The Duty to Preserve Documents Before Litigation Commences

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This paper explores the nature, extent and boundaries of the duties that exist to preserve relevant documents where no litigation has yet commenced and where such litigation can be reasonably anticipated. It uses as the context for this discussion the recent tobacco litigation case McCabe v. British Australian Tobacco (BAT). The duties to preserve are considered from the perspectives of prospective plaintiffs, who need the documents to prove a claim; prospective defendants (and their servants, agents and employees), who may for legitimate reasons have document management policies that call for routine destruction of documents; and judges (and juries), who require evidence to discharge their fact-finding and truth-seeking functions. The paper will also briefly discuss the legislation proposed in the Sallman Report, and the effect that the proposed legislation would have on the nature and scope of pre-proceedings duties to preserve documents.

Introduction

> *'Diagramma was printed on sedge papyrus. It's like tissue paper. Life span of no more than a century'.*
>
> *'Why not something stronger?'*
>
> *'Gallileo's behest. To protect his followers. This way any scientists caught with a copy could simply drop it in water and the booklet would dissolve.* ***It was great for destruction of evidence, but terrible for archivists'.*** [2]

In matters related to the preservation and destruction of documents that may become evidence in future civil proceedings, the interests of the archivist, the litigant and the litigant's lawyers will not always converge. The divergence of these interests is a frequent occurrence, not confined to the dramatic literary, and possibly historical, example of a scientist's hurried immersion of a sedge papyrus document in water to avoid detection and persecution at the hands of dangerous enemies of science. Loss and destruction of documents happens every day in more mundane cases, but will often be, as with our sedge papyrus example and notwithstanding the less dramatic nature of the loss, a difficult matter for archivists. Among the responsibilities that archivists have is the documentation of human activity and events and the preservation of that documentation. Those events often become the focal point in legal disputes. As soon as that happens, the documents become something in addition to a record of human activity. They become evidence or potential evidence. Then the responsibilities to record and preserve the records of human activity are often displaced, or at least in competition with, another set of duties and responsibilities. New actors with new interests — primarily litigants and their lawyers — enter the picture, and the aims of recording and preservation may give way to the interest of ensuring that damaging documents do not find their way into the hands of an adversary.

The purpose of this paper is to identify some of the basic principles that govern, or should govern, as between lawyers and their clients, the preservation and destruction of documents that might be relevant in future legal proceedings, where those proceedings have not yet commenced.[3] I will use as a context for this discussion the *McCabe v. BAT* litigation.[4] That case began in the Supreme Court of Victoria and found its way to the High Court of Australia. It has attracted national

and international attention, especially because the defendant tobacco company had, over a period of years prior to Rolah McCabe commencing her lawsuit, destroyed thousands of documents that would have been relevant in the McCabe litigation.

This paper explores the circumstances in which a duty to preserve documents may arise long before any actual proceedings are commenced. For the purposes of this paper, the nature and effect of statutory duties to preserve documents have not been considered here.[5]

What happened in *McCabe*?

The fifty-one year old plaintiff had lung cancer which she alleged had been caused by smoking the defendant's cigarettes over approximately four decades. She sued the defendant for damages arising from the defendant's negligence related to the marketing and sale of their cigarettes. The trial judge ordered that the defence of the defendant tobacco company be struck out and that judgment be entered for the plaintiff. He criticised the defendant for its failure to comply with discovery orders that had been made during the proceeding. BAT was unable to comply with these court orders to produce documents because it had over a period of years prior to Mrs McCabe's action destroyed large quantities of documents. These documents had been destroyed pursuant to what the company called a document retention policy. The trial judge found that the so-called document retention policy was in fact a document destruction policy intended to ensure that the documents would not be available for use in any future litigation against the company. The trial judge also found that as a result of the defendant's pre-commencement destruction of documents, the plaintiff had been deprived of the possibility of a fair trial.

BAT appealed successfully. The Court of Appeal ruled that destruction of documents prior to commencement of legal proceedings could only result in striking out the destroyer's claim or defence if the destruction amounted either to an attempt to pervert the course of justice (or, if open, contempt of court).[6] The Court of Appeal borrowed this test from the criminal law, although they stated that proof of intent to pervert the course of justice would only be required to a civil standard. The plaintiff applied for special leave to appeal to the High Court. The Attorneys-General of Victoria and New South Wales applied for leave to intervene.

