

PLAYING FOR KEEPS? TOBACCO LITIGATION, DOCUMENT RETENTION, CORPORATE CULTURE AND LEGAL ETHICS

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The Rolah McCabe case, in which a woman dying of lung cancer unsuccessfully sued a tobacco company, has led to reforms in criminal law, the law of evidence, and legal conduct rules in Australia. McCabe exposed British American Tobacco's policies of 'document retention' which led to the destruction of damaging evidence before litigation commenced. This article considers how the legislative responses to McCabe could affect the process of litigation against large corporations and the conduct of those corporations. Given the integral role of lawyers, both in-house and external, in 'document retention' policies and the process of discovery, it will also examine the implications for legal ethics. Finally, it will canvas some other strategies that might prevent a repeat of the McCabe disaster.

I ACCESS TO EVIDENCE

A Introduction

The Victorian Supreme Court case, *McCabe v British American Tobacco Australia Services Ltd*,¹ and the appeal, *British American Tobacco Australia Services Ltd v Cowell (Representing the Estate of McCabe (deceased))*,² exposed some of the difficulties that plaintiffs who sue large corporations may face in litigation involving access to documentation. The Victorian Court of Appeal reversed the first instance decision which had struck out the defence of a tobacco company ('BAT'). The basis for the first instance decision was that BAT had systematically destroyed documents that might have been relevant to the plaintiff's case. The High Court declined the opportunity to clarify the law in this important area by refusing leave to appeal.³ The effect of this case, absent statutory reform, is that corporations may destroy potential evidence provided that their actions do not

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1 [2002] VSC 73 (Unreported, Eames J, 22 March 2002).

2 (2002) 7 VR 524. The cases will be referred to collectively as '*McCabe*' and differentiated where necessary.

3 Transcript of Proceedings, *Cowell (Representing the Estate of McCabe (deceased)) v British American Tobacco Australia Services Ltd* (Gleeson CJ, Gummow and Hayne JJ, 3 October 2003).

constitute an attempt to pervert the course of justice or a contempt of court. These are notoriously difficult to establish.⁴

In the *McCabe* case, an individual sought compensation on the basis that she was injured by goods manufactured by the defendant. Litigation is a critical process by which the costs and liabilities incurred through the provision of goods and services are justly allocated. This aim, however, is not always achieved. The *McCabe* case was profoundly affected by the destruction of documents by the defendant. This paper considers the potential for litigation to be affected by evidence concealment and destruction. It notes that these difficulties are particularly likely to arise and have a significant effect in cases involving corporations that are involved in a number of similar cases. This can increase the incentives for evidence destruction and increase the advantage enjoyed by these corporations over individual litigants. This article argues that while significant reforms have been introduced in the wake of *McCabe*, a number of further options should be considered.

The integral role of lawyers, whether employed 'in-house' or otherwise retained by companies, in the development of 'document retention policies' similar to that employed by BAT in the *McCabe* litigation, has meant that the conduct of lawyers has come under scrutiny. The case and subsequent legislative reforms have important ethical implications for lawyers. One focus of the reforms is to increase the pressure on lawyers to take care in the way they deal with documentary evidence.

The first part of this paper considers the role litigation plays in shaping the activities of corporations. The manipulation of evidence, in particular documentary evidence, can have a profound effect on this process. While documentary evidence and its availability is, of course, often critical to litigation generally, where the litigation involves corporations, documentary evidence can be vital. The effect of evidence destruction on the *McCabe* case and the case's wider significance is also considered. In addition the importance of client legal privilege and its role in protecting documentary evidence from disclosure is examined.

The paper then considers the state of the law after the *McCabe* case. Since *McCabe*, a number of reforms have been implemented in an attempt to increase the pressure on the parties to litigation, including corporations, to maintain documentary evidence. These initiatives are considered in Part II of the paper.

The paper will conclude with some analysis of other reform options that could address the problem of evidence destruction and actions against large corporations generally, and the tobacco industry in particular.

After *McCabe*, there were initially calls for the lawyers involved in the document retention policy of BAT to be disciplined, but these subsided after the appeal. These calls, however, have re-emerged recently after a newspaper exposed the findings of an internal inquiry undertaken by Clayton Utz, the firm that advised BAT on the

4 Attempting to pervert the course of justice is a crime. It is a heavy burden to impose proof on a civil litigant; contempt may be investigated by a court but it seems unrealistic to expect a litigant to find proof of the destruction of evidence by an opponent. For a comprehensive analysis of this issue in the United States, see Chris Sanchirico, 'Evidence Tampering' (2004) 53 *Duke Law Journal* 1215.

retention policy in question in the *McCabe* case.⁵ The report of this inquiry has since been the subject of an interim injunction granted by the New South Wales Supreme Court which prevents publication of its contents on the ground that it contains privileged and confidential material.⁶ The question of the continuation of the injunction and whether the material can be used to re-open the *McCabe* case has now been transferred to Victoria.⁷ The Victorian Court of Appeal has recently decided to grant Mrs McCabe's estate limited use of information gleaned from the internal inquiry report in further proceedings.⁸ These proceedings will attempt to have the judgment of Eames J reinstated. So, at the time of writing, the litigation is poised to enter a new phase. Before that occurs, it is timely to examine how this stage was reached, to evaluate the existing reforms and to consider whether further reforms should be undertaken.

B Litigation Against Corporations

The process of controlling corporate power is both critical and difficult.⁹ Litigation is one strategy¹⁰ that can be employed to increase the incentives for corporations to act in a responsible fashion. Successful litigation can be effective as it changes the cost/benefit ratio for corporate behaviour. The costs, or externalities, imposed by corporations on third parties may give rise to liabilities to those parties. So, if, for example, a corporation negligently causes harm to third parties, tort law provides a remedy allowing the third party to seek redress and thereby discourages the corporation from persisting with the offending behaviour. As noted by Tully, '[t]he compensatory and deterrence functions served by tort law make it an appealing legal system for corporate accountability'.¹¹

5 William Birnbauer, 'Justice Denied: How Lawyers Set Out to Defeat a Dying Woman', *Sunday Age* (Melbourne), 29 October 2006, 16.

6 *British American Tobacco Australia Services Ltd v John Fairfax Publications* [2006] NSWSC 1197 (Unreported, Brereton J, 2 November 2006).

7 *British American Tobacco Ltd v Peter Gordon* [2007] NSWSC 230. At the time of writing the Victorian Court of Appeal is considering whether the case should be re-opened on the basis that the recently revealed documents indicate that the Court of Appeal judgment was procured by fraud: see Norrie Ross, 'Justice on Trial – QC 5 Years after Her Death, Rolah McCabe's Fight Continues', *Herald Sun* (Melbourne), 21 November 2007, 19.

8 *Cowell v British American Tobacco Australia Services Ltd* [2007] VSCA 301 (Unreported, Warren CJ, Chernov and Nettle JJA, 14 December 2007) ('*Cowell*'). The concession to the plaintiff in this case was limited in that the court stated that the defendants could raise the issue of privilege in relation to the disputed information in later proceedings. BAT has indicated that it plans to appeal this decision to the High Court.

9 Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (1999) 34.

10 *Ibid.*

11 Stephen Tully, "'Never Say Never Jurisprudence': Comparative Approaches to Corporate Responsibility Under the Law of Torts' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (2005) 125, 127.

It is possible to argue that corporations, and in particular tobacco companies, have an advantage in litigation through their position as ‘repeat players’.¹² This advantage is in part due to their access to greater resources. In addition they have the ability to recoup losses from one case in subsequent cases, thereby providing greater flexibility in a cost/benefit analysis than a ‘one-shotter’ would appear to have. The way repeat players learn from their past experiences also gives them a tactical advantage which can be wielded in order to increase their chances of success. This advantage is particularly evident in the tactical use of the discovery and pleadings processes prior to litigation.¹³ The extent to which this occurs is a matter of concern even to those with relatively deep pockets.¹⁴ Some commentators have argued that this power advantage is significant enough that corporations should have to adhere to ‘model litigant’ rules.¹⁵ These rules are imposed on the Australian Commonwealth and state governments in an attempt to ensure that they adhere to high standards in the litigation process.¹⁶

For the litigation strategy to operate efficiently, parties who have been harmed must overcome two major hurdles. First, they need to be able to pursue their claims without excessive costs. Where costs are too high, the party will not pursue the case and the corporation will not be deterred from the offending behaviour. Second, private litigants are subject to an informational asymmetry and so an additional disincentive will exist where ‘[e]vidential difficulties ... reduce to a low level the probability of proving that the harm involved was caused by the actions of the defendant’.¹⁷

Improvements to the process whereby evidence, particularly documentary evidence, is preserved and made available to claimants would tend to reduce costs to those claimants. This raises broader issues about records management. In the digital age, space is no longer an excuse for document destruction. The issues

12 Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95, 97. Galanter classifies as ‘one-shotters’ those who engage with the legal system only rarely, and the ‘haves’ as ‘repeat players’, those ‘who are engaged in many similar litigations over time’.

