a senior director of Hill Dickinson, which employs more than a thousand people across the world, warned staff of the use of AI tools.

The firm said much of the usage was not in line with its AI policy, and going forward the firm would only allow staff to access the tools via a request process.

Jan 13 (Reuters) - Minnesota Attorney General Keith Ellison cannot rely on a misinformation expert whose court filing included made-up citations generated by artificial intelligence, a federal judge ruled in a case involving a "deepfake" parody of Vice President Kamala Harris.

The <u>Friday decision</u> ☐ from U.S. District Judge Laura Provinzino in Minnesota federal court stems from an expert declaration Ellison's office <u>submitted</u> ☐ in November. Ellison is defending a Minnesota law that bans people from using deepfakes – videos, pictures or audio clips made with AI to look real – to influence an election.



GENERATIVE AI GUIDANCE FROM AUSTRALIAN JURISDICTIONS

NSW Supreme Court Practice Note SC Gen 23 Qld Court's
Guidelines for
Responsible use of
Gen Al by NonLawyers

Vic Supreme Court's Guidelines for litigants' responsible use of AI in litigation

SA's Chief Justice Kourakis Speech on the challenges of Al Qld Law Society's Al Companion Guide Joint Statement from WA, NSW & Vic on the use of AI in the Australian Legal Practice



GUIDANCE ON THE USE OF GENERATIVE AI KEY THEMES

1) Understanding Gen Al

2 Risks to confidential information

3 Accuracy of Gen Al outputs

4) When and how Gen AI can be used

5 The ethical issues of Gen Al



UNDERSTANDING GENERATIVE AI

It is important for lawyers to understand AI, including the capabilities and limitations of the large language models (LLMs) and foundation models that underpin the latest AI tools — not only because they may use AI themselves, but also because their clients may be: using AI, seeking advice on how to lawfully use AI, or adversely affected by a third party's use of AI.

Statement on the use of artificial intelligence in Australian legal practice

Law Society of New South Wales

Legal Practice Board of Western Australia

Victorian Legal Services Board and Commissioner



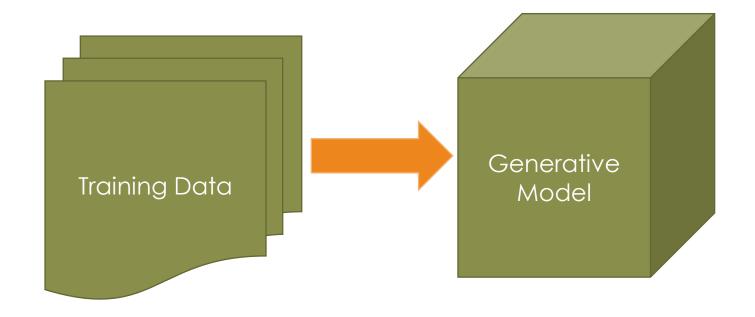
UNDERSTANDING GENERATIVE AI WHAT ISN'T GEN AI?

- For the avoidance of doubt, for the purposes of this Practice Note, Gen AI does not include technology or functionality which merely corrects spelling or grammar, provides transcription or translation, assists with formatting and otherwise does not generate substantive content, and nothing in this Practice Note is intended to preclude or apply to the use of:
 - search engines such as Google which produce a list of websites that match search criteria but which do not produce an apparently personalised textual answer in response to a specific prompt;
 - dedicated legal research software which uses AI or machine learning to conduct searches across material comprising legislation or subordinate legislation, judgments of courts or tribunals, and/or books or articles written for a legal audience

