



Public Record Office Victoria
Advice to Victorian Agencies
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Advice 18

Crimes (Document Destruction) Act 2006: Implications for government recordkeeping

This information sheet provides advice to Victorian government agencies about the recordkeeping implications of the Crimes (Document Destruction) Act 2006 and the supporting Evidence (Document Unavailability) Act 2006.

A handwritten signature in blue ink, appearing to read 'Justine Heazlewood'.

Justine Heazlewood
Director and Keeper of Public Records
Public Record Office Victoria

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Public Record Office Victoria: Jurisdiction and Authority

This Advice is issued by the Keeper of Public Records, the Director of Public Record Office Victoria (PROV). It applies to Public Records as defined by the *Public Records Act 1973*.

PROV is the State of Victoria's archival authority, established by the *Public Records Act 1973*. PROV establishes [Standards](#) for managing public records, and advises and assists agencies in the application of those standards.

This Advice must be read in the context of the general requirements laid out in these Standards and [any associated other Advice documentation](#) issued by the Keeper.

This Advice is not designed to be case-specific, and individual agencies should, if warranted, seek independent legal advice before taking action on any particular area of concern.

Public Officers are obliged to adhere to the provisions of the *Public Records Act 1973*, especially Section 13:

“The officer in charge of a public office –

- (a) shall cause to be made and kept full and accurate records of the business of the office;
- (b) shall be responsible, with the advice and assistance of the Keeper of Public Records, for the carrying out within the office of a programme of records management in accordance with the standards established under section 12 by the Keeper of Public Records; and
- (c) shall take all action necessary for the recovery of any public records unlawfully removed from the office.”

Executive Summary

The *Crimes (Document Destruction) Act 2006* and the associated *Evidence (Document Unavailability) Act 2006* create formal and specific penalties for the destruction of documents that are known to be reasonably likely to be required in evidence, where the destruction is intended to prevent the documents from coming into court.

Victorian Government agencies, as with other organisations, must be aware of the extent and implications of the legislation. All agencies will be most likely to avoid liability under the Act if:

1. they create effective, comprehensive records management systems and policies, supported by a corporate culture that does not countenance the illegal destruction of records, and
2. they provide training for all staff involved in records disposal. Agencies in particularly litigious areas of business may need to exercise even greater caution in destroying records related to activities that may potentially give rise to lawsuits.

Agencies must be aware that while the Act does **not** criminalise normal records disposal (including disposal formally authorised under a relevant Public Record Office Victoria Retention & Disposal Authority, or RDA), it will **not** be possible to use an RDA to legalise or justify the destruction of documents or records where that destruction meets all the criteria for the offence.

Recommendations

PROV recommends that:

1. All Victorian Government departments and agencies familiarise themselves with the *Crimes (Document Destruction) Act 2006* (hereinafter referred to as the Act) and its effects.
2. All departments and agencies build an explicit prohibition against the criminal destruction highlighted in the Act into their records management, information management, risk management, and other relevant policies and procedures.
3. All departments and agencies include coverage of the Act's effects in relevant staff training, which must be given to any employee or contractor who is in a position to destroy documents and records.
4. All departments and agencies refrain from destroying records or documents that they know are reasonably likely to be needed in evidence in future litigation, regardless of whether or not the destruction would otherwise be in accordance with a PROV Retention & Disposal Authority (RDA), or any other relevant standard authorised by PROV.
5. All departments and agencies refrain from destroying records or documents that have been requested in legal discovery in a concluded lawsuit, if the nature of the lawsuit is such that further actions may follow (eg. product liability, mass personal injury).
6. The implementers of RDA sentences (i.e. the people actually performing records disposal within an agency) be made aware that they cannot simply initiate a destruction based on a sentence contained in an RDA, if there is a known possibility of litigation related to the subject of the records.
7. Departments and agencies in highly litigious areas of business refrain from destroying records or documents relating to incidents, activities or situations where litigation may occur, even if no cases are yet commenced.
8. A comprehensive analysis should be undertaken of possible gaps existing in records management processes within and the nature of documents held by the organisation. Following this analysis, a risk management decision must be made on the retention of documents to avoid breaching provisions of the Act, and subsequent litigation.

