

# Destruction of paper and electronic documents — what you need to know

By **Mary Nemeth**, Partner, Rigby Cooke Lawyers

Document retention obligations are on the agenda following the referral of documents by the Victorian Attorney-General to the Victorian Director of Public Prosecutions and the Legal Services Commissioners in Victoria and New South Wales. This article outlines the key aspects of the *Crimes (Document Destruction) Act 2006* (Vic) and the *Evidence (Document Unavailability) Act* (Vic) (2006) which commenced operation on 1 September 2006 and considers the implications of their introduction for practitioners in Victoria. It also discusses the development of document retention issues since the decision of Eames J of the Supreme Court of Victoria in *Rolah Ann McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73 and the subsequent overturning of the decision by the Court of Appeal.

## Recent developments in document retention and the introduction of the *Crimes (Document Destruction) Act 2006* (Vic) and the *Evidence (Document Unavailability) Act 2006* (Vic)

The *Crimes (Document Destruction) Act 2006* (Vic) and the *Evidence (Document Unavailability) Act 2006* (Vic) are two initiatives (the Acts) which the Victorian Government has implemented following the recommendations made by Professor Peter Sallmann QC in his report titled *Document Destruction and Civil Litigation in Victoria* (the 'Sallmann Report').

The Sallmann Report was commissioned by the Victorian Attorney-General Mr Rob Hulls after the decision of the High Court to refuse leave by the plaintiff's representative to appeal against the decision of the Court of Appeal in *British American Tobacco Australia Services Limited v Roxanne Joy Cowell* (representing the estate of *Rolah Ann McCabe* (deceased)) [2002] VSCA 197 (the *McCabe case*).

The significance of the Acts and their ultimate application to factual circumstances has become even more important in light of recent

- *Destruction of documents prior to legal proceedings now regulated*
- *Victorian legislation brought into effect to regulate destruction of documents, with interstate application*
- *Importance of document retention policy to determine 'corporate culture'*

developments which have occurred following the *McCabe case*.

In October 2006, the *Sunday Age* reported on a draft memo allegedly prepared by Clayton Utz as part of an internal inquiry by the firm following the striking out of the defence of British American Tobacco Services Limited (BAT) defence by Eames J in early 2002. Clayton Utz had acted for BAT during the strike-out application but ceased to act after BAT's defence was struck out.

Copies of the documents which came into the possession of the *Sunday Age* were provided to the Victorian Attorney-General who in turn referred them to the Victorian Director of Public Prosecutions and to the Legal Services Commissioners in Victoria and New South Wales.

## Putting it into context — the *McCabe case*

The *McCabe case* commenced in the Supreme Court of Victoria when the plaintiff, Mrs McCabe, brought proceedings against BAT in negligence at common law. Once discovery had been completed by the parties, the plaintiff's solicitors brought an application to strike out BAT's defence. The application was brought on a number of grounds, the main one being that it was alleged that the destruction of documents by BAT prior to the commencement of the *McCabe case* had resulted



in the plaintiff being unable to prove her case and thereby denying her a fair trial.

After a lengthy strike-out application taking a number of days to complete, Eames J struck out the defence of BAT and entered judgment in favour of the plaintiff without the need for her to prove any aspect of her claim. Eames J made a number of findings, all of which are contained in para 289 of the judgment. One of the primary findings made was that 'the primary purpose of [BAT's document retention] policy, as then formulated, was to ensure that the destruction of material which would be harmful to the defence of any such litigation.'<sup>1</sup> His Honour struck out the defence despite expressing the view that the problems that the plaintiff was faced with were 'not insurmountable'<sup>2</sup> and that he had 'no doubt that the plaintiff is not bereft of all weapons with which to prosecute her claim.'<sup>3</sup>

The significance of the decision made by Eames J was that it was the first time in legal history in Australia that a defendant had been denied the opportunity to defend a claim brought against it for what was alleged to be destruction of documents prior to the commencement of legal proceedings. There was authority in existence in relation to the destruction of documents after the commencement of legal proceedings<sup>4</sup> but no authority to deal with destruction of documents prior to the commencement of legal proceedings.

BAT appealed against the decision to the Court of Appeal who overturned all the findings of fact and the decision of Eames J. The Court of Appeal found that:

- the destruction of documents prior to the commencement of litigation was not shown to be a breach of any rules relating to discovery
- any failure to identify documents that had been in the defendant's possession in the affidavit of documents could have been remedied by further affidavit
- there was no basis for striking out the defence and
- the destruction of documents before the commencement of litigation only attracts a sanction other than the drawing of adverse inferences to the destroyer if the destruction amounts to an attempt to pervert the course of justice or it amounts to contempt of court.<sup>5</sup>

The plaintiff's representative, Roxanne Joy Cowell, sought special leave to appeal to the High Court against the decision of the Court of Appeal. The High Court, however, refused the application for special leave to appeal.