13 Camille Cameron and Michelle Taylor-Sands, ‘“Corporate Government” as Model Litigants’ (Working Paper, 2007) 6.

14 At a Senate committee hearing in 2004, Mr Graeme Samuel, Chairman of the ACCC, spoke about the potential resource issues that would need to be considered if the ACCC embarked on litigation against a tobacco company:

[I]t is very substantial litigation. For obvious reasons, it would be defended vigorously. Then we are talking about an extensive gathering of evidence, including scientific evidence, expert witnesses, a lengthy case, lengthy appeals and the whole question of the resources of the ACCC to deal with that. We should point out that, while I think Mr Cassidy mentioned that the commission has an annual budget of some \$65 million, there is an allocated budget in that for litigation ... if we were to institute proceedings of this nature, it would require a substantial vote of our litigation budget towards these particular proceedings. That would then impact significantly on the ability of the commission to deal with other enforcement activities that are within the scope of its jurisdiction.

Senate Community Affairs Legislation Committee, Parliament of Australia, *Tobacco Advertising Prohibition* (2004) 38.

15 Cameron and Taylor-Sands, above n 13.

16 See, eg, *Legal Services Directions 2005* (Cth) app B.

17 Baldwin and Cave, above n 9, 52.

become: who should bear the cost of document archiving and upon what terms should access to the archive be granted? Access to this kind of evidence increases the probability that a claim can be accurately determined.

Documentary evidence is generally important where litigation involves a corporation:

Quite often, the critical answers sought by the court, such as ... the level of the defendants' knowledge of risks, adequacy of testing, compliance with regulatory procedures, and so on, are to be found within the 'paper trail' that is kept in corporate offices and produced through the discovery process.¹⁸

It is hard enough to examine the knowledge and memory of an individual. The knowledge and memory of a corporation are wholly contained in its documents. The actions and recollections of officers are still important evidence, but only documents evidence the 'mind of the corporation'.¹⁹ The importance of this evidence means that the incentives to destroy documentary evidence are significant: 'corporate tortfeasors engaged in document shredding ... could effectively eliminate evidence of intentional or reckless wrongdoing [and] could effectively ensure continued profiting'.²⁰

In addition, the low risk of detection of the destruction and minimal sanctions that appear to follow where the destruction is detected add to the incentives. 'Repeat players', such as tobacco companies, have developed a strong sense of which documents will be most damaging in the event of litigation and have ample time to destroy them or place them beyond the reach of discovery. They are also aware that one adverse judgment may open the floodgates to further liability.²¹

Unless a claimant has independent evidence of a document's existence it may be destroyed without anyone finding out. Where a claimant does find out about the document in a matter before the court, the corporation risks the court's displeasure. The court has an inherent power to regulate the manner in which actions are pursued before it.²² The ultimate penalty open to the court is to strike out the corporation's defence.²³ In practice, however, this option is exercised rarely and only where the defendant has demonstrated 'the most extreme fault'.²⁴ The

18 Jamie Cassels and Craig Jones, *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (2005) 259–60.

19 It will be seen from some of the cases that recollections of corporate officers and employees can establish that a document existed, but former officers cannot produce the documents themselves unless they leak or steal them.

20 Richard Sommers and Andreas Seibert, 'Intentional Destruction of Evidence: Why Procedural Remedies Are Insufficient' (1999) 78 *Canadian Bar Review* 38, 39.

21 Cameron and Taylor-Sands, above n 13, 6.

22 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [385].

23 There are other possible sanctions, including fines, imprisonment for contempt, costs orders for abuse of process and other disciplinary measures.

24 Bernard Cairns, *The Law of Discovery in Australia: Documents, Interrogatories and Property* (1984) 161. As *McCabe* shows, there is ample room for disagreement about the degree of fault required to strike out a defence; cf Sanchirico, above n 4.

defendant can thus choose between discovery of the documents, which will create a high probability of an adverse finding, and destruction of the documents, which will carry a low probability of any adverse consequences.

Of course, in the wake of evidence destruction, a plaintiff may always elect to run the case on the basis that adverse inferences should be drawn from the destruction of documents.²⁵ The uncertainty of a plaintiff succeeding using this process, however, reduces its effectiveness as a disincentive to document destruction by the defendant. Finally, a court may find that the corporation is guilty of perverting the course of justice or contempt of court. In weighing the risk of this outcome, the corporation may be comforted by the difficulty in proving that it had the requisite intention, as the *McCabe* case again illustrates.²⁶

There is considerable uncertainty about the prevalence of evidence destruction.²⁷ Indeed, it is only in cases where document destruction has failed that it is likely to come to light. Where it occurs effectively it is unlikely to be revealed. Despite the possibility that it may occur only rarely, its ability to affect outcomes that are achieved in litigation means that regulation of evidence destruction is critical. Indeed, as far back as 1991, one commentator described it as a practice that ‘threatens to undermine the integrity of civil trial process’.²⁸ Perhaps even more importantly, it helps to shape the decisions of those who are producing goods and services that may at some stage injure others. For these reasons, it is critical that regulation in this area promotes just outcomes in litigation.

C The McCabe Case

The difficulties faced by plaintiffs who pursue litigation against corporations that are willing to manage their documents aggressively are illustrated by the *McCabe* case. The facts of the case and the different decisions at first instance and on appeal have been well analysed elsewhere.²⁹ Here, we will simply summarise the present state of the common law in Victoria after the Court of Appeal decision.

25 This was the dilemma for counsel in *McCabe*: having successfully argued that the defence be struck out, they did not have to argue alternative grounds such as contempt or attempt to pervert the course of justice. Counsel would seem to need to argue multiple alternatives to ensure all bases are covered, militating against the efficient conduct of cases.

26 Actually, the Court of Appeal in *McCabe* held that contempt of court or attempt to pervert the course of justice would have given the respondent a remedy, but that as these had not been argued at first instance, they could not be explored on appeal. Her heirs have the dubious comfort that they could try to prove this criminal conduct if they bring a fresh case after they have paid the costs of the trial and appeal.

27 See Sanchirico, above n 4.

28 Charles Nesson, ‘Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action’ (1991) 13 *Cardozo Law Review* 793, 793. Sanchirico, above n 4, casts doubt on the basis of this conclusion, pointing to the lack of reliable empirical data. Empirical data is inevitably hard to come by. Regardless of the prevalence of evidence destruction, we suggest that it should be discouraged.

29 See Camille Cameron and Jonathan Liberman, ‘Destruction of Documents before Proceedings Commence: What is a Court to Do?’ (2003) 27 *Melbourne University Law Review* 273.

While lawyers cannot advise the destruction of documents without risking sanction for breach of their professional duties,³⁰ corporations can destroy documents at will up until the time litigation commences. Even if litigation is anticipated and damaging documents identified, these documents can be destroyed provided that this is done in accordance with a general policy which regulates the maintenance or destruction of documents. The key for the corporation is to ensure that its primary intention does not appear to be to destroy the documents for the purpose of preventing them falling into the hands of a subsequent litigant.

If the corporation is, however, found to have destroyed documents in anticipation of litigation, this can lead to a finding that the corporation was attempting to pervert the course of justice or is in contempt of court. This leaves a plaintiff with the option of persuading the court that adverse inferences can be drawn from the failure to discover documents. Alternatively, they can try to establish the intention of the defendant in order to establish that they have perverted the course of justice.

This approach appears problematic for a number of reasons. First, in the absence of proper discovery, the litigant might be unaware of the extent to which the evidence has been destroyed or put out of reach. Second, it requires the plaintiff to pursue matters which are normally not relevant to their case. As argued by Cameron and Liberman:

Ordinarily, allegations of criminal conduct are pursued by the police and Directors of Public Prosecutions, who have the resources to investigate and prosecute such allegations. Why should plaintiffs be required to take on this role in order to obtain a just outcome in a civil proceeding which is essentially about other issues (for example, negligence or loss) and to devote their limited resources towards doing so? A plaintiff's concern is to have his or her claim heard, and for the court to intervene appropriately where the destruction of documents by the defendant has prejudiced the plaintiff's capacity to prove his or her case.³¹

In addition to the question of resources, the intrusion of intention into the discussion provides an additional hurdle where the case involves a corporation. As Nesson notes: 'In general, intentionality is exceedingly difficult to prove, particularly when inadvertence and misunderstanding are such easy alternative explanations.'³² This problem is magnified in the corporate context. Determining the intention that is attributable to the corporation has traditionally been a vexed problem.³³

This approach seems to shift the question away from the matter that is of central importance: can the court accurately determine the issues in the case where there has been document destruction? As stated by Sallmann:

30 Since the *McCabe* case, New South Wales has amended its regulations to include a provision that makes document destruction professional misconduct. See *Legal Profession Regulation 2005* (NSW) reg 177 and discussion in text at II.C below.

