

N1 – Books and Records – ownership, possession and disclosure

GUIDANCE NOTES

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Books and Records - Ownership, Possession and Disclosure

This Guidance Note was prepared to assist members in public practice on three aspects of books and records:

- *Ownership* – what is owned by members and what is owned by their clients,
- *Possession* – having established the ownership of books and records, the question of possession arises. A member's exercise of a lien is discussed under this heading, and
- *Disclosure* – the obligations of a member to allow inspection of books and records by other parties.

For the purposes of this Guidance Note members should apply a broad definition to books and records. Books and records include, but are not limited to, any documents such as letters, reports, faxes, emails, spreadsheets, journals, ledgers, financial records, registers, contracts, deeds, minutes of meetings and financial statements whether in paper or electronic format. Section 9 of the *Corporations Act 2001* (Cth) (the **Act**) provides the following helpful definitions,

“**books** includes:

- a) a register; and
- b) any other record of information; and
- c) financial reports or financial records, however compiled, recorded or stored; and
- d) a document...”

“**financial records** includes:

- a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
- b) documents of prime entry; and
- c) working papers and other documents needed to explain:
 - i. the methods by which financial statements are made up; and
 - ii. adjustments to be made in preparing financial statements”

1.0 Ownership

1.1 Introduction

The ownership of books and records can be determined by reference to:

- a. the contract between you and your client (generally, the engagement document/letter);
- b. the capacity in which you act for your client/s (principal or agent); and
- c. the purpose for which the books and records exist or are being created

APES 305 Terms of Engagement requires members in public practice to document and communicate the terms of an engagement. This forms the basis of a contract with the client. In this contract the parties are free to agree on the ownership of any books and records already in existence or to be produced. Where the contract makes the ownership of books and records clear, any dispute relating to who owns particular documents can be resolved in accordance with the terms of the contract and escalation of the complaint can often be avoided.

There is a general rule which may assist where the contract or letter of engagement does not expressly deal with ownership of books and papers. In these cases, documents created by the member on the instructions of the client belong to the client. On the other hand, documents prepared, acquired or created by the member solely for their own purposes belong to the member.

1.2 Ownership of Specific Types of Document

Working Papers

Documents which are produced in the course of work performed and which **are not** documents which the client is required to hold by the Act or are not the end product of the engagement, belong to you. If, however, any of those working papers become an attachment to or form part of advice given to a client or are referred to or tabled at meetings, then they become part of the end product for which the client is being charged and therefore become the client's property.

Auditing

The key end product of your work is to give an auditor's report. Documents prepared solely for the purpose of carrying out your duties as an auditor belong to you. It does not matter if the audit is performed under a statutory provision or not, these documents remain your property. Other documents which you may produce and which belong to the client include the management letter and audit committee reports.

If the engagement includes providing both audit and non-audit services, it may be necessary to consider the purpose for which the particular documents in question were prepared in order to determine their ownership. In instances where the work performed or services provided are mixed, it is particularly important and strongly recommended to specify ownership of documents in your engagement letter.

General Accountancy work

When determining the ownership of documents, it is important to be mindful of the nature of the accountancy work undertaken. For example, if the work is to prepare or write up a set of books for the client, the completed books belong to the client. If the work is to prepare a profit and loss account and balance sheet from the client's books, the final accounts belong to the client, while your draft and office copies of those final accounts belong to you. If, however, the client has specifically asked for drafts to be prepared, they will belong to the client as the draft documents were requested by the client. Analysis of banking accounts and correspondence with bankers and stock brokers for the purpose of producing accounts would normally belong to you.

If your work is to produce final accounts from incomplete records, and you are not instructed by the client to work on the records themselves, schedules which you prepare for the purposes of producing the accounts would normally belong to you. However, where financial records are required pursuant to statutory provisions (for example, records required by section 286 of the Act) these belong to the client.

Taxation

Generally in taxation matters, you will be acting as the client's agent. For example, if the work is for tax compliance purposes such as the preparation and submission of accounts and tax returns, the accounts, schedules and computations belong to the client. This follows from the general rule that documents produced by an agent in the course of the engagement (work to be performed) belong to the client. If the work to be done is to give tax advice, you are acting as principal and letters or documents giving that advice belong to the client. However, drafts, memoranda, notes and correspondence with solicitors in connection with that work belong to you.

