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## **Bulletin – Artificial Intelligence and Adjudication – Paper Delivered at Adjudicate Today’s Annual Adjudicators’ Seminar**

The spectre of Artificial Intelligence (AI) radically effecting how we work has arrived with the recent advent of ChatGPT<sup>i</sup>. ChatGPT will impact and is already impacting the broader legal industry and will also impact adjudication, both for preparers and responders and adjudicators alike.

Chat:- because its conversational, a large language model (LLM) that operates as a chat-bot  
GPT:- because it's a generative pre-trained transformer

### **1. Brief Overview of AI in the Legal Industry**

Prior to ChatGPT, AI was already utilised in the legal industry, including applications:

[A] That automate document review utilized machine learning algorithms to analyse vast amounts of data and extract relevant information, reducing the time and effort required for legal document review.

[B] That can be employed in predictive analytics, assisting in case outcome predictions and aiding in the assessment of legal risks. By analysing historical case data and identifying patterns, these AI models have demonstrated the potential to provide valuable insights to lawyers and adjudicators.

[C] Such as legal research tools that can efficiently search through extensive legal databases, analyse complex legal texts, and provide relevant case law and legal opinions. By automating the process of information retrieval and analysis, AI-powered legal research tools offer significant time savings for legal professionals.

According to ChatGPT itself:

“The emergence of ChatGPT further expands the possibilities of AI-assisted adjudication, with its conversational nature and generative capabilities. The transformative potential of AI in adjudication lies not in replacing adjudicators but in serving as a valuable tool that can assist in various tasks, such as proofreading, summarizing submissions, clarifying legal language, and aiding in the prediction of counterarguments.”

### **2. ChatGPT-4<sup>ii</sup>, Aces Uniform Bar Examination**

ChatGPT-4, has reached incredible achievements that the earlier versions could not attain – including passing the Uniform Bar Examination in the top 10th percentile. The news has both excited and worried many lawyers.<sup>iii</sup>

### **3. Can AI Usurp the Adjudicator’s Function?**

Not under the Building and Construction Industry Security of Payment Act 1999, or likely its equivalents, for at least the following reasons:

[1] The legislation refers to an adjudicator as being a *person*. Section 18 of the Building and

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<sup>i</sup> Chat GPT stands for Chat Generative Pre-Trained Transformer and was developed by an AI research company, Open AI. It is an artificial intelligence (AI) chatbot technology that can process our natural human language and generate a response.

<sup>ii</sup> Version 4 Released late March 2023

<sup>iii</sup> ChatGPT Passed the Uniform Bar Examination: Is Artificial Intelligence Smart Enough to be a Lawyer?

By: Lara Kimmel, April 7, 2023. <https://international-and-comparative-law-review.law.miami.edu/chatgpt-passed-the-uniform-bar-examination-is-artificial-intelligence-smart-enough-to-be-a-lawyer/>

Construction Industry Security of Payment Act 1999 (**Act**) foresaw the eventuality of eligibility criteria for adjudicators being legislated by way of regulations.<sup>iv</sup>

[2] Judicial guidance from the judgment of Walmsley AJ in *St Hilliers Property Pty Limited v ACT Projects Pty Ltd and Simon Wilson* [2017] ACTSC 177 (20 July 2017) (***St Hilliers Property***).

Relevant parts of that judgment are:

“[87] Mr Miller submitted the parties were entitled to assume Mr Wilson would comply with s 24(2). If they had known he would get someone else to draft his determination, they should have had an opportunity to make submissions to that other person. As they did not have that opportunity, there was procedural unfairness.

[88] Mr Miller conceded an adjudicator may obtain help of a limited kind, but said what had occurred here was an extreme example, where Mr Wilson had, in effect, asked another adjudicator to do his job for him and then adopted it as his own.

[102] Although denying he had taken Mr Turner’s views into account when preparing his adjudication, Mr Wilson ultimately conceded he had considered Mr Turner’s views about facts, the contract, and the case law.

[103] But he insisted he had independently considered every item in the adjudication and, in effect, brought his intellectual consideration to bear on every one of them. His position was that Mr Turner had been a great help, but in the end he, Mr Wilson, was the one who had made all the decisions.

[109] Mr Orlov referred me to cases where ministers of the crown had obligations to make decisions but had the right to have assistance in the process: *Tickner v Chapman* [1995] FCAFC 1726; (1995) 57 FCR 451, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1985) 162 CLR 24, *O’Reilly v The Commissioners of the State Bank of Victoria* [1983] HCA 47; (1982) 153 CLR 1. He also referred me to *Minister for Local Government v South Sydney City Council* [2002] NSWCA 288; 55 NSWLR 381, where appointees of the NSW Government required to inquire into election results were found to have appropriately had help with aspects of their inquiry.