Each of these recommendations are expanded on elsewhere in this Advice.

Scope

This Advice covers:

- the content, background and purpose of the *Crimes (Document Destruction) Act 2006*;
- the implications of the Act for public sector recordkeeping;
- the relationship between the Act and the *Public Records Act 1973*, Public Record Office Victoria (PROV) standards, including relevant PROV Retention & Disposal Authorities;
- the corresponding changes to the *Evidence Act 1958* which support the Act; these changes were brought about by the *Evidence (Document Unavailability) Act 2006*.

This Advice does not cover:

- any other legislative change to Victorian public or private sector recordkeeping requirements, either mooted or actual
- any specific recordkeeping situations which may give rise to liability under the Act. Agencies are advised to seek independent legal advice if they have any particular concerns about the application of the Act to their situation.

Summary of Principles and Objectives

The *Crimes (Document Destruction) Act 2006* was created as an amendment to the *Crimes Act 1958*. The Document Destruction provisions insert a new division 5 into part 1 of the *Crimes Act 1958*.

The purpose of the Act is to create a new offence relating to the destruction of a document or other object that is reasonably likely to be required in evidence in a legal proceeding. It is important to note that the Act creates this offence in situations where no litigation is actually commenced (it has always been illegal to destroy evidence once a case has actually been launched).

This covers circumstances where an individual or organisation destroys documents that may at some *future* time be needed in evidence, and where this need can and has been anticipated.

Crimes (Document Destruction) Act 2006 in context

Public Records Act 1973 and PROV standards

The *Crimes (Document Destruction) Act 2006* explicitly states that it is not the intention of the legislation to criminalise lawful and appropriate destruction of records and documents. In particular, the explanatory notes to the Act state that destruction properly authorised by a standard issued under the *Public Records Act 1973* will not attract penalty:

The offence will apply where all of the elements of the offence can be proven by the prosecution. The offence will not apply to lawful forms of document destruction that do not involve the type of criminal misconduct covered by the offence.

For example, under the *Public Records Act 1973*, records can be destroyed in accordance with standards issued by the Keeper of Public Records. Record destruction practices in accordance with these standards that do not involve the criminal conduct targeted by the offence will be unaffected.

However, agencies and individuals will **not** be able to simply use a PROV-issued Retention & Disposal Authority (RDA) as a “shield” if the destruction of the records meets all four of the key criteria for proving the offence. If an agency knows that particular records are reasonably likely to be required in evidence, and proceeds to destroy those records in order to prevent them from being used in evidence, it will not be a defence for the agency to point to a PROV RDA, or standard which authorises the destruction of a particular class of records at that time.

In effect, this is an extension of existing principles in PROV RDAs and standards; these already state that agencies must not destroy records that are required in litigation already commenced, whether they fall into a disposal class or not. This principle can now be extended to records that agencies know are reasonably likely to be needed in future cases, not just cases currently underway.

Evidence law

The *Evidence (Document Unavailability) Act 2006* was introduced into the Victorian parliament in May 2006 to support the changes to the criminal law embodied in the *Crimes (Document Destruction) Act 2006* with corresponding changes to the *Evidence Act 1958* and *Victorian Civil and Administrative Tribunal Act 1998*. The purpose of this Act was described in the second reading speech as follows:

...to enable the courts and the Victorian Civil and Administrative Tribunal to intervene in civil proceedings where relevant documents are unavailable to ensure a fair outcome between parties in civil proceeding.¹

The *Crimes (Document Destruction) Act 2006* picks up the themes raised in the Victorian case of *McCabe v British American Tobacco (BAT)*. The plaintiff, Rolah McCabe, was suing the tobacco company in a product liability action, relating to her advanced lung cancer, most likely to have been caused by smoking cigarettes.

