

## update

3 November 2006

## Friday Facts: Document Retention back on the agenda

*Document retention obligations are back on the agenda in Victoria following a call this week by the Victorian Attorney-General, Mr Rob Hulls for the Government Solicitor to examine findings made by Justice Eames in the McCabe case against BAT's former solicitors.*

The call comes after The Sunday Age report on 29 October 2006 of a draft memo allegedly prepared by Clayton Utz as part of an internal inquiry by the firm following the striking out of BAT's defence by Justice Eames in early 2002.

Justice Eames struck out BAT's defence after making a number of findings, including a finding that the primary purpose of BAT's document retention policy was to ensure the destruction of material which would be harmful to the defence of tobacco litigation. His Honour struck out the defence despite expressing the view that the problems which Mrs McCabe was faced with were not insurmountable and that he had no doubt that Mrs McCabe was not bereft of all weapons with which to prosecute her claim.

BAT appealed against the decision to the Court of Appeal who overturned all the findings of fact and the decision of Justice Eames. The Court of Appeal also confirmed that Clayton Utz had not acted inappropriately despite findings made by Justice Eames at first instance.

This further development comes following the commencement of the Crimes (Document Destruction) Act (Vic) and the Evidence (Document Unavailability) Act (Vic) on 1 September 2006.

Both Acts have application to documents destroyed prior to the commencement of the legislation. Therefore destruction of documents prior to the commencement of the legislation will be examined by the court and dealt with in accordance with the legislation, despite the fact that the legislation may not have been in operation at the time of the actual destruction. Both Acts were introduced following a report commissioned by the Attorney-General following the decision by the High Court of Australia not to allow special leave for Mrs McCabe's estate to appeal against the decision of the Court of Appeal.

The Crimes (Document Destruction) Act makes it a crime for an individual or a company to destroy documents prior to the commencement of litigation which are, or are reasonably likely to be, required in evidence in a legal proceeding. The sanctions for failing to comply with the provisions of the Act include for an individual being found guilty of an indictable criminal offence and imprisonment of up to five years and/or a fine of \$62,886. For a corporation, the entity can be found guilty of a criminal offence and fined up to \$314,430.

The Evidence (Document Unavailability) Act further strengthens 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 Act essentially expands and reinforces the powers which the Courts have to admit evidence under the Evidence Act (Vic). It further 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, the Act goes 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 that being, it was necessary to demonstrate that there had been "an intent to pervert the course of justice".

As a result, document retention obligations have become far more onerous.

Organisations not only need to ensure that they comply with their document retention obligations but that also need to ensure that their corporate culture 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.

It appears that the only way to ensure that is the case is by ensuring that organisations have document retention policies which comply with the law and more importantly are implemented in accordance with principles espoused in them.

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