Consideration

[117] I accept Mr Miller’s submission that the use of singular words in s 22, such as “an adjudicator” (s 22(1)), shows that the job of adjudicator is personal to the person who agrees to adjudicate.

[118] I do not consider s 24(2) requires that an adjudicator work alone, with no clerical or other assistance. Clearly, adjudicators must have some assistance. In the end, whether the assistance amounts to a usurpation of the task of adjudication must be a matter of degree.

[119] However, as much as Mr Wilson sought to say all the work was his, I infer most was that of Mr Turner, and that he adopted Mr Turner’s work to a substantial degree and put forward the final product as his own. That is powerfully supported by the time entries and the document SW3 and to a degree by the oral and affidavit evidence of Mr Wilson.

[120] In *Laing O’Rourke v H and M* [2010] NSWSC 818 at [39] McDougall J said:

“In my view, the obligation to consider matters imposed by [the equivalent section in the NSW legislation to s 24(2)] should ... [require] an active process of intellectual engagement. It may be thought that this imposes a substantial burden on adjudicators.<sup>v</sup>

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<sup>iv</sup> Refer RGCL Bulletin Ref 0001119 on Adjudicator Eligibility and Regulation Clauses 18 and 19

<sup>v</sup> McDougall J’s principle of prescriptively imposing the level of intellectual engagement required of an adjudicator was overruled in *Goodwin Street Developments v DSD Builders* [2018] NSWCA 276. See article of Davenport ‘Moving the goal posts back’ [2019] #184 ACLN 40. However, the principle of *St Hilliers Property* is likely still good law in the writers opinion.

That may be so; but there are at least two reasons why, even if that is correct, it does not justify reading down the statutory obligation to “consider”.

The first is that adjudicators are not forced to accept nomination. They may decline nomination; or they may accept only on the condition that they are given some longer period of time than ten working days to produce their determination. The second reason is that the outcome of the adjudicators consideration may have very significant consequences.”

[122] Mr Wilson at the time the adjudication was prepared, according to the time sheets, was spending 19 hours per day on other projects.

[127] I had the considerable opportunity of seeing Mr Wilson being cross examined. I thought he gave it honestly, but I consider, as Mr Miller submitted, Mr Wilson was mistaken in asserting he did all of what was required of him.

[128] I am not satisfied on the balance of probabilities Mr Wilson actively engaged in the decision-making process of all aspects of the adjudication he was required to undertake. I am satisfied he took into account documentation prepared by Mr Turner without that active engagement. That, it seems to me, was a failure to comply with s 24(2) of the Act.

[130] As to the cases cited by Mr Orlov concerning a decision-maker’s right to have assistance, I do not find them helpful in construing the Act. Tickner and Peko-Wallsend and O’Reilly involve the exercise of powers by ministers of the Crown who had no choice about exercising jurisdiction. It follows, as Mason J said in Peko-Wallsend at [38], that it was unlikely Parliament intended a minister’s power be exercised without some assistance.

[131] In the South Sydney case it was held that the relevant statute contemplated the statutory holders of a power to inquire, were to have assistance which would not in the circumstances amount to an inappropriate delegation of their function.

[132] Here however the Act is quite explicit about what an adjudicator may consult.

[133] Although I accept Mr Orlov’s submission that his client was entitled to have assistance, what occurred here was far more than that somewhat benign description.

[134] The parties were entitled to have their dispute decided by the person who had agreed to decide it. They did not have that.

[135] On this ground I would have declared the determination void.”

#### **4. Likely a Question of Degree Regarding Reliance Upon AI**

So, applying the principles of the above judgment with regard to obtaining another human’s assistance, to the use of the assistance of AI, it is likely a question of degree.

The first Caveat – an obvious one, you are the adjudicator and must determine every element, otherwise the whole determination will likely be open to review by the court.

#### **5. Judicial Use of ChatGPT**

On 30 May 2023 the Christian Science Monitor reported<sup>vi</sup>:

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<sup>vi</sup> By Adam Smith, Anastasia Moloney, and Avi Asher-Schapiro Thomson Reuters Foundation. See <https://www.csmonitor.com/USA/Justice/2023/0530/AI-in-the-courtroom-Judges-enlist-ChatGPT-help-critics-cite-risks>

“An Indian High Court Judge Anoop Chitkara has ruled over thousands of cases. But when he refused bail to a man accused of assault and murder, he turned to ChatGPT to help justify his reasoning.

He is among a growing number of justices using artificial intelligence (AI) chat bots to assist them in rulings, with supporters saying the tech can streamline court processes while critics warn it risks bias and injustice.

“AI cannot replace a judge. However, it has immense potential as an aid in judicial processes,” said Mr. Chitkara.

No doubt the Australian judiciary is working on this issue, though I’m not privy to such machinations.