¹ Victorian Hansard, May 2006 p1470 – Evidence (Document Unavailability) Bill 2006 – Second Reading Speech

BAT, the defendant company, was shown to have destroyed a number of documents that might have tended to show a degree of awareness of the carcinogenic effects of cigarette smoking, along with other matters that might have contributed to their liability in health-related lawsuits. These documents, however, had been destroyed well before Ms McCabe launched her action, following the conclusion of other similar lawsuits in earlier years.

In effect, the *Evidence (Document Unavailability) Act 2006* formalises the judicial discretion exercised by Justice Eames in the original McCabe judgement, giving the court a number of options to allow discretion on behalf of plaintiffs, who are victims of organisations' wilful destruction of evidence.

Thus, the two pieces of legislation work together. The *Crimes (Document Destruction) Act 2006* provides a criminal penalty for deliberate, knowing destruction of evidence; the *Evidence (Document Unavailability) Act 2006* provides a range of practical methods for redressing the unjust effect of the document's destruction in the particular proceeding in question.

The *Evidence (Document Unavailability) Act 2006* also reinforces the existing principle of law that legal discovery should not be impeded by poor document organisation making things hard to find. Documents should not become unavailable by virtue of being "lost in the system".

The *Evidence (Document Unavailability) Act 2006* reinforces the concept that it is every organisation's responsibility to have document management systems sufficient to the task of locating and providing evidence in litigation, and that inadequate document retention policies or document classification will not excuse the unavailability of documents in court.

Other legislation and regulation

The *Crimes (Document Destruction) Act 2006* also has implications for a number of other Acts operating on Victorian Government agencies.

In the case of most Acts with recordkeeping requirements, the Act supports and reinforces the key recordkeeping principles underlying other legislation. For instance, the *Electronic Transactions Act 2000* requires that agencies which keep records electronically retain them "for the period for which they are required".

The penalties under the *Crimes (Document Destruction) Act 2006* and related *Evidence (Document Unavailability) Act 2006* serve as a strong added incentive to ensure that when the purpose for which the records may be required is one relating to litigation, the *Electronic Transactions Act 2000* objective will be met and the records retained. Similarly, the *Crimes (Document Destruction) Act 2006* may serve to ensure the availability of documents requested in Freedom of Information enquiries, and to safeguard records that may be used by whistleblowers to provide proof of the issues about which they speak.

In terms of compliance with information privacy legislation (the *Information Privacy Act 2000* and the *Health Records Act 2001*), the Act does not pose any obvious conflict. Although Information Privacy Principle 4.2 requires that organisations take steps to destroy or permanently de-identify personal data when it is no longer needed "for any purpose", it is clear that with the passage of the Act, knowledge of looming litigation would satisfy the requirement for a "purpose". Organisations would not be in breach of privacy requirements for retaining records with personal data if they know the records are reasonably likely to be required in future evidence, even if the primary purpose for which the data was collected has ended.

The *Crimes (Document Destruction) Act 2006* promotes and supports all requirements for thorough and transparent recordkeeping. The Act in no way renders compliance with any existing legislation more difficult or complicated; it simply adds a new incentive to comply and a new penalty for a particular kind of non-compliance, that is deliberate destruction of documents.

Implications of *Crimes (Document Destruction) Act 2006* for public sector recordkeeping

General principles for all agencies

All public sector employees, and all government departments and agencies, must be aware of the effect of the *Crimes (Document Destruction) Act 2006*, and to actively manage recordkeeping processes, especially the destruction of records, to ensure that they are not in breach of the Act.

Essentially, this means agencies need to:

- understand that documents **cannot** be lawfully destroyed in order to prevent their use in some future anticipated legal proceeding;
- educate all their employees and agents in that principle, and ensure that it is documented, and built into all relevant policies, procedures and training programs;
- apply document destruction to records appropriately after considering the nature of the records and any known potential litigation. This means not simply applying RDA sentences automatically without reference to particular circumstances, or worse yet, using RDA sentences as a justification for destroying records that are known to be reasonably likely to be needed in evidence.