31 Cameron and Liberman, above n 29, 292.

32 Nesson, above n 28, 802.

33 Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (2002) 144–5.

Naturally the circumstances and context of the destruction are relevant but one would have thought that much more important was the impact of the destruction on the disadvantaged party and also the ability of the court to adjudicate upon the proper merits of the dispute before it.³⁴

This argument has been echoed by Ross, who argues that the focus of a court faced with document destruction should be whether this has permitted a fair trial rather than whether it is criminal conduct.³⁵

The attitude of the court appears to condone the way the lawyers prioritised the obligation to the client above that of the obligation to the court. This is contrary to the frequently-stated rule that lawyers are, first and foremost, officers of the court whose primary duty is to the administration of justice.³⁶

Finally, this approach lends support to existing corporate practices of developing ‘document retention’ policies that have at their heart the aim of ‘reduc[ing] legal exposure through the destruction of possibly incriminating evidence’.³⁷

D Role of Client Legal Privilege

The role of client legal privilege (or ‘legal professional privilege’)³⁸ in keeping relevant documents out of court has attracted considerable controversy in recent years.³⁹ Conceived as a way of encouraging free communication between clients and their lawyers and assisting the administration of justice, the privilege can also be used as a device for subverting justice.

34 Peter Sallmann, *Report on Document Destruction and Civil Litigation in Victoria* (2004) 12.

35 Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (4th ed, 2005) 527. See also Cameron and Liberman, above n 29.

36 See, for example, *Giannarelli v Wraith* (1988) 165 CLR 543, 555–6 (Mason CJ). It is interesting to note a comment of Kessler J from *United States v Philip Morris USA Inc* 449 F Supp 2d 1, 4–5 (DDC, 2006) (*'USA v Philip Morris'*):

Finally, a word must be said about the role of lawyers in this fifty-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine. At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes. They devised and coordinated both national and international strategy; they directed scientists as to what research they should and should not undertake; they vetted scientific research papers and reports as well as public relations materials to ensure that the interests of the Enterprise would be protected; they identified “friendly” scientific witnesses, subsidized them with grants from the Center for Tobacco Research and the Center for Indoor Air Research, paid them enormous fees, and often hid the relationship between those witnesses and the industry; and they devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege. What a sad and disquieting chapter in the history of an honorable and often courageous profession.

37 Christopher Chase, ‘To Shred or Not to Shred: Document Destruction Policies and Federal Obstruction of Justice Statutes’ (2003) 8 *Fordham Journal of Corporate and Financial Law* 721, 725.

38 The recent ALRC discussion paper prefers the term ‘client legal privilege’ as it emphasises that the privilege belongs to the client: Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, Discussion Paper No 73 (2007) 22.

39 In particular the extensive claims of privilege made by Australian Wheat Board in the AWB Commission of Inquiry led to considerable criticism. This was the catalyst for the ALRC discussion paper mentioned above n 38.

[T]he doctrine bears this albatross: that in a legal system dedicated to the task of determining where the truth of a matter lies, the application of legal professional privilege permits communication relevant to that task to be hidden, with the result that the ascertainment of the truth is certainly made harder, and may well be thwarted.⁴⁰

Privilege encourages clients to be completely frank with their lawyers in order to gain legal advice. This is of benefit to clients themselves as it ensures that they are given the most relevant legal advice.⁴¹ It also supports the efficient running of the legal system through expeditious settlements and compliance with the law.⁴² The standing of privilege has been gradually enhanced and its scope widened to cover communications beyond the judicial process.⁴³ The critical nature of privilege was underlined by the High Court when Kirby J referred to privilege as 'an important human right deserving of special protection for that reason'.⁴⁴

During the Australian Wheat Board ('AWB') Royal Commission, Commissioner Cole pointed out that two important interests are at stake:

A conflict thus arises between the public interest in discovery of the truth which is a prime function of a Royal Commission, and the fundamental right of persons to obtain legal advice under conditions of confidentiality. The issue for consideration is whether the public interest in discovering the truth should prevail over the private interest of companies or individuals in maintaining claims for legal professional privilege.⁴⁵

As this indicates there is an inherent tension between privilege and the truth-seeking role of courts and investigatory bodies. This difficulty can be exacerbated in some circumstances where privilege is employed to shield documents where some or many of the documents do not satisfy the test for privilege. In the *McCabe* case the potential for privilege to be used by lawyers and clients to place documents out of reach of the court, both by advising on their destruction and by rendering them subject to the privilege, was revealed.⁴⁶ In the AWB Royal Commission the potential for privilege to be used to protect large numbers of documents from

40 Ronald Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005) 3.

41 *Baker v Campbell* (1983) 153 CLR 52, 95 (Wilson J).

42 *Ibid.* For a critique of these conventional arguments in support of privilege, see Hock Lai Ho, 'Legal Professional Privilege and the Integrity of Legal Representation' (2007) 9 *Legal Ethics* 163, 170–1.

43 Ho, above n 42, 164.

44 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 576.

45 Commonwealth of Australia, Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, 1 *Final Report* (2006) [7.66].

46 See also *Re Mowbray: Brambles Australia Ltd v British American Tobacco Australia Services Ltd* [2006] NSWDDT 15 (Unreported, Curtis J, 30 May 2006) [19].

disclosure caused the commissioner considerable concern.⁴⁷ Where the client has access to in-house lawyers, the number and type of documents which can attract privilege can be expanded simply by including the in-house lawyers on the list of those to whom the document is circulated. The convenience and proximity of in-house lawyers makes the process easy to establish as an automatic one. Although this process may not satisfy the strict rule of privilege, the claim of privilege can be used to tactical advantage.

The involvement of in-house lawyers in privilege claims raises two potential difficulties.⁴⁸ Whether a document is privileged or not is dependent on the dominant purpose for which the document was created. If this dominant purpose is the seeking or providing of legal advice, or for the purpose of litigation or legal proceedings, then privilege will attach to the document.⁴⁹ In-house lawyers may be involved in providing both legal and commercial advice.⁵⁰ If commercial advice is provided in a document then the court will need to consider this when applying the dominant purpose test. 'The matter is necessarily one of fact and degree and involves a weighing of the relative importance of the identified purposes.'⁵¹

A second, perhaps less straightforward, difficulty is related to the level of impartiality in-house counsel are capable of bringing to the evaluation of privilege.⁵² In *Seven Network Ltd v News Ltd*,⁵³ the court was asked to rule on whether privilege attached in circumstances that strongly suggested an abuse of process. At the centre of the dispute were extensive claims of privilege supported by an affidavit sworn by News Ltd's Chief General Counsel, Mr Philip. Seven Network Ltd ('Seven') challenged this affidavit on the basis that Mr Philip was insufficiently independent to provide legal advice due to his extensive engagement in the commercial activities of News Ltd. News Ltd then conceded that privilege over a number of the documents could not be maintained. Mr Philip withdrew his affidavit. An external lawyer who swore a subsequent affidavit to support the privilege claims also withdrew his affidavit when Seven sought to cross-examine him. A third affidavit in support was provided by the company secretary of News Ltd, who by his own admission had made only cursory inquiries into

47 Commissioner Cole appears to have been particularly disturbed by way the extensive claims of privilege were only whittled down when under challenge by the Commission. The initial claim of privilege over 1 400 documents was reduced ultimately to about 900 documents as the Commission persisted in seeking a list of all documents over which privilege was claimed. This suggests that the initial claim of privilege was overstated. Ultimately the effect of this process was a lengthy delay as the privilege challenges were contested in the Federal Court. See *Inquiry into the UN Oil-for-Food Programme*, above n 45 [7.44]–[7.55].

48 See, eg, Gino Dal Pont, *Lawyers' Professional Responsibility* (3rd ed, 2006) [13.40]–[13.50].

49 *Esso Australia Resources v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49, 73 (Gleeson CJ, Gaudron and Gummow JJ).

50 *Sydney Airports Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 (Unreported, Spigelman CJ, Sheller JA and Campbell AJA, 9 March 2005) [24].

51 *Seven Network Ltd v News Ltd* [2005] FCA 142 (Unreported, Tamberlin J, 28 February 2005) [5].

52 The position of in-house lawyers as employees of the client may reduce their ability to consider privilege claims objectively: see, eg, Rosalind Croucher, 'To Privilege or Not to Privilege – and Whose is it Anyway? The ALRC Inquiry on Legal Professional Privilege' (Speech delivered at the Macquarie Forum, Sydney, 26 June 2007).

