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## AI rule change may be on cards after lawyers express concerns



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By [Cindy Cameronne](#) | Sydney

A NSW Supreme Court judge has hinted there may be changes to a new practice note on the use of AI in court proceedings, following complaints about how it applies to discovery and expert evidence.

The NSW Supreme Court's [practice note on the use of artificial intelligence](#), released last month, states that any material intended to reflect the writer's evidence or opinion — including affidavits, witness statements, character references or expert reports — must not be prepared with the assistance of generative AI.

The note also prohibits certain material from being entered into any generative AI program, including material produced on subpoena. However, the guidance does not mention other uses of AI common in the legal profession, such as the standard e-discovery practice of TAR, or technology assisted review.

In a directions hearing in the [Murray Darling class action](#) on Friday, NSW Supreme Court Justice Peter Garling said that there may be amendments to the new practice note after concerns were raised about discovery and expert evidence.

“A concern was raised with the court at an open forum about [the practice note’s] application in circumstances regarding discovery and documents sought on subpoena. There were also a couple of small points with respect to expert evidence,” said Justice Garling.

“There may be an amendment [to the practice note]. I think there will be, regarding discovery but I am not so sure with respect to expert evidence,” said Justice Garling.

The judge also said the parties in the Murray Darling class action will need to consider the new practice note’s requirements on the preparation of expert reports.

“By the time this is heard, the terms of the court’s practice note on artificial intelligence will be in place. That will have a significant effect on expert reports so I just let the parties know that there will need to be attention to the final version of the practice note and its requirements on experts,” said Justice Garling.

Beginning February, practitioners will be required to confirm that generative AI was not used in generating the content that they put forward for the purpose of proceedings.

The note makes allowance for “exceptional cases”, where leave can be sought to use the technology for the preparation of an annexure or exhibit, witness statement, character reference or expert report.

The new practice note also prohibits judges from using generative AI in forming and writing their reasons and in evidence analysis, including the use of bespoke programs like Lexis Advance AI, ChatGPT for Law, Westlaw Precision, AI Lawyer, Luminance and CoCounsel Core.

Editing and proofing judgements is also not a job for AI, according to the practice note, which requires that “no part of a draft judgment” be inputted into AI systems.

When discussing the practice note last month, Chief Justice Andrew Bell said the rules were needed to guard [against “laziness”](#) in the legal profession.

“It’s not a blanket prohibition but no other jurisdiction I think has gone so far or has been so explicit in proscribing its use in the generation of the content of evidence and that was a considered decision on our part,” said Justice Bell.

“We simply can’t have inaccuracy and dare I say laziness in the profession; it’s not satisfactory and it won’t be tolerated by the Supreme Court.”

With its practice note, the NSW Supreme Court goes one step further than its [Victorian counterpart](#) did with its May practice note, which only warned practitioners that caution should be used when using AI for witness statements and affidavits.

Banton Group filed the Murray Darling class action [in May 2019](#) seeking damages from the Murray Darling Basin Authority and the Commonwealth for alleged negligence in the exercise of the MDBA’s powers in managing the water flowing through the Murray Darling system, which runs through one-seventh of Australia.

The class action is represented by Sebastian Hartford-Davis, instructed by Banton Group. The Murray Darling Basin Authority is represented by Thomas Prince SC, instructed by Ashurst.

The case is Doyle’s Farm Produce Pty Ltd atf Claredale Family Trust v Murray Darling Basin Authority.