Communications between you and your client

Letters received by you from your client belong to you. Your copy of any letter written to your client is made solely for your own purposes and also belongs to you. Your notes of instructions or interviews with the client belong to you. With emails, ownership is difficult as there may be a series of responses back and forth between you and your client. In this instance, both parties may have equal rights to ownership.

Communications with Third Parties

Where you are acting as agent, such as liaising with the Australian Taxation Office (**ATO**), all communication documents belong to the client. Where you obtain a document as principal, for example documents confirming the balance of an account between a third party and the client or the custody of securities, such documents would normally belong to you. However, documents prepared by a third party as part of the engagement and sent to you (other than at your expense) belong to the client. Where documents prepared by a third party are sent to you, there may be particular documents which are solely for your benefit, in which event they would belong to you.

At a Glance

It is emphasised that ownership is best specified in the engagement letter. Where this has not been done, the following represents a guide as to ownership.

Type of engagement	Member is Principal/agent	Owned by client	Owned by member
Audit	Principal	Audit report, audit committee report, management letter	Audit workpapers
Tax – compliance	Agent	Tax returns, accounts, schedules, computations	Working papers
Tax – advice	Principal	Letters of advice, or correspondence between the client and other solicitors / court papers	Drafts, memoranda, notes and correspondence with member's own solicitors
Accountancy – Engagement to create, maintain or store Company records	Generally acting as agent	Financial records, required by s.286 of the Act	Not applicable
Accountancy – Ownership not stipulated in contract	Generally acting as agent	Documents which member has agreed to prepare as part of the engagement e.g. financial statements, books of account.	Drafts and office copies prepared in the course of preparing final documents. Correspondence with banks and stockbrokers conducted to produce accounts.
Accountancy – Contract to produce final accounts from incomplete records	Generally acting as agent	Final accounts	Schedules, computations and working papers, but may belong to the client depending on the facts and circumstances. Best specified in the engagement letter.

2.0 Possession

2.1 Introduction

In some instances, such as a failure to pay for work performed, you may consider retaining documents as a way of 'enforcing' payment. This is called a lien and it is important to understand that there are limits to these types of action. A lien is "the right to hold a person's property as security for the performance of an obligation (such as the payment of money owing)" (The Law Handbook, Redfern Legal Centre Publishing). Except in very rare circumstances, a lien does not give the person in possession the right to sell or dispose of the property, but only the right to retain it. The general law recognises two types of liens, a general lien and a particular lien. In addition, the member and client may agree to a contractual lien arrangement whether by way of the retainer or otherwise. This is dealt with further at clause 2.4.

2.2 General Lien

A general lien covers all property which can be retained until payment of the whole debt owed by the client to the person who performed the work. It applies whether or not the retained property is for all or part of a debt owed or whether the debt only relates to the most recent work performed. A general lien may be exercised by solicitors, bankers, mercantile agents and stockbrokers but Australian authorities suggest that accountants *are not entitled to a general lien*. [see *Malouf v Rowley* (unreported, 13 October 1980, NSWSC, Powell J)]. Therefore, it is strongly recommended you do not adopt this approach until such time as the Australian courts further clarify the rights of accountants to exercise a general lien.

2.3 Particular Lien

A particular lien is where a particular piece of property is retained by the person performing the work until the debt incurred in respect of that property has been paid. Before resorting to this type of lien, the following circumstances must apply:

- a. the documents must be the property of the client who owes the money and not documents which belong to a third party. This distinction is particularly important where you are engaged to perform work by a company and also by a director of the same company to perform work relating to their personal affairs;
- b. the documents must have come into your possession by proper means;
- c. work must have been done by you on the documents or in producing them, not merely examined by you for the purpose of your work; and
- d. the fees for which the lien is exercised must be outstanding for work performed in relation to those documents and not for other unrelated work.

The lien covers documents worked upon by you during the period for which work fees are outstanding. It does not extend to any separate documents on which earlier work was completed and payment has been received for that work.

Although a lien may appear to be a convenient method to encourage payment of outstanding fees from a client, it should not be used lightly and is not always the most effective way of resolving a fee dispute. Many of the complaints received from members of the public against accountants relate to the inappropriate withholding of documents by members. This has the potential to bring the member and the profession into disrepute and a lien should only be used when other efforts to resolve the dispute have been exhausted.