Agencies which are bodies corporate could be charged with an offence under the Act, if contractors working on their behalf destroy documents needed in evidence. Agencies or departments which are not bodies corporate cannot be charged under the Act, but can, of course, incur government-wide financial cost if the offence leads to them losing a case with major damages involved.

The assumption in the legislation is that bodies corporate **are** liable for the crimes of the employees, unless they demonstrate that they exercised “due diligence” to prevent the offence. This means that:

- the body corporate did not explicitly or implicitly authorise, direct or permit the employee to destroy the documents
- a corporate culture existed which made it clear that the destruction of documents that might be required in evidence was **not** allowed.

To prove the offence, it is necessary to prove that the destruction was done with the intention of preventing the documents from coming into evidence. This is a relatively high standard of proof.

However, it is PROV's view that agencies would be best advised to adopt a cautious approach to this matter and, putting intention aside, err on the side of **not** destroying documents that are reasonably likely to be needed in future litigation. Whether or not the destruction is done with ill intention, the **fact** of destroying documents that are known to be reasonably likely to be called into litigation is a powerfully persuasive factor towards proving the offence, and intention can be inferred from the act of destruction.

Agencies whose core business involves a high risk of litigation

Agencies whose core activities fall in highly litigious areas, especially agencies who have previously been involved in lawsuits (in any capacity) are advised to exercise caution in destroying records. It is recommended that:

- agencies refrain from destroying records or documents that have been requested in legal discovery in a concluded lawsuit if the nature of the lawsuit is such that further actions may follow (eg. product liability, mass personal injury);
- agencies refrain from destroying records or documents relating to incidents, activities or situations where litigation may occur, even if no cases are yet commenced;
- agencies seek independent legal advice if they have any concerns about destroying particular classes of records, even if that destruction would otherwise comply with a properly-issued RDA.

Contractors working on behalf of agencies

Whether or not an agency would be liable for the activities of a contractor who destroys records is likely to depend on whether or not the agency is a body corporate. The definitions section of the Act refers to "associates of the body corporate" in the following terms:

- a) an employee or agent of the body corporate to the extent that he or she is acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority; or
- b) an officer of the body corporate.

An "associate" would cover both employees and contractors, whether working on the agency's premises or the contractor's own premises, provided the individuals in question are "acting within the actual or apparent scope" of their job. **However**, this would only apply if the agency was a body corporate. Agencies which are bodies corporate could be charged with an offence under the *Crimes (Document Destruction) Act 2006* if contractors working on their behalf commit a crime in destroying documents needed in evidence. Agencies or departments which are not bodies corporate cannot be charged under the Act.

It is important to note that this distinction only applies in situations where the agency and its staff are **unaware** of the illegal destruction and have **in no way** authorised, ordered or permitted it (i.e. where the contractor acts purely on their own initiative). If agency staff have been complicit in the destruction, they, of course, can be and will be charged under the Act, even though it is the contractor who has actually performed the destruction.

Contractors themselves will attract personal and corporate liability under the Act if they knowingly and intentionally destroy documents that are reasonably likely to be needed in evidence. A contractor is an "individual" and so can be charged under the Act.

Managing the expectations imposed by the *Crimes (Document Destruction) Act 2006*

Policies, procedures and training

Government departments and agencies are most likely to avoid any liability under the Act, and fulfil their legal recordkeeping obligations, if they have:

- A records management policy with supporting processes and procedures based on legislation, regulation and standards.
- A records management system which enables the effective classification, safe storage and ready retrievability of records.
- A training program for agency staff that highlights the value of creating, capturing and managing full and accurate records.
- A corporate culture that explicitly acknowledges the impact of unlawful document destruction and does not in any way approve or countenance it.
- An approach to records destruction which requires the implementer of a Retention & Disposal Authority to consider the specific context of the records and assess whether they are likely to be needed in evidence, and use that knowledge in determining whether to activate the disposal sentence

These factors will help show that the agency both understands and values good recordkeeping and intends to behave appropriately, in its management of documents that might be required in evidence.