The basis of their desire to intervene was concern about the effect that the Court of Appeal decision might have on the administration of civil justice.[7] The High Court rejected both Rolah McCabe's application for leave to appeal and the requests of the Attorneys-General for permission to intervene.[8] The High Court expressly refused to comment on the correctness of the Court of Appeal test regarding the destruction of documents in the pre-commencement phase.[9]

This case raises numerous questions about civil procedure, evidence, professional responsibility, ethics and the administration of civil justice. I want to explore two of those questions in this paper. First, what responsibilities do individuals and enterprises have to preserve their records for use in civil proceedings, where those proceedings have not yet commenced? Second, and related to the first question, when does a document management policy cease to be about management and preservation and, in reality, become a strategy to destroy potentially harmful documents with a view to ensuring that they never see the light of day in a civil dispute? My focus will be on the nature and scope of the rights and duties regarding preservation and destruction of documents in the pre-commencement stage because that was the issue in the McCabe litigation and because that is a period that would be of particular interest to archivists. The impact of this issue on archivists is especially acute in the light of the fact that the duty to preserve documents that may be relevant evidence in future civil proceedings may arise many years before those proceedings commence. Prior to exploring these issues, however, it is instructive to consider briefly the nature and scope of the duty to preserve evidence *after* litigation has commenced.

Post-commencement duties to preserve and produce documents

As soon as proceedings are commenced, the civil procedure rules in every jurisdiction in Australia, and in every common law jurisdiction, become the guide in determining how the disputing parties must deal with their documents. In particular, parties are bound to put measures in place to ensure that all documents relevant to the matters in issue between the disputing parties are preserved and will be available in the discovery process. The purpose of discovery is to make available to all litigating parties, and of course to the judge (and the jury if there is one) all relevant information. Relevance has for at least the last 125 years

been given a very wide interpretation in the discovery process.[10] The development of the discovery rules and practice over the past 125 years is dominated by one theme – the requirement is full disclosure of all information that could either harm or help a party's case or an opponent's case. The first principles that underlie the discovery process in civil litigation are full disclosure, avoiding trial by ambush, saving time and cost, and encouraging settlement.

One caveat is required. In recent years, concerns have been expressed in civil justice reform discussions about the exorbitant cost of discovery and about the effect this can have on access to justice. These concerns have led some jurisdictions to narrow the definition of relevance and, therefore, to reduce the number of documents that litigants must produce. These changes represent an attempt to reconcile and balance competing policy goals and interests. On the one hand, full disclosure of all relevant documents is seen as a way of advancing the truth-seeking functions of judges (and juries) and of ensuring that civil litigation processes and outcomes are fair. On the other hand, production of thousands of documents during the discovery process can be time-consuming and expensive, and can have the effect of restricting, rather than facilitating, access to justice. Some of the recent attempts to limit the extent of document disclosure are aimed at improving the balance between these two competing aims – ensuring continued access to relevant information, while at the same time curbing the excesses of discovery, especially in relation to documents that are only very marginally relevant.

But the point is that as soon as proceedings are commenced, the responsibilities to manage, preserve and produce relevant documents are governed by the discovery rules as set out in the written rules of court. Those rules are clear. A litigant must produce for inspection by the other side all relevant documents (unless they are privileged). Failure to do this can result in a costs order against a party or, in extreme cases, dismissal of a party's claim or defence.

Pre-commencement obligations not to destroy documents

The Nature of Discovery

What about the pre-commencement phase? How do we determine what the rights and responsibilities are for individuals and enterprises

regarding the preservation and destruction of their documents when proceedings have not yet been commenced? How fair is it to impose on an individual or enterprise the responsibility to preserve documents that might possibly be relevant in future litigation, even if no proceedings have yet commenced? Are we asking them to be able to foretell the future? Are we interfering to an unacceptable extent with their property rights in their own documents and records and with their right to dispose of that property as they see fit? These were among the questions raised directly and indirectly by *McCabe.*

The civil procedure discovery rules mentioned above apply to civil proceedings after commencement, but do they also have a role in defining the rights and responsibilities in the pre-commencement phase? The conventional answer is no — the civil procedure rules regarding discovery do not apply until proceedings have been commenced. This conventional approach is deficient. In *Destruction of Documents Before Proceedings Commence: What is a Court to Do,*[11] Cameron and Liberman stated:

> Though the process of discovery of documents does not begin until after proceedings have been commenced, their destruction *prior* to the commencement of proceedings can have just as damaging an effect on the courts' powers to adjudicate disputes as their destruction *after* those proceedings have been commenced ... It would greatly undermine the purpose of discovery, and the crucial function it serves in the adjudication of disputes, if the time prior to the commencement of proceedings were seen as a window of opportunity to destroy documents that would be required to be discovered once proceedings had been filed. One might therefore expect courts to take a strong stance in cases where the pre-proceedings destruction of documents has impaired their capacity to exercise their powers.[12]

The point here is that conduct in the pre-commencement phase can have a devastating effect on post-commencement discovery and proof. Some American courts have responded to this problem by concluding that the relevant discovery rules, notwithstanding the fact that on a strict reading they appear to apply only after proceedings have commenced, can also be a pre-commencement source of a duty to preserve

documents, 'lest the fact-finding process in our courts be reduced to a mockery'.[13] The trial judge in *McCabe v. BAT* agreed with this approach.[14] The Court of Appeal rejected this approach and ruled that only if the pre-commencement destruction had been done with an intent to pervert the course of justice could the destroyer's claim or defence be struck out. The American approach endorsed by Eames J in *McCabe v. BAT* is in the author's view and for the reasons stated by Eames J, the correct approach.[15]

Pre-proceedings Duties to Preserve — Specific Examples

We can begin to understand the nature and scope of an enterprise's rights and responsibilities regarding the pre-commencement preservation and destruction of documents by considering the following examples:

> *(a) The enterprise can reasonably anticipate that it will be sued because it has received notice, but no proceedings had been commenced when the documents were destroyed.*

In this first example, there could be various sources of the enterprise's reasonable anticipation of a lawsuit, including a comment to the enterprise by the plaintiff-to-be (P), or perhaps by P's lawyer. If the enterprise destroys documents in the pre-commencement time period and those documents are relevant to the foreshadowed claim of P, the consequences for P are that P will be deprived of the record that she needs to prove her case. The extent of the damage P suffers as a result of the destruction will vary depending on the amount of information destroyed and its degree of materiality to the facts that P needs to prove. (The odds are, of course, that because the documents were destroyed when litigation in which they would be relevant was anticipated, they are probably very material indeed). The nature and number of the documents destroyed may be such that it is impossible for P to get a fair trial. If that happens, it would be the conduct of the enterprise in destroying the documents, albeit in the pre-commencement phase, knowing that they were important or perhaps essential for P to prove her case, that has made it impossible for P to get a fair trial.

Many people familiar with the Heiner Affair in Queensland would argue that the Queensland Government's destruction of records, occurring as it did after it had received notice that those records were needed for

possible litigation, is an example of the situation described in the preceding paragraph.[16]

> *(b) The enterprise has not yet been sued but is engaged in the business of making and selling products that have the potential (or are actually known to) cause harm.*

Assume for the purposes of this second example that in recent years various people alleging injury resulting from the use of the enterprise's products have sued the enterprise. As a result of this pattern of past claims, the enterprise has in place a litigation strategy to deal with future ones that they are almost certain will happen (although they have no specific notice of an intended claim, and in fact have never heard of or from the claimant).

These facts resemble those in *McCabe v. BAT.* Although Rolah McCabe had not communicated with BAT in a manner that would have put BAT on notice of a possible specific claim by her, they knew that a claim like hers was inevitable and imminent. This was agreed by all parties to the litigation, was confirmed by the trial judge, and is one of the trial judge's findings that was not overturned on appeal. The defendant tobacco company had destroyed thousands of documents knowing that a lawsuit like the one commenced by Rolah McCabe was almost certain to occur, also knowing that the documents it was destroying would be relevant, and in many cases a 'knockout blow', for any plaintiff like Mrs McCabe.[17]

Nor was there any doubt when BAT, pursuant to its 'document retention policy', destroyed thousands of documents, that it knew it was engaged in an enterprise that produced a dangerous product. The danger was not just one that *might* occur incidental to the nature of the business, or the nature of the product, or the way it was used (for example, Coca-Cola bottles can explode or car engines can catch fire). Rather it was inherent in the nature of the product and manifest every time someone used the product (ie, every time someone smoked a cigarette).