53 [2005] FCA 142 (Unreported, Tamberlin J, 28 February 2005).

the privilege claim.⁵⁴ While the court was not prepared to find that this was ‘deliberately evasive’⁵⁵ it held that that the claims of privilege were not ‘based on an independent and impartial legal appraisal’.⁵⁶

While this misuse of privilege has been noted in the context of tobacco litigation,⁵⁷ the exploitation of the doctrine of privilege is attracting considerable attention in a wider context as well. At the Cole Inquiry, which explored the activities of the Australian monopoly wheat trader AWB Ltd in securing wheat contracts with Iraq under the UN Oil for Food Program, excessive claims of privilege caused a delay of ‘nearly a year’.⁵⁸ A similar issue was raised in the context of the Jackson Inquiry into the James Hardie corporate restructure. In that case actuarial reports that were used to calculate the extent of liabilities to injured workers were labelled as privileged in a vain attempt to protect them from disclosure.⁵⁹ In both of these cases, the documents were exposed to public scrutiny through public inquiries and the feeble nature of the claims for privilege came to light. Despite the potential for abuse of privilege, however, in cases where individual plaintiffs are attempting to sue corporate bodies, little has been done to prevent suspect claims of privilege.⁶⁰ For these litigants, the costs and difficulties of challenging the claim would be prohibitive. As with document destruction, the extent of abuse of privilege is difficult to determine. Again the confidentiality associated with the lawyer/client relationship can operate as a screen to reduce the likelihood that abuse be discovered. It is only where abuse has failed that it is revealed.

II RESPONSES TO THE MCCABE CASE

A Crimes (Document Destruction) Act 2006 (Vic)

The Victorian government was interested in pursuing the issues raised by the *McCabe* case.⁶¹ As a result the Attorney-General Rob Hulls asked the Victorian Law Reform Commission (VLRC) to examine administration of justice offences in May 2003. The recommendation was that a specific offence be enacted to

54 Ibid [24].

55 Ibid [25].

56 Ibid [38]. Tamberlin J’s concerns about the behaviour of News Ltd are reflected in the granting of costs to Seven Network Ltd on an indemnity basis: at [44].

57 Christine Parker, ‘Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible’ (2004) 23 *University of Queensland Law Journal* 347, 364.

58 Croucher, above n 52, 2. See also Inquiry into the UN Oil-for-Food Programme, above n 45.

59 New South Wales, Special Commission of Inquiry into the Medical Research and Compensation Foundation, *Report Volume 1* (2004) [14.44], [15.33], [15.36]–[15.37]. For a discussion of this process see Suzanne Le Mire, ‘Case Study: James Hardie and its Implications for the Teaching of Ethics’ in Bronwyn Naylor and Ross Hyams (eds), *Innovation in Clinical Legal Education: Educating Lawyers for the Future* (2007) 25.

60 While this difficulty is faced by all those who encounter specious privilege claims it is disproportionately difficult for those with very limited time and resources to counter them.

61 The Victorian Attorney-General was one of the two states Attorneys-General who attempted to intervene in the High Court application in 2003.

deal with evidence destruction.⁶² In addition, the Crown Counsel, Professor Peter Sallmann, was asked to examine the existing law, practices and procedure in relation to document destruction. Both of these reports recommended that statutory provisions be enacted in order to prevent evidence destruction in civil litigation.⁶³

As a result, the Attorney-General introduced legislation which created a new criminal offence where an individual or corporation destroys evidence.⁶⁴ The offence occurs where 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’ either destroys or conceals that evidence or authorises its destruction or concealment.⁶⁵ In order to commit an offence, this act must occur with the intention of preventing the item from being used in evidence.⁶⁶ By framing the offence in this way, the legislation ensures that destruction before litigation has commenced is given the same weight by the courts. In addition, it covers the situation where a litigant arranges for evidence to be held by third parties in order to avoid its disclosure.⁶⁷ The offence does, however, retain the emphasis on intention which was critical to the findings in *McCabe*.

The Act employs, as a solution to the difficulties in establishing the intention of corporate litigants, a method similar to that used in the *Criminal Code Act 1995* (Cth). Where the evidence shows that destruction is carried out by an employee or agent acting within the actual or apparent scope of their employment (an ‘associate’) or by an officer of the corporation, and that party is aware of its importance in actual or anticipated litigation, intention can be established in a number of ways.⁶⁸ The intention of the corporation’s board of directors or officers can be directly attributed to the corporation as a whole.⁶⁹ Alternatively, intention can be established where the intention is held by an associate and the corporation has a culture that ‘directed, encouraged, tolerated or led to’ the creation of that intention.⁷⁰

Corporate culture is defined in the Act as ‘an attitude, policy, rule, course of conduct or practice existing’ within the corporation or any part of the corporation.⁷¹ The Act further provides that in order to establish the intention, it will be relevant to show that the associate had a reasonable belief or expectation that an officer of the

62 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2181 (Rob Hulls, Attorney-General). The VLRC is currently conducting a review of civil procedure which may yield further developments in this area.

63 See Sallmann, above n 34, 7.

64 *Crimes (Document Destruction) Act 2006* (Vic) s 3. The Act received royal assent on 4 April 2006 and is now in force. Section 3 inserts a new Division 5 in Part I of the *Crimes Act 1958* (Vic).

65 *Crimes Act 1958* (Vic) ss 254(1)(a)–(b)(i).

66 *Crimes Act 1958* (Vic) s 254(1)(c).

67 *Crimes Act 1958* (Vic) s 254(1)(b)(ii).

68 *Crimes Act 1958* (Vic) s 255.

69 *Crimes Act 1958* (Vic) ss 255(1)(c)(i)–(ii).

70 *Crimes Act 1958* (Vic) s 255(1)(c)(iii).

71 *Crimes Act 1958* (Vic) s 253.

corporation would have approved of his or her actions.⁷² This seems to require yet more internal documentation. It also seems to give opportunity for an associate to either take responsibility or be disowned by the corporation.⁷³

The theoretical justification for using corporate culture as an element of a criminal offence can be found in the literature that examines the impact of organisational culture on the behaviour of individuals within that organisation. Research has shown that the behaviour of individuals is significantly affected by the ethical context that surrounds them.⁷⁴ The impact of the corporate structure is to make it more likely that the individual will adopt the ethics of the corporation.⁷⁵ This may mean that they ignore their personal ethics when they act as officers or employees of an organisation. This appears to be the case despite the commitment those individuals may have to ethical behaviour in other contexts.⁷⁶ Therefore, it seems reasonable that the law should recognise the impact that the corporate culture can have on the decision-making of individuals within that culture.

The practical aspect of the reform is that the prosecution of corporations may depend on enquiring into the culture of the corporation. It is here that the reforms begin to look more problematic. Faced with the 'practical difficulties of basing a corporate prosecution on such a nebulous concept' it seems unlikely that prosecutors would act.⁷⁷ This may be the reason why there do not seem to have been any prosecutions based on Part 2.5 of the *Criminal Code Act 1995* (Cth) to date. In order to establish the corporate culture, the primary resource will be the policy documents that have been developed by the corporation, often, as in *McCabe*, in consultation with their lawyers. It is unlikely that the corporate culture as revealed by these documents would reveal an unethical culture.⁷⁸ Ironically, any prosecution for document destruction may be thwarted by the carefully created 'document retention' policy which ensures the destruction of the documents this Act is attempting to protect. Beyond that, any prosecution will depend on evidence of those individuals within the corporation who are familiar with the practices and ethics of the corporation. The likelihood of someone stepping forward to give evidence seems remote.⁷⁹ In

72 *Crimes Act 1958* (Vic) s 255(6)(b).

73 For a more detailed analysis of this reform see Suzanne Le Mire, 'Document Destruction and Corporate Culture: A Victorian Initiative' (2006) 19 *Australian Journal of Corporate Law* 304.

74 Lynne Dallas, 'A Preliminary Inquiry into the Responsibility of Corporations and their Directors and Officers for Corporate Climate: the Psychology of Enron's Demise' (2003) 35 *Rutgers Law Journal* 1, 10.

75 Christine Parker, *The Open Corporation* (2002) 32.

76 *Ibid* 33.

77 Clough and Mulhern, above n 33, 144.

78 Frederick Gulson's testimony in *Re Mowbray: Brambles Australia Ltd v British American Tobacco Australia Services Ltd* [2006] NSWDDT 15 (Unreported, Curtis J, 30 May 2006) [19] described BAT's document retention policy as not 'simply the written policy itself, but the corporate knowledge of how the policy was to be applied apart from the written language...the written document was incomplete in terms of describing the actual workings and purpose of the Document Retention Policy'. He went on to say that the 'Document Retention Policy was a contrivance designed to eliminate potentially damaging documents while claiming an innocent "housekeeping" intent'.

79 It should be noted that there are limited examples to counterbalance this assumption. For example, Frederick Gulson and the US whistleblower Jeffrey Wigand. These whistleblowers have been significant but, considering the numbers employed in the industry, are very rare.

addition to these difficulties, it seems unlikely that prosecutors with limited time and resources will invest their efforts into pursuing a prosecution that dabbles in matters ordinarily left to the civil courts.⁸⁰

The Cole Commission has considered recommending the *Criminal Code* provisions as a way of bringing AWB to account for the illegal payments made to Saddam Hussein's regime in the years before the Iraq war.⁸¹ In the context of AWB, the ability of the Cole Commission to compel the disclosure of evidence increases the potential to establish a poor corporate culture. The admissibility of the evidence in later criminal proceedings may, however, be open to question.⁸² In any event, this will provide an interesting test for the provisions. If the corporate culture of AWB, which has been opened up in so public a fashion, cannot provide evidence to support a successful prosecution, it may be an indication that successful prosecutions are extremely unlikely.