### The Sallmann Report

Following the decision of the High Court the Attorney-General of Victoria, Mr Rob Hulls,

commissioned Professor Sallmann to prepare a report on:

... the current law, procedures and practices of discovery in the conduct of civil litigation in Victoria, with special emphasis on the approach that should be adopted if documents that could be relevant evidence in a trial are destroyed, whether that destruction occurs before or after the actual legal proceedings commence.<sup>6</sup>

Professor Sallmann made three policy recommendations.

- New civil procedure legislation should be introduced which would give trial judges the power to exercise their discretion to make rulings against parties who destroy documents before litigation is commenced — this recommendation was implemented by the *Evidence (Document Unavailability) Act 2006* (Vic) discussed below.
- New criminal legislation should mirror s 39 of the *Crimes Act 1914* to broaden the offence of destruction or tampering with evidence to include such destruction or tampering before the commencement of litigation and to be enforceable against a corporation. The *Crimes (Document Destruction) Act 2006* (Vic) discussed below seeks to implement an offence of this nature but not one in which intention of a corporation is not required.
- New professional conduct regulations should be introduced for lawyers giving advice about document retention and destruction, including when lawyers are in possession of documents relevant to actual or anticipated legislation. As at the date of writing this article a specific professional conduct rule of this nature is yet to be introduced in Victoria although general professional conduct rules already exist in Victoria concerning the obligations of a lawyer providing advice to their client<sup>7</sup>.

### The Evidence (Document Unavailability) Act (2006)

The *Evidence (Document Unavailability) Act 2006* (Vic) (the Document Unavailability Act) commenced operation on 1 September 2006. Its purpose is to implement the first recommendation made by Professor Sallmann.

It seeks to strengthen the legislative regulation of document retention by reversing the onus of proof in civil cases and requiring the individual or corporation who loses documents to demonstrate that the loss was not untoward.

The Document Unavailability Act essentially expands and reinforces the powers which the Courts have to admit evidence under the *Evidence Act 1958* (Vic).

It enables specific orders to be made by the court if it is not proven there was no untoward purpose for the destruction of a document.

Those orders include the drawing of an adverse inference, the prevention of the adducing of a fact into evidence, the allowing of a fact in issue to be presumed as true and the enabling of the court to strike out all or part of a defence or claim.

As such, its provisions go much further than the circumstances in which the Court of Appeal stated in *McCabe* could enable it to strike out all or parts of a defence, which were necessary to demonstrate that there had been ‘an intent to pervert the course of justice’.

### The Crimes (Document Destruction) Act (2006)

The *Crimes (Document Destruction) Act 2006* (Vic) (the Document Destruction Act) was passed by the Victorian Parliament on 4 April 2006 and commenced operation on 1 September 2006. Its purpose is to implement the second recommendation proposed by Professor Sallmann.

The Document Destruction Act creates a new criminal offence in Victoria in relation to the destruction of a document or other thing that is, or is reasonably likely to be, required as evidence in a legal proceeding.<sup>8</sup> The provisions of the Document Destruction Act will be inserted into Pt 1 of the *Crimes Act 1958* (Vic) (Crimes Act).

Section 254 of the Crimes Act provides that a person who:

- (a) knows that a document or other thing of any kind is, or is reasonably likely to be, required in evidence in a legal proceeding; and
- (b) either —
  - (i) destroys or conceals it or renders it illegible, undecipherable or incapable of identification; or
  - (ii) expressly, tacitly or impliedly authorises or permits another person to destroy or conceal it or render it illegible, undecipherable or incapable of identification and that other person does so; and
- (c) acts as described in paragraph (b) with the intention of preventing it from being used in evidence in a legal proceeding —

is guilty of an indictable offence and liable for imprisonment for up to five years and/or a fine of \$64,458.<sup>9</sup>

Section 255 of the Crimes Act also seeks to impose corporate criminal responsibility for offences committed by providing that:

- (1) For the purposes of a proceeding against a body corporate for an offence against section 254 —

- (a) relevant conduct engaged in by an associate or the body corporate must also be attributed to the body corporate; and
- (b) knowledge of an associate of the body corporate must also be attributed to the body corporate; and
- (c) intention —
  - (i) if the body corporate’s board of directors; or
  - (ii) an officer of the body corporate; or
  - (iii) of any associate of the body corporate if a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the formation of that intention — must also be attributed to the body corporate.<sup>10</sup>

If an officer of the body corporate is found to have contravened s 254, the body corporate must also be taken to have contravened that section and may be proceeded against and found guilty of an offence against that section. The only defence available for a body corporate is for the body corporate to prove that it exercised due diligence to prevent the contravention of the section by the officer.

