CASE NOTE*

HIRED GUNS AND SMOKING GUNS: *McCABE V BRITISH AMERICAN TOBACCO AUSTRALIA LTD*

I INTRODUCTION

Successful damages claims against tobacco companies are rare, but on 23 March 2002, Eames J of the Supreme Court of Victoria struck out the defence of British American Tobacco Company Australia Services Limited ('BAT Australia') and awarded judgment to the plaintiff, 51 year old Rolah McCabe.[1] Eames J found that the defendant, for a period of approximately 15 years beginning in the mid 1980s, had systematically destroyed documents that would have been relevant to the claim of Ms McCabe[2] and to the claims of other potential plaintiffs with smoking related illnesses. The plaintiff submitted, and the judge agreed, that as a result of the defendant's destruction of documents it was impossible for McCabe to have a fair trial.[3]

McCabe v British American Tobacco Australia Services Ltd ('*McCabe*') has generated considerable interest in the media and in other quarters.[4] This is not surprising. There is a long history of unsuccessful litigation against tobacco companies in Australia and in the United States, and a legal victory against a tobacco company could therefore be expected to generate national and international interest. The intense interest and scrutiny is even more predictable in light of the judge's findings that the defendant's legal advisers participated in the wrongful destruction of documents and in subsequently misleading the plaintiff and the court.

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* Camille Cameron. Associate Professor, Law Faculty, University of Melbourne.

1 *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) ('*McCabe*'). Damages were later assessed at A$700 000. There was a sense of urgency about the matter because the plaintiff was terminally ill. Thus she agreed to forego any claim to punitive damages to expedite the final decision. The defendant's appeal was heard in August 2002. As of 31 October 2002 the appeal decision was still pending.

2 The plaintiff's case was that the defendant's duty extended far beyond the provision of warnings. Her case was not framed as a failure to warn, but as 'negligently manufacturing and marketing a dangerous product'.

3 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [289]–[322]. See [289] for the main findings of the case, and [290]–[322] for the specific conclusion regarding the denial of a fair trial.

4 Many of the media reports are cited in this article. For other reactions, including, for example, those of the legal profession and the Australian Competition and Consumer Commission, see below Part V.

This case note analyses the significant ethical and procedural issues raised in *McCabe*. Part II gives a brief history of the events that led to Justice Eames' decision, especially the genesis and implementation of the controversial 'Document Retention Policy', a policy that was aimed at destruction not retention. In Part III, the procedural issues are discussed, including the role and purpose of discovery, the nature of the striking out remedy, and the extent to which the adversarial system might be to blame for some or all of the conduct of the defendant and its solicitors. These procedural issues, while important, were in a sense the backdrop for the more significant and complex ethical issues raised in the case, which are analysed in Part IV. The analysis of those ethical issues begins with the United States tobacco litigation culture, the close links and similarities between American and Australian tobacco litigation, and the influence of American tobacco lawyers and litigation on their counterparts in Australia. The nature of the relationship between the defendant and its corporate legal advisers is then examined. This case note argues that those legal advisers acted in their dealings with their client more like 'hired guns' than 'wise counsellors'. The professional and ethical significance of this lack of independence is analysed and considered in the context of a lawyer's duty to the court. Finally, in Part V, the national and international reactions to and ramifications of the decision are discussed.

II FACTS AND PROCEEDINGS

A From Commencement to the Application to Strike Out the Defence

When Rolah McCabe began her action against the defendant on 26 October 2001, she was 51 years of age, had been smoking since the age of 12, was suffering from lung cancer and had a life expectancy of months, possibly weeks. She alleged in her claim that the defendant knew that cigarettes were addictive and dangerous to health, had by its advertising targeted children as consumers, and had failed to take any reasonable steps to reduce or eliminate the addiction and health risks of smoking.[5] In response to the plaintiff's allegations, the defendant expressly pleaded that it 'did not have any knowledge about the risk of lung cancer or any difficulty associated with quitting smoking that was not in the public domain.'[6] In light of these pleadings, documents relating to the defendant's knowledge of the addictive properties of nicotine, the health risks of smoking, the research conducted by scientists on behalf of the defendant, and the defendant's response to such research would all have been very relevant to the plaintiff's case.[7]

5 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [7]. Ms McCabe passed away on 28 October 2002.

6 Ibid [10], quoting paragraph 5(d) of the defence.

7 Ibid [12].

The case was characterised by acrimonious and seemingly intractable disputes regarding the defendant's discovery obligations.[8] When the trial date was only two months away there were still a number of unresolved interlocutory matters, especially in relation to discovery.[9] At one of the applications in which these matters were to be resolved, the judge granted the plaintiff's request to replace the application regarding discovery with an application to strike out the defence.

B The Strikeout Application: How the Plaintiff and the Court Found the 'Smoking Guns'

The plaintiff's strikeout application extended over 16 days. In response to the plaintiff's allegations that the defendant had destroyed relevant documents, had through its counsel and solicitors misled the plaintiff and the court as to the true situation concerning relevant documents, and had thereby caused severe prejudice to the plaintiff and deprived her of the possibility of a fair trial,[10] the defendant filed several affidavits with exhibits annexed. Among these exhibits were two letters containing legal advice given to the defendant between 1992 and 1998 in relation to document destruction and discovery obligations. Upon reading that affidavit and the documents attached to it, the plaintiff requested other documents relating to legal advice received by the defendant, on the basis that the defendant had waived any claim to privilege over the requested documents by annexing other related privileged documents to their affidavits. The plaintiff's requests were broad, and were aimed at finding out as much as possible about the post-1985 destruction of documents, what had happened to the documents and the databases compiled for the Cremona litigation,[11] and what legal advice the defendant had received in relation to these matters.[12]

The defendant denied waiver and claimed privilege for the requested documents. The Court decided that waiver had occurred, and accepted that 'ordinary notions of fairness'[13] required that if the defendant was going to rely on advice given during a certain period of time, then the plaintiff should have access to other advice given during that same period of time.[14] The defendant was therefore ordered to disclose these additional documents immediately. It is primarily the documents disclosed pursuant to that order that Eames J referred to in his decision striking out the defence.

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8 See, eg, ibid [198]–[199], [240]–[241] (Eames J).

9 Ibid [4].

10 Ibid [2].

11 See below Part II(D) for a discussion of the Cremona litigation.

12 The specific requests are set out in *McCabe v British American Tobacco Australia Services Limited (No 2)* [2002] VSC 112 (Unreported, Eames J, 6 February 2002) ('*McCabe (No2)*'). See especially [18], [19], [22], [27], [30]–[34].

13 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 492–93, 497–98 (Mason and Brennan JJ).

14 *McCabe (No 2)* [2002] VSC 112 (Unreported, Eames J, 6 February 2002) [18]–[22], [22], [27], [30], [34].

C The Document Retention Policy

The defendant stated that it destroyed documents pursuant to a company policy, which it referred to as a 'Document Retention Policy'. The judge found that, notwithstanding the policy's title, its purpose was destruction, not retention. He was 'entirely satisfied' that the purpose of the policy, in 1985 and subsequently, 'was to provide a means of destroying damaging documents under the cover of an apparently innocent house-keeping arrangement.'[15] Clayton Utz, one of the law firms advising the defendant, had ensured that words were inserted into the written policy document which could be relied on to assert an innocent motive for document destruction.[16] That firm also advised the defendant that documents destroyed in Australia should be held offshore so that they could be used by BAT Australia in the defence of any future claims. The best illustration of how the defendant used the Document Retention Policy to destroy documents that would have been very damaging to its interests, and very helpful to Rolah McCabe and other potential plaintiffs, is to consider what happened to documents disclosed by the defendant in 1997–98 in the Cremona litigation.

D The Cremona Litigation

In 1996, Phyllis Cremona sued the defendant in Australia. The defendant's discovery effort in that case was massive and, predictably, expensive.[17] Approximately 30 000 documents were identified by the defendant as possibly relevant for discovery purposes. Of these documents, 11 600 were determined to be relevant and were included in an Affidavit of Documents. An electronic database of all 30 000 documents was created. This database included an index of the documents and summaries of most of the documents. One of the tasks undertaken by the defendant's lawyers as part of this discovery process was to rate all of the documents in terms of the damage they could do to the defendant in the Cremona or other litigation. A rating of five meant a 'knockout blow' against the company.[18]

Remarkably, Ms Cremona's solicitors requested only 200 of the 11 600 documents disclosed by the defendant. The Cremona proceedings were discontinued, on the defendant's application, in 1998,[19] and the defendant demanded the return of those 200 documents. The defendant immediately destroyed the thousands of documents that had been disclosed in the Cremona discovery process.[20] By the time discovery in *McCabe* was underway four years

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15 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [19].

16 Ibid [289].

17 Ibid [112]. The entire discovery in the Cremona litigation cost approximately A$2 000 000. This figure does not include the plaintiff's discovery costs.

18 The details of the Cremona litigation are discussed at various places in *McCabe*. See especially ibid [109]–[126].

19 Ibid [127]. The Harrison proceedings were also discontinued in April 1998 upon the defendant's application: at [280].

20 Ibid [127]–[166]. This occurred pursuant to the cancellation of the 'hold order' and implementation of the 'Document Retention Policy' as soon as there were no proceedings 'on foot' (the Cremona and Harrison proceedings having both been discontinued).

later, all of the Cremona documents, including the index, summaries and ratings of importance, had been destroyed.[21]

E Was Litigation 'Anticipated' After Termination of the Cremona Proceedings?