B Evidence (Document Unavailability) Act 2006 (Vic)

A second Act has tackled the evidentiary effect of document destruction. The *Evidence (Document Unavailability) Act 2006* (Vic), which received assent on 15 August 2006, inserts a new Division 9 into Part III of the *Evidence Act 1958* (Vic). This introduces the new concept of 'document unavailability' where a document has been in the possession, custody or power of a party to a civil proceeding but is no longer and the document has been destroyed, disposed of, lost, concealed or rendered illegible or incapable of identification either before or after the commencement of the proceeding.

Under the new s 89B, if it appears to the court in a civil proceeding that such a document is unavailable, there is no reproduction available, and the unavailability is likely to cause unfairness to a party to the proceeding, the court may of its own motion or on the motion of a party 'make any ruling or order that the court considers necessary to ensure fairness to all parties to the proceeding'. Section 89B(2) then sets out some examples of possible orders without limiting the generality of s 89B(1), such as drawing an adverse inference, presuming a fact in issue to be true, prohibiting the adduction of certain evidence, striking out all or part of a claim or defence, or reversal of burden of proof in relation to a fact or issue. Section 89C requires the court to consider the circumstances in which the document became unavailable, the impact of the unavailability on the proceeding, and any other matter that it considers relevant. Section 89D extends the application of the Act to VCAT. A new s 158 applies the Act to any proceeding issued after its commencement regardless of when the document became unavailable.

80 It is ironic that prosecutors seem inclined to leave these matters to the civil courts while the civil courts, for example in *McCabe*, have imposed a criminal burden of proof for document destruction, as noted above.

81 Jason Koutsoukis, 'Wheat Inquiry May Call Ministers', *The Age* (Melbourne), 31 January 2006, 1.

82 See, for example, *Giannarelli v Wraith* (1988) 165 CLR 543 and the *Royal Commissions Act 1902* (Cth). It is understood that reforms to this law are under consideration.

This Act contributes to overturning the effect of the Court of Appeal's decision in *Cowell*, but still leaves the possibility of a similar result. As Cameron and Liberman have recommended, it encourages the court to look at the effect of the unavailability on the proceedings rather than the intention of the party which has rendered the document unavailable.⁸³

C Changes to the Regulation of Lawyers

After the *McCabe* case the role of the lawyers attracted public scrutiny.⁸⁴ As a result, reforms which focused on lawyers were suggested as a possible response to the case.⁸⁵ It is possible that threatening lawyers with disciplinary action would prevent them presiding over wrongful document destruction. Whereas litigants have no clear duty to uphold justice, lawyers clearly do. It is therefore unfortunate that the conduct of the lawyers involved in the 'document retention policy' in *McCabe* escaped the closer attention of the authorities.⁸⁶ They might have been liable for improper conduct even if BAT was not, but this was not put to the test.

New South Wales authorities have seen the potential of this avenue in enacting reg 177 of the *Legal Profession Regulation 2005* (NSW) making it professional misconduct to advise a client to make a document unavailable for likely litigation. There is, again, the obvious problem that this conduct would not come to light unless privilege is waived, as was held by the trial judge to have occurred in the *McCabe* case, a finding subsequently overturned by the Court of Appeal.

It is a well established principle that the lawyer's duty to the court is paramount.⁸⁷ Lawyers are officers of the court and a vital part of the administration of justice. In the *McCabe* case, as in other cases, the duty to the court 'is supposed to override lawyers' duties to their clients. The law firm's apparent disregard for its, and its client's, duty to the court, was a likely consequence of the law firm's closeness to and financial dependence on its client.'⁸⁸ It is clients who pay the lawyers' bills and

83 See Cameron and Liberman, above n 29, 283.

84 See, eg, Richard Ackland, 'Missing Documents Haunt Tobacco Giants', *The Sydney Morning Herald* (Sydney), 9 July 2004, <<http://www.smh.com.au/articles/2004/07/08/1089000290425.html?from=storylhs>> at 17 June 2008.

85 Sallmann, above n 34, 23.

86 Recent developments indicate that there may yet be some action taken against the lawyers involved. After the Clayton Utz internal inquiry was publicly revealed, the Victorian Director of Public Prosecutions referred the matter to the Australian Crime Commission with the recommendation that a full inquiry into the behaviour of the lawyers and BAT occur: William Birnbauer, 'Smoking Gun Aimed at Big Tobacco', *The Age* (Melbourne), 19 August 2007, 4.

87 See, for example, *Giannarelli v Wraith* (1988) 165 CLR 543.

88 Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *The University of Queensland Law Journal* 347, 362.

the ethic of doing what you can for your client may mean that lawyers are overly solicitous of clients' views.⁸⁹

The primary response where lawyers abuse process is the disciplinary sanctions contained in each state's legislation regulating lawyers. Disciplinary proceedings, however, rarely consider breaches of a duty to the administration of justice, as the disciplinary process is generally driven by client complaints. In the case where a lawyer acts over-zealously in the client's favour there is unlikely to be a client complaint. Even if the client is unhappy, as large corporate clients, they are likely to have alternative ways of disciplining their lawyers, particularly where those lawyers are 'in-house'. While disciplinary regulators have the power to consider complaints from other sources, or indeed to commence proceedings spontaneously, this rarely occurs. This may in part be due to the daunting complexities involved in pursuing sanctions in cases of this type. Where the matter involves lawyers at a large law firm, regulators face opponents with the resources and incentives to resist discipline vigorously. Consequently, regulators are reluctant to take action.⁹⁰ This, in itself, undermines the effectiveness of the regulatory system and public confidence in the legal system generally.

D Other Court Responses to the BAT Retention Policy

A further notable development has been the decision in the Dust Diseases Tribunal of New South Wales in the matter of *Re Mowbray; Brambles Australia v BAT*.⁹¹ In this case, Brambles had been ordered to pay compensation to Mowbray's widow for asbestos-related cancer and was seeking contribution from BAT as Mowbray was also a smoker. Brambles sought similar documentation to that sought in *McCabe*. When the desired documentation was not provided by BAT, Brambles argued that BAT had taken deliberate steps to destroy, 'warehouse' and 'privilege' documents in order to prevent them falling into the hands of litigants.⁹² Frederick Gulson, former corporate counsel for BAT, gave evidence of its document retention/destruction policies. His evidence was not contradicted in these interlocutory proceedings.⁹³ Evidence of John Welch, formerly of the Tobacco Institute and Jeffrey Wigand, former Vice President of Research and Development at Brown & Williamson, a member of the BAT group, was cited in support of Gulson. There was also the evidence of Peter Holborrow of BAT that after the *Cremona* litigation was discontinued, large numbers of documents

89 The James Hardie corporate scandal, described in the Jackson Report, is another recent example of this dynamic. In that case, lawyers were involved in the creation, implementation and defence of a scheme which had, at its heart, the desire to shake off liabilities to workers who had suffered injuries due to asbestos exposure while working for James Hardie subsidiaries: New South Wales, Special Commission of Inquiry into the Medical Research and Compensation Foundation, *Final Report* (2004).

90 Geoffrey Hazard and Ted Schneyer, 'Regulatory Controls on Large Law Firms: A Comparative Perspective' (2002) 44 *Arizona Law Review* 593, 607 and Le Mire, above n 59, 31.

91 [2006] NSWDDT 15 (*Mowbray*).

92 *Ibid* 21.

93 *Ibid* 52.

were destroyed.⁹⁴ Many of these documents had been digitally photographed and these images too were destroyed, making it clear that the destruction was not to minimise storage costs.

Curtis J held that claims of privilege made by BAT over their document retention policy and related communications were based on 'fraud' within s 125 of the *Evidence Act 1995* (NSW).⁹⁵ This provision of the *Evidence Act* sets out the circumstances where client legal privilege will be lost. These include where a party can show that a communication is made in 'furtherance of a fraud'.⁹⁶ Curtis J found that fraud in this context 'must involve an element of dishonesty'.⁹⁷ He held that BAT had developed the document retention policy for the purpose of a 'fraud'.⁹⁸ This finding did not rest on the destruction of the documents per se but on the efforts 'by sham and contrivance, intentionally [to] conceal the fact from the opposing party for the purpose of avoiding the adverse inference that might otherwise be available'.⁹⁹ Considerable weight appears to have been given to the way the document retention policy failed to set out the criteria for determining whether documents should be retained or destroyed. This effectively removed the possibility that opposing parties could challenge the destruction: it prevented 'scrutiny or [the] chance that it may be held accountable to some objective measure contained within the policy'.¹⁰⁰ The legal advice about the retention policy was also tainted as it was given in support of the policy.¹⁰¹ The court was satisfied that Brambles had provided sufficient credible evidence to support its argument that BAT had taken deliberate steps to prevent documents falling into the hands of litigants.