With these elements in place, it will be less likely that individuals will engage in illegal document destruction. Even if they do, infractions made by individual employees or contractors will be more easily able to be disassociated from the organisation's overall behaviour and focus.

Risk management for agencies

In order to escape corporate liability under the Act, a body corporate must prove that it exercised due diligence to prevent its agents (employees or contractors) from committing the offences. What constitutes "due diligence" will vary from circumstance to circumstance, but it is likely that agencies which invest in the policies, procedures and training outlined above (8.1) will be judged to have demonstrated due diligence.

It is important that agencies consider their risk profile in determining what level of action is required to show due diligence towards preventing unlawful document destruction. In an organisation with a history of litigation and/or a history of ad hoc or reactive document destruction, more effort must go into re-educating staff and effecting behavioural change, and reorganising systems to ensure that breaches of the Act do not occur.

Organisations with sound pre-existing document and records management systems, policy and training, and a corporate culture that prevents destruction of documents for the purpose of minimising liability, may have very little work to do to ensure general compliance with the Act.

Creating and maintaining a corporate culture that is defensible

A defensible corporate culture could be demonstrated by:

- Documented Records Management procedures and policies in place
- Evidence supporting implementation of policies and procedures
- Evidence of corporate direction supporting Records Management (both formally and informally, and supported by eyewitness testimony of present and past workers)
- Evidence of training/promotion of good Records Management practice. For example, the Department of Treasury and Finance introduced an initiative that supplied each user with a Records Management prompter consisting of a desktop reference guide, containing a range of Records Management information that users would need to know, in support of their EDRMS initiative

Effectively, the court will be looking for proper recordkeeping that can be proved over a number of years. If an organisation has a history of poor recordkeeping, inappropriate destruction and general ignorance of their responsibilities then it is may be more likely to be found in breach of the Act and penalised. If an organisation had systems in place and this was a found to be a one-off mistake, then it will be more likely that the organisation can show that its corporate culture of recordkeeping was sound.

Conclusion

The *Crimes (Document Destruction) Act 2006* and supporting *Evidence (Document Unavailability) Act 2006* represent significant new barriers to the destruction of records and documents that may be required in evidence. Any organisation, whether prone to frequent litigation or not, will best avoid liability under these Acts if:

- a full and comprehensive records management regime is followed
- employees and agents of the organisation are educated about their recordkeeping responsibilities under these and other Acts
- the corporate culture of the organisation is demonstrably disapproving of the idea of destroying records in order to keep them out of litigation
- a very conservative and cautious approach is taken to the destruction of records in areas which are known to be potentially litigious
- a consideration of possible litigation is built into the disposal process as a formal step to be undertaken before enacting any disposal authority or sentence.

Appendix 1:

Crimes (Document Destruction) Act 2006: Background and Core Principles

What is the content of this legislation?

The *Crimes (Document Destruction) Act 2006* was created as an amendment to Victoria's *Crimes Act 1958*. The Document Destruction provisions insert a new division 5 into part 1 of the Crimes Act.

The purpose of the *Crimes (Document Destruction) Act 2006* is to create a new offence relating to the destruction of a document or other object that is reasonably likely to be required in evidence in a legal proceeding. It is important to note that the Act creates this offence in situations where no litigation is actually commenced (it has always been illegal to destroy evidence once a case has actually been launched). This covers circumstances where an individual or organisation destroys documents that may at some *future* time be needed in evidence, and where this need can be and has been anticipated.

The offence reads as follows:

S 254

A person who—

- 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
- either—
 - destroys or conceals it or renders it illegible, undecipherable or incapable of identification; or
 - 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
- acts as described above with the intention of preventing it from being used in evidence in a legal proceeding—

is guilty of an indictable offence.

Why was the Act passed?

The *Crimes (Document Destruction) Act 2006* picks up the themes raised in the Victorian case of *McCabe v British American Tobacco (BAT)*. The plaintiff, Rolah McCabe, was suing the tobacco company in a product liability action, relating to her advanced lung cancer, most likely to have been caused by smoking cigarettes.

