

WIN In-House Counsel Week 2024

Artificial Intelligence: The (un)imaginable upsides and potential pitfalls

Presenter: Nicholas Boyle



WIN what in-house
lawyers need



Today's session

- What do we mean we talk about AI?
- How and why is AI 'disrupting' the legal profession and other businesses?
- What legal issues arise out of the deployment and use of AI?
 - Governance and risk assessment / management
 - Privacy impacts
 - Administrative justice considerations
 - IP ownership
 - Negligence / performance risks
 - Emerging regulatory issues
- Are there particular focus areas for in-house counsel when looking at AI projects?
- How are law firms (including DLA Piper) and other organisations implementing AI?



*An image visualizing an AI tool at work
(courtesy of DALL·E)*

What do we mean when we talk about AI?

An umbrella terms for many different types of technologies

The EU AI Act defines AI as:

“A machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as content, predictions, recommendations, or decisions that can influence physical or virtual environments”

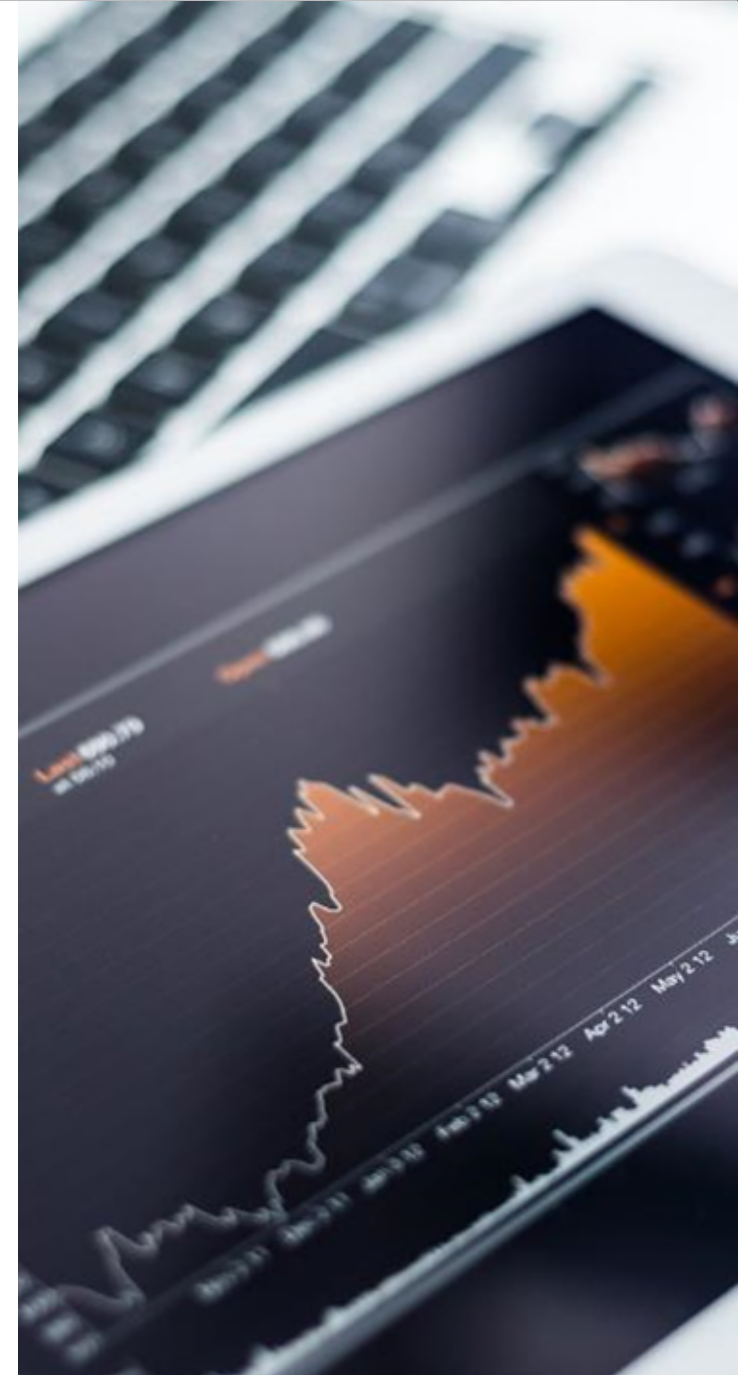
‘Narrow AI’ means AI systems which are capable of specific, relatively simple tasks – e.g., searching the internet or navigating a vehicle.

‘Artificial general intelligence’ is a system (currently theoretical) that *“possess autonomous self-control, a reasonable degree of self-understanding, and the ability to learn new skills. It can solve complex problems in settings and contexts that were not taught to it at the time of its creation”* (Amazon).



How and why is AI ‘disrupting’ the legal profession and other businesses?