NSW Supreme Court Practice Note SC Gen 23

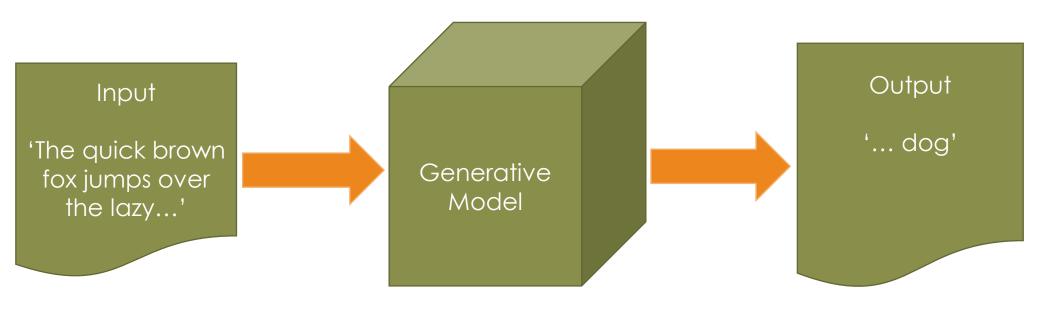


MACHINE LEARNING - TRAINING



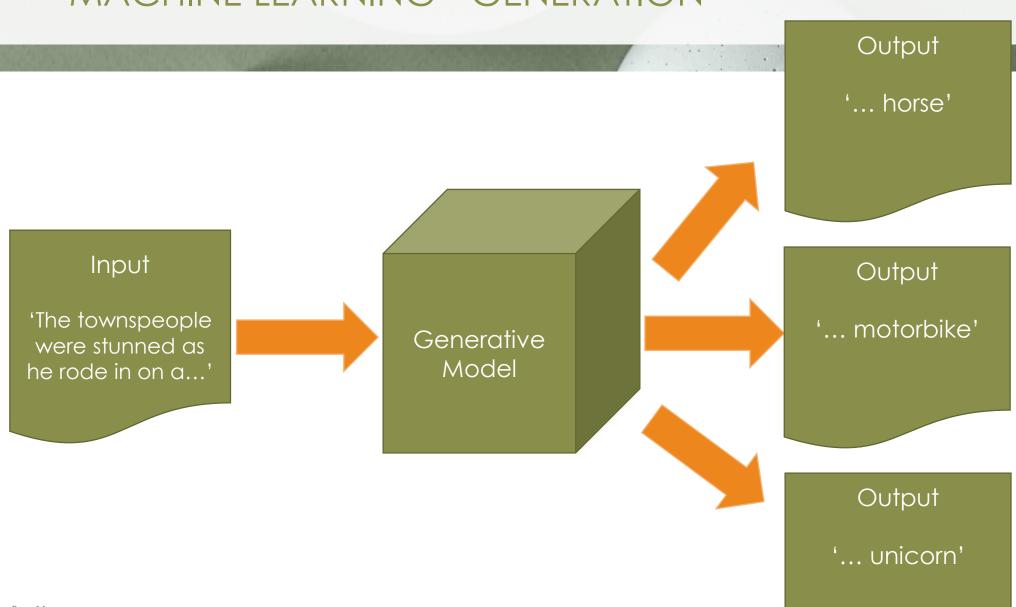


MACHINE LEARNING - GENERATION





MACHINE LEARNING - GENERATION



MACHINE LEARNING - GENERATION

Generative AI and Large Language Models create output that is not the product of reasoning. Nor are they a legal research tool.

They use probability to predict a given sequence of words.

Output is determined by the information provided to it and is not presumed to be correct.

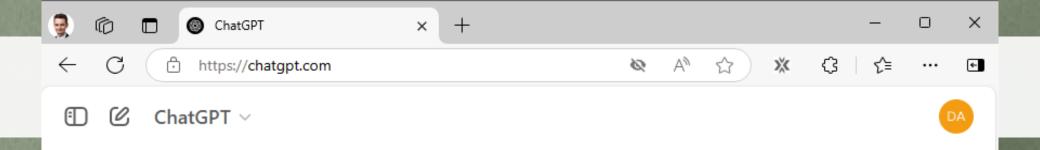
Supreme Court of Victoria Guidelines for litigants: responsible use of artificial intelligence in litigation



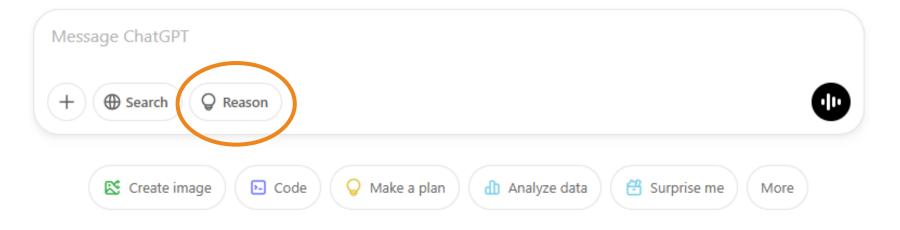
UNDERSTANDING GENERATIVE AI REASONING MODELS

- Attempt to introduce some 'thought process'
 - Remains an exercise in predicting the next syllable, just 'talking it through' before giving an answer
- Examples
 - OpenAl o1 and o3
 - o DeepSeek r1





What can I help with?



ChatGPT can make mistakes. Check important info.

Would an Australian cafe owner be liable if they accidentally served an allergen to a customer, and the customer suffered a serious medical event?

deepseek-r1:8b

In considering whether an Australian cafe owner might be legally liable for serving an allergen to a customer who experienced a serious medical event, several key factors come into play:

- 1. **Duty of Care**: The cafe owner has a responsibility to ensure that products are safe and accurately labeled. Failure in this duty could lead to legal consequences.
- 2. **Negligence**: If the owner failed to act reasonably by not preventing the allergen exposure, it might be considered negligence. This would require showing that the owner did not take steps a reasonable person would, leading to harm.

- 3. **Tort Law and Damages**: Under Australian tort law, if an action (or inaction) causes injury, compensation can be sought. The owner must demonstrate they took reasonable precautions; otherwise, liability may arise.
- 4. **Vicarious Liability**: In a business context, the owner might be held responsible for staff actions, especially if the staff failed to ask about allergies.
- 5. **Defenses and Precautions**: The cafe should have policies and practices in place, such as proper labeling and staff training, to avoid liability. If these were lacking, it could impact legal defenses.

In conclusion, the cafe owner could be liable if they didn't take reasonable steps to prevent allergen exposure leading to serious harm. Demonstrating due care is crucial to avoiding such liability.

Would an Australian cafe owner be liable if they accidentally served an allergen to a customer, and the customer suffered a serious medical event?

<think> Okay, so I'm trying to figure out whether an Australian cafe owner would be legally liable if they accidentally served an allergen to a customer who then had a serious medical event. Let me break this down step by step.

First, I need to understand what's considered an allergen in food. Common allergens include things like nuts, shellfish, eggs, dairy, soy, wheat, etc. If the cafe owner serves a customer something that they didn't know was allergenic or if it wasn't properly labeled, that could be a problem.

Next, I should think about the duty of care owed by the cafe owner. In Australia, businesses have a duty to ensure that their products are safe for consumption. This might involve labeling allergens clearly or asking customers about any allergies before serving food. If the owner fails in this duty, they could face legal consequences. Then, there's the concept of negligence, which is when someone fails to act in a way that a reasonable person would, causing harm to another. If the customer had an allergic reaction because the allergen wasn't properly communicated or avoided, that might be considered negligent.

I should also consider whether this led to serious medical events. In Australia, if someone's actions (or lack thereof) cause injury, they could be sued for damages under tort law. The cafe owner would need to show that they took reasonable steps to prevent such an incident, and if they can't, the customer might win compensation.