The defendant submitted that it was entitled to destroy the Cremona documents because there were no actual proceedings either in progress or anticipated when those documents were destroyed. Eames J disagreed, ruling that not only was litigation against the defendant in Australia 'virtually certain' when the Cremona action ended, but that the defendant knew this to be the case.[22] On the facts as found by Eames J, it is difficult to imagine how the defendant could not have anticipated that there would be other lawsuits after Cremona. Eames J summarised his assessment of the matter as follows:

> Far from it being the case that the program of destruction of documents was undertaken from 6 March 1998 in anticipation that all litigation had concluded, in my opinion, it was conducted in anticipation that further litigation would soon arise. There was an urgency in the task. In the Cremona litigation the defendant had been requested to supply only 200 of the 11 600 documents which its lawyers had identified and listed in discovery as being relevant to the action. The defendant would have well appreciated that such a limited exploration of their documents was unlikely to be repeated in later litigation. In my opinion, the belief held by the defendant in 1998 (as it was for the whole period from 1985) was that future proceedings were not merely likely, but were virtually certain, as indeed, proved to be the case.[23]

Chief among the factors that led Eames J to reject the defendant's submission, and to find that the defendant destroyed the documents so that they would not be available in lawsuits that were 'virtually certain' to occur, were the following factors.

1 *The Letter to Legal Aid*

In 1993 or early 1994 the defendant wrote to Legal Aid authorities in Australia urging that no legal aid funding be made available for tobacco litigation. The defendant stated in that letter that the plaintiffs would not be able to prove a case, that discovery in such cases would be extensive, and that the cost of such litigation would be needlessly incurred.[24] One of the people who assisted in drafting this letter was David Schechter, in-house counsel for BAT United States ('BATUS'), the North American affiliate of the defendant.[25] Lawyers representing the defendant's English affiliates were also consulted. The letter is evidence of the defendant's state of mind regarding the likelihood of

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21 One of the most instructive aspects of the scale of discovery in the Cremona case is that it gives us a basis of comparison between the level of discovery one might reasonably have anticipated in *McCabe* and the disclosure actually given by the defendant. The plaintiff's solicitors were expecting discovery on a scale similar to that in the Cremona litigation, but they received about 800 documents.

22 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [288].

23 Ibid.

24 Ibid [92]–[93].

25 Ibid [92].

future litigation and also shows that the defendant appreciated how broad discovery would be in such cases.[26]

2 *The 'Army of Litigation Lawyers'*

The design of the Document Retention Policy, and supervision of the subsequent destruction of thousands of documents pursuant to that policy, 'were the product of advice, decisions and supervision by an army of litigation lawyers from several countries'.[27] From at least as early as 1985, lawyers from the United States, England and Australia, including in-house corporate counsel of the defendant and their affiliates and lawyers from private firms, participated in discussions regarding the Document Retention Policy, the destruction of documents, and the 'warehousing' of documents. These lawyers met at conferences in Australia and elsewhere at which time they compared notes and discussed tobacco litigation defence tactics. The focus in Australia of the activities of the defendant and its legal advisers was to prepare for what the defendant's Australian lawyers described as an anticipated 'wave of litigation' against the tobacco industry in Australia.[28] Eames J found that this continuous activity emphasised 'the absurdity of the claims' that the defendant did not anticipate further litigation when the Cremona documents were destroyed.[29]

F Summary: What the Defendants and Their Legal Advisers Did Wrong

As a result of this decision, BAT Australia lost the right to defend itself against the plaintiff's claim. Eames J took this extraordinary step because in his view the conduct of the defendant and its legal advisers had deprived the plaintiff of any possibility of a fair trial. The defendant, with the assistance of its legal advisers, had designed and implemented a strategy to destroy, move or store documents with the intention of making those documents unavailable to potential plaintiffs in litigation that they knew was virtually certain to occur in Australia.[30] The documents would have been highly relevant in this anticipated litigation, and would have helped plaintiffs to prove their allegations against the defendant regarding the health effects of smoking and the addictive effects of nicotine.

After Rolah McCabe started proceedings, the defendant, again with the assistance of its legal advisers, failed to disclose to the plaintiff and the court the fact and the extent of the defendant's document destruction efforts, in general and especially in relation to the 11 600 documents that they had previously disclosed in the Cremona litigation. Eames J found that he and the plaintiff had

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26 Ibid [93]. The defendant asserted in the letter that 'extensive inquiry and discovery' would be required in such future litigation, including discovery of research documents. The subsequent expenditure of A$2 000 000 to assemble the documents in the Cremona litigation confirmed that the predictions regarding the costs of litigation and of discovery were accurate.

27 Ibid [62].

28 Ibid [277]. This is the phrase used by Clayton Utz in a letter to the defendant in 1985.

29 Ibid [286].

30 Ibid [289]. Eames J also found that some of the document destruction occurred when actions by *specific* plaintiffs were anticipated.

been misled by the defendant in correspondence, in affidavits, and in representations made to the court at the numerous hearings in which attempts were made to resolve the outstanding discovery issues.[31]

The discovery process is the context in which the significant ethical and procedural issues raised in this case unfolded. It is therefore an appropriate starting point for discussion of those issues.

III PROCEDURAL ISSUES

A The Role of Discovery in the Administration of Civil Justice

1 *The Purpose of the Discovery Process*

The discovery process is intended to enable the parties to make a frank assessment of the strengths and weaknesses of their respective cases, to increase the prospects of settlement and to facilitate preparation for trial. The Court relied on these simple first principles in rejecting the defendant's response to the plaintiff's strikeout application.

The defendant made two alternative arguments in an attempt to justify its destruction of documents. The first of these, that the destruction of documents was justified because litigation was not anticipated, was rejected by Eames J, who found as a fact that the defendant not only anticipated litigation, but considered it a virtual certainty.[32] The defendant's second argument was that even if documents were destroyed when proceedings were anticipated, it was lawful for the defendant to destroy its own documents.[33] All that the plaintiff could do in such circumstances was to ask that adverse inferences be drawn against the defendant as a result of the destruction. Only if the defendant had destroyed documents after proceedings had begun could the plaintiff ask that the defence be struck out.[34]

We need only consider this argument in the context of the purposes of discovery to realise how untenable it is. A succinct answer is found in *Bowmar Instrument Corp v Texas Instruments Inc*,[35] which was relied on by Eames J:

> The most extreme legal position taken by the defendant is that the court is powerless to punish the wholesale, willful destruction of relevant evidence where the destruction takes place prior to the specific order for their production. Surely this proposition must be rejected. *The plaintiffs are correct that such a rule would mean the demise of the real meaning and intent of the discovery process*... It has long been recognised that sanctions may be proper where a party, before a lawsuit is

31 Ibid [199].

32 See above Part II(E).

33 Ibid [340]–[341]. The defendant relied on the Practice Note in *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693, 694, which Eames J distinguished on the basis that it was not concerned with deliberate destruction of documents with a view to prejudicing anticipated proceedings.

34 Ibid [342]–[346].

35 25 Fed R Serv 2d (Callaghan) 423 (ND Ind, 1977).

> instituted, wilfully places himself in such a position that he is unable to comply with a subsequent discovery order.[36]

It was submitted on behalf of BAT Australia that only legislative reform would deny a company the right to destroy documents in anticipation of litigation.[37] But the combined effect of the purpose and spirit of the discovery rules, and the court's inherent power to prevent abuse of its own process, were a sufficient basis on which to reject this submission.[38] Allowing the defendants to do what they did would have meant 'the demise of the real meaning and intent of the discovery process'.

2 *Discovery and Access to Justice*

McCabe reminds us of the serious access to justice issues raised by the discovery process, especially when one party (typically a plaintiff) is suing a much richer opponent. This huge gap in resources has always existed in tobacco litigation, and is one of the reasons why there have been so few successes against tobacco companies. Reports of tobacco litigation in the United States describe an approach to discovery by defendants that is similar to the approach in *McCabe*. That approach is one characterised by delays, technical objections to requests for information and repeated trips to court to resolve discovery issues.[39]

The time and cost associated with discovery in these circumstances is considerable. We know, for example, that the defendant spent over A$2 000 000 on discovery in the Cremona case.[40] Had that case continued, Cremona's lawyers would have had to review and evaluate all of those documents, at considerable cost to the plaintiff.[41] The expense of discovery is therefore a real barrier to people who want to sue large corporations, especially corporations whose policy is to defend as aggressively as tobacco companies do.

One of the aims of discovery reform in some jurisdictions has been to address this access issue by narrowing the scope of relevance.[42] The rationale for such

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36 Ibid 426, cited in *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [363] (emphasis added).

37 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [367]. There was considerable discussion in the decision of Eames J of the tort of spoliation, which in the United States imposes a duty of care not to intentionally and in bad faith thwart a person's right of access to the courts. Counsel for the defendant argued that this principle would not apply in the context of the rules of discovery in Victoria without appropriate legislative reform. Eames J disagreed.

38 Ibid.

39 In a lawsuit filed on 12 May 1986, *Horton v American Tobacco Co*, (Unreported, Holmes County Circuit Court, Miss, filed 12 May 1986), the defendant's first response to the plaintiff's requests for discovery was a set of general objections that applied to most of the discovery requests. Follow-up individual questions from the plaintiff were then objected to individually on the basis that they were vague, or that the information requested was privileged, or irrelevant. The result was frequent trips to court to resolve discovery issues. See Michael Orey, *Assuming the Risk* (1999) 48–9. See also *Horton v American Tobacco Co*, 667 So 2d 1289 (Miss, 1995).

40 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [112].

41 This goes some way to explaining why the solicitors for Ms Cremona asked to inspect only 200 of the 11 600 documents disclosed by the defendant pursuant to its discovery obligations.