- AI has the potential to change the way knowledge workers do their work.
- Factors driving adoption of AI include:
 - Sophistication and capability of tools;
 - Financial pressures (both revenue and costs);
 - Resourcing constraints.
- To date much of the focus has been on automating or replacing tasks currently undertaken by human lawyers or “task substitution”.
- But what about the potential to deliver legal **outcomes** to clients in an entirely different way? For example, what if there were systems to identify and rectify performance issues before they became contractual disputes?



What legal issues arise out of the deployment and use of AI?

Let's start with first principles...

- There is a *lot* of discussion about new regulations, need to change laws, etc. - just see the volume and velocity of commentary on LinkedIn
- **BUT**, there are existing laws and legal principles that apply and they highlight a number of risks and issues:
 - Governance and risk assessment / management;
 - Privacy impacts;
 - Administrative justice considerations;
 - IP ownership;
 - Negligence / performance risks.



An image representing the foundational principles of law and justice (courtesy of DALL·E)

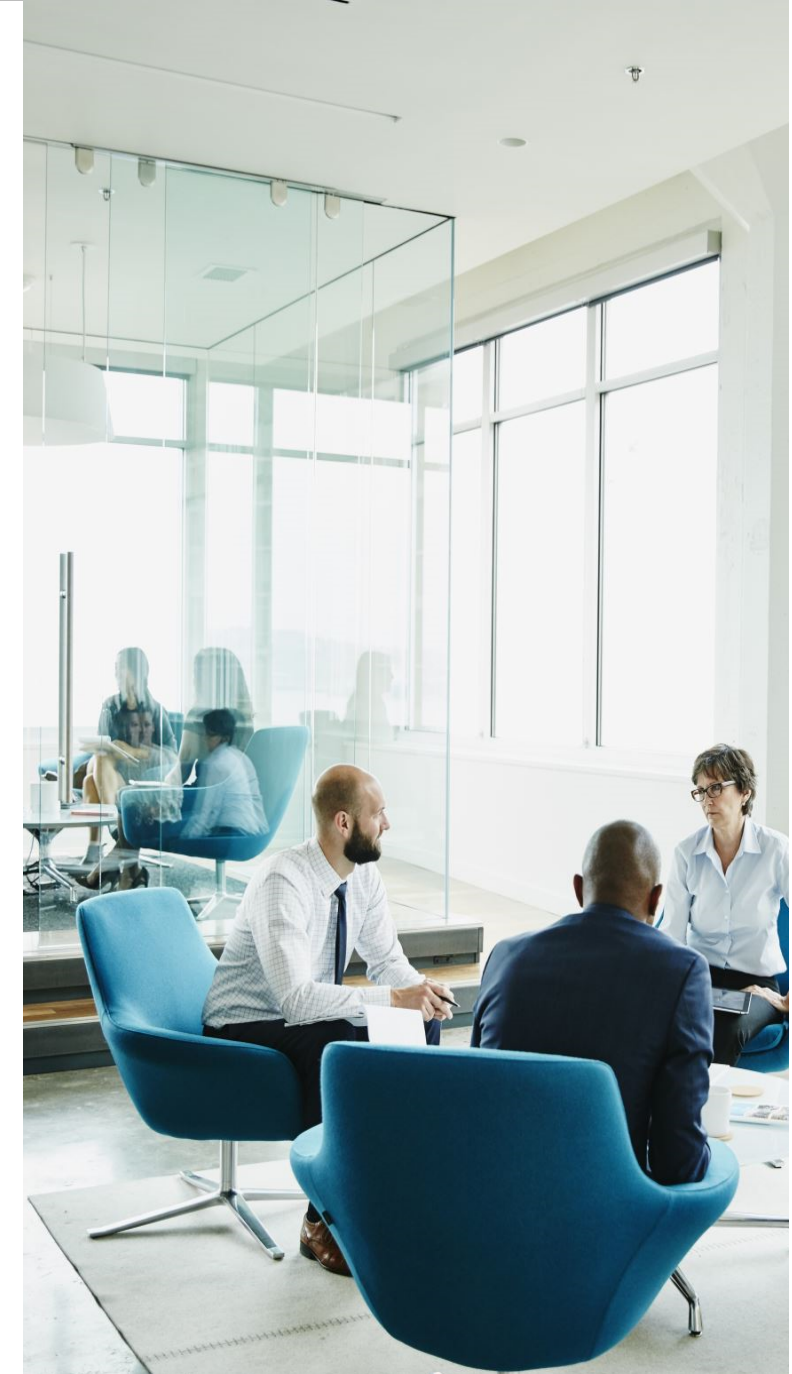
What legal issues arise out of the deployment and use of AI?

- **Governance and risk assessment / management**

- Whatever regulatory approach is ultimately adopted, the applicable obligations and requirements can and should vary based on risk profile
- Therefore critical to implement proper assessment and review processes – both before implementation, and while systems are in use
- Documentation of policies, processes and decisions – transparency

- **Privacy impacts**

- Understanding what data is being used, how and why?
- Some of this was addressed in GDPR already around ‘profiling’ and automated decision making, but AI takes this to another level



What legal issues arise out of the deployment and use of AI?