Somewhat intriguingly, the case has now been settled without payment of any money by either side.¹⁰² The case provides perhaps the most complete evidence yet of the way the document retention policy was used by officers of BAT to manage potentially damaging documentary evidence. By achieving a settlement of the claim made by Brambles prior to the hearing of the substantive case, BAT avoided a finding on the extent to which these practices could lead to adverse inferences about liability. If the court had accepted that adverse inferences could be drawn this would have been of great significance in any subsequent cases.

In the United States, a judge in the District of Columbia District Court has made findings against BAT and others which suggest that the primary decision in *McCabe* was amply justified and that the Victorian Court of Appeal enabled a

94 For a fuller account of the *Cremona* litigation see *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [109]–[27].

95 [2006] NSWDDT 15, 56.

96 *Evidence Act 1995* (NSW) s 125(1)(b).

97 [2006] NSWDDT 15, 30.

98 *Ibid* 56.

99 *Ibid* 47.

100 *Ibid* 56.

101 *Ibid* 57.

102 'Hearsay', *Australian Financial Review* (Sydney), 7 July 2006.

grave miscarriage of justice.¹⁰³ In the course of a 1 653-page judgment, Judge Gladys Kessler made many negative findings about tobacco companies' use of information and the conduct of their lawyers. The action was initiated under the *Racketeering Influenced and Corrupt Organizations Act 1970* (US) ('RICO'), of which there is no Australian equivalent. This enabled federal authorities to obtain large amounts of documentation and they also had the resources to process it. Judge Kessler found an intention by the defendant companies to defraud the public by the information they disseminated and ordered corrective advertising. This mild outcome was the peg on which the judge then hung an effective and meticulously documented exposure of the misconduct of the tobacco industry and its legal advisers. The 'crime-fraud exception' was used to overcome claims of privilege. As in the *Mowbray* case, the efforts of manufacturers to destroy information detrimental to their interests were noted.¹⁰⁴

Given these New South Wales and United States cases, there now seems to be further scope for private law actions against the corporations involved in the production of dangerous goods. In particular, the indication that the courts may be willing to look behind the veil of privilege is promising. The *Mowbray* case indicated that the 'fraud' exception in the *Evidence Act* provisions can be used to remove privilege where a party can establish that there is prima facie evidence of dishonesty. This is consistent with the view that fraud in this context covers a wide variety of activity that can be described as 'trickery' or 'shams'.¹⁰⁵ The court in *Mowbray* suggested that the common law fraud exception may be even wider in that it may not require evidence of dishonesty.¹⁰⁶ The High Court has previously considered that the crime/fraud privilege exemption extends to situations where confidentiality is sought 'in order to frustrate the processes of the law'.¹⁰⁷ The advantage of interpreting the exception in this way is that it would help overcome some of the difficulties parties face when asked to prove dishonesty. In *Mowbray*, the element of dishonesty was established through the uncontested evidence of BAT insiders. This kind of evidence, however, is likely to be available only rarely.

Concerns about the difficulty involved in proving an improper purpose was raised by a number of submissions to the recent Australian Law Reform Commission ('ALRC') inquiry.¹⁰⁸ These suggested that the exemption should cover any communications 'relating to fraud' rather than merely those 'in furtherance of fraud'. The essence of the difficulty is that often the information needed to prove

103 *USA v Philip Morris* (2006) WL 2380650.

104 *USA v Philip Morris* (2006) WL 2380650, 11.

105 *Wei Ling Kang v Kwan* [2001] NSWSC 698, 37 (Santow J). See also Suzanne McNichol, *Law of Privilege* (1992) 107.

106 [2006] NSWDDT 15, 27.

107 *Attorney General for the Northern Territory v Kearney* (1985) 158 CLR 500, 514 (Gibbs J), citing with approval *R v Bell*; *Ex Parte Lees* (1980) 146 CLR 141, 156 (Stephen J).

108 The scope of the Inquiry prevented the ALRC from making recommendations about the substantive law of client legal privilege. The ALRC is also of the opinion that the procedural reforms would, if implemented, assist by providing parties with clearer and more complete information about the basis for privilege claims: see ALRC, above n 38, [3.127]–[3.129].

the improper purpose is contained in the communication that is protected by privilege. Extending the exemption in this way, however, risks undermining client confidence that privilege will protect their communications.¹⁰⁹

III FURTHER POSSIBLE REFORMS

A *The Promise of Corporate Culture*

Notable among the reforms discussed above are those that target the corporate culture as a mechanism for imposing criminal sanctions on corporations.¹¹⁰ This option is part of an increasing emphasis on systems theory as a way of attributing criminal responsibility to corporations.¹¹¹ By targeting corporate culture in this way the criminal law can usefully provide both an upstream and downstream effect.¹¹² The upstream effect is provided by its ability to shape the conduct of corporations that are considering the extent to which they must maintain their documents. It provides a warning to corporations that there may be severe sanctions for destroying documents. It will, therefore, become a matter that is considered by corporate legal advisors when they are developing 'document retention' policies and codes of conduct for their clients. It may also give corporate officers and advisors an additional reason to consider the culture that prevails within their organisation more widely. This impetus is reinforced by the ability of statutes containing criminal sanctions to visit penalties on corporate officers who are involved in the document destruction thereby creating a personal incentive which may outweigh the incentives for the corporation to destroy evidence.

Legislatures have indicated the importance of corporate culture in the *Crimes (Document Destruction) Act 2005* (Vic) and the *Criminal Code Act 1995* (Cth). In addition, the courts have demonstrated a willingness to consider the way corporations have responded to legal requirements.¹¹³ The *Principles of Good Corporate Governance*, developed by the ASX Corporate Governance Council, recommend that corporations develop a Code of Conduct in order to 'promote ethical and responsible decision-making'.¹¹⁴ Listed corporations are required by the ASX Listing Rules to comply with these *Principles* or state their reasons for non-compliance. A similar preoccupation is evident in s 406 of the *Sarbanes-Oxley Act 2002* (US) that requires US corporations to disclose whether they

109 McNichol, above n 105, 113.

110 See, eg, *Crimes (Document Destruction) Act 2006* (Vic) and the *Evidence (Document Unavailability) Act 2006* (Vic) discussed above.

111 Celia Wells, 'Corporate Criminal Responsibility' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (2005) 153.

112 For a consideration of the importance of both the upstream and downstream effect of law, see Sanchirico, above n 4, 1220.

113 Christine Parker and Olivia Conolly, 'Is there a Duty to Implement a Corporate Compliance System in Australian Law?' (2002) 30 *Australian Business Law Review* 273, 293.

114 ASX Corporate Governance Council, *Principles of Good Corporate Governance* (2003) recommendation 3.1, principle 3.

have a code of ethics and whether the code has been waived for members of senior management.

The ability of these codes to change corporate behaviour is a matter of debate. The debate centres on whether codes are effective tools that can change corporate behaviour or are merely 'window-dressing'.¹¹⁵ However, it is possible that in so far as this argument focuses solely on measurable effectiveness it misses the more subtle advantages of the process of development of a code. The task of developing a code of conduct can encourage those within the corporation to focus on ethical issues.¹¹⁶ They can serve as 'external and internal signalling devices'¹¹⁷ to show both those inside and outside the corporation that ethical behaviour is valued. While it is clear that this alone will be insufficient to improve a corporate culture it is a good starting point.¹¹⁸

While these initiatives may well influence the upstream behaviour of corporations they are less effective at ensuring that the litigious process achieves justice between the parties (the downstream effect). The potential lack of knowledge and burden of proof faced by plaintiffs disadvantaged by document destruction does not seem to be removed by these reforms.

B Document Banks

It is difficult to imagine a system that would ensure document retention. One possibility would be to presume that relevant documents existed and place the onus on the defendant to prove that they did not. It is notoriously hard, however, to prove a negative and this would probably be seen as an over-reaction to the problem.

Another possibility would be automatic archiving of company documents, but it would be hard to devise a fair system of access. This system has been tried as part of the settlement of tobacco litigation in the United States with the establishment of document depositories in the United States and the United Kingdom. The US depository is independently administered but the UK variant, in Guildford, is run by BAT and there are disturbing reports of surveillance of its users.¹¹⁹ This surveillance is carried out by BAT's lawyers Lovells, raising doubts about the ethics of this practice.

A third possibility would be a rigorous public testing regime so that the information on product safety was clearly in the public domain. In taking this approach,

115 Joshua Newberg, 'Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct' (2004) 29 *Vermont Law Review* 253, 265.

116 *Ibid* 286.

117 *Ibid* 269.