42 This was one of the aims of the recent discovery reforms in the United Kingdom. See, eg, Lord Woolf, *Access to Justice: Interim Report* (1995) ch 21, 164–73, <http://www.lcd.gov.uk/civil/interim/contents.htm> at 17 November 2002.

reforms is that many documents disclosed pursuant to the traditional, broad test of relevance are of little if any assistance in solving the real issues in dispute. By limiting the number of documents that must be disclosed, the expense of discovery to both parties is controlled. Even if we accept this as a general proposition,[43] such reforms probably do little to address in any meaningful way the kinds of access to justice issues raised in cases like *McCabe*. There are two main reasons for this, the first being the nature of complex litigation and the second being the centrality of voluntary compliance in the discovery process.

3 *Discovery in Complex Cases*

In complex cases like *McCabe*, reducing the number of documents that need to be disclosed by redefining 'relevance' will have no significant impact on the resource inequality between the parties. Whether the governing principle is the traditional, very wide *Compagnie Financiere du Pacifique v Peruvian Guano* (*'Peruvian Guano'*) 'train of inquiry' test,[44] or a narrower 'directly relevant' test,[45] the nature and complexity of the matters in issue will mean that discovery will still be an expensive, time-consuming process. This problem is exacerbated by the fact that in many of these cases there will be disputes about discovery obligations that will have to be resolved at contested hearings, at considerable cost to the parties.

4 *Voluntary Compliance*

Discovery depends on voluntary compliance. If a party chooses not to comply, and purposely to withhold relevant documents or to fail to disclose what has happened to documents no longer in its possession, this can pass undetected. The defendant's conduct in *McCabe* might well have remained undetected but for the tenacity of the plaintiff and her legal advisers, and the ruling by the judge that the defendant had waived privilege by annexing letters of legal advice to an affidavit.[46] Reforms aimed at reducing the cost of discovery by narrowing the scope of relevance offer little assistance to a party faced with an opponent determined to ignore either the letter or the spirit of the discovery rules. One recent civil justice reform initiative has explicitly acknowledged this fact by rejecting calls to narrow the scope of relevance. In its report on civil justice reform, the Hong Kong Law Society said:

> After considerable debate, the Law Society has concluded that the existing *Peruvian Guano* test for discovery of documents should be retained ... There was

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43 Lord Woolf acknowledged that at least in the short term, his discovery reforms would probably result in an increased number of applications for further disclosure, thereby increasing the cost of litigation. See ibid 171. Michael Zander discussed the reasons why the reforms proposed by Lord Woolf would not result in costs savings: Michael Zander, 'Why Lord Woolf's Proposed Reforms of Civil Litigation Should be Rejected', in A A S Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (1995) 79.

44 *Compagnie Financiere du Pacifique v Peruvian Guano* (1882) 11 QBD 55.

45 This is the test which has been adopted in the United Kingdom in place of the broad *Peruvian Guano* 'train of inquiry' test. See *Civil Procedure Rules 1998* (UK) r 31.6.

46 *McCabe (No 2)* [2002] VSC 112 (Unreported, Eames J, 6 February 2002).

> considerable reticence, in the interests of justice, to any narrowing of the scope of discovery: that was thought to provide too much latitude to the unscrupulous to hide relevant documents. There are many examples where only the broad test of discovery had allowed key documents to be unearthed, and examples where the narrower test had allowed parties to hide key documents, which had only come to light by accident ... While it was acknowledged that the unscrupulous will always make efforts to hide relevant documents, it was felt that a narrower test of discovery would unnecessarily facilitate this.[47]

B The Striking Out Remedy

The court's power to strike out a defence where the defendant fails to comply with an order for discovery is found in r 24.02 of the *Supreme Court Rules*.[48] This remedy is extraordinary and will only be granted if the conduct of the party in default has made it impossible for the other party to have a fair trial.[49] Eames J was satisfied that the defendant's intentional destruction of documents when litigation was anticipated was such that it was impossible for the plaintiff to have a fair trial. He considered the options short of striking out the defence but found that none of these options would overcome the prejudice caused by the defendant's conduct:

> A trial is either fair or it is not. Unless all unfairness which the defendant has created can now be removed then a verdict by the jury in favour of the plaintiff would not demonstrate that the unfairness in the trial had been eliminated, but merely that the plaintiff had succeeded despite the unfairness of her trial.[50]

The defendant and its legal advisers knew that a possible consequence of their document destruction activities was that the defence could be struck out. Notes of a 1992 telephone conversation between the defendants and one of their Australian legal advisers refer to the possibility of sanctions due to document destruction, and state: 'Greatest sanction would be to deny a defence.'[51]

C The Defendant's Failure to Call Witnesses

Party control is one of the principal features of adversarial systems. This means that the parties, usually through their legal advisers, control the main procedural steps in a case, including when it is begun, the issues that are pleaded, the evidence that is presented and the witnesses who are called to give

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47 The Law Society of Hong Kong, *Report on Civil Justice Reform* (2002) 11.

48 *Supreme Court (General Civil Procedure) Rules 1996* (Vic) r 24.02(1)(b). The plaintiff also relied on r 24.05, which confirms the inherent power of the court to strike out a defence if the defendant fails to comply with an order of the court or to do any act required under the Rules: see *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [351]–[353]. Similar rules apply in other jurisdictions, eg, *Supreme Court Rules 1970* (NSW) r 23.4(c)(ii).

49 The relevant facts and authorities were discussed in *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [290]–[322], [338]–[366]. See especially [290], [299], [307], [309]–[317], [336], [363]–[366].

50 Ibid [376].

51 Ibid [68].

that evidence.[52] A complementary traditional adversarial principle is that 'justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations'.[53]

The increasing importance in the adversarial litigation process of judicial case management, directions hearings, specialist judges and lists, pre-action protocols and stricter enforcement of procedural time limits have all eroded these traditional principles.[54] The increasing number of litigants in person in civil proceedings has also necessitated a transformation of the traditional role of the judge, from passive observer to one who actively intervenes to assist those litigants.[55] However, while the primacy of party control and judicial non-intervention have changed dramatically in Australia and in other common law jurisdictions in the past 10–15 years, the traditional views are still robust in relation to the witnesses who will be called to give evidence. The parties in civil proceedings choose which witnesses they will call to prove their respective cases, and the judge makes a determination based on the evidence given by those witnesses. The gradual change in the role of the judge in adversarial civil proceedings has not yet reached the point that the judge will intervene to tell the parties who should be called to give evidence.

McCabe is replete with comments by Eames J that witnesses who had knowledge of the conduct of the defendant and their legal advisers regarding the Document Retention Policy and the destruction of documents, and who could have shed light on these issues, were not called to give evidence.[56] Arguably we should be content with the fact that Eames J drew adverse inferences from the defendant's failure to call key witnesses, but the fact remains that the plaintiff and the court were deprived of the opportunity to hear highly relevant evidence from crucial witnesses.[57] At least in cases in which the issues are of considerable public interest — and this is such a case — judges should perhaps take a more active role in directing the defendant to call specific witnesses.[58]

In at least one instance, this is precisely what Eames J tried to do. A hearing on 1 March 2002 dealt specifically with allegations that the defendant and its

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52 See the summary of the relevant principles in Sir Jack I H Jacob, *The Fabric of English Civil Justice* (1987) 9–19. After stating the traditional view, Jacob makes suggestions for reform. One of these suggestions is that the court should be able 'to call a witness not called by the parties': at 19.

53 *Jones v National Coal Board* [1957] 2 QB 55, 63 (Denning LJ) referring to comments of Lord Greene in *Yuill v Yuill* [1945] 1 All ER 183, 189. See also the analysis of this traditional view by Justice A J Rogers in 'Judges in Search of Justice' (1987) 10 *University of New South Wales Law Journal* 93.

54 The extent to which these measures have been adopted and are effectively used varies among common law countries and among jurisdictions within those countries, but to a greater or lesser extent all common law systems have implemented these measures.

55 The relevant authorities are discussed in Camille Cameron and Elsa Kelly, 'Litigants in Person in Civil Proceedings: Part 1' (2002) 32 *Hong Kong Law Journal* 313.

56 See, eg, *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [44] (Wilson, Clayton Utz), [55] (Gulson, Wills/BAT Australia), [166] (Cannar, BAT Australia), [266] (Travers, Clayton Utz).

57 See, eg, ibid [266], [329] (Travers, Clayton Utz).

58 Rogers, 'Judges in Search of Justice', above n 53, 101. Rogers refers with approval to comments made by Sir Richard Eggleston in 'What is Wrong With the Adversary System' (1975) 49 *Australian Law Journal* 428, 437, to the effect that the responsibility of judges to ensure cases are correctly decided will in some cases mean that the judge directs a party to call a particular witness.

lawyers had 'warehoused' documents with a view to avoiding discovery obligations.[59] During that hearing, Eames J said it was open to him to conclude that the defendant and its lawyers had subverted the discovery process, and that Richard Travers, the defendant's instructing solicitor, was the only person who could adequately explain the matter to the Court.[60] Eames J adjourned the case for 72 hours to give the defendant time to consider whether or not to call Mr Travers to give evidence.[61] Mr Travers was not called. The only other option for a judge in such circumstances, apart from drawing an adverse inference, is to order that the person be called. If we accept that one of the purposes of a hearing or trial is to ensure that cases are correctly decided, then at least in situations where a party has adopted a deliberate strategy of not calling crucial witnesses, a judge should consider compelling the party to call those witnesses.[62]

We can also consider this issue from the perspective of the duties imposed on lawyers by the increase in judicial case management. These duties are to conduct cases efficiently and expeditiously, and to avoid conduct that causes delay, inconvenience or needless expense.[63] Justice Ipp has suggested that 'as calls for reform of the justice system increase, duties which stress the lawyer's responsibility to assist the judge by exercising an independent judgment as to the evidence to be led and the points to be argued will assume greater importance'.[64] The reference by Justice Ipp to 'independent judgment' means independent of the narrower adversarial interests that have traditionally determined what evidence will be led.