Another point is vicarious liability, where one person is held responsible for another's actions, especially in a business setting. If the waiter or staff were negligent in not asking about allergies, the owner might still be liable because it's their responsibility to ensure everyone's safety.

I also need to think about possible defenses.

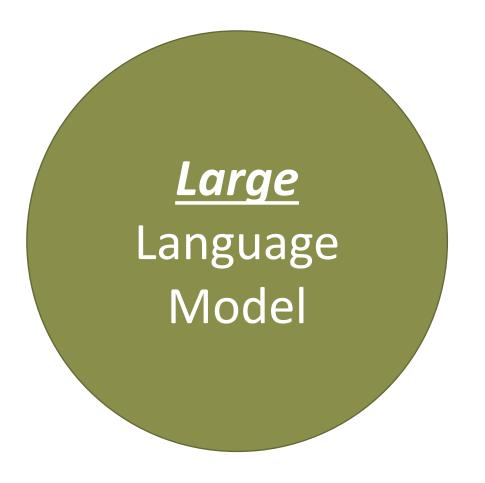
Maybe the cafe had a policy in place, but if they didn't implement it correctly, that won't help. Or perhaps there was an unforeseeable event, but given that allergens are common knowledge, that might not apply here.

Preventing future incidents is important too. The owner should review their practices to make sure they're taking all necessary precautions, like using safe ingredients or proper labeling, and training staff to handle allergies correctly. In summary, it seems likely that the cafe owner could be liable if they didn't take reasonable steps to prevent allergens from being served, especially if it led to serious harm. They'd need to demonstrate their due care to avoid liability. </think>

In considering whether an Australian cafe owner might be legally liable for serving an allergen to a customer who experienced a serious medical event, several key factors come into play:

- 1. **Duty of Care:** The cafe owner has a responsibility to ensure that products are safe and accurately labeled. Failure in this duty could lead to legal consequences.
- 2. **Negligence**: If the owner failed to act reasonably by not preventing the allergen exposure, it might be considered negligence. This would require showing that the owner did not take steps a reasonable person would, leading to harm.
- 3. **Tort Law and Damages**: Under Australian tort law, if an action (or inaction) causes injury, compensation can be sought. The owner must demonstrate they took reasonable precautions; otherwise, liability may arise.
- 4. **Vicarious Liability**: In a business context, the owner might be held responsible for staff actions, especially if the staff failed to ask

CONFIDENTIAL INFORMATION & GENERATIVE AI WHERE IS THE INFORMATION GOING?



- The information you share needs to be sent somewhere
 where is it going?
- Generative AI tools are typically run in the cloud by third party vendors
 - Data submitted to these tools is accordingly disclosed to those vendors
 - Can potentially form part of future training data



CONFIDENTIAL INFORMATION & GENERATIVE AI HOW CAN THE INFORMATION BE USED?



Our use of content. We may use Content to provide, maintain, develop, and improve our Services, comply with applicable law, enforce our terms and policies, and keep our Services safe.

Will you use my conversations for training?

When you use our services for individuals such as ChatGPT, we may use your content to train our models. You can opt out of training through our <u>privacy portal</u> by clicking on "do not train on my content," or to turn off training for your ChatGPT conversations, follow the instructions in our <u>Data Controls FAQ</u>. Once you opt out, new conversations will not be used to train our models.



CONFIDENTIAL INFORMATION & GENERATIVE AI GUIDANCE FROM THE COURTS

- Vic Confidentiality cannot be guaranteed with public Gen Al
- Qld Should <u>not</u> submit confidential, sensitive or privileged info
- NSW prohibits certain material from being submitted:

Information subject to:

- Non-publication orders
- Suppression orders
- Implied undertakings Harman undertakings

Materials:

- Produced under subpoena
- Subject to statutory prohibition upon publication



CONFIDENTIAL INFORMATION & GENERATIVE AI GUIDANCE FROM THE COURTS – NSW EXCEPTIONS

 NSW Practice Note allows for confidential info to be submitted under certain restrictions:

Program is within a controlled environment

Program is subject to confidentiality and privacy restrictions

Submitted info is only used for the relevant proceedings



CONFIDENTIAL INFORMATION & GENERATIVE AI LEGAL PROFESSIONAL PRIVILEGE

"The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection...

It is not only a matter of protection of the client. The **freedom to consult one's legal adviser in the knowledge that confidential communications will be safeguarded** will often make its own contribution to the general level of respect for and observance of the law within the community..."

Baker v Campbell [1983] HCA 39



CONFIDENTIAL INFORMATION & GENERATIVE AI REQUIREMENTS FOR LEGAL PROFESSIONAL PRIVILEGE

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a **confidential communication** made between the client and a lawyer, or
- (b) a **confidential communication** made between 2 or more lawyers acting for the client, or
- (c) the contents of a **confidential document** (whether delivered or not) prepared by the client, lawyer or another person,

for the **dominant purpose of the lawyer**, or one or more of the lawyers, **providing legal advice to the client.**

Section 118, Evidence Act 1995 (Cth)



CONFIDENTIAL INFORMATION & GENERATIVE AI WAIVING LEGAL PROFESSIONAL PRIVILEGE

Legal privilege belongs to clients – only they can waive it

"Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law"[23]. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege."