Alternative options for recovering fees, such as mediation, arbitration or civil actions should be considered. The CA ANZ Dispute Resolution Toolkit is available to assist members in public practice to meet their obligations under [Regulation CR 3.12](#) to establish policies and procedures to deal with complaints.

2.4 Contractual Liens and the *Personal Property Securities Act 2009* (Cth)

While liens are excluded from the *Personal Property Securities Act 2009* (Cth) (**PPSA**) when certain conditions are met, contractual liens agreed to by the client are included in the PPSA regime. This means that if a member intends to rely on a contractual lien provided for by the retainer, the lien will need to be “perfected” generally either by registration of the security interest on the Personal Property Securities Register or by possession of the goods over which the lien is asserted. The priority of any such security interest as against other creditors will also be affected by the provisions of the PPSA.

2.5 Situations where a Lien cannot be used

Statutory Books of Companies

You cannot use (exercise) a lien over certain statutory books of a company as these must be available for inspection as per sections 173(1) and 251B of the Act. Examples of these documents include the register of members and the minute books for meetings of members.

Accounting Records of Companies

Because section 288 of the Act requires a company to make financial records available in a hard copy form within a reasonable time to a person who is entitled to inspect the records you cannot exercise a lien over any financial records required to be kept by section 286 of the Act.

The financial records required to be kept by a company by section 286 are “records that (a) correctly record and explain its transactions and financial position and performance; and (b) would enable true and fair financial statements to be prepared and audited”.

Liens and Receivership

The appointment of a receiver for any or all of a company's assets may not affect a lien. The position is the same whether the receiver is appointed by the court (unless the court orders otherwise) or pursuant to a deed.

Liens and Administration and Liquidation

An existing lien will remain in place on the appointment of a voluntary administrator or liquidator to a company, whether the liquidation is voluntary or not. However, a lien cannot be exercised over documents which come into your possession after the commencement of the liquidation.

A member is not entitled, as against the liquidator or voluntary administrator of a company, to retain possession of books of the company or to claim or enforce a lien on such books, but the legislation provides that such a lien is "not otherwise prejudiced": sections 438C and 530B of the Act. This means that while documents must be provided to a voluntary administrator or liquidator upon demand to allow them to perform their role as such, this does not entitle the voluntary administrator or liquidator to then dispose of the books without regard to the lien. [see *Bennett & Co v CLC Corporation* [2001] WASCA 51].

Liens and Bankruptcy

You cannot claim a lien on the papers and documents of a bankrupt. Any documents retained by you must be surrendered to the trustee in bankruptcy on request.

Liens and disclosure

In many instances, where you return documents subject of a lien to your client, or deliver them to a third party, the lien will be extinguished. However, in some situations, the lien may remain in force, for example where the documents are:

- delivered to a voluntary administrator or liquidator in response to a demand for books and records under section 438C or 530B of the Act;
- produced pursuant to an order from the Australian Securities & Investments Commission (**ASIC**). (Refer to section 3 – Disclosure, below); or
- depending on the circumstances, delivered to Court pursuant to a subpoena or other compulsory court process in the course of litigation.

Where legal proceedings are commenced by the member for the recovery of unpaid fees, the retained documents generally form part of the evidence in the case and will need to be disclosed as part of normal court procedures. A lien over documents may not be practically effective once disclosure has occurred, particularly where the client only requires the information contained in the documents, rather than the documents themselves.

3.0 Disclosure

3.1 Introduction

As an accountant, you owe a contractual duty of confidentiality to your client. Accordingly, if you disclose confidential information regarding your client's affairs to a third party without the approval of the client you will have breached this duty and your client may hold you liable for any damage that your disclosure caused. There are limited statutory provisions which do allow disclosure to a third party without your client's permission or where you have a legal duty to disclose certain information. You must understand and act within the precise limits of any such statutory provision so that only the information allowed or required is disclosed.

Accountants who are registered tax agents or BAS agents under the *Tax Agents Services Act 2009* (Cth) (the **TASA**) are also subject to the confidentiality of client information obligation under subsection 30-10(6) of TASA (Code of Professional Conduct, Code item 6). Code item 6 provides that, unless there is a legal duty to do so, registered agents must not disclose any information relating to a client's affairs to a third party without the client's permission. For more information, please refer to the Tax Practitioners Board website - <https://www.tpb.gov.au/confidentiality-client-information> .