The combined force of the case management powers of judges and the duty of lawyers to assist the judge in the exercise of those powers, all with a view to the fair administration of justice, would have been a sufficient justification for a decision by the trial judge to require the defendant to call specific witnesses, especially where no reasonable explanation had been offered for their absence.

D Is the Adversarial System to Blame?

It is tempting to blame the adversarial system for what happened in *McCabe*. The overzealous identification with client interests at the expense of any other interest is, the argument goes, an inevitable result of the competitive, winner-take-all, party dominated adversarial system. One author writing about tobacco litigation has summarised the attacks against the adversarial system as follows:

> (1) attacks premised on the harms to the public interest deemed to flow from pursuit of narrow self-interest; (2) attacks premised on the truth manipulation that is claimed to function as an essential element of the process; and (3) attacks premised

59 Transcript of Proceedings, *McCabe* (Supreme Court of Victoria, Eames J, 1 March 2002).

60 Ibid 396, line 14–397, line 4.

61 Ibid 409, lines 1–11.

62 These issues are discussed in Eggleston, 'What is Wrong With the Adversary System', above n 58.

63 See the discussion in Justice David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 105–6.

64 Ibid 106.

> on the harm thought to flow from the inherently antagonistic and conflict-encouraging nature of the adversary process.[65]

While it is beyond the scope of this article to revisit this debate and to analyse the extent to which these criticisms are valid, either generally or in relation to tobacco litigation, it can safely be asserted that the conduct of the defendants and their legal advisers in this case, and the results of that conduct, invite all three of these criticisms. The public interest was adversely affected because information with significant public health ramifications was destroyed. 'Truth manipulation' describes the intentional destruction of this information, the subsequent attempts to conceal the destruction, and the defendant's 'loophole lawyering', pedantic approach to interpreting the judge's discovery order.[66] The judge's reference to 'a tone of personal antipathy, suspicion and disbelief as to the bona fides on either side'[67] is evidence of the antagonism and conflict for which the adversarial system is so often criticised, as is his view that the 'evasive and less than frank approach' adopted by the defendant and its legal advisers was seen by them as appropriate and merely an attempt to gain a tactical advantage.[68]

But the blame for what happened in *McCabe* cannot be laid solely, or even primarily, at the doorstep of the adversarial system, nor explained as 'adversarial excess'. In 1939, in *Myers v Elman*,[69] the House of Lords reminded us of the nature and scope of solicitors' duties regarding their clients' discovery. Similarly, the duty to the court, and the responsibility of lawyers as officers of the court, is not a new or vague concept. It is a fundamental principle that governs the conduct of lawyers in adversarial litigation.[70] Even accepting that many of the abovementioned criticisms of the adversarial system are valid, operating in that system does not give a licence to mislead the court and to destroy documents that would be highly relevant in litigation that is virtually certain to occur. We will have to look elsewhere if we wish to assign blame.

IV ETHICAL ISSUES

A The Tobacco Litigation Culture

1 *Introduction*

Long before Rolah McCabe issued proceedings in Australia against the defendant, the script of how the Australian proceedings would unfold was being

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65 Martin Redish, 'The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971' (2001) 51 *DePaul Law Review* 359, 362.

66 This is discussed below Part IV(C).

67 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [199]. The judge said it became clear as the case unfolded that the suspicion of the plaintiff's solicitors was 'largely justified': at [199].

68 Ibid [235].

69 [1939] 4 All ER 484. There are some striking similarities between *Myers v Elman* and *McCabe*, including the fact that the solicitor had been put on notice that extra vigilance was required regarding his client's compliance with discovery obligations (see, eg, 494C–H, 495E–F (Viscount Maugham); 498E–499B (Lord Aitkin), and the Court's concern as to the significant delay caused by the failure of the defendant to give appropriate discovery in a timely way: at 491D–H (Viscount Maugham).

70 The nature and the scope of a lawyer's duty to the court are discussed below Part IV(C).

written in the United Kingdom and the United States. By the time the Australian defence lawyers appeared on the scene in the mid-1980s, that script was in place. It appears that the drama unfolded in Australia with virtually no rewriting. In their representation of tobacco interests in Australia, and in their defence on behalf of those interests of the McCabe and other claims, the Australian lawyers adjusted to the litigation culture already developed in the UK and USA and firmly entrenched in the defendant's corporate strategy. It is essential to understand that litigation culture in order to understand the *McCabe* case.[71]

2 *The United States Approach*

In 1994, professors at the University of California received a delivery from an unnamed source. The delivery consisted of thousands of previously unpublished documents, many of which were marked 'confidential', 'attorney work product', or 'privileged'.[72] The documents were memoranda, letters and research reports from internal files of the Brown and Williamson Tobacco Company and its British parent, British American Tobacco Company ('BatCo'). These documents, subsequently published as *The Cigarette Papers*,[73] give us an excellent insight into the litigation strategy of the tobacco industry in general, and of Brown and Williamson and BatCo (affiliates of the defendant in *McCabe*) in particular. Many of the documents consist of correspondence among lawyers for the tobacco companies, and were written without any intention on the part of their authors that they would ever become public.[74] The documents show that the tobacco companies acted in a concerted way to 'prevent, or at least delay, public knowledge of the health dangers of smoking and to protect the companies from liability if that knowledge became public.'[75] Among other things, 'these documents reveal that the tobacco industry's public position on smoking and health has diverged dramatically not only from the generally accepted position of the scientific community but also from the results of its own internal research.'[76]

Much of the research strategy and activity of the US tobacco companies was directed by their lawyers. It was designed to protect the companies from liability, not to advance knowledge about the effects of smoking on health. The lawyers determined which topics would be the subject of research, controlled the

71 The best description of this litigation culture in the United States is found in Stanton A Glantz et al, *The Cigarette Papers* (1995), <http://www.library.ucsf.edu/tobacco/cigpapers/book/contents.html> at 17 November 2002. In addition to the specific references below, see generally chh 7 and 8, and the Introduction.

72 The only information by way of return address was 'Mr Butts'. Brown and Williamson brought action for return of the documents, which had been taken by a paralegal who had previously worked for that company. The court rejected the claim for privilege over the documents, on the basis that the public had an interest in publication and access. See ibid 10.

73 See above n 71.

74 There is an interesting parallel here between US tobacco litigation and *McCabe*. Much of what we know about both is the result, not of the ordinary discovery process, but of extraordinary occurrences. In the US, the actions of a whistleblower gave us access to the information. In Australia, it was the defendant's inadvertent waiver of privilege that finally gave the plaintiff and the court access to the highly relevant documents and information that the defendant had failed to disclose.

75 Glantz et al, above n 71, 13.

76 Ibid 2.

research funds awarded by the tobacco industry to external applicants, and oversaw the publication of research findings.[77] The principal way in which they achieved these goals was through their control of the Centre for Tobacco Research ('CTR'). In the United States in the 1960s, the CTR lost any genuine scientific research focus it had and became one of the main weapons in the efforts to protect the tobacco companies against adverse publicity and potential liability. This was achieved by a 'CTR Special Projects' category. These projects did not have to go through a standard peer review process and were chosen for funding by tobacco industry lawyers. The purpose of these projects was to generate research that could be used to defend the tobacco companies against claims alleging a connection between smoking and disease. The documents published in *The Cigarette Papers* reveal that the 'CTR Special Projects' category was used to fund projects that did not pass the peer review process but were thought by industry lawyers to be useful projects.[78]

The Cigarette Papers also reveals that tobacco lawyers in the United States controlled research through the use of special law firm accounts. These accounts were used primarily to fund research projects and consultancies and to prepare expert and other testimony for use in specific court cases or hearings.[79] The lawyers selected the projects that would be funded from these special accounts.[80] An examination of the general research and consultancy projects chosen for funding reveals that the intended use of the results was to divert attention from research on the adverse effect of cigarettes on health, by identifying other potential causes and factors. This has long been one of the key strategies of the tobacco industry.[81]

So it is clear that American tobacco lawyers in private law firms played a key role in determining the focus, content and results of the research conducted by the tobacco companies. Their intention in controlling the research process was not only to produce 'research' that could be used by tobacco companies to defeat negligence claims and to influence government policy and regulation, but also to lay the foundation for a claim of privilege over research data (dubious as such a claim might be) in subsequent litigation. This appears to have been a matter of having their cake and eating it too. If the research over which the lawyers had control was useful in influencing government regulation or in litigation, the tobacco companies would use it. If it was not, then a privilege claim would be asserted on the basis that it was conducted in anticipation of litigation.[82]

The attempt of American tobacco lawyers to control the documents and research extended to advising the tobacco companies to destroy documents, or in

77 Ibid ch 8, see especially 289.

78 Ibid 290. For example, in the minutes of a meeting attended by lawyers for six tobacco companies, it is recommended that one application be put through the standard CTR peer review process, and that if it does not pass peer review, it will be funded as a 'special project'.