Mann v Carnell [1999] HCA 66



CONFIDENTIAL INFORMATION & GENERATIVE AI SOLICITORS' CONDUCT RULES – DUTY OF CONFIDENTIALITY

- A solicitor must not disclose any information which is confidential to a client and acquired during the client's engagement
- Exceptions to this duty do not include the use of Gen AI:

Express or implied authorisation by client

Permitted or is compelled by law

In a confidential setting for obtaining advice in connection to legal or ethical obligations

Avoiding the probable commission of a serious criminal offence

Preventing imminent serious physical harm

Disclosure is to the solicitor's insurer



CONFIDENTIAL INFORMATION & GENERATIVE AI SOLICITORS' CONDUCT RULES – DUTY OF CONFIDENTIALITY

"Maintaining client confidentiality (ASCR r 9.1; BR r 114). Lawyers cannot safely enter confidential, sensitive or privileged client information into public AI chatbots/copilots (like ChatGPT), or any other public tools. If lawyers use commercial AI tools with any client information, they need to carefully review contractual terms to ensure the information will be kept secure."

Statement on the use of artificial intelligence in Australian legal practice by Victorian Legal Services Board and Commissioner, Law Society of NSW and Legal Practice Board of Western Australia



CONFIDENTIAL INFORMATION & GENERATIVE AI LEGAL PROFESSIONAL PRIVILEGE VS GENERATIVE AI

Requirements for privilege	Document must be confidential	Created for the dominant purpose of obtaining legal advice	Legal advice must come from a lawyer
Advice from lawyer	Confidentiality may be compromised if input into LLM	✓	✓
'Advice' obtained from LLM	LLM's settings may compromise confidentiality	Difficult to establish dominant purpose	X



CONFIDENTIAL INFORMATION & GENERATIVE AI KEY TAKEAWAYS & TIPS FOR USING GEN AI

Takeaways

- Avoid public Gen Al programs
- Private Gen AI needs security and protection measures
 - Still unlikely to be protected by legal professional privilege
- Lawyer's have professional and ethical obligations to protect confidentiality and privilege

Tips

- Avoid specifics of a matter
- Ask general questions
- Check for privacy options





Melbourne lawyer referred to complaints body after AI generated made-up case citations in family court

Legal professional used software to generate a case citation list, but did not use documents that had undergone human verification

Josh Taylor

Thu 10 Oct 2024 17.31 AEDT

A Melbourne lawyer has been referred to the Victorian legal complaints body after admitting to using artificial intelligence software in a family court case that generated false case citations and caused a hearing to be adjourned.

In a 19 July 2024 hearing, an anonymous solicitor representing a husband in a dispute between a married couple provided the court with a list of prior cases that had been requested by Justice Amanda Humphreys in relation to an enforcement application in the case.

When Humphreys returned to her chambers, she said in a ruling that neither herself nor her associates were able to identify the cases in the list. When the matter returned to court the lawyer confirmed that the list had been prepared using legal software Leap, and he said there was an AI element to Leap's software.

He acknowledged he did not verify the accuracy of the information before submitting it to the court.



Australian lawyer caught using ChatGPT filed court documents referencing 'non-existent' cases

Immigration minister says such conduct must be 'nipped in bud' as lawyer referred to office of the NSW Legal Services Commissioner for consideration

Josh Taylor

Sat 1 Feb 2025 14.23 AEDT

An Australian lawyer has been referred to a state legal complaints commission, after it was discovered he had used ChatGPT to write court filings in an immigration case and the artificial intelligence platform generated case citations that did not exist.

In a ruling by the federal circuit and family court on Friday, Justice Rania Skaros referred the lawyer, who had his name redacted from the ruling, to the Office of the NSW Legal Services Commissioner (OLSC) for consideration.

The court heard in an appeal of an administrative appeals tribunal ruling the lawyer filed an amended application to the federal circuit and family court in October 2024, as well as an outline of submissions. Skaros said "both documents contained citations to cases and alleged quotes from the tribunal's decision which were nonexistent".

On 19 November, the lawyer wrote to the court stating the errors were unintentional, and that he deeply regretted them. At a hearing on 25 November, the lawyer admitted to using ChatGPT to write the documents.

"The [lawyer] stated that he had used AI to identify Australian cases, but it provided him with nonexistent case law," Skaros said. "The court expressed its concern about the [lawyer]'s conduct and his failure to check the accuracy of what had been filed with the court, noting that a considerable amount time had been spent by the court and my associates checking the citations and attempting to find the purported authorities."

ACCURACY WHY DOES THIS HAPPEN?

- LLM seek to predict the next 'token' in sequence
 - Not drawing on 'knowledge' or 'facts' from training data, merely statistical relationships regarding different patterns of words
 - Can 'hallucinate', creating materials not reflecting underlying training data
 - Generally produces something that fits appropriate patterns so sounds plausible
 - Because output tends to read well, it is difficult to remain vigilant to identify errors
- Trained on broad datasets
 - Foreign jurisdiction
 - Out of date



ACCURACY WHY CAN'T WE STOP THIS?

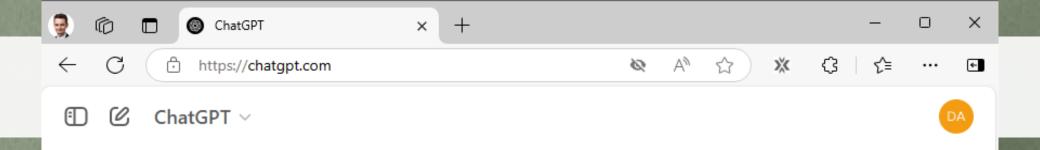
- Contents of an LLM model generally inscrutable
 - Can't 'delete' inaccurate parts
- Program the system not to give incorrect answers?
 - LLMs typically only able to be 'controlled' via:
 - 'Mechanically' screening input
 - 'Mechanically' screening output
 - Asking for desired output, in plain English
 - Apple Mail 'Smart Replies' internal prompt
 - You are an assistant which helps the user respond to their mails. Please draft a concise and natural reply based on the provided reply snippet. Please limit the answer within 50 words. Do not hallucinate. Do not make up factual information. Preserve the input mail tone.