3.2 Requests for access by the Australian Taxation Office

The ATO has particular powers under the *Taxation Administration Act 1953* (Cth) (the **TAA**) to gain access to documents. For more information please refer to the ATO website at <https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/Privacy-and-information-gathering/Our-approach-to-information-gathering/>.

Powers under the TAA

Section 353-15 of Schedule 1 of the TAA grants the Commissioner of Taxation or an authorised representative the right to take certain actions such as:

- enter and remain on any land, premises or place;
- full and free access to all documents, goods and other property;
- inspect, examine, make copies of or take extracts from, any documents; and
- inspect, examine, count, measure, weigh, gauge, test or analyse any goods or property and, to that end, take samples.

These actions can only be undertaken where they are directly related to matters covered by a taxation law (such as income tax, FBT and GST).

A person attempting to exercise rights under section 353-15 must produce on request, an authority signed by the Commissioner of Taxation giving the person those rights. If the signed authority cannot be produced, the person must leave the premises and has no right of access to documents.

If an authority is produced, failing to provide reasonable assistance and access is an offence and can result in a fine.

While section 353-15 overrides a duty of confidentiality, it does not operate over documents or information covered under legal professional privilege. Broadly speaking, legal professional privilege protects the disclosure of certain communications between a lawyer and a client when these communications are for the main purpose of seeking or providing legal advice, or for use in existing or anticipated legal proceedings.

Any such documents must be identified and kept separate and not disclosed to the Commissioner of Taxation or an authorised person appointed under section 353-15.

The ATO also provides administrative concessions which limits the Commissioner of Taxation's access to certain documents. Administrative concessions may apply for professional accounting advisers' papers (Accountants' concession) or certain advice for a corporate board on tax compliance risk (Corporate board advice concession).

To claim the Accountants' concession or Corporate board advice concession for certain documents, you must apply to the ATO. More information is available on the ATO website - https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/Privacy-and-information-gathering/Our-approach-to-information-gathering/?page=52#Accountants__concession.

It is important to bear in mind that section 353-15 only relates to access to documents and does not include the right to ask questions or obtain verbal evidence. This is covered by section 353-10.

3.3 Requests for access by ASIC

Like the ATO, ASIC has wide ranging powers to assist them investigate matters in their remit. ASIC can require you to produce either your working papers or a client's books. ASIC can also require people to attend an examination. Failing to comply with ASIC's requests can result in legal action. For more information please refer to ASIC's website - <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/>

Interaction between ASIC's powers and liens

Where production of documents is requested by ASIC pursuant to the Commission's order or a search warrant, any lien in place at the time of the request will continue to have effect. However, a lien over documents produced pursuant to a special investigation by the Commission will not have any effect once the documents are provided to ASIC. It is always wise to advise that any documents that are produced are subject to a lien. Whether the lien will have any continuing effect after production of the documents may vary from case to case.

3.4 Requests for access by Police

Police may be permitted to look at the information contained in a client's books and records and from the member's own documents provided the request for access to view the information is in relation to a criminal investigation. However, a search warrant is generally required before the Police can obtain possession of the books and records.

The *Proceeds of Crime Act 1987* (Cth) allows Police officers to enforce a request to produce documents and/or to search for and seize documents. Usually this will be done under a valid warrant or a court order. However, Police officers may request production, search or take possession of documents with the consent of a relevant person. As an accountant, you may be placed in the position where your consent is requested.

To prevent any breach of your client's confidentiality when Police request your consent to access a client's or your own documents etc. it is recommended that you advise the Police officer:

- you will be happy to grant access when a valid warrant or court order is produced, or
- you would like to obtain legal advice (and you should then obtain that advice) before granting access.

This is important as other laws may over ride your duty of confidentiality, granting access to your own documents could breach confidentiality and may trigger other sections of law which empower the Police officer/s to search and / or seize documents.

3.5 Receipt of a subpoena requiring the production of documents

A subpoena is a court order issued for the production of books and records or other documents in legal proceedings. A subpoena will:

- be issued to you or your business;
- specify what documents are being requested; and
- specify a time and place for you to deliver the subpoenaed documents.

We recommend that you obtain legal advice if you receive a subpoena. You should also notify the client a subpoena has been served.

3.6 Request for access to audit working papers by third parties

You may receive a request from another accountant to view your audit working papers, this is common when there is a change of auditor or when a client is undertaking a transaction. Members should refer to [GS 011 Third Party Access to Audit Working Papers](#) for guidance.