There is a strong argument to be made, perhaps more on moral than on legal grounds, that an enterprise engaged in this type of activity can never destroy documents that are in any way relevant to the harmful nature of the activity (and regardless whether there is any statutory obligation to preserve). If we are not comfortable with the moral justification for this position, then it is possible to state a legal one. We could argue that by the very nature of the harmful activity in which

some enterprises are engaged, those enterprises can anticipate legal action, because we live in a litigious society in which people affected by the harmful activities of enterprises tend to sue to recover compensation. This is a possible alternative legal justification for retaining the documents if one is not satisfied with the moral justification.

If an enterprise destroys documents in the pre-commencement phase that are relevant to the kind of claims that they anticipate will happen in the near future, they have not knowingly deprived a specific, identifiable claimant of the possibility of advancing a claim. However, they have arguably deprived a potential class of claimants of the possibility of bringing and proving claims and vindicating their rights. The duty to preserve the documents does not exist solely because the enterprise has possession of the documents. Because the enterprise has been put on notice, directly or indirectly, is some reason why destruction could cause problems of proof in the future. In this second example, the reason is a combination of the nature of their business and the history of claims against them.

> *(c) The enterprise has not yet been sued, has never previously been sued, and the nature of its business is not such that it has the potential, incidental to its ordinary business activities, to cause harm or injury to consumers or others with whom it has ordinary business relations.*

This situation is very different from the first two examples. If this enterprise has a legitimate document management policy, whether formalised or just a practice of periodically doing a 'spring clean', then it is more difficult to find a source of a duty that they should not carry out their routine destruction or their spring cleaning. Where there has been no specific notification that a lawsuit will be commenced, and where there is no pattern of litigation either in this specific enterprise or in the industry in which it is engaged, then routine document destruction would appear to be unobjectionable.

What if in this situation a lawsuit that could not reasonably have been anticipated is subsequently commenced against the enterprise and many of the documents that were destroyed either in the routine spring-cleaning exercise or pursuant to a formalised document retention policy would have been highly relevant in the subsequent litigation? This situation presents the challenge of identifying who ought to be

responsible for the consequences of the destruction. If we assume in this case that the enterprise is the defendant, and that the plaintiff's ability to prove her allegations is hindered or perhaps even destroyed as a result of the destruction, we are faced with a difficult choice. If that plaintiff is told that she must bear the consequences of the destruction, she may be left without a remedy, depending on the nature and number of documents destroyed. If the defendant is told that judgment will be entered in favour of the plaintiff (ie, that the defendant must bear the consequences of the destruction) then the defendant is penalised for conduct that was consistent with acceptable business practice not intended to hamper any plaintiff's ability to prove a claim.

The best answer here is that there must be some duty on the part of the enterprise to retain the documents. The duty to preserve is not triggered merely by the fact of possession. The usual source of the duty will be that some event has triggered an anticipation that legal proceedings may be commenced. In the situation described in this third example, no duty arises. For that reason, this may be an example of the rare case in which a plaintiff is left without a remedy as a result of the pre-commencement destruction of documents.

Other issues relevant to the duty to preserve and the right to destroy

Modern means of information storage

Matters of cost and convenience will be relevant when determining whether to destroy documents and when evaluating at a later time, in the post-commencement phase, what the consequences of the earlier destruction ought to be. One of these cost and convenience issues will be the burden placed on an enterprise by the need to store the documents. As it becomes increasingly easy to store information electronically, the cost of storage space becomes less relevant as a justification for destruction than it might have been 5 or 10 years ago.

Document management policies and strategic (or cynical?) compliance

Imagine a business that relies on a dangerous activity, such as parachuting, paragliding or bungee jumping to generate its profits. Because of the dangerous nature of the activity, people who pay to do it are from time to time injured. The company provides first aid assistance to these people and keeps record of every incident requiring first aid

intervention. This company has a policy that at the end of every season (ie, once per year), all first aid records generated in that season are destroyed. The company operates in various locations and all employees in all locations are instructed that they must adhere strictly to this policy. The practical effect of this policy is that an entire class of documents becomes unavailable to a class of people who might need the documents to prove (or defend) a case.

This was the situation in *Reingold v. Wet N' Wild*.[18] Wet N' Wild operated a water park that included a very steep water slide. The plaintiff was injured when he slipped after going down, and while exiting, the slide. He suffered a broken hip and required immediate surgery. The employees of Wet N' Wild took him to their first aid station to wait for an ambulance. Reingold sued Wet N' Wild for negligence. He tried to obtain from them information about any slip and fall accidents that had occurred at their water park in the five years preceding his fall. Wet N' Wild responded that they were unable to provide that information because all first aid logs were destroyed at the end of each season. This meant that the logs for July 1989, which is when Mr Reingold fell, and any preceding years, would have been destroyed well before the Reingold proceedings commenced on 3 July 1991.

