

CRIMES (DOCUMENT DESTRUCTION) ACT 2006 AND ITS IMPLICATIONS FOR THE UNIVERSITY

Explanation of the Act

The Crimes (Document Destruction) Act 2006 ('the Act') came into effect in Victoria on 1 September 2006. The Act amends the Victorian Crimes Act 1958 and was introduced as part of a package of measures to address the legal and policy implications arising from the Victorian Court of Appeal decision in the McCabe tobacco case in which it was alleged that sensitive documents had been destroyed by British American Tobacco to prevent them being used as evidence against BAT in future legal proceedings.

The Act creates a new criminal offence prohibiting the knowing destruction or concealment of a document or other object that is, or is reasonably likely to be, required as evidence in legal proceedings in circumstances where the destruction or concealment is intended to prevent the documents from being used as evidence in legal proceedings. The Act also prohibits rendering such a document illegible, undecipherable or incapable of identification.

The Act applies to all types of documents, including emails, and other "things" which can constitute evidence. A legal proceeding includes any civil or criminal proceeding and any inquiry in which evidence is or may be given before any Court or person acting judicially.

A breach of the Act by an individual or corporation carries heavy financial penalties including up to five years' imprisonment for an individual.

The Act penalises:

- 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 by the other party in future cases of the same nature, and
- those who may not have been a party to a legal proceeding in the past but have reason to believe that they will be in future.

The behaviour targeted by the Act is unfair, unconscionable behaviour which is intended to make it less likely that a plaintiff can succeed in legal proceedings.

To be convicted of this offence, it must be proved beyond reasonable doubt that:

- the destruction or concealment of the document/s actually took place, and
- the destruction or concealment of the document/s was performed, ordered or authorised by the defendant, and
- the defendant knew that there was a reasonable likelihood that the document would be required in a legal proceeding at some later stage, and

- the defendant's actions were intended to prevent the use of the document in evidence in a legal proceeding.

Implications of the Act for the University

Management should ensure that their staff are familiar with the provisions of the Act and its effects. All sections of the University should ensure that their practices and policies do not contravene the Act. They must not destroy records or documents that they know are reasonably likely to be needed as evidence in future litigation, *regardless* of whether or not destruction would otherwise be in accordance with a standard authorised by the Public Records Office of Victoria or University records management policy or guide.

It is a defence in proceedings brought against a corporation under the Act that the corporation exercised due diligence to prevent the contravention of the Act. Relevant to this question is the corporate culture and whether or not it directed, encouraged or tolerated the conduct being carried out.

If there is doubt as to whether or not a record or document is reasonably likely to be required as evidence in future litigation, staff should seek advice from Legal Services or the University's Records Manager.

Steps to Minimise Risk

Every section of the University should review its records management and document destruction and retention policies and practices to ensure compliance with the Act.

If litigation has commenced, or may reasonably be likely to be commenced, all documents potentially relevant to the litigation must be retained. All document destruction processes in respect of those documents must be suspended, pending the documents being reviewed. Legal Services or Records Management should be contacted for advice as to what should occur.

Further information about the Act can be found at <http://www.prov.vic.gov.au/records/advice18>

This paper is not an exhaustive statement of the law. Staff who wish to obtain detailed advice on a specific matter should contact Legal Services.

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Legal Services