BAT, the defendant company, was shown to have destroyed a number of documents that might have tended to show a degree of awareness of the carcinogenic effects of cigarette smoking, along with other matters that might have contributed to their liability in health-related lawsuits. These documents, however, had been destroyed well before Ms McCabe launched her action, following the conclusion of other similar lawsuits in earlier years.

The destruction was therefore not a matter of destroying evidence required in an action already underway, and thus was not covered by the existing criminal sanction against spoliation of evidence or contempt of court. Furthermore, the documents were destroyed under the terms of a document retention and disposal policy authorised by BAT's lawyers, seeming to place the company's actions within the bounds of normal and reasonable business recordkeeping practice.

Ms McCabe's lawyers were able to successfully argue, despite these facts, that BAT's destruction of documents that would have aided the plaintiff's case was unfair and malicious, and had denied Ms McCabe (and any future plaintiffs) a fair hearing of their case. The judge in the case, Justice Eames, agreed, and ruled that BAT's conduct had rendered it liable to an award of damages in favour of Ms McCabe.

While this ruling was later overturned on appeal, the Victorian government committed to ensuring that such behaviour would, in future, be specifically penalised. This amendment is the result of that commitment.

What sort of behaviour is the Act designed to criminalise?

The *Crimes (Document Destruction) Act 2006* criminalises the deliberate destruction of documents or other items, that an individual or corporation knows are reasonably likely to be required, in future legal actions.

In other words, it aims to penalise:

- those who use a gap between court cases to destroy evidence that has been already identified as relevant to that particular kind of lawsuit, and is therefore very likely to be requested in legal discovery in future cases of the same nature
- those who may not have been party to lawsuits in the past, but have reason to believe they will be in the future.

As shown in the McCabe case, the tobacco industry is one which meets the first kind of scenario – they have been sued in the past, and it is extremely likely that they will be sued in the future, for the same kinds of things.

An example of the second scenario might be an organisation that becomes aware that a particular action or area of business has resulted in harm to people, raising the possibility of future litigation. Organisations that worked with asbestos may have been in this position at one time, before asbestosis lawsuits commenced; a hospital with a number of neonatal birth injuries related to the same obstetrician may be another example.

The behaviour targeted in the Act is best characterised as unfair, unconscionable behaviour which is intended to make it less likely that legitimate plaintiffs can succeed in their actions. Plaintiffs have a right to access to all relevant material that could serve as evidence in their case. Destroying that evidence unfairly reduces their opportunity for a fair trial, and it is this injustice that the Act aims to remedy.

Proving the offence

To convict of this offence, the prosecution must prove all the elements of the offence beyond **reasonable doubt**. Thus, it must be proved that:

- the destruction or concealment of the document/s actually took place; *and*
- the destruction or concealment was performed, ordered, or authorised by the defendant in the case; *and*
- the defendant knew that there was a reasonable likelihood that the document would be required in legal evidence at some later stage; *and*
- the defendant's actions were intended to prevent the use of the document in evidence.

All four of these elements would need to be demonstrated beyond reasonable doubt in order to convict for this offence.

Appendix 2:

Core Terms used in the *Crimes (Document Destruction) Act 2006*

“Know”: The *Crimes (Document Destruction) Act 2006* requires that the person or corporation who performs the destruction “knows” that the document/s are reasonably likely to be needed in evidence in some future legal proceeding.

The word “know”, in this context, should be considered to mean what the person **in fact** knows, not what they should know or could know or might know. A person can know something by assuming it or making an educated guess; it is not necessary that they have been actually told by a third party.

However, because their knowledge must be real, the prosecution cannot argue that a person “should have known” by virtue of their position in a company, or general intellect; the prosecution needs to convince the jury or judge that the person did **in fact** know.

There are several ways the prosecution might establish this knowledge, including:

- testimony from the person in question (they may admit to knowledge)
- testimony from other witnesses
- documentary evidence showing a knowledge on the part of the person

Whatever means they use, it is important to note that what the prosecution is required to prove is knowledge *in fact*, not supposed or possible knowledge.