79 Ibid 305.

80 Ibid 289.

81 Ibid 306.

82 These matters are discussed in Bruce Green, 'Thoughts About Corporate Lawyers After Reading *The Cigarette Papers*: Has the "Wise Counsellor" Given Way to the "Hired Gun"?' (2001) 51 *De Paul Law Review* 407, 416–17.

some cases to ship them out of the country.[83] Shipping them offshore would suggest that the tobacco companies had no control over the documents, thus taking them out of that category of documents that must be produced for discovery. The intended effect of destroying them is obvious.

The authors of *The Cigarette Papers* described the role of the tobacco lawyers 'not just as advisers but also as managers'.[84] The same can be said of many of the Australian lawyers who advised BAT Australia in the *McCabe* case, in other similar litigation in Australia, and generally since at least 1985 in relation to their overall litigation strategy in Australia. The 'blurred line' between the defendant and the lawyers who were supposed to be providing independent legal advice was a matter of considerable concern to Eames J.[85] It is arguably one of the most significant and troubling aspects of *McCabe*, and one that will be discussed below. Before that discussion, however, it is appropriate, having just discussed the approach of tobacco lawyers and their clients to litigation in the United States, to compare that approach to the one subsequently adopted in Australia.

3 *The Australian Approach*

The similarities between American and Australian tobacco litigation strategy, especially the conduct of the tobacco lawyers in those countries, is striking. The same 'not just advisers but also managers' role is evident, especially in the attempt to control research and documents. At least by 1985, if not sooner, Clayton Utz had proposed to the defendant that it would develop its own database of scientific and related material. That database was set up at Clayton Utz[86] and was funded by the Tobacco Institute of Australia (which in turn was funded by tobacco companies, including the defendant).[87] Eames J found that in setting up this database, Clayton Utz took advice from a partner from Shook, Hardy and Bacon, an American law firm representing US tobacco interests.[88] The extensive references to that law firm in *The Cigarette Papers* reveal that the firm played an instrumental role in designing the research strategy of American tobacco companies in such a way that tobacco litigation lawyers, not the tobacco companies, determined what research would be done.[89]

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83 Glantz et al, above n 71, 231, 437.

84 Ibid 12.

85 See *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [286]. The matter has also been mentioned in media reports. See, eg, Margaret Simon, 'Justice Inc', *Agenda*, *The Age* (Melbourne), 4 August 2002, 1.

86 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [331].

87 Ibid [330].

88 Ibid [335]. Mr Northrip of Shook, Hardy and Bacon visited Australia to advise on the Clayton Utz database, and Mr Eggleton of Clayton Utz visited the American office to examine their database.

89 Glantz et al, above n 71, 305–6. Among the extensive references to Shook, Hardy and Bacon in *The Cigarette Papers* is information regarding a memo from that firm to lawyers for American tobacco companies. The memo explains the manner in which the 'Special Funds' for research are administered, and ends with the comment: 'There is probably no need for you to retain those notes once you have satisfied yourself of the current situation'.

The intended purpose of the Clayton Utz database was to further its tactic of having third parties hold documents and information so that the defendant could get access to it to rebut the plaintiff's case, while at the same time not having to disclose the information in an Affidavit of Documents. The defendant and its legal advisers intended that such non-disclosure would be justified on the grounds that the information was not under the possession, custody or power of the defendants.[90] In addition to developing the Clayton Utz database, the defendant and its legal advisers arranged to have documents stored offshore, again with the intention of putting them beyond reach for discovery. Eames J found that as a result of this 'warehousing' of documents, 'the whole process of discovery had been subverted by tactics adopted by the defence'.[91] The Court's invitation to the defendant to call witnesses to rebut this inference was, after counsel took time to consider the matter, not taken up.[92]

These 'warehousing' arrangements are significant in several respects. First, they underline the connection between tobacco lawyers in Australia and those in the United States, and the extent to which American tobacco litigation defence tactics influenced the shape of tobacco litigation in Australia. Secondly, they show that the defendant fully appreciated just how crucial these 'warehoused' documents were to the case. Thirdly, they are an example of the lengths to which the defendants were prepared to go to deny to the plaintiff access to relevant documents. Finally, they supported Justice Eames' view that the real purpose of the Document Retention Policy, and the destruction of documents pursuant to that policy, 'was to deny a fair trial to any plaintiff who later brought proceedings'.[93]

B The Relationship Between the Corporate Lawyers and Their Clients

1 *'Wise Counsellors' and 'Hired Guns'*

Good legal advisers give independent, legally correct advice to clients. In order to give that independent advice there must remain some intellectual and emotional distance between the lawyer and the client. In the context of lawyers advising corporate clients, this role has been described in various ways. One archetype is the 'wise counsellor', a lawyer who exercises independent judgment based on 'standards that transcend [the] client's most immediate and narrow economic self-interest'.[94] A lawyer who acts as a 'wise counsellor' in advising corporate clients will act, not just as a member of the client's management team

90 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [324]. The defendant had delivered to the plaintiff, just before the 1 March 2002 hearing, a witness statement with some relevant research documents annexed to it. Those documents had not been discovered by the defendant in it's Affidavit of Documents: at [325]. See also Transcript of Proceedings, *McCabe* (Supreme Court of Victoria, Eames J, 1 March 2002) 376 ff.

91 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [328].

92 Ibid.

93 Ibid [336].

94 Robert A Kagan and Robert E Rosen, 'On the Social Significance of Large Law Firm Practice' (1985) 37 *Stanford Law Review* 399, 409–10. There is a discussion of this and other similar authorities in Green, above n 82.

whose job is to see to it that corporate policy gets implemented,[95] but in a more independent way as an adviser who 'mediates between the private interests of the corporation and the regulatory interests of the state'.[96]

At the other end of the spectrum is the 'hired gun'.[97] The corporate legal adviser as hired gun is one whose main role is not to advise clients what they can or cannot do, but to act along with company employees to ensure that corporate policy is implemented. The 'hired gun' legal adviser is one who 'takes advantage of the forms and letter of the law, rather than the spirit or intent, to maximize [the] client's narrowly defined and essentially asocial goals'.[98] In the case of international corporations, what they are often looking for is local implementation of international corporate strategy. That is certainly what BAT Australia was looking for and is, as we have seen, what they got (albeit with unanticipated consequences).[99] One of the results of mega-firms and mega-corporations, and increasing specialisation within large law firms, is that corporate legal advisers have become more dependent on single clients than has been the case in the past. Large groups of lawyers in law firms often work solely for one client.[100] It is probably inevitable that one of the results of this increasing dependence on single, transnational corporations, combined with the increasing pressure within law firms to generate billable hours, has been a shift from the 'wise counsellor' to the 'hired gun'.[101] Increasing competitiveness in the profession, which has resulted in less stable lawyer–client relationships, exacerbates these problems. Because corporations have the ability to shop around, and have substituted transactional interactions for long-term relationships, lawyers are less likely to tell clients that they cannot do what they want to do.[102]

It is hard to find many 'wise counsellors' in the *McCabe* case. The legal advisers, far from telling the defendant they could not or should not destroy

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95 See Simon, above n 85. 'Sometimes the client is the Australian arm of an international corporation. What they want from their Australian lawyers is not advice or questioning but efficient local implementation of an international legal strategy': at 1.

96 Green, above n 82, 407.

97 See ibid for a comparison of the 'wise counsellor' and 'hired gun' models. The hired gun and wise counsellor models of professional conduct can serve a useful analytical purpose as long as we recognise that they are located at extreme ends of a spectrum of behaviour and that in reality neither of these two extremes is adequately sensitive to the complex context in which corporations and their legal advisers interact. See the critique of the hired gun and wise counsellor models in the context of compliance professionals in Christine Parker, 'The Ethics of Advising on Regulatory Compliance: Autonomy or Interdependence' (2000) 28 *Journal of Business Ethics* 339, 339–51.

98 Kagan and Rosen, above n 94, 419.

99 See above Part III(B). It is not entirely accurate to describe the results as 'unanticipated', because the defendant had been forewarned that having its defence struck out was one of the possible consequences of its document destruction activities.

100 See, eg, Simon, above n 85, commenting on the internal organisation and operation of large corporate law firms.

101 Geoffrey Hazard, *Ethics in the Practice of Law* (1978) 69, quoted in Green, above n 82, 411. Geoffrey Hazard suggests that the diversity of a law firm's clientele was one of the reasons why corporate legal advisers were able to be 'wise counsellors' and to give advice that transcended their client's narrow self-interests.

102 See Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000) 9.

documents, actively participated in preparing, or at least in approving a draft of, the Document Retention Policy,[103] and were subsequently involved in decisions about destruction purportedly pursuant to that policy.[104] Furthermore, in a manner identical to their American counterparts, the Australian lawyers assumed an active role in the storage of documents by establishing their own law firm databases. Their purpose was to further the defendant's strategy (future plaintiffs such as Rolah McCabe should have access to as few documents as possible) by trying to extend legal professional privilege to the documents on that database. The fact that the database would be paid for by the Tobacco Institute of Australia, which was funded by the defendant and other tobacco companies, did not deter them from giving this advice and from setting up the database. There appears to have been only one lawyer, among the many who were active at this time, who advised that such privilege would never apply and that the documents in the Clayton Utz database would have to be discovered in any litigation.[105]

2 *The Professional and Ethical Significance of the Interdependence of Corporate Lawyers and Their Clients*

The substantive and procedural issues raised in *McCabe* are not complicated and can be resolved by reference to some basic first principles about the fundamental purpose of discovery and the court's inherent jurisdiction to prevent abuse of its process.[106] The ethical issues, however, are more complicated and a solution is not as obvious. What I will attempt here is not to resolve those issues, but to suggest that some widely held views about professional responsibility should, at least in the context of the modern corporate legal adviser, be revisited and reconsidered. These concern the accountability of lawyers for their clients' conduct, and the extent to which lawyers are servants, not only of their clients' interests, but also of the broader public interest.