- **Administrative justice considerations**

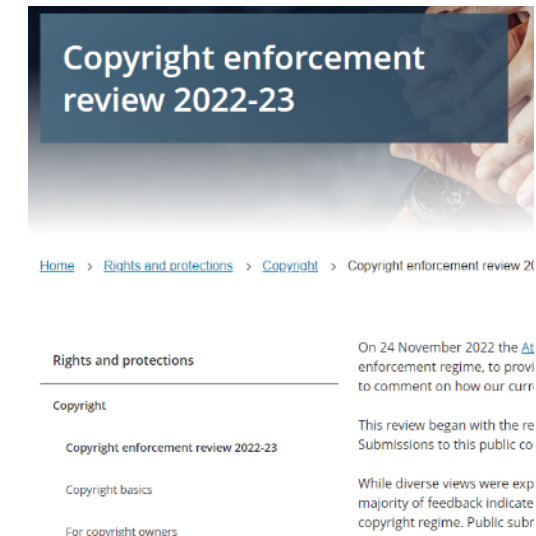
- Chapter 17 of the Robodebt Royal Commission report is focused entirely on automated decision making, and focuses to a high degree on transparency, explainability, and human oversight / accountability.
- As an aside, Chapter 19 of the report focuses on lawyers and legal services and contains some very strong observations and guidance to lawyers about their roles and responsibilities.

- **IP ownership**

- This is relevant both in the training of AI models – be they general or specific to particular activities – and also in determining who (if anyone) owns the output of AI
- Still a developing area, and there is a copyright review ongoing in Australia and these issues are at the forefront
- International litigation (such as the *NYT v OpenAI* case) will also influence global commercial and regulatory responses
- Contractual commitments are key



(ABC News: Toby Hunt)



What legal issues arise out of the deployment and use of AI?

- **Negligence / performance risks**

- For AI providers and AI users, risk allocation through contracts is key
- Issues around audit, transparency, etc.
- What happens on termination?
- Co-mingling of data / training of models – can this be reversed?
- The UK Society for Computers and Law (SCL) has published some model clauses that address these issues (as well as others) but practice and market positions will continue to evolve



What legal issues arise out of the deployment and use of AI?

...while there are also specific regulatory regimes developing

- European AI Act
 - Extraterritorial effect
 - Some overlap with GDPR concepts
 - Prohibited Systems / High Risk AI Systems / General Purpose AI models
- Australia AI regulation
 - Commonwealth Government's '*Supporting responsible AI*' discussion paper dated 1 June 2023, and 17 January 2024 'interim' response to public submissions
 - Identified 3 themes as mandatory requirements for regulation:
 - **testing and audit**, including in relation to product safety and data security;
 - **transparency**, including in relation to public reporting obligations, and disclosures regarding model design, use of data and watermarking of AI-generated content; and
 - **accountability**, including in relation to organisational roles and responsibilities and training requirements.



Are there particular focus areas for in-house counsel when looking at AI projects?

Both for projects within legal teams, and when advising other business stakeholders

- What is the business objective of the project and what does success look like?
- Have you designed and implemented an AI policy? How will that impact on the proposed use case(s)?
- What project assessment process do you need / should you follow to consider the project and the associated risks?
- What limits and parameters do you want / need to put around that AI use case (e.g., cannot put client data into the AI tool) based on that assessment process?
- What regulatory frameworks apply to not only the AI but the underlying business process / task affected by the AI?
- What data is input, processed and output by the AI tool / model? What limitations (under privacy laws, contracts, regulations) apply to use of that data?
- What contractual terms apply to the use of the AI tool / model? *There are many follow up questions to ask in relation to specific commercial issues arising out of the contract.*

How are law firms (including DLA Piper) and other organisations implementing AI?

- We have developed an AI tool for use in connection with identifying possible cartel conduct – Aicensio.
- We are also permitting people to use ChatGPT and similar tools **subject to** no client data being submitted, and tools must not be used for the preparation of legal advice.
- Looking at implementing AI tools (based on existing AI models) within our own IT environments so that they can use our own data in a controlled and separate environment, without risk of disclosure.
- Other clients and organisations are rolling out similar internal AI models/tools (e.g., ChatPwC, PairD at Deloitte) while others are using very task-specific tools with well-defined policies and practices in place (e.g., Westpac with software developers using generative AI tools from OpenAI, Amazon and Microsoft).
- In legal departments, there are vendors pushing their own solutions very strongly (e.g. Thomson Reuters) but it very much depends on work types and work flows.
- Still a lot of legal departments in the ‘discovery’ phase gathering more detailed information about what they do, why, how, for whom, which is needed to make informed decisions.
- Pilots/trials and working groups to identify opportunities for AI are very common in our experience.

Questions?



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