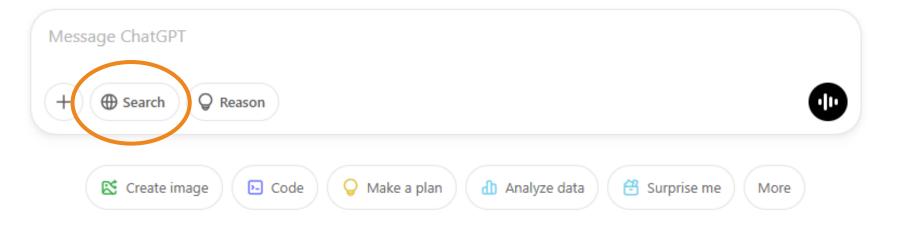
ACCURACY WHY CAN'T WE STOP THIS?

- Limit training data?
 - More tends to produce better results
 - Training is an intensive process
 - Niche models unlikely to be viable at this stage
- Retrieval augmented generation?
 - Combining an LLM with a search engine
 - Search scope could be:
 - the entire web
 - a limited set of reference documents

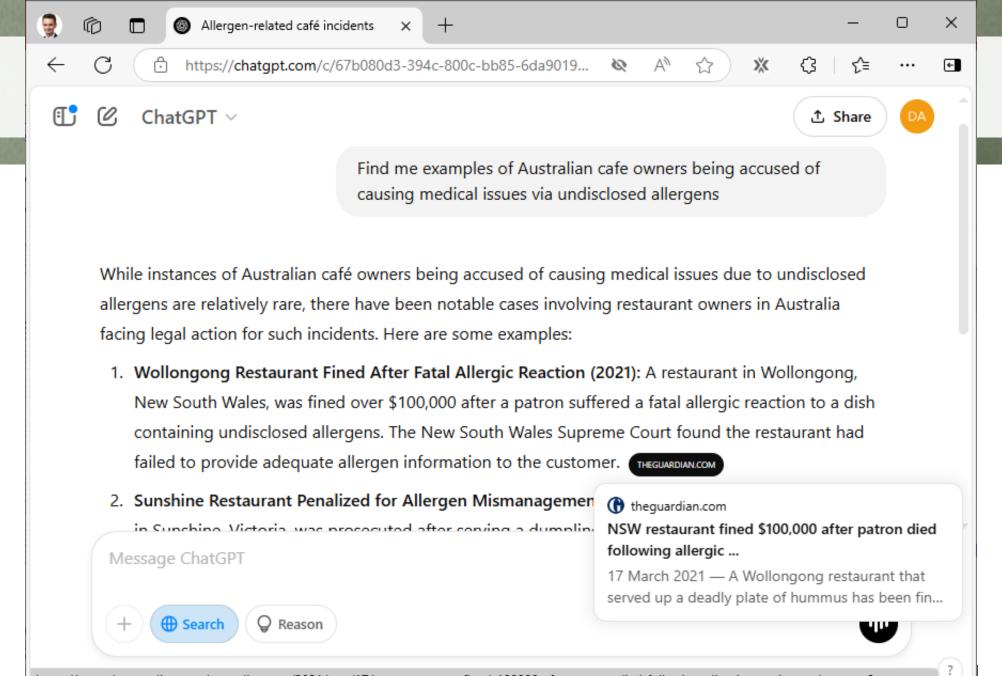




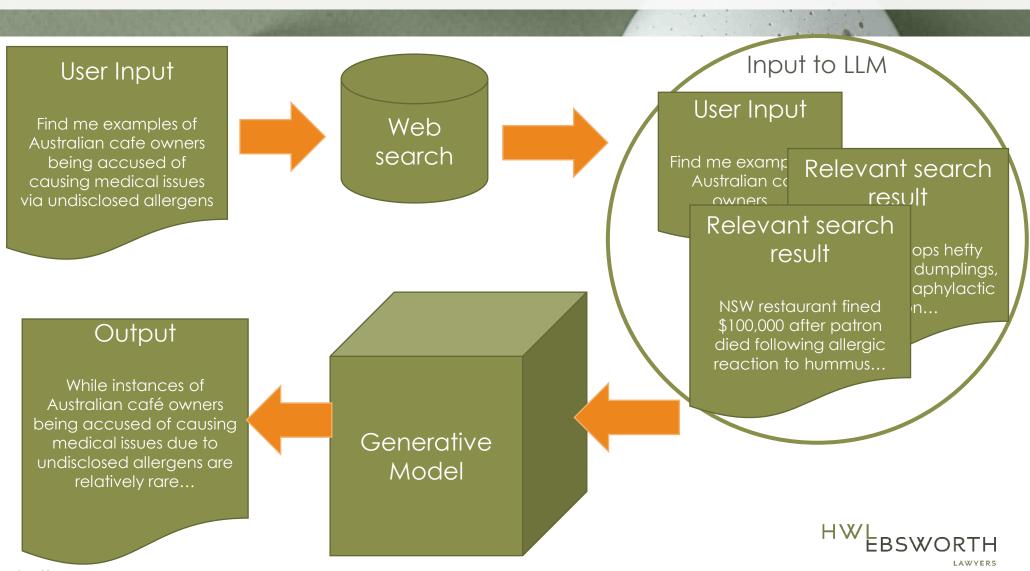
What can I help with?



ChatGPT can make mistakes. Check important info.



RETRIEVAL AUGMENTED GENERATION



ACCURACY WHY CAN'T WE STOP THIS?