One of the claims lawyers make about how they do business is that they are not morally accountable for their client's actions.[107] A version of this 'moral independence' or 'moral non-accountability' theory seems to have been relied on by the chief executive partner of Clayton Utz in an interview he gave to *The Age* in the wake of the *McCabe* decision: 'Morality', he has said, 'has no place in the

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103 This is one of the facts found by Eames J: *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [17], [20].

104 See, eg, ibid [19]. In 1995, a lawyer working with Mallesons, Ian Angus, appears to have advised the defendant that information stored on the Clayton Utz database would have to be discovered if there were litigation. Clayton Utz disagreed with this advice. This is one of the few examples referred to in the case, notwithstanding the army of lawyers who were involved from at least 1985 to 2001, of a lawyer who gave advice contrary to the express wishes and preferred strategy of the defendant.

105 Ibid.

106 See discussion above Part II(F).

107 There is an excellent discussion of this 'moral independence' approach in Richard Painter, 'The Moral Interdependence of Corporate Lawyers and Their Clients' (1994) 67 *Southern California Law Review* 507. The author argues that in the context of increasing interdependence between corporate lawyers and their 'independent' legal advisers, the 'moral independence' theory is inapplicable. (I have chosen to use the term 'moral non-accountability' instead of 'moral independence', because the latter term can also be used to describe the lawyer who chooses to exercise a moral judgment contrary to directions of the client.)

advice a lawyer gives to his client. Providing the client is acting in accord with the law, and the lawyer in accord with ethical standards, then both are behaving appropriately'.[108]

Lawyers can therefore represent someone who has committed a crime without also being in any way responsible for that crime or its consequences, and can represent someone who has breached a contract without also being responsible for that breach. This 'moral non-accountability' theory is based on the premise that the actions of the lawyer and the client are distinct[109] and permits of a degree of ethical isolation of lawyers from their clients' actions. When a lawyer participates in the conduct of the client, however, this theory does not work, because the acts of the client and the lawyer are not distinct. Such is often the case in the relationship between modern corporations and their legal advisers, and such most certainly was the case between Clayton Utz and BAT Australia. The participation of Clayton Utz in preparing the Document Retention Policy, in advising on the destruction of documents pursuant to that policy, and subsequently continuing to advise the defendant in litigation regarding document destruction strategies, are examples of this interdependence.[110] Modern corporate lawyers do not just counsel corporations after the fact; they actively participate in the activities of that corporation. Richard Painter has categorised the functions that corporate legal advisers perform as 'monitoring' and 'dealmaking':[111]

> When lawyers act as monitors and dealmakers, they often lend their reputations to clients and their actions are sometimes difficult to distinguish from actions of their clients. Clients can be as dependent upon lawyers to frame and carry out their business objectives as lawyers are dependent upon clients for employment.[112]

When the same lawyers who advise on the design and implementation of corporate policy are key advisers in subsequent litigation in which that policy is in issue, or under attack, the interdependence increases, and objectivity is a casualty. This is where the barrister can perhaps do what the legal advisers and litigation solicitors have failed to do. In *McCabe*, however, both the Document Retention Policy and the destruction of documents carried out pursuant to that policy were protected and defended to the end. All of the affidavits and representations to the court during the protracted and acrimonious discovery dispute were made, according to the findings of Eames J, with a view to concealing from the court and the plaintiff all information regarding the existence of the Document Retention Policy and the destruction of documents pursuant to that policy.

Painter suggests that in these circumstances, lawyers should acknowledge that their relationship with their client is one of moral interdependence and accountability.[113] What are the results of such an approach? If corporate lawyers were to acknowledge their potential moral and ethical responsibility for the

108 Simon, above n 85, 1.
109 See Painter, above n 107.
110 See *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [286].
111 Painter, above n 107, 512.
112 Ibid, 512–13.
113 Ibid.

conduct of their clients, they might include in their choice of client, in addition to financial considerations, an analysis of the moral merits of the client's objectives. Having agreed to work for a particular client, they might be more vigilant about their role in restraining unethical conduct. They might also become more conscious about the effect on their reputations, and on the reputations of other stakeholders (for example, partners and associates in their law firms), of the consequences of a client's unethical conduct. Finally, if there is a general increase of awareness in the profession of the moral interdependence of corporate lawyers and their clients, professional ethical codes might be changed to reflect that increased consciousness.[114]

3 *The Lawyer and the Public Interest*

Another way of redefining or recasting the lawyer's role is to consider it in terms of the lawyer's duty to the 'public interest' or to 'justice'. The public interest responsibilities of lawyers have over time become severed from their ordinary, daily professional lives, and are often catered to either by full-time work in the public interest or by pro bono work as a small segment of what they do in the private sector.[115] However, 'if lawyers see themselves as officers of justice, they must accept greater obligations to pursue justice'.[116] This suggests that one way of encouraging lawyers to think of their broader public interest responsibility is to revisit and reinforce the importance of the lawyer's duties to the court and their related role as 'officers of the court'.

C A Lawyer's Duties to the Court

The lawyer's duty to the court is often described more generally as a 'duty to the administration of justice'.[117] This description accurately conveys the nature and scope of the duty. It is not a duty to a specific judge at a specific time. Rather, the duty is 'owed to the larger community which has a vital public interest in the proper administration of justice'.[118] Nor is it a single duty — what we generally refer to as a lawyer's duty to the court is a number of different duties, which can be broadly classified as the duty of disclosure to the court, the duty not to abuse court process, the duty not to corrupt the administration of

114 Some of these potential benefits are discussed by Painter, ibid. I have discussed here the interdependence of corporate lawyers and their clients. However, the suggestion that lawyers should accept moral responsibility for their professional actions should not be restricted to corporate lawyers. See, eg, Rhode, above n 102. Rhode argues that 'overzealous representation of powerful clients has exposed innocent third parties to substantial health, safety, and financial risks': at 50. Rhode's thesis is that what is professionally convenient consistently, and unacceptably, takes precedence over what is socially acceptable, and that lawyers need to take more responsibility for redressing that imbalance.

115 Rhode, above n 102, 50.

116 Ibid 15. Some American authors have argued that the concept of an American lawyer as an officer of justice or of the court is an empty one, used by lawyers for public relations purposes but consistently being trumped by the duty to be a zealous advocate for a client: see Eugene R Gaetke, 'Lawyers as Officers of the Court' (1989) 42 *Vanderbilt Law Review* 39.

117 See, eg, Justice Ipp, above n 63; Gino E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2002).

118 Justice Ipp, above n 63, 63.

justice, and the duty to conduct cases efficiently and expeditiously.[119] When the court enforces these duties, it is doing so as guardian of the administration of justice.[120]

Lawyers are therefore described as officers of the court.[121] This is a recognition of their role as 'assistants in the administration of justice'.[122] Their principal duty as officers of the court is 'to act with frankness, candour and honesty in relations with the court'.[123] This includes the duty not to make a misleading statement to the court on any matter:[124]

> Conduct by counsel which misleads the court ... undermines the confidence which courts and fellow practitioners can thereafter place in her or his integrity. Were it to become the norm ... the administration of justice would be seriously impeded. For this reason, willfully misleading the court has been judicially described as 'outrageously dishonourable' and, as such, deserving of strong disciplinary action.[125]

Inevitably, lawyers' duties to the court may conflict with their duty to their clients. In such a case, the duty to the court prevails.[126] This is why the lawyer's duty to the court is described as an 'overriding' or 'paramount' duty'.[127] The rationale for this paramountcy is that the court represents the public interest in the administration of civil justice and, as officers of the court, lawyers therefore share the responsibility of representing that interest. That responsibility is owed, 'not to individuals, but to procedures and institutions'.[128]

It should be evident from this discussion of the nature of lawyers' duties to the court that there is in those duties a significant public interest element. Any plea that the profession must become more committed to protecting the public interest is not, therefore, asking them to break new ground. If the legal advisers for BAT Australia had remembered their duties to the court, we could reasonably have expected the following different results.

(1) The Cremona documents (at least) would not have been destroyed.[129] The intended purpose — and the result — of this destruction was to deprive potential plaintiffs of the right to prove a meritorious case

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119 Ibid 65.

120 Ibid 63.

121 See, eg, *Legal Practice Act 1996* (Vic) s 8(1)(b).

122 Dal Pont, above n 117, 444.

123 Ibid 443; Ipp, above n 63, 68–71.

124 *Barristers' Practice Rules* (Vic) r 19; see also *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 298.

125 Dal Pont, above n 117, 444, and the cases referred to there.

126 *Giannerelli v Wraith* (1988) 165 CLR 543, 556.

127 Dal Pont, above n 117, 444. In *Giannerelli v Wraith*, ibid, Mason CJ stated that the duty to the court is paramount even if the client gives clear instructions to the contrary: at 556.

128 Justice Ipp, above n 63, 103, quoting Lon L Fuller and John D Randall, 'Professional Responsibility: Report of the Joint Conference' (1958) 44 *American Bar Association Journal* 1159, 1162.

129 As I have already argued, however, it is not even necessary to resort to the lawyer's duty to the court to explain why destruction of the documents in this case was improper. On the facts, litigation was anticipated, and in such circumstances any destruction of potentially relevant documents can only be seen as an attempt to frustrate the purpose of discovery, which is to require disclosure of relevant documents so that parties can frankly assess the strengths and weaknesses of the respective cases. See above Part III(A).

against the defendant. This conflicts with the lawyer's role to assist the court in the administration of justice.