The company argued that they had done nothing wrong in destroying the records because they were just following the company's normal document management policy. The trial court found that there was no 'willful suppression' within the terms of the relevant statute because Wet N' Wild was just adhering to its usual business practice. The Court of Appeal disagreed. They stated:

> This policy [to destroy all first aid records at the end of each season] means that the accident records are destroyed even before the statute of limitations has run out on any potential litigation for that season. It appears that this record destruction policy was deliberately designed to prevent production of records in any subsequent litigation. Deliberate destruction of records before the statute of limitations has run out on the incidents described in those records amounts to suppression of evidence. If Wet N' Wild chooses such a records destruction policy, it must accept the adverse inferences of the policy.[19]

This case has no value as an Australian precedent (it is an American case), but it is an instructive example of a situation where strategic or cynical compliance may be insufficient to justify pre-commencement document destruction. All of the surrounding circumstances ought to be considered, and if the effect of the compliance is to make an entire class of documents unavailable in any subsequent litigation, the destroyer may have to bear the consequences, in litigation, of the pre-commencement destruction. This would be especially true where the destruction happened even before any relevant statute of limitations period had expired (as was the case in *Wet N' Wild*).[20]

Legal advisers and document management policies

Just as the practical effect of a document management policy can be used as one measure of the true purpose of the policy, so can the fact that lawyers have been involved in the drafting and implementation of such a policy. Legal advisers for BAT played a central role in the development of the company's document management policies and strategies. The trial judge stated:

> I have no doubt that the document retention policy which was put in place did have some quite legitimate management and administrative purposes and benefits, and the documents contained much material relevant to such functions. I am, however, entirely satisfied that the primary purpose of the development of the new policy in 1985 and subsequently was to provide a means of destroying damaging documents under the cover of an apparently innocent house-keeping arrangement. When regard is had to the background material relating to the origins of the new policy, and the critical role played by litigation lawyers in its development and implementation, it is clear that the post-1985 policy documents reflect the acute consciousness of their authors (and explain their attempts to disguise the fact) that the Document Retention Policy was primarily directed towards the risks of litigation.[21]

The Court of Appeal disagreed with the trial judge on this point. In their view there was nothing about either the defendant's document management policies or the participation of lawyers in the preparation

and implementation of those policies which suggested that the true purpose of the policies was to facilitate destruction under 'an apparently innocent house-keeping arrangement'.[22]

It is not easy to understand how the trial judge and the Court of Appeal could have reached such diametrically opposed views of the true purpose of the defendant's policies and practices. There are various reasons why lawyers might participate in the development of a company's document management policies. One very important reason is to give advice and guidance to ensure that a company complies with its legal and statutory requirements. At the other end of the spectrum is advice aimed at ensuring that any potentially damaging documents are kept out of the hands of future litigants. For the immediate purposes of this paper, however, it can be acknowledged that if lawyers (and especially litigation specialists) are actively involved in the development of a company's document management policies, then the risk is created, depending on the nature of their involvement, that the policies may be judged as having more to do with keeping documents out of the hands of future litigants than with responsible document retention.

A Tort of 'Spoliation'?

The destruction of evidence in pending or anticipated civil proceedings is often referred to as spoliation.[23] The doctrine of spoliation has its roots in Roman law, specifically in the maxim *omnia praesumuntur contra spoliatorem* – all things will be presumed against the spoliator or wrongdoer.[24] The term 'spoliation' is also used to refer to the tort of spoliation. Most of the case law and academic literature on this tort is American, and it is voluminous.[25] Several states in the United States of America have recognised a spoliation tort. While courts in Australia and Canada have not yet recognised the tort, there are some cases in those jurisdictions in which the possibility of such claims in an appropriate case has been acknowledged.[26] The biggest barrier to overcome in recognising a tort claim for spoliation is determining the nature of the harm caused by the document destruction. This barrier, while not insurmountable, is significant. For this reason, the array of existing remedies available to address the effects of spoliation in civil proceedings – for example, evidentiary rulings against the party responsible for the destruction, costs sanctions, striking out all or part

of a claim or defence — are preferable to an independent tort claim for spoliation.[27]