- Retrieval augmented generation?
 - Likely does assist in reducing hallucinations
 - Results still ultimately rely on the output of an LLM creating output from given input, potential for hallucination remains
 - o TechCrunch:
 - [RAG] models can get "distracted" by irrelevant content in documents, particularly in long documents where the answer isn't obvious. Or they can for reasons as yet unknown simply ignore the contents of retrieved documents, opting instead to rely on their parametric memory.



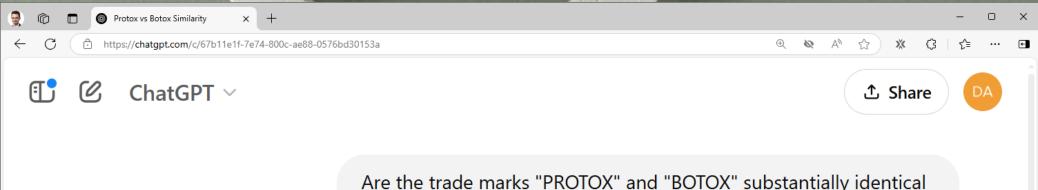
ACCURACY NSW SUPREME COURT PRACTICE NOTE SC GEN 23

- Where Gen AI has been used in the preparation of written submissions or summaries or skeletons of argument, the author must verify in the body of the submissions, summaries or skeleton, that all citations, legal and academic authority and case law and legislative references:
 - (a) exist
 - (b) are accurate, and
 - (c) are relevant to the proceedings,

and make similar verification in relation to references to evidence...

- Such verification must not be solely carried out by using a Gen AI tool or program
- Any use of Gen AI to prepare written submissions or summaries or skeletons of argument does not qualify or absolve the author(s) of any professional or ethical obligations to the Court or the administration of justice





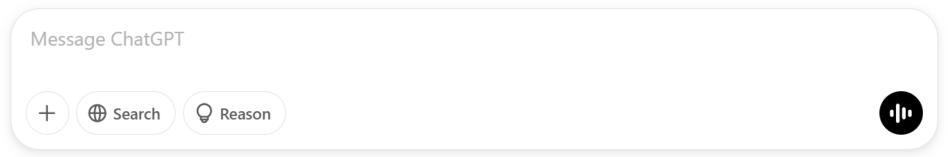
or deceptively similar under the Australian Trade Marks Act?

Under the **Australian Trade Marks Act 1995 (Cth)**, the question of whether "PROTOX" and "BOTOX" are **substantially identical** or **deceptively similar** would be considered under **sections 44 and 10** of the Act.

1. Substantially Identical

To determine whether two marks are **substantially identical**, courts apply a **side-by-side comparison** focusing on their **visual**, **phonetic**, **and conceptual similarities**.

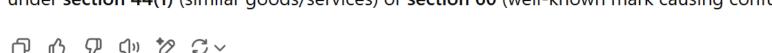
• "PROTOX" and "BOTOX" have the same suffix ("-TOX"), which is a significant part of the mark.

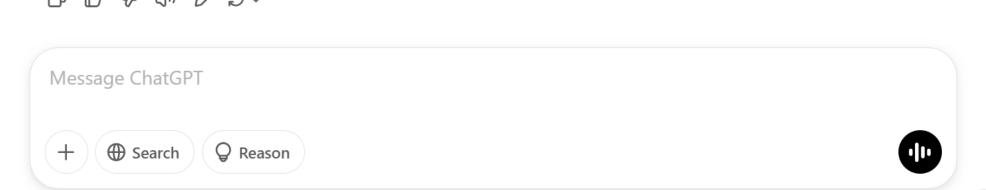


Conclusion

- "PROTOX" and "BOTOX" are not substantially identical, as their prefixes differ.
- However, they are **likely to be deceptively similar**, especially if used in similar goods or services (e.g., cosmetics, pharmaceuticals).
- If "BOTOX" is a well-known trade mark (which it is), this strengthens the argument for a likelihood of deception or confusion.

In practice, the owner of "BOTOX" (Allergan) could **oppose or challenge** the registration of "PROTOX" under **section 44(1)** (similar goods/services) or **section 60** (well-known mark causing confusion).





ACCURACY

ChatGPT 40

 However, they are likely to be deceptively similar, especially if used in similar goods or services (e.g., cosmetics, pharmaceuticals)

 If "BOTOX" is a well-known trade mark (which it is), this strengthens the argument for a likelihood of deception or confusion

Self Care IP Holdings P/L v Allergan Australia P/L [2023] HCA 8

- PROTOX was not deceptively similar to BOTOX because the similarities between the marks, considered in the circumstances, were not such that the notional buyer was likely to wonder whether the products came from the same trade source
- when assessing deceptive similarity under s 120(1), reputation of the registered trade mark and that of its owner is not relevant



ACCURACY

You should watch for the 'plausibility bias': the fluency of ChatGPT can induce a false sense of credibility. If you are unfamiliar with the area of law in question, you may miss subtle or even gross inaccuracies in a ChatGPT text. Always check to ensure the final product is accurate and helpful and if in doubt, don't use it.

Victorian Legal Services Board & Commissioner Generative AI and Lawyers



ACCURACY

Mistral:

- You acknowledge and agree that Our Services are inherently subject to certain unpredictabilities, particularly with the Outputs generated... as the technology behind Our Services is complex and continuously evolving
- For the avoidance of any doubt and to the extent permitted by applicable law, Our Services are provided without any express or implied warranty regarding the quality or the accuracy of the Outputs.
- Consequently, You agree that the Outputs generated by Our Services may be incomplete, not up-to-date or not entirely accurate
- Therefore, when using Our Services, You must... Assess the accuracy and/or the suitability of the Output to your needs before using or sharing the Output... and Check the information generated by the Output and, in any case, not rely on the Output as a unique source of truth and/or information, as safe and inoffensive in every circumstance, or as a replacement for professional guidance



PRESENTING GENERATIVE AI IN COURT

"Particular caution needs to be exercised if generative AI tools are used to assist in the preparation of affidavit materials, witness statements or other documents created to represent the evidence or opinion of a witness."