Whilst there is much debate on the ethics and pitfalls of using AI in decision-making, risk of bias and injustice to name a few, a detailed policy analysis of these is beyond the scope of this paper, suffice to say that the courts will be soon grappling with these issues.

One thing I think is clear is the non-delegable nature of an adjudicators and common law judicial function. We need not fear our task being usurped by a *robo-adjudicator* any time soon.

However, there are likely some clear guide rails that we, as adjudicators would be well advised to stay within – which are discussed below.

## **6. Why use ChatGPT? – What can it do for an Adjudicator?**

ChatGPT can be utilised as a very capable personal assistant, using prompts it can assist you in for example the following ways:

Prompt: *Proofread the following text: “[text blah blah]”*

Prompt: *Read the following text and identify any unclear language: “[text blah blah]”*

Prompt: *I am presenting a paper on Artificial Intelligence and Adjudication to my fellow adjudicators, please review my first draft paper and identify any obvious gaps in subject matter I have covered: “Bulletin – Artificial Intelligence and Adjudication ...”*

The power of ChatGPT lies in its ability to quickly access its large language model. It’s conversational, and responds to prompts commands. What’s more, it can iteratively improve its response, based on your feedback and further prompting.

## **7. Second Caveat – Confidentiality**

You cannot enter any confidential or privileged information into the chat-bot<sup>vii</sup>.

You can treat the AI like a trainee or a personal assistant. However, it won’t sign an NDA or keep confidentiality. So you have to cater to that. For example, define the Claimant and the Respondent in the first paragraph of the determination – and then ensure that you never feed that paragraph into the bot.

Of course its not as simple as defining the parties as set out above, given that excerpts of emails and statements and the like are often copied into the determination – so one will need to be very judicious before cutting and pasting paragraphs into the bot.

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<sup>vii</sup> Also known as PII, Personally Identifiable Information, parties names, peoples names, addresses and the like. ChatGPT is being read by AI trainers at OpenAI and used for training their Language Model.

## 8. Other prompts, to utilize ChatGPT as a Personal Assistant

Example prompt: *I work on an iMac. For some reason if people send me email attached to another email (in .msg format) then I cannot read them - they don't open. Please give me a solution to this issue.*

Brainstorming – ask for bullet points on anything.

- Write a first draft of:
  - A contract
  - A complaint
  - Examination questions
  - A brief to counsel
  - An email
- Rephrase anything from legalese into plain language
- Summarise anything
- Predict counter arguments

## 9. Third Caveat – Hallucinations

ChatGPT will very confidentially give you false information and will rely upon its own false information. It hallucinates an answer rather than admit it doesn't know. ChatGPT may generate responses that are completely dreamt up - based on false information. You must check everything. Having said that, it does remove a very time intensive task of say producing a first draft, so that you are spending most of your time proofing or fine tuning something, five seconds after inputting your initial prompt request.

In a New York judgment handed down just last week, a federal judge on Thursday imposed \$5,000 fines on two lawyers and a law firm in an unprecedented instance in which ChatGPT was blamed for their submission of fictitious legal research in an aviation injury claim.<sup>viii</sup> In a cringe-inducing court hearing, a lawyer who relied on A.I. to craft a motion full of made-up case law said he “did not comprehend” that the chat bot could lead him astray.<sup>ix</sup>

Judge P. Kevin Castel said they acted in bad faith. But he credited their apologies and remedial steps taken in explaining why harsher sanctions were not necessary to ensure they or others won't again let artificial intelligence tools prompt them to produce fake legal history in their arguments.

"Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance," Castel wrote. "But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings."

A Texas judge earlier this month ordered attorneys to attest that they would not use ChatGPT or other generative artificial intelligence technology to write legal briefs because the AI tool can invent facts.<sup>x</sup>

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<sup>viii</sup> Mata v Avianca Airlines see <https://www.cbsnews.com/news/chatgpt-judge-fines-lawyers-who-used-ai/>

<sup>ix</sup> <https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html>

<sup>x</sup> *ibid* CBS News website

## 10. Legal Prompt Engineering

Legal prompt engineering is the process of designing prompts that provide the relevant context for ChatGPT to produce the desired output within the legal domain.

- Be specific when providing prompts, the more specific the better and include context and examples
- Drill down on answers and ask it to refine the results

Example: I want you to act as .... I want you to act as a lawyer in a firm specialising in Data Protection law. Write a bullet list of the most important parts of a privacy statement according to Australian law.<sup>xi</sup>

An example I just used.