The Sallmann Report

In May 2004, the *Report on Document Destruction in Civil Litigation in Victoria* was published by the office of the Crown Counsel for Victoria.[28] The Report was written in response to a request from the Attorney-General, Rob Hulls MP. The Attorney-General's request arose out of concern about the decision of the Court of Appeal in *Roxanne Cowell (representing the estate of Rolah McCabe, deceased) v. British American Tobacco Australia Services Limited*,[29] and as a result of the decision of the High Court to refuse both the Attorney-General's application for leave to intervene and the estate of Rolah McCabe's application for special leave to appeal.[30] The following terms of reference were given by the Attorney-General to Crown Counsel Professor Peter Sallmann:

> Following the recent case of *Roxanne Cowell (representing the estate of Rolah Ann McCabe, deceased) v. British American Tobacco Australia Services Limited*, you are asked to examine the current law, procedures and practice of discovery in the conduct of civil litigation in Victoria, with special emphasis on the approach that should be adopted if documents that could be relevant evidence in a trial are destroyed, whether the destruction occurs before or after the actual legal proceedings commence.
>
> As part of your investigation of these matters, you are required to give particular attention to the need for fair trials in civil litigation in Victoria, and what the appropriate role for the courts should be in ensuring the fairness of proceedings when relevant documentary evidence has been destroyed.
>
> Having examined these matters you are asked to report your views to the Attorney General, The Hon Rob Hulls, MP, including on any proposals or suggestions for changing the present position under Victorian law, and on how any such proposals or suggestions would best be implemented.[31]

In the Report, Professor Sallmann has recommended a three-pronged approach to address the issues raised for the administration of civil justice by the destruction of documents or other material, whether that destruction occurs before or after civil proceedings have commenced. The first of his three recommendations is that there should be new statutory provisions giving judges in civil proceedings the same power to deal with pre-commencement destruction of documents that they are now given by rules of court to deal with post-commencement destruction. The second recommendation is that a new statutory criminal offence is required to deal with egregious acts of destruction of material that would be relevant in judicial proceedings. The proposed criminal offence would in an appropriate situation encompass cases of pre-commencement as well as post-commencement destruction.[32] Finally, Professor Sallmann recommends a new professional conduct regulation to govern solicitors and barristers in relation to the advice they give about the preservation and destruction of potentially relevant material.

The aspect of the Report that is most relevant in the context of the issues explored in this paper is the proposal that judges be given the same power to deal with pre-commencement destruction that they are now given by the formal rules of court to deal with post-commencement destruction. The terms of reference given to Professor Sallmann by the Attorney-General specifically ask him to focus on 'the approach that should be adopted if documents that could be relevant evidence in a trial are destroyed, *whether the destruction occurs before or after the actual legal proceedings commence.*[33] The terms of reference also refer specifically to 'the need for fair trials in civil litigation in Victoria'.[34] The following comments from the Sallman Report indicate that this need is one of the underlying principles that inform the Report's conclusions:

> The broad policy conclusion reached by this review is that the exercises of a trial judge's discretion in civil litigation to rule on the consequences of failure by parties to comply with discovery rules should not be limited to circumstances in which formal legal proceedings have been commenced. It should extend to certain pre-commencement situations. The main reasons for this general conclusion are to ensure fairness in civil litigation; to enable courts to decide cases on the basis of as much relevant evidence and information as possible; and to preserve and enhance the overall

> integrity and reputation of the civil justice process and therefore the justice system as a whole. Destruction of relevant documents is a serious matter that can adversely affect individual parties to litigation as well as damage community confidence in the system of justice itself. This can be so whether the destruction occurs after or before the commencement of litigation.[35]

It is not yet clear whether these recommendations will be implemented in Victoria.

Conclusion

The duty to preserve documents that might be relevant in litigation can arise long before any actual litigation commences. That duty does not begin solely because an individual or enterprise possesses documents. The duty may be statutory but may also arise because it is reasonable for the party possessing the documents to anticipate that litigation in which those documents could be relevant is likely to or may occur. That anticipation can emanate from a number of sources. As discussed, these sources include actual or constructive notice that a lawsuit will be commenced, past practice in a particular enterprise or industry, and/or the nature of the business in which the individual or enterprise is engaged. If the documents are destroyed, then there will be civil consequences for the destroyer, which could range from a costs penalty all the way to dismissal of the destroyer's claim or defence. Depending on the jurisdiction in which the destruction happens and the willingness of prosecutors to prosecute, there might also be criminal sanctions. Finally, if legal advisers are involved, they may face separate professional disciplinary penalties depending on the nature and scope of their participation in the document destruction.

