

DESTRUCTION OF DOCUMENTS: A NEW CRIMINAL OFFENCE

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In brief

- ✍ Legislation creating a new criminal offence in relation to the destruction of documents has been introduced into Victorian Parliament.
- ✍ Where documents are reasonably likely to be required in legal proceedings, a person performing the relevant act of destruction who knows this and intends to prevent the document from being used, could be prosecuted for document destruction.
- ✍ Both individuals and companies can be prosecuted.
- ✍ The Bill introduces a "corporate culture" test for assessing a person's intention to prevent a document from being used as evidence, and offers a limited defence of "due diligence".
- ✍ The Bill highlights the need for companies to develop centrally managed and audited document retention systems while regularly communicating document retention protocols to their employees, agents and officers.

The *Crimes (Document Destruction) Bill 2005 (Vic)* (the Bill) proposes to create a new criminal offence in relation to the destruction of documents likely to be required in legal proceedings. This article discusses the elements of the offence and how criminal responsibility is to be attributed to companies and their officers. It is recommended that companies develop centrally managed and audited document retention systems and regularly communicate document retention protocols to employees, agents and officers.

The proposed Crimes (Document Destruction) Bill 2005, was passed by the Legislative Assembly of the Victorian Parliament on 28 February 2006 and debate on the Bill is scheduled to resume in the Legislative Council on 28 March 2006. The Bill will come into effect no later than 1 September if passed by the Legislative Council.

The stated purpose of the Bill is to amend the *Crimes Act 1958 (Vic)* (Crimes Act) to "create a new criminal offence 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." (Document Destruction)

The introduction of the Bill follows the decision of the Victorian Court of Appeal in *British American Tobacco Australia Services Ltd v Cowell (as Representing the Estate of Rolah Ann McCabe, Deceased)* [2002] VSCA 197, and the subsequent report by Professor Peter Sallmann on "Document Destruction and Civil Litigation in Victoria".

The Bill

Formalities

- ✍ Both individuals and companies can be prosecuted for the offence of Document Destruction.
- ✍ The offence must be proved by the prosecution beyond reasonable doubt.
- ✍ A person found guilty of an offence is liable to be sentenced to a maximum of 5 years in prison or a fine of 600 penalty units (currently \$62,886). The maximum fine that may be imposed on a company is 3000 penalty units (\$314,430).

Elements of the offence

In order to prove the offence of Document Destruction, the prosecution must establish that the accused person or body corporate:

- ✍ **knew** that a document was, or was reasonably likely to be, required in evidence in a current or future legal proceeding;

and then

- ✍ **destroyed** the document, or **expressly, tacitly or impliedly authorised or permitted the destruction** of the document by another person. (where a document is **concealed** or **rendered illegible**, indecipherable or incapable of recognition, the conduct is also caught by the legislation) (the "relevant conduct");
- ✍ the relevant conduct must be with the **intention** of preventing the document from being used in evidence in a legal proceeding.

The ways in which authorisation or permission to destroy a document may be proven include, but are not limited to, proving that a corporate culture existed within the company that directed, encouraged, tolerated or led to the relevant conduct being carried out.

Contraventions by an officer of the body corporate

If an officer breaches the Document Destruction provisions of the *Crimes Act*, the company is also taken to have breached those sections and may be prosecuted. The liability of the company does not depend on an officer being prosecuted.

In these circumstances, the company may raise the defence that it exercised “due diligence” to prevent the officer from breaching the Document Destruction provision.

Corporate culture

The Bill provides that when determining whether a corporate culture existed that led to the destruction of the document, a Court is to consider whether:

- ✍ authority to commit the offence of Document Destruction or an offence of a similar character had been given by an officer of the body corporate; and
- ✍ the employee or agent who sought to prevent the document from being used as evidence, believed on reasonable grounds, or entertained a reasonable expectation, that an officer of the company would have authorised or permitted the act of destruction being carried out with that intention.

Further legislative reform proposed

The Victorian Government also proposes to introduce legislation in relation to civil proceedings in Victorian Courts. The proposed legislation:

- ✍ would give courts power to intervene in proceedings affected by the unavailability of relevant documents, including when documents have been destroyed or removed in advance of legal proceedings; and
- ✍ will focus on whether the unavailability of relevant documents has made a fair trial impossible.

It is expected that the further legislation will be introduced into Parliament in Autumn 2006. The Government intends that the further legislation dealing with civil proceedings will commence at the same time as the Bill.

Recommended action for companies

It is recommended that companies:

- ✍ develop centrally managed, regularly audited, document retention systems; and
- ✍ regularly communicate their document retention protocols to their employees, agents and officers.

This would assist in ensuring that the reason for destroying documents was to comply with the company's document retention policy and not to prevent the document from being used in evidence. It would also assist the company in establishing a due diligence defence if required.

Companies should, however, bear in mind the "corporate culture" provisions when developing their document retention protocols. If, for reasons of "risk management", for example, companies err on the side of destroying documents sooner rather than later, or if the policy is to destroy any controversial documents, this could be construed as a "corporate culture" which seeks to destroy documents which may expose the company to liability. The Bill is silent as to the level of "knowledge" the accused must have that the document "is, or is reasonably likely to be, required in evidence."

Therefore a policy of destroying documents broadly because they may expose the company to liability could give rise to an offence.

Companies should also bear in mind that it will be increasingly difficult to attempt to justify the destruction of documents purely for reasons of space and storage costs given the widespread availability of technology which enables the electronic storage of scanned copies of documents.

A person or company that destroys a copy of a document that may be relevant in legal proceedings with the intention of preventing its use at trial, could be prosecuted even though another copy of the document or the original itself is ultimately available at trial. This reflects the Bill's focus on the state of mind of the person destroying the documents, rather than on the impact of the document destruction on future legal proceedings.