RG:- *How long after expiry of bankruptcy notice does the creditor have to apply for a sequestration order?*

ChatGPT:-

*The timing for applying for a sequestration order can vary depending on the jurisdiction, so it's always best to check the specific laws and regulations in your area. However, here is some general information based on the laws in many jurisdictions:*

*A bankruptcy notice is usually issued to a debtor by a creditor, and it typically provides a period of time for the debtor to either repay the debt or to come to some agreement with the creditor. This period of time is often 21 days, but again, this can vary.*

*If the debtor does not comply with the bankruptcy notice within the specified time frame, the creditor can then apply for a sequestration order. This is often done immediately after the bankruptcy notice has expired, as there is usually no requirement to wait any additional period of time before applying for a sequestration order.*

*However, the creditor typically has a specific window of time in which they can apply for a sequestration order after the expiry of the bankruptcy notice. This can be different in each jurisdiction but often is within **6 months** after the act of bankruptcy.*

*Please note that this information might not apply to your specific situation, and you should always consult with a legal professional in your area to get advice tailored to your specific circumstances.*

## 11. Adjudication Examples

Following are some further possible applications for which ChatGPT maybe utilised by an adjudicator:

- I want you to act as an adjudicator and condense / summarise the parties' submissions into 4 dot points.
- Can you explain this clause [/ this submission]?
- "Act as a PromptPersonality bot"
  - EG. Write the PromptPersonality for this email: [for these submissions] to analyse the experience level of the drafter
- Have final proofread / challenge proof tool, say: review determination to identify any conclusion not supported by submissions.

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<sup>xi</sup> From CLE by Martin Bregulla Practical Guidance to leveraging ChatGPT as a lawyer

## 12. ChatGPT Limitations

The following summarises ChatGPT's limitation to which an adjudicator must be mindful:

- Confidentiality and privacy issues – eliminate all PII in any data inputs
- Be careful with respect to copy write issues, it's a grey area as to who will own the copy write in text produced. You could be breaching copy write of material inputted into the AI by OpenAI
- Watch out for ChatGPT hallucinations
- Ensure its your determination, our function is non-delegable
- Maximum word input limit of ChatGPT-4 is 25,000 words – but watch PII with such a big input!

## 13. Future Enhancements

ChatGPT plugins permit that chatbot to interface with outside services.

Plugins feed directly into the bot giving it access to a wide range of knowledge and information from its third-party partners and excitingly, the web. According to OpenAI, this update will help ChatGPT “access up-to-date information, run computations, and use third-party services”. Without a doubt, this update is incredibly exciting and will take an already powerful model to the next level.hatGPT Limitation.

So providers like Lexis Nexis, Jade and the like will likely produce plugins to be utilised with ChatGPT.

## 14. Final Caveat

When I first started thinking about ChatGPT in February, I entered the following prompt:

Prompt: AI and adjudication under the Building and Construction Industry Security of Payment Act 1999 (NSW)

ChatGPT Response:

*AI can potentially play a role in the adjudication process under the Act by providing assistance to the adjudicator in analyzing the complex construction contracts and other technical documentation involved in disputes. For example, AI algorithms can be used to identify and extract key clauses and terms in the contracts, analyze and compare schedules of work, and review project plans and specifications.*

*In addition, AI can help to ensure that the adjudication process is fair and unbiased by analyzing large volumes of data to identify patterns or trends in adjudication decisions, and alerting the adjudicators to any potential biases or inconsistencies. This can help to increase the transparency and consistency of the decision-making process.*

*However, it is important to note that AI should not replace the role of human adjudicators in the decision-making process, as there are many legal and ethical considerations involved in making decisions that may impact the livelihoods of contractors and subcontractors. AI should be used as a tool to assist adjudicators in making more informed and consistent decisions, rather than replacing the decision-making process altogether.*

The above response that ChatGPT can be used to: “identify patterns or trends in adjudication decisions, and alerting the adjudicators to any potential biases or inconsistencies”, foresees the inputting of determinations into the chatbot and profiling adjudicators.

It could also be used to allege bias in an adjudicator.

As a group of statutory-decision-makers it is incumbent upon us:

[A] to keep up with this technological development, not only to stay efficient in our task, but also to be engaged in guidelines and or practice notes and etc with regard to its potential misuses.

[B] to be involved with policy and or legislative responses to it. It would be good if we could get a birds eye view into the judiciaries own response to ChatGPT, who are potentially at more risk, given most of their judgments are published.

[C] to also keep an eye on other jurisdictions responses.

## **15. Start Using ChatGPT**

ChatGPT provides ample food for thought. I recommend adjudicators start using ChatGPT, even for their extra-adjudication tasks, to gain some familiarity with the technology, which is easy to use, especially if the above set out Caveats are kept in mind.

## **16. Postscript**

**Legal Practitioners need to be aware of the NSW Chief Justices practice note first published in 21 November 2024, and updated on 28 January 2025, which bans the use of AI in preparing court pleadings and annexures to affidavits and the like.**

**Refer Practice Note SC Gen 23**