

# DOCUMENT RETENTION UPDATE

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## *Crimes (Document Destruction) Act* 2005 passed by Victorian Parliament

### Update on Document Retention: Procedures for In-House Counsel seminar

Further to our recent seminars conducted on this topic, the *Crimes (Document Destruction) Act* 2005 ("the **Act**") was passed by the Victorian Parliament on 4 April 2006.

It will commence operation on 1 September 2006 but its provisions will have **retrospective** application.

The Act is the first criminal legislation of its kind in Australia which seeks to deal with the destruction of documents prior to the commencement of litigation. It was introduced by the Victorian Government in response to the controversial case of *Roxanne Joy Cowell (representing the estate of Rolah Ann McCabe deceased v British American Tobacco Australia Services Limited* (the "**McCabe Case**").

At first instance in the McCabe Case, Justice Eames of the Supreme Court of Victoria struck out British American Tobacco's defence on the basis that it had destroyed documents prior to the commencement of litigation thereby denying Mrs McCabe a fair trial. On appeal, the Court of Appeal overturned the findings made by Justice Eames and stated that the destruction of documents before the commencement of litigation only attracts a sanction (other than the drawing of adverse inferences to the destroyer of the documents) if the destruction amounts to an attempt to pervert the course of justice.

An application by Mrs McCabe's estate to appeal to the High Court was unsuccessful.

Following that application, the Victorian Government commissioned a report prepared by Professor Peter Sallman QC (the "**Sallman Report**") into *Document Destruction and Civil Litigation in Victoria*. One of the recommendations of the Sallman Report was the introduction of criminal legislation, being the Act.

## *Crimes (Document Destruction) Act 2005 passed by Victorian Parliament* cont

The application of the Act is of particular importance to in-house counsel as it specifically deals with the conduct of officers of corporate entities.

The Act provides that a person who knows that a document is, or is reasonably likely to be, required in evidence in a legal proceeding and either destroys it, or conceals it, or authorises or permits someone else to do so with the intention of preventing it from being used in evidence in a legal proceeding, will be guilty of a criminal offence and liable for imprisonment.

As a result, the role of in-house counsel in ensuring that their organisations comply with their document retention obligations has become far more onerous.

The Act makes it clear that it will not be sufficient for organisations to merely have in place a document retention policy. Organisations must ensure that their "corporate culture" – defined as an attitude, policy, rule, course of conduct or practice existing within the organisation – is not one in which the destruction of documents is carried out or the intention to prevent a document from being used in evidence in a legal proceeding is formed. The only defence that is available is that the corporate entity exercised due diligence to prevent the contravention by the officer.

If you would like assistance in the preparation and implementation of a document retention policy, and also assistance in developing strategies to ensure that your organisations corporate culture complies with the Act, please contact Mary Nemeth, Partner, Rigby Cooke Lawyers on (tel) 03 9321 7810 or [mnemeth@rigbycooke.com.au](mailto:mnemeth@rigbycooke.com.au)

*Mary Nemeth acted for British American Tobacco in the McCabe Case on appeal to the Court of Appeal and the High Court of Australia.*



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