

Are you aware of your new document retention obligations?

Both individuals and organisations should be aware of the new Victorian laws that create increased document retention obligations. As part of the Victorian government's response to the legal and policy implications of the *McCabe tobacco case*, new Victorian legislation came into effect on 1 September 2006 to:

- (a) make it a criminal offence to destroy documents with the intention of preventing those documents being used in evidence in a legal proceeding; and
- (b) give the courts broad powers in civil litigation to draw adverse inferences, strike out defences and reverse the evidential burden of proof, where a document is "unavailable".

18 September 2006

CRIMINAL LIABILITY GENERALLY

The Victorian *Crimes (Document Destruction) Act* 2006 makes it an offence if a person (including a body corporate) knows that a document (or other thing) is *reasonably likely* to be required in evidence in a legal proceeding, and either:

- (i) destroys, conceals or renders the document or thing illegible, undecipherable or incapable of identification; or
- (ii) authorises another person to do any of the things listed above,

where that person does so with the intention of preventing the document or thing from being used in evidence in a legal proceeding.

It is important to note that the Act applies in relation to legal proceedings that "*may be*" commenced as well as proceedings that are currently in progress.

An individual found guilty of this offence is liable for up to 5 years in prison or a monetary penalty of \$64,458 and a company can be liable for up to \$322,290.

CRIMINAL LIABILITY BY AN ORGANISATION

Conduct/knowledge/intention attributed to the organisation

Relevant conduct and knowledge by the following people is attributable to their organisation:

- (a) an employee or agent of the organisation, to the extent that person is acting within the actual or apparent scope of his or her employment or authority; or

- (b) an officer of the organisation (for example, a director, secretary or another person who makes or participates in making decisions that affect the business of the organisation, and in accordance with whose instructions or wishes the directors are accustomed to act) .

The intention of:

- (a) the board of directors;
- (b) an officer of the organisation; and
- (c) an employee or agent of the organisation *if a corporate culture existed that directed, encouraged, tolerated or led to the formation of that intention*, is also attributable to their organisation.

It is not necessary for the act of destruction/ authorisation and the relevant intention (to prevent that document being used in evidence in a legal proceeding) to be by the same person.

Automatic contravention by organisation if an officer contravenes

The Act also provides that if an *officer* of an organisation contravenes the document destruction provisions, the organisation will be taken to have contravened those sections and can be held liable, regardless of whether the officer is either prosecuted or found guilty. This is unless the organisation can establish the defence *that it exercised due diligence* to prevent the contravention by the officer.

Unfortunately the meaning of "due diligence" is not defined by the Act. Clearly, due diligence would not be exercised if the organisation did not give any guidance about which documents may be destroyed and



which documents must be retained. By contrast, an organisation with:

- a comprehensive document retention policy;
 - regular communication of the document retention policy to all its employees;
 - management enforcement and support of the document retention policy;
 - a comprehensive practical system for document retention (covering both electronic and physical documents) that included back-ups of electronic documents and regular audits of the system,
- would have a better chance of establishing a defence of due diligence.

What constitutes authorisation?

“Authorisation” by an organisation to destroy a document can be established by proving one of the following:

- (a) an officer of the organisation gave authorisation or permission (except if the organisation exercised *due diligence* to prevent the authorisation or permission);
- (b) the board of directors gave the authorisation or permission; or
- (c) a corporate culture existed within the organisation that directed, encouraged, tolerated or led to the relevant conduct being carried out.

This emphasises the importance of “corporate culture” within an organisation. Corporate culture means “an attitude, policy, rule, course of conduct or practice” in the organisation or the part of the organisation where the relevant conduct occurred. In addition to ensuring that the organisation has an appropriate corporate culture in relation to document retention, it is also important to ensure that particular departments within an organisation, for example:

- sales and marketing;
- research and development;
- legal;
- financial;
- compliance,

do not develop their own sub-cultures that condone, encourage or tolerate the destruction of relevant documents.

It is also important to ensure that officers of the organisation understand their responsibilities regarding document retention and the importance of supporting the organisation’s document retention policy when communicating with employees. This is because the Act provides that it is relevant to corporate culture whether:

- (a) an officer of the organisation has given authority to commit an offence of document destruction (or a similar offence) in the past; and
- (b) whether the person who destroyed the document or had the relevant intention to prevent that document being used in evidence, had a reasonable belief or expectation that an officer of the organisation would have authorised or permitted the relevant conduct with the relevant intention.

ORDERS IN CIVIL PROCEEDINGS WHERE DOCUMENTS ARE “UNAVAILABLE”

The recent Victorian *Evidence (Document Unavailability) Act 2006* also gives the courts broad powers to make rulings or orders in civil proceedings where a document is “unavailable”, meaning:

- (a) the document is or was in the possession custody or power of a party; and
- (b) the document has been destroyed, disposed of, lost concealed or rendered illegible, undecipherable or incapable of identification (whether before or after the commencement of the proceeding).

If it appears to the court that the unavailability of a document is likely to cause unfairness to a party to that proceeding, the court may make any ruling or order necessary to ensure fairness to all parties to the proceeding, including:

- (a) drawing an adverse inference from the unavailability of the document;
- (b) presuming a fact in issue between the parties to be true in the absence of evidence to the contrary;
- (c) not allowing certain evidence to be adduced;
- (d) striking out all or part of a defence or statement of claim; or
- (e) reversing the evidential burden of proof in relation to a fact in issue.



When making such a ruling or order, the court should have regard to:

- (a) the circumstances in which the document became unavailable;
- (b) the impact of the unavailability of the document on the proceeding; and
- (c) any other matters the court considers relevant.

RECOMMENDATIONS

To reduce the likelihood of criminal liability for destroying documents and to avoid adverse orders being made in civil proceedings if a document is “unavailable”, we recommend that organisations:

- develop a comprehensive document retention policy, which provides for:
 - the retention of all documents that are reasonably likely to be required in evidence in legal proceedings, (including proceedings that may be commenced in the future);
 - a practical system for document retention (covering both physical and electronic documents), preferably one that is centrally managed; and
 - regular audits of the document retention system;
- hold regular internal seminars to communicate the organisation’s document retention policy to its officers, agents and employees;
- ensure that the organisation’s officers and management understand their obligations under the document retention policy and the importance of enforcing and supporting that policy when communicating with other employees; and
- ensure that each of their internal sections or departments, for example marketing, compliance, research and development, legal, etc, maintains a document retention culture that is consistent with the organisation’s document retention policy.

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FURTHER INFORMATION

For further information or advice on the topics covered in this article or other intellectual property law matters please contact:

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