

This talk was presented at the event organised by Monash University Law Faculty and Centre for Regulatory Studies, *McCabe Ten Years on – What's Really Changed?* on Wednesday 5 September 2012

McCabe Ten Years on – What's Really Changed?

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It is now 10 years since Justice Eames' finding that lawyers for British American Tobacco (BAT) had advised on a 'document retention policy' that intentionally resulted in the destruction of thousands of documents that would have been relevant to Rolah McCabe's negligence case against BAT for her mortal cancer. The decision was later overturned on appeal, but later revelations on the public record about the conduct of BAT and its lawyers largely vindicated Justice Eames' findings.

So how has the legal profession responded to the [McCabe Case](#)? Has anything changed?

The conduct of the lawyers in McCabe was referred to legal profession regulators, to the Victorian Department of Public Prosecutions and to the Australian Crime Commission. At one stage even the Australian Competition and Consumer Commission indicated it was investigating. But [no prosecution or disciplinary action](#) was ever forthcoming.

This is not surprising. The regulation of the ethics of lawyers is still largely based on the idea that problems with lawyers' ethics are a matter of individual character – bad apples who break the rules under pressure. The issue is not about whether some individual lawyer broke a rule and should have been disciplined. Justice Eames' decision in McCabe was refreshing because it didn't focus on the rules. It was based on the idea that a corporation's external lawyers should demonstrate some broader sense of professional autonomy and ethical judgment beyond what professional conduct rules and law strictly require.

In a recent PhD thesis [Dr Kath Hall](#) has explained how commercial lawyers can rationalize away any need to consider the broader ethical and social implications of their work. She uses well established psychological principles to show that we all have an amazing capacity to rationalize away any conflict between external expectations of our conduct and our own “need” to make money.

Lawyers have created a persuasive account of their role in the adversary system that is particularly useful in neutralising broader ethical concerns. Thus the Chief Executive partner of one of the main law firms who acted for BAT could [flatly deny](#) any moral role for a commercial lawyer by referring to the lawyer’s role in an adversary system as being to advocate for their clients’ interests subject only to the rules. According to many lawyers, it is up to the adversarial system to decide the legality and hence the morality of clients’ actions, not lawyers.

But what is ethically rotten at the core of the conduct in McCabe was that British American Tobacco, like the other major tobacco companies, used its lawyers to shut down the proper operation of the adversary system and therefore legal scrutiny of its conduct.

One can make a very good case that tobacco companies are substantively and systematically immoral and unethical at their core because they sell a product that they know is addictive and lethal to a large proportion of their customers, and often market it in ways that are misleading and designed to appeal to vulnerable people. However in the McCabe Case this was not the issue. The company and its lawyers made sure that the legal system could not even see and determine this substantive and urgent moral and legal issue. They did so by making sure they themselves could not see the ethical issues as relevant.

This is not a problem of lack of professional conduct or civil procedure rules, or of non-compliance with those rules. This is a problem of large powerful organisations who feel they are above the law and can manipulate the law to avoid scrutiny of

their conduct.

Nor is it an isolated incident. There are a range of industries whose business models seem to depend – at least in part - on avoiding the scrutiny of the legal system. We have also seen a number of cases since McCabe of lawyers assisting these large power organisations to do so including [James Hardie's](#) attempt to separate itself from the long tail of its legacy of [asbestos liabilities](#) and the [Australian Wheat Board's](#) attempts to cover up its bribery of Saddam Hussein's regime.

Legislation in Victoria now says that it is illegal to destroy a document where a person knows that it is reasonably likely to be required in evidence in a legal proceeding. But questions of who knew what when, and with what intention they acted are exactly the kind of questions that lawyers can litigate to death. We can make civil procedure and professional conduct rules ad infinitum. Every new rule that is introduced is a boon to the very human – and lawyerly - ability to rationalize and interpret away ethical responsibility.

Instead lawyers need to understand better the underlying social, psychological and economic processes that lead to ethical blindness. We all need [a sense of ourselves](#) – as lawyers, regulators, academics and observers - as citizens of a society in which a legal system is there to serve substantive justice and lawyers are there to help ensure that happens.