In Victoria, the decision of the Court of Appeal in *BAT v. Cowell* has created some confusion about the nature and the extent of the duty to preserve documents in the pre-commencement period. The confusion will be resolved if legislation as proposed in the Sallmann Report is enacted. Even without such legislation, however, the criticism of the Court of Appeal decision has been sufficiently strong to suggest that the test articulated by the Court of Appeal — that pre-commencement destruction is wrong only if done with an intent to pervert the course of

justice – ought not to be embraced unreservedly, or perhaps ought not to be embraced at all.

Endnotes

1 Paper prepared by Camille Cameron for the ASA *Challenges in The Field Conference*, Canberra 2004. I want to acknowledge the contribution of Jonathan Liberman, Director, Law and Regulation, VicHealth Centre for Tobacco Control, The Cancer Council of Victoria. This paper draws significantly on a paper we authored together, *Destruction of Documents before Proceedings Commence: What is a Court to Do?* (2003) 27 MULR 273 and on other discussions we have had. I also thank Chris Hurley for his helpful comments on the draft of this paper.

2 Dan Brown, *Angels and Demons*, Great Britain, Corgi Books, 2001.

3 When I refer in this paper to 'commencement of proceedings' I mean the actual filing of papers that officially commences the case. I am not referring to the commencement of *the trial* (which happens long after the actual *proceedings* are commenced).

4 *McCabe v. British American Tobacco Australia Ltd* [2002] VSC 73 (22 March 2002).

5 Nor will I distinguish between pre-proceedings destruction of documents after investigation commences and pre-proceedings destruction of documents before investigation commences. The question whether there is a duty to preserve documents before any investigation commences (for example, to ensure that the investigative powers of executive and legislative bodies will not be stymied), and whether any such duty is different from the duty to preserve after investigation commences but before proceedings commence, has not received much attention in the literature, is beyond the scope of this paper and is probably a suitable subject for separate consideration.

6 *British American Tobacco Australia Services Limited v. Cowell* (as representing the estate of Rolah Ann McCabe, deceased) [2002] VSCA 197, para. 173.

7 It is clear from the terms of reference given by the Attorney-General of Victoria to Professor Sallmann that the impact of the Court of Appeal decision on the possibility of fair civil trials was the central concern. See below, at 11-12 for the terms of reference.

8 *Cowell v. British American Tobacco Australia Services Limited* [2003] HCA Trans 384 (3 October 2003).

9 ibid.

10 The leading case is *Compagnie Financiere et Commerciale Du Pacifique v. the Peruvian Guano Company* (1883) 11 QBD 55 (CA).

11 C Cameron and J Liberman, *Destruction of Documents Before Proceedings Commence: What is a Court to Do*, (2003) 27 MULR 273, available at <http//www.austlii.edu.au/au/ journals/MULR/2003/12.html>.

12 ibid, pp. 278-79.

13 *Bowmar Instrument Corp v. Texas Instruments, Inc*, 25 Fed. R. Serv. 2d 423, 1977 WL 22799 (N.D.Ind. 1977), paras. 426-27.

14 Note 4, paras. 361-67.

15 One possible criticism, however, is that the court in *Bowmar* had to adopt a very strained interpretation of the relevant rule in order to arrive at what I am arguing is the preferred result. One solution is to change such rules so that they refer explicitly to pre-commencement conduct.

16 Information about the Heiner Affair and the related Senate Select Committee can be found at <http://www.aph.gov.au/Senate/committee/lindeberg_ctte/index.htm>. One of the submissions received by the Select Committee, and available on this website, is from the Australian Society of Archivists. That submission states, among other things, that the factors archivists take into account in making decisions about the preservation and disposal of records include 'information concerning upcoming legal proceedings or risk assessments of the necessity for retaining records for envisaged legal proceedings'. See pp. 2-3.