(2) The defendant would not have adopted a pedantic, 'loophole lawyering' interpretation of the judge's order regarding its discovery obligations.[130] Eames J had ordered the defendant to give discovery of 'documents *of* the defendant' in various categories. The defendant interpreted that order to exclude documents in the possession, custody or power of the defendant but authored by people who were not employees or agents of the defendant. The defendant would only have been obliged to disclose them or, if they had been destroyed, to disclose what had happened to them, if the order had read '*held by* the defendant'. Eames J described this as a narrow and improbable interpretation of the order, and was critical of the fact that the defendant did not advise either the plaintiff or the court that it was proceeding in this manner.[131] Such an approach was an unreasonable interpretation of Justice Eames' order, straining the words in a way that defied common sense and that contributed greatly to delay, inconvenience and needless expense. It was therefore contrary to that aspect of the duty to the court which requires lawyers to conduct cases efficiently and expeditiously.

(3) The defendant would have revealed, much sooner than it did, what had happened to the Cremona documents. Arguably, the defendant's failure to reveal this information violated the duties to disclose, not to abuse the court process, and to conduct cases efficiently and expeditiously.

(4) Eames J would not have had to rule that both he and the plaintiff had been misled by the defendant and the defendant's legal advisers.

This is what conventional wisdom about the nature and scope of the 'duty to the court' would lead us to conclude about the conduct of the defendants' legal advisers in this case. Are these conclusions accurate? Or is 'duty to the court' merely an empty phrase, 'vacuous and unduly self-laudatory',[132] used to make lawyers feel good about themselves and as an effective public relations exercise, but routinely sacrificed to the wishes of individual clients? Eugene Gaetke argues persuasively that in the American context, the role of lawyers as 'zealous advocates' and the duties arising from that role consistently trump any supposed duties they might have to the court.[133]

But the preceding review of Australian authorities leads us to a different conclusion in the Australian context. These authorities suggest that there is a more robust shared view in Australia that a lawyer's duty to the court is a paramount duty, and must prevail over a client's interests where both conflict. In Australia, therefore, the concept of duty to the court has the potential to be a positive force in discussions about ethics. One of the lessons we can learn from

130 See *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [188], [190].

131 Ibid. Eames J also referred to this in the March 1 hearing. See Transcript of Proceedings, *McCabe* (Supreme Court of Victoria, Eames J, 1 March 2002), 389, line 22, 392, lines 1–8, 400, lines 11–23.

132 As suggested by Gaetke, above n 116.

133 Ibid.

McCabe is that we have to reconsider, in the context of a lawyer's duty as 'a guardian of the administration of justice',[134] the role and responsibilities of corporate legal advisers who actively participate in formulating and implementing their clients' policies and business practices. At the very least, this reconsideration would require corporate lawyers to acknowledge that they are accountable for their corporate clients' conduct, and would perhaps force law societies and bar associations to strengthen their ethics rules to explicitly describe that accountability.

V RESPONSES TO THE *McCABE* DECISION

A Immediate Responses

Few cases receive as much media attention as the *McCabe* case has received. This attention includes numerous newspaper articles, radio programs, and a television documentary.[135] There have also been legal and official responses. In addition to the appeal filed by the defendant, and a request by one of the partners in the Clayton Utz firm to have separate representation at the appeal,[136] the findings by Eames J of lawyer involvement in the destruction of documents have prompted scrutiny by the Australian Competition and Consumer Commission ('ACCC'), law institutes in two States and the Victorian Government Solicitor.[137] The ACCC said after the decision was released that it would investigate whether there had been misleading, deceptive or unconscionable conduct by the defendant or its legal advisers in contravention of the *Trade Practices Act 1974* (Cth).[138] The ACCC's concerns, said its Chairman, 'extend not only to major businesses but also to any professional advisers they may have to the extent that they become involved in the planning and execution of unlawful behaviour'.[139] The president of the Law Society of New South Wales stated that the matter would be investigated and, if there was substance to the allegations of lawyer participation in improper document destruction, a full investigation would go forward for which the possible penalties included fines, reprimands, suspension or being struck off.[140] Anti-smoking groups have renewed their attempts to convince the government to explore with State and

134 Justice Ipp, above n 63.

135 The newspaper articles have been referred to above. The television documentary was ABC Television, 'Beyond the Brief', *Four Corners*, 10 June 2002 <http://www.abc.net.au/4corners/stories/s579969.htm> at 17 November 2002. For radio programs, see ABC Radio, 'Professional Standards', *The Law Report*, 23 April 2002 <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s538402.htm> at 17 November 2002.

136 Brian Wilson requested and was granted the right to be separately represented at the appeal hearing.

137 The Law Society of New South Wales and the Law Institute of Victoria stated after the decision was released that they would investigate the actions of the solicitors involved in defending the case: see Richard Yallop, 'Tobacco Lawyers Beseiged', *The Weekend Australian* (Sydney), 13–14 April 2002, 1.

138 See the reports of the ACCC's comments, ibid; Sarah Crichton and Cynthia Banham, 'Tobacco Lawyers Face Two Inquiries', *Sydney Morning Herald* (Sydney), 13 April 2002, 4.

139 Australian Competition and Consumer Commission, 'Tobacco Decision: ACCC Investigates' (Press Release, MR 76/02, 12 April 2002).

140 Reported in Crichton and Banham, above n 138.

Territory Attorneys-General the possibility of a lawsuit against tobacco companies to help pay for the cost of treating smoking related illness.[141]

B Legislative Responses

In a specific, tailored response to the document destruction issues raised by the *McCabe* case, the State Attorneys-General agreed the text of a new regulation. In the explanatory note to the regulation, the objects are expressly stated. They include:

> (a) to place restrictions on the giving of advice by legal practitioners to clients to the effect that documents that *might* be required in *anticipated* legal proceedings should be destroyed or should be *moved*;
> (b) to place restrictions on a legal practitioner aiding or abetting a person to destroy or move such documents; and
> (c) to declare that a contravention of [these] restrictions ... is professional misconduct.[142]

There follows a detailed regulation regarding document destruction. It is appropriate to preface an examination of that regulation with a few comments on the objects. First, the specific reference in the objects to 'moving' documents is obviously intended to prevent warehousing documents, or transferring them offshore, or in some other way changing their location to create the argument, however flimsy it might be,[143] that a party has no possession, custody or power as that phrase is used in the applicable rules.[144] Secondly, we should go beyond the specific language of the objects (and the regulation that follows) and ask if any such regulation is necessary. It will be evident from the preceding discussion that a lawyer's overriding duty to the court,[145] combined with the spirit and intention of the discovery rules (if not the letter of those rules),[146] are a sufficient base from which argue that both the destruction of documents by the defendant, and the related advice they received, were improper. Perhaps the proposed regulation will make the matter clearer as between law societies and their members, but it serves in this case to confirm rather that to add to or change the propriety of the conduct in question.

Another criticism of this approach is that a case-by-case response to ethical transgressions is not the most effective way either to address weaknesses in professional ethics codes or to improve the ethical standards of the legal profession. A comprehensive response, which has as one of its tasks determining

141 Ibid.
142 Explanatory Note, Preliminary Discussion Draft, *Legal Profession Amendment (Documents) Regulation 2002* (NSW) (emphasis added).
143 The relevant facts are discussed above Part IV(A)(3).
144 See, eg, *Supreme Court (General Civil Procedure) Rules 1996* (Vic) pt 29.
145 See above Part IV(C).
146 See above Part III(A)(1).

whether the existing codes are appropriate to address the conduct in question, would be a more effective approach.[147]

What does the regulation add to our discussion? The first paragraph of the regulation is as follows:

> 69I Advice on and handling of documents
>
> (1) A legal practitioner must not give advice to a client to the effect that a document should be destroyed, or should be moved from the place at which it is kept or from the person who has possession or control of it, if the legal practitioner is aware that:
>
> (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
>
> (b) following the advice will result in the document being unavailable for the purpose of those proceedings.[148]

As the *McCabe* case moved through various interlocutory hearings regarding the defendant's failure to comply with its discovery obligations, the defendant's legal argument crystallised. That argument was that only if documents are destroyed after proceedings have commenced could a defence be struck out,[149] and that the defendant had no duty to the plaintiff to preserve documents prior to the commencement of proceedings.[150] If the proposed regulation were approved, it would be impossible for a lawyer accused of misconduct in circumstances similar to those in *McCabe* to rely on the arguments advanced in that case.

C The Legal Profession's Response

As discussed above, the Law Society of New South Wales and the Law Institute of Victoria have stated that they will investigate the matter as a result of the findings of Eames J.[151] In an interview reported in the *Financial Review* on 24 April 2002, the managing partner of Clayton Utz stated that the law firm would conduct a comprehensive internal audit to ensure that proper ethical

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147 A recent survey conducted by researchers in Ontario, Canada, suggests that lawyers tend not to refer to or rely on written codes of ethics in resolving ethical issues. The researchers also concluded that such codes tend to inhibit ethical deliberation by those lawyers who refer to them for assistance in resolving specific ethical problems. See Margaret Ann Wilkinson, Christa Walker and Peter Mercer, 'Do Codes of Ethics Actually Shape Legal Practice?' (2000) 45 *McGill Law Journal* 645. Such conclusions invite the legal profession to go beyond tinkering with existing written codes, and invite legislators to resist tailored responses such as the regulation discussed above, and to engage instead in a more thorough reconsideration of the efficacy of codes of ethics in regulating and shaping lawyers' conduct and ethical deliberations. That reconsideration would have to include questions about how appropriate it is for lawyers to have as much control as they now have over the regulation of their professional conduct. In the words of Deborah Rhode, 'Why the ABA Bothers: A Functional Perspective on Professional Codes' (1981) 59 *Texas Law Review* 689, 720:

> No matter how well-intentioned and well-informed, lawyers regulating lawyers cannot escape the economic, psychological, and political constraints of their position ... By abjuring outside interference, professionals can readily become victims of their own insularity, losing perspective on the points at which fraternal and societal objectives diverge.