> Supreme Court of Victoria Guidelines for litigants: responsible use of artificial intelligence in litigation

"Affidavits, witness statements, character references should contain and reflect a person's own knowledge, not Al-generated content."

NSW Supreme Court Practice Note SC Gen 23



Image created via ChatGPT



PRESENTING GENERATIVE AI IN COURT DUTY TO THE COURT

"an officer of the court concerned in the administration of justice [a legal practitioner] has an overriding duty to the court, to the standards of his profession, and to the public, ..."

Rondel v Worsley [1969] 1 AC 191, 227 (Lord Reid)

"19.1 A solicitor must not deceive or knowingly or recklessly mislead the court."

Solicitors' Conduct Rules 2015



PRESENTING GENERATIVE AI IN COURT VICTORIAN COURTS GUIDANCE

"The use of AI programs by a party must not indirectly mislead another participant in the litigation process (including the Court) as to the nature of any work undertaken or the content produced by that program. Ordinarily parties and their practitioners should disclose to each other the assistance provided by AI programs to the legal task undertaken. Where appropriate (for example, where it is necessary to enable a proper understanding of the provenance of a document or the weight that can be placed upon its contents), the use of AI should be disclosed to other parties and the court."

Supreme Court of Victoria Guidelines for litigants: responsible use of artificial intelligence in litigation



PRESENTING GENERATIVE AI IN COURT VICTORIAN COURTS GUIDANCE

"Self represented litigants (and witnesses) who use generative AI to prepare documents are encouraged to identify this by including a statement as to the AI tool used in the document that is to be filed or the report that is prepared. This will not detract from the contents of the document being considered by the relevant judicial officer on its merits but will provide useful context to assist the judicial officer."

Supreme Court of Victoria Guidelines for litigants: responsible use of artificial intelligence in litigation



PRESENTING GENERATIVE AI IN COURT NSW COURT GUIDANCE – EVIDENTIARY MATERIAL

Gen Al can be used to prepare:

- Chronologies, indexes, or witness lists
- Briefs or draft Crown Case Statements
- Summaries of documents
- Written submissions or summaries of argument

Gen Al prohibited from:

- Generating evidentiary material
- Modifying evidentiary material

Required disclosure in documents

- Gen Al did not generate content of:
 - Evidence; or
 - exhibits or annexures

Allowed exceptions to prohibitions

- Annexures or exhibits prepared for other purposes
- Leave granted by the court to use Gen Al



PRESENTING GENERATIVE AI IN COURT NSW COURT GUIDANCE – APPLICATION FOR LEAVE



PRESENTING GENERATIVE ALIN COURT NSW COURT GUIDANCE – EXPERT EVIDENCE

Expert witnesses prohibited from using Generative AI

Instructing parties must inform expert witnesses of the Practice Note

Application for leave can be made to allow use of Generative Al



PRESENTING GENERATIVE AI IN COURT NSW COURT GUIDANCE – EXPERT EVIDENCE – APPLICATION FOR LEAVE



PRESENTING GENERATIVE AI IN COURT NSW - EXPERT REPORT - REQUIREMENTS IF LEAVE GRANTED

Disclose what sections of report use Gen Al

Keep and annex records of how Gen Al was used

Annex relevant code of practice or principles for Gen Al



PRESENTING GENERATIVE AI IN COURT KEY TAKEAWAYS

Victoria strongly encourages disclosure where Gen Al is used NSW prohibits the use of Gen Al without leave

Applications for leave must identify specific details about the use of Gen Al

NSW requires disclosures that Gen Al was not used

Expert Witnesses must be informed of NSW's requirements

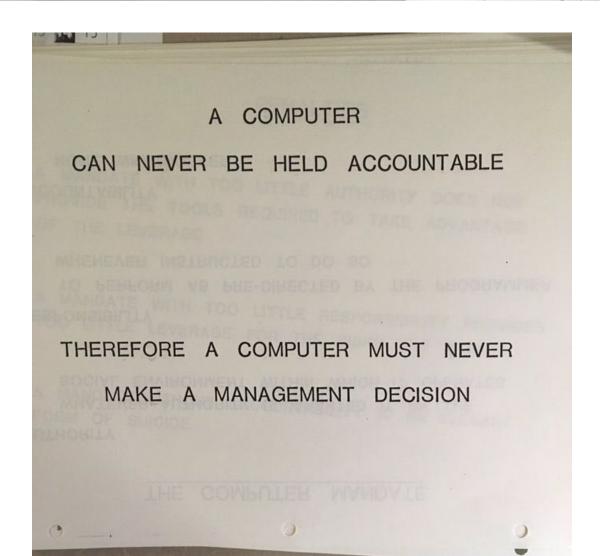


ETHICAL ISSUES

- Professional duties
- Bias
- Copyright
- Labour issues
- Environmental issues



ETHICAL ISSUES PROFESSIONAL DUTIES





PROFESSIONAL DUTIES

the personal duty of practitioners to the Court cannot be outsourced. When it comes to evidence in court, the use of AI to summarise information to be included in affidavits will give no immunity from the consequences of pledging a false oath, and in submissions and lists of documents, AI hallucinations will not excuse practitioners from breach of their ethical obligations

Kourakis CJ, Supreme Court of South Australia



PROFESSIONAL DUTIES

Generative AI does not relieve the responsible legal practitioner of the need to exercise judgment and professional skill in reviewing the final product to be provided to the Court

Supreme Court of Victoria Guidelines for litigants: responsible use of artificial intelligence in litigation

Al chatbots/copilots and other LLM-based tools cannot reason, understand, or advise. Lawyers are responsible for exercising their own forensic judgement when advising clients, and cannot rely on the output of an Al tool as a substitute for their own assessment and analysis of a client's needs and circumstances.