118 Despite the evidence of widespread unethical behaviour, Enron had a Code of Ethics: Dallas, above n 74, 54.

119 See Monique Muggli, Eric Le Gresley and Richard Hurt, 'Big Tobacco is Watching: British American Tobacco's Surveillance and Information Concealment at the Guildford Depository' (2004) 363 *The Lancet* 1812. The authors cite evidence that BAT tracks the electronic searches, physical movements and even, on occasion, mobile phone use of visitors.

governments would risk the possibility that litigants take action against the state rather than the tobacco companies. It would therefore be unlikely to gain political support. This third possibility raises the point that plaintiffs should not have to be so reliant on private information to make out claims of negligence. The tobacco industry, however, is notorious for carrying out secret product research which shows the harmful effects of smoking and the addictive qualities of nicotine even more clearly than public research.¹²⁰ The downside of using public research is that the plaintiff can then be accused of voluntary assumption of risk. This takes us back to the bigger issue of whether litigation is the best way to address a public health problem.

C Class Actions

It is interesting to contrast the US experience, where a \$US145 billion settlement was reached between tobacco companies and various American states as a result of a class action,¹²¹ with the Australian experience in *Philip Morris (Australia) Ltd v Nixon*.¹²² This was an attempted Federal Court class action or ‘representative proceeding’ in which a group of smokers attempted to sue a group of tobacco companies. The action was not allowed to proceed on the ground that it did not comply with the requirements for representative proceedings. The requirements imposed by the court, that every plaintiff must have a cause of action against every defendant, seem extremely onerous.¹²³ There have been no other attempts to mount representative proceedings against tobacco companies since this case. The prospects for class actions as a significant source of relief against corporations in Australia seem limited. As Morabito notes:

[I]t does not appear unreasonable to conclude that, unless the conduct of more than one person that is being challenged by a group of aggrieved persons entails a single transaction, act or event; a single document or, perhaps, a limited number of very similar transactions, acts or events, persuading the

120 The activities of the tobacco industry in commissioning research and concealing the findings have been widely reported: see, eg, Graeme O’Neill, ‘The Great Smokescreen’, *The Sunday Herald Sun* (Melbourne), 3 September 1995, 81; ‘Tobacco Firm’s Long Cover-Up On Dangers’, *The Advertiser* (Adelaide), 5 April 1997, 19. This has also been noted in the academic literature. See Graham Kelder and Richard Daynard, ‘Judicial Approaches to Tobacco Control: The Third Wave of Tobacco Litigation as a Tobacco Control Mechanism’ (1997) 53 *Journal of Social Issues* 169, 176, stating that:

[R]ecent evidence makes clear, however, that the industry was well aware of the pharmacologically active, addictive, and harmful nature of its products, and that it took active steps to hide this information from its customers and the public at large.

121 See Warren Pengilly, ‘Comments: Representative actions under the *Trade Practices Act*: The Lessons for Smokers and Tobacco Companies’ (2000) 8 *Competition and Consumer Law Journal* 176.

122 (2000) 170 ALR 487.

123 The Victorian Law Reform Commission Civil Justice Enquiry has issued a draft recommendation for comment suggesting that reforms to rules governing class actions be instituted. In particular they suggest that the law be changed to allow class actions to proceed where all plaintiffs have a claim against one ‘lead’ defendant. Where this is satisfied additional defendants may be joined even though only some plaintiffs have claims against them. The Victorian Law Reform Commission is due to issue its final recommendations by March 2008. See Victorian Law Reform Commission, *Civil Justice Enquiry*, First Exposure Draft (2008) [6.2.1].

Court that the claims in question comply with the [requirements] will be a difficult task indeed.¹²⁴

While there may be legitimate reasons for limiting the use of representative actions, such as the difficulty of managing the evidentiary burdens in multiple claims at the same time, it means that an avenue for the pooling of resources and sharing costs of civil claims is of limited efficacy.

D Tort of Spoliation

Another alternative that has been adopted in the United States is the tort of spoliation, which originated in a decision of the California Court of Appeal.¹²⁵ There the court allowed a plaintiff harmed by the destruction of evidence in a civil matter to recover damages under a separate tort. This change was subsequently adopted in some other jurisdictions, though the extent to which this has occurred is limited and interest in a tort of spoliation seems to be fading.¹²⁶ Interestingly, in recent times the California courts have retreated from this position¹²⁷ and appear to have been influenced by a recognition that the ‘burdens imposed upon society by spoliation causes of action outweigh their benefits’.¹²⁸ Of particular concern was that the tort threatened the finality of litigation by allowing cases to be revisited if evidence of spoliation was discovered after the event. The alternative sanctions available throughout the proceedings such as adverse inferences and possible criminal prosecutions are now seen as sufficient.

E Whistleblower Protection

In the light of recent developments in *McCabe*, it is timely to consider whistleblower protection for lawyers.¹²⁹ While this would be a major paradigm shift from the fundamental duty of confidentiality to the client, there are established situations where the duty of confidentiality is overcome.¹³⁰ Given that evidence destruction is now a crime, it is possible that reporting it could be easily sanctioned under another legislated exception. The obvious advantage of this lies in the fact that it would increase the pressure on those considering document destruction. Unintended consequences may arise, however, such as making lawyers less likely to be aware of the activities of their clients, or simply not having a clear

124 Vince Morabito, ‘Class Actions Against Multiple Respondents’ (2002) 30 *Federal Law Review* 295, 333–4.

125 *Smith v Superior Court* 198 Cal Rptr 829, 831 (Ct App 1984).

126 Sanchirico, above n 4, 1280.

127 *Cedars-Sinai Medical Centre v Superior Court* 954 P 2d 511, 512 (Cal 1998).

128 Jason Hendren, ‘Spoliation of Evidence: Why this Evidentiary Concept Should Not Be Transformed into Separate Causes of Action’ (2004) 27 *University of Arkansas at Little Rock Law Review* 281, 294.

129 Ross, above n 35, 200.

130 For example, under legislation or in relation to legal aid and financial transactions reporting.

opportunity to fully advise clients about the extent of their legal obligations in the area of document destruction.

The likely effectiveness of these reforms is also open to question. The Law Council of Australia's model rules,¹³¹ and the Victorian Professional Conduct and Practice Rules,¹³² allow disclosure to prevent the probable commission or concealment of a serious criminal offence. Difficulties faced by whistleblowers, however, are generally well-known and are likely to deter many considering it.¹³³ In addition, the prospective whistleblower might be dissuaded from disclosure if the burden is then on them to prove the probability of a criminal offence.

F Proposed Changes to Legal Privilege

The High Court has specifically acknowledged that privilege, as a common law doctrine, can be 'significantly curtailed', although not in the absence of 'compelling legal considerations'.¹³⁴ More recent authority suggests that even changes on this basis may be increasingly unlikely.¹³⁵ Whether the difficulties caused by false claims of privilege would be considered by the court to be sufficiently compelling is unclear. Even if the courts were reluctant to encroach on the ambit of privilege claims, there is potential for legislative intervention to reduce the hardship that can flow where there are extensive and unfounded claims of privilege. The likelihood of this kind of change appears to be higher in the wake of two recent developments.

The first of these is the AWB Royal Commission's recommendation in favour of legislative reform. Commissioner Cole recommended that royal commissioners be given the power to abrogate privilege where the public interest in the revelation of the documents is such that it outweighs the private interest.¹³⁶ This suggests that royal commissioners engage in an evaluative balancing act between public and private interests that the High Court has previously said is unnecessary and even impossible.¹³⁷ The difficulty with this kind of exercise is that privilege has

131 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) [3.1.3].

132 Law Institute of Victoria, *Professional Conduct and Practice Rules* (2005) [3.1.3].

133 Dana Gold, 'Whistleblowers: The Critical Link in Corporate Accountability' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (2005) 255.

134 *Carter v The Managing Partner, Northmore Hale Davey & Leake* (1995) 183 CLR 121, 138 (Deane J).

135 The association of privilege with human rights would appear to have entrenched it as a basic element of the Australian legal system. This is consistent with a finding of the European Court of Justice in *AM&S Europe Ltd v Commission* C155/79 [1982] ECR 1575 that privilege is a basic right under EU law because it was protected under all member state laws. It is possible that, due in part to its special status, in Australia privilege can only be changed by clear words in legislation. See *Carter v The Managing Partner, Northmore Hale Davey & Leake* (1995) 183 CLR 121, 138 (Deane J); *Baker v Campbell* (1983) 153 CLR 52, 96 (Wilson J).

136 Cole, above n 45, recommendation 4.

137 *Commissioner of Australian Federal Police v Propend* (1997) 188 CLR 501, 583 (Kirby J).

generally been seen by the Court as ‘an absolute rule from which no derogation should be allowed’.¹³⁸

Interestingly, there is no criteria suggested by which this determination could be made, thus leaving the commissioner with a wide discretion. Furthermore, given that the courts have generally refused to engage in this kind of exercise there is little judicial precedent for the commissioner to consider in making such a decision. The danger this process immediately suggests is that by removing the clear and simple character of client legal privilege,¹³⁹ and substituting for it the uncertainty of a judicial discretion, the reassurance it currently provides to clients considering their communications with their solicitors will be lost.