148 *Legal Profession Amendment (Documents) Regulation 2002* (NSW), Preliminary Discussion Draft, sch 1, Amendment.

149 *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [344].

150 See the discussion above Part II(C) and ibid [343].

151 See above Part V(A).

standards were being maintained. The audit would include all aspects of the *McCabe* case.[152] A subsequent report states that the firm established a professional excellence committee, including former High Court Chief Justice Sir Anthony Mason, '"to enhance existing policies" to do with conflict of interest, Chinese walls and legal professional privilege'.[153] Several months later, the Law Institute of Victoria invited law firms to appoint 'designated ethics practitioners' within their firms as part of an effort to formalise methods for dealing with ethical issues.[154]

Unlike the accounting profession, however, which seems to be engaged in a full scale, profession-wide debate on ethical standards as a result of the Enron/Andersen debacle and similar cases,[155] there has not yet been any reported public discussion of the need for such reflection and training within the legal profession. It might be argued in response to this observation that there is a significant difference, both in substance and scope, between what happened in Enron and similar cases, and the events revealed in *McCabe*. This is true, but the cases also share at least one striking similarity. In both cases legal advisers worked closely with the companies, as 'monitors and dealmakers' to borrow the words of Painter,[156] to help the companies achieve their business goals. Some of the criticisms leveled at Enron's law firm, Vinson & Elkins ('V&E'), are identical to the criticisms advanced in this casenote of the conduct of the Australian legal advisers of BAT Australia. For example, in an article entitled 'One Big Client, One Big Hassle', the blurred lines (the words used by Eames J

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152 Bill Pheasant, 'Clayton Utz to Run Ethics Audit', *Australian Financial Review* (Sydney), 24 April 2002, 3.

153 Margaret Simons, 'Lawyers Not Moral Judges: Clayton Utz Chief', *The Sunday Age* (Melbourne), 4 August 2002, News 3.

154 Law Institute of Victoria, 'Good Ethics Requires Constant Vigilance' (Media Release, 6 September 2002).

155 See, eg, Melissa Marino and Richard Webb, 'Suddenly, Ethics is a Booming Business', *The Sunday Age* (Melbourne), 28 July 2002, 1, 11.

156 See Painter, above n 107, 512. More recently, Richard Painter was the lead author of a letter, signed by 39 other leading American professional responsibility and/or securities regulation academics, to the Chairman of the Securities and Exchange Commission ('SEC'), expressing concern about the role of lawyers in recent high profile securities cases. The letter states: 'While regulation of accountants has been discussed extensively at the SEC, in Congressional hearings and in the press, *we believe that attention should also be given to the role of lawyers in representing public corporations,* and in particular to whether lawyers should inform a client corporation's directors about violations of securities law.' (emphasis added), Letter from Richard Painter et al to Harvey L Pitt, 7 March 2002, The American Bar Association Task Force on Corporate Responsibility <http://www.abanet.org/buslaw/corporateresponsibility/responsibility_relatedmat.html> at 17 November 2002. In its preliminary report dated 16 July 2002, the Taskforce concluded:

> Corporate responsibility and sound corporate governance thus depend upon the active and informed participation of independent directors and advisers who act vigourously in the best interests of the corporation and are empowered effectively to exercise their responsibilities. *The core conclusion of the Task Force, however, is that, as evidenced by the recent failures of corporate responsibility, the exercise by such independent participants of active and informed stewardship of the best interests of the corporation has in too many instances fallen short.*

American Bar Association Taskforce on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility* (2002) 9–10, <http://www.abanet.org/buslaw/corporateresponsibility/preliminary_report.pdf> at 17 November 2002.

to describe the relationship between BAT Australia and the Australian law firms advising it)[157] between Enron and V&E were described as follows:

> Enron and V&E have enjoyed one of the closest lawyer-client relationships in Corporate America. Both Enron's General Counsel, James V Derrick Jr, and his top lieutenant, deputy general counsel Robert H Walls Jr, are former partners at the law firm. An additional 20 or so V&E attorneys have taken jobs at Enron's legal department over the past decade ... And Enron is V&E's largest customer. In 2001, Enron accounted for more than 7% of V&E's $450 million in revenue. The law firm had several lawyers working virtually full-time on company business, including some permanently stationed in its offices. By contrast, Enron contributed less than 1% to auditor Arthur Andersen's revenues.[158]

In the same article, a former Enron employee is quoted as saying that Enron might not have been able to carry out the transactions now under investigation without the opinion letters of V&E. 'The company "opinion-shopped for what it needed," says this source.'[159]

This lack of independent advice is one of the issues being investigated by the American Bar Association's Task Force on Corporate Responsibility.[160] The similar criticisms of the conduct of independent legal advisers in Australian tobacco litigation and in the securities cases that have given rise to the American Bar Association ('ABA') investigation, suggest that Australia might find something instructive in the ABA investigative process, and possibly in the results of that investigation.

D The International Response

The tobacco companies' aggressive litigation tactics were, as we have seen,[161] well-established and well-known in the United States long before Rolah McCabe commenced her action in Australia. It is not surprising, therefore, that the *McCabe* decision would be of considerable interest in the United States. The findings of Eames J that American lawyers were central in the design and implementation in Australia of the Document Retention Policy — and the destruction of documents pursuant to that policy — have not escaped notice in the United States. The request to Rolah McCabe's lawyers from the United States Department of Justice to provide the information on which they established their allegations of document destruction indicates the potential

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157 See above Part IV(A)(2) and *McCabe* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [286].

158 Mike Francis, *One Big Client, One Big Hassle: Vinson & Elkins' Heavy Reliance on Enron is Now a Potential Liability for the Law Firm* (2002) Business Week Online <http://www.businessweek.com/magazine/content/02_04/b3767706.htm/> at 27 November 2002.

159 Ibid. There are many other similar public criticisms. For example, see John Schwartz, 'Enron's Many Strands: The Lawyers; Troubling Times Ahead for Enron's Law Firm', *The New York Times* (New York) 12 March 2002, Late Edition-Final, C1, in which it is reported that an internal investigation of Enron led by University of Texas Law School dean William C Powers Jr complained of lack of 'objective and professional advice' by outside counsel at V&E.

160 See above n 156.

161 See above Part IV(A)(2).

damage that has been done to tobacco companies.[162] One of the most obvious questions arising from Justice Eames' conclusion that there was systematic destruction of documents in an effort to deprive prospective plaintiffs of evidence related to the health risks of smoking, is whether there had been similar occurrences in other countries that would prejudice other prospective plaintiffs. If the answer is yes, more successful plaintiffs' claims can reasonably be expected.

E Other Responses

We can anticipate that other people contemplating lawsuits against tobacco companies in Australia might be encouraged by this decision. While the poor track record of such claims was a potential deterrent to prospective plaintiffs, the *McCabe* case has changed that. In particular, plaintiffs who have suffered health-related problems due to smoking and who wish to assert a claim similar to the one asserted by Rolah McCabe, are in a stronger position as a result of the now public knowledge regarding the destruction of documents relevant to such claims.[163]

VI CONCLUSION

This case arose from a discovery dispute, but is notable primarily for the ethical challenge it presents to the legal profession. It is a striking example of what can go wrong when corporate lawyers become too closely aligned with the clients they are advising. The forces of increased competition in the legal profession, transnational corporations who are looking more for implementation of head office strategy than independent legal advice, internal law firm pressure to increase profits, and the movement of key personnel between corporations and the firms of their independent legal advisers, all combined in *McCabe* to produce legal advisers who more closely resembled 'hired guns', not 'wise counsellors'. The regulation proposed by the State Attorneys-General, which states that destruction of documents when litigation is anticipated is professional misconduct, is a positive step to address what happened in *McCabe*, but a more broad-based debate about the ethical issues raised in this case is required. The focus of that debate could be to revisit, and possibly to redefine, the public role

162 See Christopher Kremmer, 'Tobacco Cover-Up: US Seeks Papers from Australia', *Sydney Morning Herald* (Sydney), 19 April 2002, 5. See also Raymond Bonner and Greg Winter, 'Shredding of Smoking Data is Ruled Deliberate', *The New York Times* (New York), 17 April 2002, 10. Bonner and Winter report that in 1999, the Justice Department alleged in its lawsuit against several large cigarette makers, including Philip Morris, R J Reynolds and British American Tobacco, 'that the tobacco companies had "engaged in a widespread scheme to frustrate public scrutiny" for nearly half a century.'

163 See, eg, Adam Shand, 'Heat on Tobacco Companies', *Australian Financial Review* (Sydney), 17 May 2002, 19, a report on a lawsuit to be commenced in New South Wales by Myriam Cauvin alleging a '25-year conspiracy by the international tobacco manufacturers to hide the health effects of smoking [and] seeking orders that the costs of her disability pension and continuing treatment ... be borne by the tobacco companies': at 19.

of the lawyer as an officer of the court who has a duty to ensure that civil justice is administered fairly, expeditiously and in a way calculated to avoid harm to third parties. At the very least, corporate lawyers should acknowledge their interdependence with their corporate clients, and accept the consequences of that interdependence — that they have some moral accountability for their clients' conduct and for the results of that conduct.