17 Lawyers for the defendant had in 1996-97 rated all of the documents assembled for purposes of the earlier Cremona tobacco litigation case on a scale of 1 to 5, with '5' meaning that the document was a knockout blow against the company and '1' meaning that the document was a knockout blow in favour of the company. See on this issue paras. 109-115 of the trial decision, in *McCabe v. British American Tobacco Australia Ltd.*, note 4.

18 *Ronald J. Reingold v. Wet N' Wild Nevada Inc.*, 1997 113 Nevada 967.

19 ibid., 970.

20 Doreen McBarnet and Christopher Whelan have written about 'creative compliance', which they define as 'using the law to escape legal control without actually violating legal rules'. See *The Modern Law Review*, vol. 54 (1991) 848. They state (at 848) that 'creative compliance thrives on a narrow legalistic approach to rules and legal control'. The authors were discussing (among other things) regulation and its capacity to 'transcend formalism' (at 873), but what they describe as creative compliance is similar in some significant respects to what I have referred to here as strategic or cynical compliance. I thank my colleague Christine Parker for drawing the work of these authors to my attention.

21 Note 4, para. 19. See paras 17-56 for the trial judge's detailed explanation of the evolution of the defendant's document management policies and the central role of lawyers in that evolution.

22 *British American Tobacco Australia Services Limited v. Cowell*, paras. 71-109.

23 *Black's Law Dictionary*, 7th edition: 'The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document'.

24 *Butterworths Australian Legal Dictionary*, 1997, p. 818; *Blacks Law Dictionary*, 6th ed.

25 See, for example, Kathleen Kedigh, *Spoliation: To the Careless Go the Spoils*, (1999) 67 UMKC L. Rev. 597; Jonathan Judge, *Reconsidering Spoliation: Common-Sense Alternatives To The Spoliation Tort*, 2001 Wis. L. Rev. 441; Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, (1994) 26 St. Mary's LJ 351; Norman Witzleb, *Spoliation of Evidence – A New Tort for Australia ?*, (2003) 11 Tort L Rev 127; Christopher Egan, *Arthur Andersen's Evidence Destruction Policy: Why Current Spoliation Standards do not Adequately Protect Investors*, (2002) 34 Tex. Tech L.Rev. 61; Craig Jones, *The Spoliation Doctrine and Expert Evidence in Civil Trials*, (1998) 32 UBCL Rev. 293; Kenneth Lang, Pamela Clancy and Matthew Flesher, *Spoliation of Evidence: The Continuing Search for a Remedy and the Implications for Aviation Accident Investigations*, (1995) 60 J. Air L & Com 997; Drew Dropkin, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, (2002) 51 Duke L.J. 1803; Lawrence Solum and Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, (1987) 36 Emory L.J. 1085; Maguire and Vincent, *Admissions Implied from Spoliation or Related Conduct*, (1935) 45 Yale L.J. 226; David Bell, Margaret Koesel and Tracey Turnbull, *Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation*, (1997) 29 Ariz. St. L.J. 769; Richard Sommers and Andreas Siebert, *Intentional Destruction of Evidence: Why Procedural Remedies are Insufficient*, (1999) Can B. Rev. 38.

26 See *Mills & Another v. Central Sydney Area Health Services & Another* [2002] NSWSC 728 (27August 2002); *Spasic v. Imperial Tobacco* (2002) 2 CCLT (3d) 43 (Ont. CA).

27 One possible exception is where the destruction happened at the hands of a stranger to the primary litigation. The evidentiary and procedural remedies in the primary litigation would be unavailable against the stranger to that litigation (who is also the destroyer of the documents). In such a case, an independent claim for damages against the destroyer of the documents is worthy of consideration.

28 Professor Peter Sallmann, *Report on Document Destruction and Civil Litigation in Victoria*, May 2004, Crown Counsel Victoria (referred to as the 'Report').

29 *British American Tobacco Australia Services Limited v. Cowel*, note 6.

30 *Cowell v. British American Tobacco Australia Services Limited*, note 8.

31 *Report on Document Destruction and Civil Litigation in Victoria*, para. 4.

32 In every Australian jurisdiction, criminal sanctions already exist in relation to the perversion of justice, some of them explicitly targeting destruction of evidence that is or may be required in legal proceedings. See Cameron and Liberman, *Destruction of Documents*, above notes 1 and 11, at pp. 287-89, for a discussion of the relevant Victorian provision and related case law.

33 *Report on Document Destruction and Civil Litigation in Victoria*, note 31 (emphasis added).

34 ibid.

35 ibid., para. 5.