Joint Statement on the use of artificial intelligence in Australian legal practice by Victorian Legal Services Board and Commissioner, Law Society of NSW and Legal Practice Board of Western Australia



ETHICAL ISSUES BIAS

the model will have been created based on data that the user is unaware of, but which may over- or under-represent certain demographics or otherwise prefer certain viewpoints over others in a way that will not be transparent to users

Supreme Court of Victoria Guidelines for litigants: responsible use of artificial intelligence in litigation

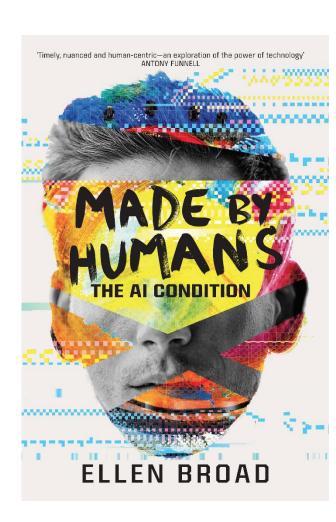


Despite a perception of machines as **infallible**, these systems are **made by humans**...

Sometimes the systems are bad because they're learning from historical data to reflect our own structural biases straight back at us Sometimes they're bad because the humans who came up with them have heroically overstated what data and machine learning can do

And sometimes they're bad because the humans designing then system are just plain biased, or sloppy, or short of money and time to design the system safely

...the pristine sheen of AI can mask the human fingerprints underneath



ETHICAL ISSUES BIAS

- Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)
 - Proprietary tool used by US Courts to assess likelihood of recidivism
- 2016 study by ProPublica
 - 'looked at more than 10,000 criminal defendants in Broward County, Florida, and compared their predicted recidivism rates with the rate that actually occurred over a two-year period'
 - 'Black defendants were often predicted to be at a higher risk of recidivism than they actually were'
 - 'White defendants were often predicted to be less risky than they were'
 - 'even when controlling for prior crimes, future recidivism, age, and gender, black defendants were 45 percent more likely to be assigned higher risk scores than white defendants'
 - 'Black defendants were also twice as likely as white defendants to be misclassified as being a higher risk of violent recidivism'



ETHICAL ISSUES COPYRIGHT

OpenAl:

- o It would be impossible to train today's leading AI models without using copyrighted materials ... Limiting training data to public domain books and drawings created more than a century ago might yield an interesting experiment, but would not provide AI systems that meet the needs of today's citizens
- Models generated by machine learning processes do not contain verbatim copies of training data, however:
 - Collating training data and feeding into machine learning system involves reproducing those copyright works
 - Some generative AI tools have a tendency to regurgitate input data



Output from GPT-4:

many of America's other global companies — aren't nearly as avid in creating American jobs as other famous companies were in their heydays.

Apple employs 43,000 people in the United States and 20,000 overseas, a small fraction of the over 400,000 American workers at General Motors in the 1950s, or the hundreds of thousands at General Electric in the 1980s. Many more people work for Apple's contractors: an additional 700,000 people engi-

neer, build and as other products.

the United State companies in Asi ries that almost to build their wa "Apple's an exar middle-class jobs stein, who until to the White Ho

talism, we should be worried."

Apple executives say that going overseas, at this point, is their only option. One former executive described how the company relied upon a Chinese factory to revamp iPhone manufacturing just weeks before the device was due on shelves. Apple had redesigned the iPhone's screen at the last minute, forcing an assembly line overhaul. New screens began arriving at the plant near midnight.

A foreman immediately roused 8,000 workers inside

Actual text from NYTimes:

many of its high-technology peers — are not nearly as avid in creating American jobs as other famous companies were in their heydays.

Apple employs 43,000 people in the United States and 20,000 overseas, a small fraction of the over 400,000 American workers at General Motors in the 1950s, or the hundreds of thousands at General Electric in the 1980s. Many more people work for Apple's contractors: an additional 700,000 people engi-

The New Hork Times

The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work

Millions of articles from The New York Times were used to train chatbots that now compete with it, the lawsuit said.

ones and Apple's of them work in work for foreign ewhere, at factoigners rely upon

o hard to create said Jared Berneconomic adviser

"If it's the pinnacie of capitalism, we should be worried."

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ETHICAL ISSUES COPYRIGHT

The use of AI tools based on LLMs may also raise copyright and plagiarism issues. For example, Generative AI chatbots can be very useful in condensing or summarising information or presenting the information in a different format. However, the following should be considered:

- using a chatbot to summarise a portion of a textbook or other intellectual property could breach the author's copyright
- o any such use would need to be carefully reviewed to ensure the summarised passage carries the same meaning as the original content
- depending on context, the source may need to be acknowledged and citations added

The Use of Generative Artificial Intelligence (AI): Guidelines for Responsible Use by Non-Lawyers Queensland Courts



KEY TAKEAWAYS IF USING GENERATIVE AI

Understand limitations of tool used

2 Avoid divulging confidential or privileged information

3 Check all output thoroughly

4 Consult with any Rules or guidance in your jurisdiction

You are responsible for the work you produce



QUESTIONS?



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