However, even if an individual has not committed an offence, the body corporate can still be found to be liable under s 255 provided that the body corporate had the relevant *mens rea* to commit the offence. The *mens rea* is enshrined in the Act by the concept of ‘corporate culture’ which is discussed below.

The means by which authorisation or permission as required by s 254(1)(b)(ii) may be established include:

- proving that an officer of the body corporate gave authorisation or permission
- proving that the body corporate’s board of directors gave authorisation or permission or
- proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the relevant conduct being carried out.

The Document Destruction Act provides for defined terms, which include:

- ‘corporate culture’, defined to mean an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the ‘relevant conduct’ is carried out or the ‘relevant intention’ is formed<sup>11</sup>
- ‘relevant conduct’, defined to mean the destruction, concealment, or rendering illegible, undecipherable or incapable of identification, of a document or other thing of any kind<sup>12</sup>
- ‘relevant intention’, defined to mean the

intention of preventing a document or other thing of any kind from being used in evidence in a legal proceeding<sup>13</sup>.

The maximum penalty for corporations is a fine of \$322,290.<sup>14</sup>

It is unclear how the provisions of the Document Destruction Act will be applied to a factual situation.

While it is clear that 'intention' of the body corporate will be required to establish 'corporate culture' until it is tried and tested, it is uncertain as to what will be enough to demonstrate the 'intention' of a body corporate to prevent a document from being used in evidence in a legal proceeding. Indeed it is the first time in Victoria that the *mens rea* of a corporation has been incorporated into a criminal offence.

Equally, the issue becomes how does a body corporate ensure that it encourages and promotes a 'corporate culture' which does not prevent a document from being destroyed, which may be used in evidence in a legal proceeding which is yet to be commenced, sometime in the future, by a plaintiff who is yet to be identified?

It seems that the only positive way in which a body corporate can protect itself from contravening the Document Destruction Act is by having a document retention policy which specifically deals with categories of documents created by the organisation which may become discoverable in proceedings issued in the future. It is clear that an organisation that does not have a document retention policy may fall victim to an inability in the future to explain what may have otherwise been 'innocent' document destruction.

Similarly, a document retention policy alone will not be enough. It will be necessary to ensure that procedures are put in place by the body corporate to implement and adhere to its document retention policy.

### States other than Victoria

While the Acts only have application in Victoria, that does not mean they do not affect other states.

If a business operates in a state outside Victoria but also in Victoria, it will still be subject to the Acts. Warehousing of documents in other states will not be tolerated by the courts.

As discussed above, general provisions of the Crimes Act dealing with tampering and destruction of documents already apply in all states of Australia. Similarly, professional conduct rules regulate the conduct of lawyers advising in relation to document retention in New South Wales.

### Conclusion

The significance of the provisions of both Acts is that they are the first of their kind in Australia.

Both Acts commenced operation on 1 September 2006 and it will be interesting to see their application in litigation in which there has been document destruction and in particular how courts will deal with specific cases in light of the provisions of the Acts.

Neither Act has as yet been applied in the courts.

A document retention policy is one way to deal with the Acts; however, in order for a business to take advantage of the benefits of a policy, it needs to ensure that their staff understand the importance of the implementation of the policy and the consequences of non-compliance under the Acts.

The document retention policy must also in the event of actual or anticipated litigation or investigation be able to quickly and accurately identify relevant documents and prevent them from being destroyed. This requires an effective communication system and clear lines of authority and responsibility for suspension of the policy.

In addition, scrupulous records must be kept of what happens to documents, including those that are destroyed. The retention of these records will ensure that, should it be necessary, the identification of records destroyed can be easily ascertained so that such disclosures can be made by the company to the court should it become necessary to demonstrate that the company has complied with the requirements of the Acts.

Mary Nemeth can be contacted on (03) 9321 7810 or via email at [mnemeth@rigbycooke.com.au](mailto:mnemeth@rigbycooke.com.au).

### Notes

- 1 *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73, para 289
- 2 *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73, para 301
- 3 *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73, para 373
- 4 *Registrar of the Supreme Court, Equity Division v McPherson & Ors* [1980] 1 NSWLR 688
- 5 *British American Tobacco Australia Services Limited v Roxanne Joy Cowell (as representing the estate of Rolah Ann McCabe (deceased))* [2002] VSCA 197, para 175
- 6 P Sallman *Report on Document Destruction and Civil Litigation in Victoria*, 1 May 2004
- 7 Professional Conduct and Practice (Amendment) Rules 2003 — Rule 15
- 8 s 1 *Crimes (Document Destruction) Act 2006* (Vic)
- 9 s 3 *Crimes (Document Destruction) Act 2006* (Vic)
- 10 *ibid*
- 11 *ibid*
- 12 *ibid*
- 13 *ibid*
- 14 *ibid* ●