“Reasonably likely”: The person or corporation doing the destruction must “know” that the documents they are destroying are “reasonably likely” to be required in evidence. “Reasonably likely”, in this context, is not specifically defined in the Act’s definition section, and so must be given its ordinary everyday meaning.

In effect, to establish this “reasonable likelihood”, all the circumstances of the organisation’s business, its litigation history, its industrial context etc., may have to be considered. It is again a question of fact – in *this* particular set of circumstances, would the average person consider that it is reasonably likely that the documents will be needed in evidence?

The prosecution would therefore have to establish, by reference to this web of circumstances:

1. that it was reasonably likely that the documents would be required in evidence,
and
2. that the person doing or authorising the destruction knew that this was the case.

Reasonable likelihood by itself will not suffice if no knowledge is established. There may well be a scenario where a person does destroy documents that are reasonably likely to be needed in evidence, but does not know that this is the case, and such a person could not be liable under the Act.

“Intended”: An important element of the offence is provided in the fourth part of the description, where it is stated that the person performing the destruction must **intend** that the destruction would have the effect of preventing relevant evidence from coming into court.

Intention in this instance would require that the prosecution show that the person in fact **meant** to keep the document/s out of court (facts being established in the same ways as indicated for “know” and “reasonably likely”). It may or may not be possible to construe intention if the person’s actions can be shown to be extremely reckless (in other words, the person, knowing that the documents were reasonably likely to be needed in evidence, simply did not care and went ahead and destroyed them anyway).

“Corporate culture”: Individuals can be prosecuted under the *Crimes (Document Destruction) Act 2006*, but so can organisations, based on the actions of their employees or agents. In order to escape vicarious liability for the actions of its employees, an organisation can show that it had a corporate culture which neither encouraged, authorised nor permitted the illegal destruction of documents. Corporate culture is defined in s 253 as

“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 formed”

Appendix 3:

Penalties under the *Crimes (Document Destruction) Act 2006*

The *Crimes (Document Destruction) Act 2006* specifies penalties for the offence, for both individuals and for corporate entities. For individuals, the penalty is a maximum of 5 years in prison or a fine of 600 penalty units (currently \$62,886). For corporations, it is a maximum fine of 3,000 penalty units (currently \$314,430).

There is another significant penalty which can be applied in respect of this offence. A judge may instruct the jury that the destruction of the evidence should give rise to an adverse inference regarding liability. More seriously, the judge might order that the defence be struck out (ignored) by the jury, so the plaintiff wins by default.

Thus, corporations and individuals may, by destroying documents, make it much more likely that they will lose the relevant case, and be subject to considerably greater financial penalties in terms of awards of damages than those nominated under the Act.

This occurred in the McCabe case, where Justice Eames wrote:

In my opinion, the process of discovery in this case was subverted ... with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful. It is not a strategy which the court should countenance, and it is not an outcome which, in the circumstances of this case, can now be cured so as to permit the trial to proceed on the question of liability. In my opinion, the only appropriate order is that the defence should be struck out and judgment be entered for the plaintiff, with damages to be assessed.

Appendix 4:

Further Reading

McCabe case

Tobacco Control Resource Centre, *Document Destruction Practices Obliterate Tobacco Company Defenses in Explosive Australian Decision*, April 2002
<http://www.tobacco.neu.edu/litigation/cases/Backgrounders/mccabe.htm>

J Liberman, "The shredding of BAT's defence: McCabe v British American Tobacco Australia", *Tobacco Control* 2002;11:271-274
<http://tc.bmjournals.com/cgi/content/full/11/3/271>

William Birnbauer, "The insider and the ghost of Rolah McCabe", *The Age*, 19 July 2003
<http://www.theage.com.au/articles/2003/07/18/1058035197454.html>

Victorian Hansard – Evidence (Document Unavailability) Bill – Second Reading Speech, May 2006

Crimes (Document Destruction) Act 2006:

<http://www.dms.dpc.vic.gov.au>

Evidence (Document Unavailability) Act 2006:

<http://www.dms.dpc.vic.gov.au>

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