

Retention of Business Records

Business proprietors may find almost overwhelming questions like “what records do I need to keep”, “how should I keep them” and “how long do I need to keep them”. Although greater regulation in turn increases the variety of records which must be retained, developments in technology and associated law do make this an easier task.

In theory, the question is very complex. There are many Commonwealth and State laws which regulate document retention, some of which apply universally and some of which apply to specific industries and transactions, with enormous variation as to how and how long such records must be kept.

In practice, the question is not so complex. The prudent approach is to retain documents indefinitely, but in most cases electronically. The Electronic Transactions Act 1999 (Cth) and the Electronic Transactions Act 2000 (NSW) provide that almost all documents which must be retained may be retained electronically. However, there are exceptions, e.g. some documents relating to court proceedings or relating to interests in land. There are also technical requirements, e.g. the capability of producing a hard copy from the electronic copy. Further, there are practical considerations, such as retaining the ability to prove the integrity of the document, i.e. to prove when it was made and that it has not been altered, which could be very important if the document is ever required for court proceedings.

The main document categories and how best to deal with them is set out below:

- **Title & registration documents** - Documents evidencing title to property, such as title deeds and certificates or statutory registrations, should be retained indefinitely as originals. This includes related documents such as deeds and contracts. For this purpose, property includes real property, personal property and intellectual property, such as copyright. Most of these documents need not be kept as originals, but many of them do and which is which can be difficult to determine, so it is prudent to keep them all.
- **Client documents** - A business may have records maintained on behalf of clients, which may be the client’s property and be subject to the law of bailment, as well as express and implied contractual terms. The business may be liable to the client if these records are dealt with otherwise than in accordance with the client’s instructions, so the prudent approach would be to return these records to the client when no longer required, retaining an electronic copy for the reasons set out below. The records should not be destroyed without the client’s consent.
- **Documents required for commercial purposes** – Many businesses providing advisory services may receive a request for further advice, potentially unexpectedly or a significant time after providing initial advice. It will be difficult to service that request if the relevant records have not been retained, at least electronically. Further, it can be difficult to contest an attack on the quality of the initial advice without access to such records, which can make litigation more likely. In tension with this, contracts engaging advisors commonly

contain a confidentiality provision providing that such records must be returned or destroyed on termination of the retainer. That should be qualified by provision for a usual commercial file to be retained, subject to ongoing confidentiality obligations.

- **Documents required for litigation purposes** - Many documents may be required for the purpose of litigation and these should be retained, at least electronically. There are some special cases:
 - Many documents filed in court are excluded from provision in the electronic transactions legislation for electronic copies to be retained in lieu of originals and the prudent approach would be to retain the original of any document filed in court, at least until the proceedings and any possible appeal are concluded.
 - Destruction of documents which may be required for current or anticipated proceedings may attract criminal penalties, contempt proceedings or disciplinary action under relevant professional legislation and such records should be retained for as long as proceedings are current or anticipated.
 - The Limitation Act 1969 imposes time limits for certain types of proceedings and one could argue that documents may not be required beyond those periods. However, those limits are often unpredictable and lengthy, e.g. a cause of action relating to a property purchase can arise on resale of the property. There is an ultimate bar in section 51, but that is 30 years. Accordingly, this legislation is only really useful to indicate a minimum (rather than maximum) retention period.

In light of this, records should be retained electronically, for as long as they may be required for the purpose of such proceedings, which may be indefinitely.

- **Company Records** - These are regulated by various acts, including the Corporations Act 2001. The main categories are:
 - Registers and minute books, which must be retained for 5 years from the date of the last entry.
 - Accounting records, which must be retained for 7 years from completion of the transaction or conclusion of the accounting period during which the transaction took place.
- **Employment Records** – These are regulated by various acts, including the Fair Work Act 2009. These records include those relating to such as employment status, hours worked, salary/wages, leave and superannuation and must be kept for 7 years.
- **Industry specific records** - Legislation applicable to certain industries impose further record keeping requirements. For example, Section 104 of the Property, Stock and Business Agents Act 2002 requires a licensee to retain, for 3 years after it is made, a record containing particular transactions as licensee.
- **Tax Records** - these are regulated by various acts, depending on the form of taxation involved. The main categories are:

- Income tax – retain for 5 years from the latter of the date on which the records were prepared or the relevant transaction was completed.
- Payroll tax – retain for 5 years from the latter of the date on which the records were prepared or the relevant transaction was completed.
- CGT – retain for the duration of ownership of the asset, plus 5 years from the end of the accounting period in which disposal occurred.
- FBT – retain for 7 years from the latter of the date on which the records were prepared or the relevant transaction was completed.
- **Documents subject to privacy obligations** - In tension with the principles set out above, a business should only retain records containing personal information in line with privacy law considerations, e.g. for so long as there is a legitimate business purpose in retaining them.

In our view, the best approach to this is a mix of ongoing and diarised action involving the following:

- On completion of a transaction and closure of the file for the transaction, determination of:
 - What records need to be kept as originals and how they will be kept. Typically, a filing system will accommodate this.
 - What records will be scanned and retained electronically. For the reasons set out above, this will typically be all documents not required to be kept as an original.
 - What records will be discarded altogether. For the reasons set out above, given current technology, there will be few if any documents in this category, with the possible exception of documents the subject of privacy obligations which are no longer required for a legitimate business purpose.
- Periodically, e.g. quarterly or annually, a corresponding determination, but in relation to the business records as a whole.

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