In addition to Commissioner Cole’s recommendations, the ALRC has suggested that specific legislation should be considered in relation to particular royal commissions or investigations to remove privilege where appropriate.¹⁴⁰ In considering the enactment of this legislation three factors should be considered:

- The impact of the investigation or inquiry on the public and/or whether it is a covert investigation;
- Whether the information can be obtained without excessive delay and without abrogating privilege; and
- The extent to which the information is likely to be of benefit to the investigation.

This approach has the benefit of avoiding some of the uncertainty involved in granting all royal commissioners and investigatory bodies a complete discretion. In any event it provides little help to those seeking redress in litigious, rather than investigatory, situations. Therefore, at best this recommendation, should it come to pass, is of interest, and possibly helpful, in combating extensive and poorly founded claims of privilege in the context of royal commissions.

The recent ALRC discussion paper also addresses the issue of privilege with a broader brush.¹⁴¹ A significant number of its proposals focus on refining and clarifying the way federal bodies and legislation deal with privilege.¹⁴² The discussion paper does, however, make some more wide-ranging propositions, the effect of which if implemented, would be to reduce the likelihood of an abuse of privilege occurring. The discussion paper suggests a number of procedural reforms to be put in place by federal courts with a view to creating a more

138 Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (2000) 898. By ‘absolute’ in this context the courts generally mean that there are ‘no exceptions to its operation’ rather than that the courts cannot find that there are ‘limitations on its scope’ or that courts cannot, in their discretion, require that a document is produced notwithstanding a claim of privilege.

139 *Commissioner of Australian Federal Police v Propend* (1997) 188 CLR 501, 584 (Kirby J).

140 Australian Law Reform Commission, above n 38, [Proposal 6-1].

141 *Ibid* 25. This exhaustive examination of client legal privilege was released in September 2007 and seeks further submissions prior to a final report being issued. It indicates the Inquiry’s current thinking in the form of specific reform proposals.

142 *Ibid* [Proposal 5-3]. So, for example, it is recommended that where legislation is intended to remove or modify the operation of privilege clear words to that effect should be used.

rigorous framework within which privilege claims are considered. So it is suggested that where claims of privilege are made they should be specific, with the documents claimed being individually identified, or if in bundles, described so as to be identifiable.¹⁴³ Furthermore, the basis upon which privilege is being claimed should be specified.¹⁴⁴ Where the documents are prepared by an in-house counsel this, too, should be disclosed along with sufficient details about the in-house counsel's independence.¹⁴⁵ In addition, the ALRC suggested that there be a process of certification whereby lawyers are asked to confirm that there are reasonable grounds for the claim of privilege,¹⁴⁶ and that a process for independent review of disputed privilege claims be developed.¹⁴⁷

These procedural reforms are aimed at attaining a greater degree of clarity and an appropriate process for dealing with privilege claims. The approach is not to reduce the ambit of privilege but to try and reduce the potential for abusive claims. In addition, the potential for possibly justifiable but extensive privilege claims to significantly delay litigation would be reduced through the adoption of a more streamlined method for evaluating claims. The real significance of these proposals, however, lies in the way that they attempt to increase the pressure on lawyers to carefully and ethically consider whether or not a particular claim of privilege is sustainable. As such the ALRC is acknowledging the critical role that lawyers play in the maintenance of faith in the doctrine of privilege. Lawyers are the gatekeepers for privilege claims.¹⁴⁸

G State Actions

The possibilities set out above focus on ways to increase the likelihood that private litigation achieves accurate outcomes for litigants. In addition, there may be other ways for the state to address this issue. Drawing on the case of *USA v Philip Morris*, and other similar cases run by United States governments against tobacco companies, it must be asked whether Australia should proceed down this path. Given the experiences in the *Cremona* and *McCabe* litigation, and the difficulty of mounting class actions in Australia, it would seem that only the state has the resources to take on the litigious might of the tobacco companies. State actions have a considerable advantage over those pursued by individuals.¹⁴⁹ Not only is the state likely have more extensive resources at its disposal, it is less likely to be seen as a 'blameworthy plaintiff'. Individuals who sue tobacco companies face arguments based on voluntary assumption of risk or contributory negligence

143 Ibid [Proposal 8-3 (b)(1)].

144 Ibid [Proposal 8-3 (a)].

145 Ibid [Proposal 8-3 (b)(3)].

146 Ibid [Proposal 8-3 (b)(5)(ii)].

147 Ibid [Proposal 8-14].

148 This emphasis is also the basis for a number of recommendations about legal education and changes to legislation in order to more specifically spell out the disciplinary consequences of making false claims of privilege.

149 Kelder and Daynard, above n 120, 178.

because many have continued to smoke despite knowledge of the dangers. It is unlikely, however, that tobacco companies could establish that state plaintiffs have consented to the risk associated with smoking or contributed to the state's losses. This option, therefore, is a promising avenue for recovering losses to the state arising out of tobacco use.

A number of other countries appear to be mounting significant cases against tobacco companies.¹⁵⁰ It is likely that in Australia, as in Canada, a case of this type would require legislative intervention. At this point, however, there is no indication that Australia intends to mount this kind of action against tobacco companies. However, the advantages of state actions mean that this option should be considered by Australian policy-makers.

IV CONCLUSION

Litigation against corporations, in particular tobacco litigation, raises challenging issues for the legal system. The importance and vulnerability of documentary evidence and the potential for corporate litigants who are repeat players to have significant power advantages over individual litigants make this a fertile area for exposing any inequities. The state of the law immediately following the *McCabe* case could be criticised for imposing unreasonable burdens on individuals who were facing opponents prepared to aggressively manage their documentary evidence.

Fortunately the revelations of document destruction in *McCabe* have been a potent catalyst for change. A number of significant legal changes have been implemented in the years since *McCabe* was decided. These reforms are characterised by efforts to clarify pre-existing obligations and provide clear sanctions for their breach, and may therefore be seen as incremental rather than radical. A notable aspect of the current and proposed reforms is the focus on the role of lawyers, who are under increasing pressure to meet their obligations as officers of the court. The NSW regulation specifically stating that advising a client to make evidence unavailable is professional misconduct provides a useful signal by clarifying lawyers' obligations. To some extent this is not new. The traditional formulations requiring lawyers to avoid professional misconduct are arguably sufficient to prohibit advising clients to destroy evidence. That said, the additional clarity provided by the NSW regulation is to be welcomed as an indication from the authorities that behaviour of this type will be taken seriously. It is therefore unfortunate that the remaining states have so far decided that the current professional conduct formulations, which do not mention evidence unavailability specifically, are sufficient.

Another attempt to influence lawyer behaviour is apparent in the ALRC's proposed procedural reforms to client legal privilege. The process of certification of privilege

150 See eg *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473; [2005] SCC 49, which held that an act of the British Columbia Parliament that allowed the government to recover health care costs from tobacco companies was constitutional; ABC Television, 'Nigeria Sues Tobacco Companies for \$US40bn', *NEWS* (Sydney) 8 November 2007, <<http://www.abc.net.au/news/stories/2007/11/08/2084816.htm>> at 29 November 2007.

by lawyers attempts to reduce the likelihood that blanket claims of privilege will be made. The advantages of these proposals make them worthy of close scrutiny by authorities across Australia.

The new *Crimes (Document Destruction) Act 2006* (Vic) and *Evidence (Document Unavailability) Act 2008* (Vic) are two wider Victorian reforms that have the potential to affect the behaviour of lawyers and corporate officers. While these may well be valiant efforts to address the difficult issue of evidence destruction, the complexities involved in prosecuting anyone under these Acts appears daunting. It would therefore be surprising if these were widely used. Notwithstanding this, the indication by the authorities that evidence destruction is to be avoided is valuable, and as such these reforms may be of interest to other states.

Australia is not alone in grappling with the challenges posed by tobacco litigation and discovery abuse. A number of other options have been used in other jurisdictions in order to discourage discovery abuses and pursue tobacco companies. In particular, document banks and the tort of spoliation are of note. While these are of interest, the difficulty in transferring these to the Australian system, and the pitfalls revealed by the experience of other jurisdictions, suggest that they are better avoided. State actions are the one approach that appears to have some potential in the Australian context, although it is likely that legislative intervention would be required.

The next stage in the *McCabe* saga is yet to be played out. The Victorian Court of Appeal's recent decision, allowing qualified use of information revealed by a former Clayton Utz lawyer in an application to re-open Mrs McCabe's case, is testimony to the enduring nature of the *McCabe* litigation. Regardless of the final outcome, there can be no doubt that the ripples from *McCabe* will continue to be felt for some time.