

To shred or not to shred – Does your company have an adequate document retention policy?

Two new pieces of important legislation

Introduction

In response to the document destruction allegations against British American Tobacco in the highly publicised Rolah McCabe case and the subsequent finding of the Victorian Court of Appeal that such actions did not constitute an attempt to pervert the course of justice, the Victorian Parliament has introduced *The Crimes (Document Destruction) Act 2005* ('the Act') and the *Evidence (Document Unavailability) Act 2006* ('the Civil Act').

This new legislation places a high onus of responsibility on boards of directors of corporations and owners of small businesses to ensure that adequate document retention procedures are implemented and adhered to.

Why is the retention of documents so important?

Documentary evidence is crucial to proving legal liability and solving legal disputes. Whilst the potential to destroy documents which may be detrimental to the success of a litigious dispute may seem advantageous, it is a practice which is viewed with much contempt by the courts.

Retaining documents relevant to actual or anticipated litigation is fundamental to the fair and transparent administration of justice.

The scope of the Act

The Act came into operation on 1 September 2006. Its aim is to make it a criminal offence to destroy, hide or make incapable of identification a document or other thing that is, or is reasonably likely to be, required as evidence in a legal proceeding.

The definition of document extends beyond hard copies of documents and also includes emails, sound recordings and photographs.

A person found guilty of this offence is liable to a maximum of 5 years in prison or a fine of up to \$64,458 or both and a company found guilty is liable to a fine of up to \$322,290.

What is the potential effect of the Act on your business?

If an officer of a company is found to contravene the Act the company may also be found guilty of the same offence. The definition of officer is broad and it may extend to employees, external advisors and any other person who has a substantial decision making role in a company. This concept of dual responsibility will apply regardless of whether the employer has intentionally instructed the officer or employee to destroy the document.

If it can be proved that the employer either expressly or by implication authorised or permitted the destruction of a document or that a corporate culture existed within the company that 'directed, encouraged, tolerated or led to the relevant conduct being carried out' then the provisions of the offence may be triggered.

"It may be a defence or a mitigating factor to a charge under the Act if a company can prove that it exercised due diligence and took all reasonable steps to educate its officers about the importance of document retention."



It may be a defence or a mitigating factor to a charge under the Act if a company can prove that it exercised due diligence and took all reasonable steps to educate its officers about the importance of document retention and the provisions and penalties of the Act.

At this stage the Act has not been considered or interpreted by the courts and so it is difficult to anticipate the types of behaviour that will be deemed to breach the Act. However, what is clear is that the provisions of the Act are broad ranging in scope.

The scope of the Civil Act and its effect

The purpose of the Civil Act is to enable the courts and the Victorian Civil and Administrative Tribunal to intervene and make orders in civil proceedings where the unavailability of documents has affected the fairness of the proceeding.

The Civil Act gives the courts a broad power to make any ruling or order it considers necessary to ensure fairness to all the parties. The type of ruling made will be influenced by the impact of the unavailability of the document and the circumstances which lead to the document becoming unavailable.

What can a business do to prevent a contravention of the legislation?

The most effective way to make your employees aware of the implications of the legislation and to safeguard your company from prosecution is to implement a legally sound document retention policy.

An effective document retention policy will not only educate employees and officers about the importance of maintaining proper documentary archives but it may also assist an employer in proving to a court that all necessary steps were taken to prevent a breach of the Act. It may also be influential in defending an allegation that a 'corporate culture' existed within the company which ultimately led to the conduct being carried out.

Implementing a document retention policy means more than recording some instructions and guidelines in writing and filing it away in your company's archives. It involves actively educating all staff, officers and board members about the importance of maintaining proper archived records and ensuring that any system that is implemented is strictly adhered to.

Conclusion

The exchange of documents is essential to ensuring that the justice system is open and equitable and that the decisions of the courts are accurate and fair.

A document retention policy which addresses the issue of document creation and the archiving of documents is essential for all Victorian businesses. If a company and its board does not turn its mind to the importance of a properly maintained and managed document retention system it not only runs the risk of being charged under the Act but also being exposed to the public humiliation and corporate embarrassment that flows from a failure to retain appropriate documents.

"Implementing a document retention policy means more than recording some instructions and guidelines in writing and filing it away in your company's archives."