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## Executive Summary

The Victorian public sector performs a wide variety of functions, including direct provision of services to the community, policy advice, the collection and administration of public money, regulation, funding and contracting private and non-government

organisations for service delivery. These services are delivered through the public service (departments, administrative offices and the Victorian Public Sector Commission) and through public entities operating in the wider public sector.

Adopting appropriate legal forms and governance arrangements for the functions and activities being undertaken by public entities is critical for high quality performance. Well considered and fit for purpose forms and arrangements provide a foundation for effective and efficient governance and management of public sector bodies with high standards of accountability, responsibility and credibility. In contrast, poor alignment between functions, forms and governance arrangements can impede high performance, create unnecessary costs, or inhibit the delivery of suitable levels of public accountability and transparency.

These guidelines propose a process for determining the most appropriate legal form and governance arrangements when establishing a public entity. The process involves identifying the functions to be undertaken, considering the most appropriate legal form and governance arrangements, and consulting and seeking approval for the entity. It is assumed that in creating a public entity, the government has decided to undertake a particular function and that this function is best performed by a public entity rather than a public service body (a department or administrative office). These guidelines are not intended to be prescriptive; rather they provide a basis for informed decision making and the exercise of judgement by policy practitioners.

It is important to note that the intention of these guidelines is to inform decision makers considering the establishment of a new public entity or undertaking a review of an existing entity. The intention of the document is to assist with forward looking analysis, not to critique existing arrangements which were the product of earlier policy environments. However, in discussing various types of entities reference is made to existing examples to illustrate the discussion.

These guidelines were originally published in 2010. This revised version contains information updated to reflect machinery of government changes, effective at May 2013.

Figure 1 in section 1.3 provides a summary of the key issues when determining selection of the appropriate legal form for a public entity.

# Abbreviations

**CEO**

Chief Executive Officer

**DPC**

Department of Premier and Cabinet

**DEPI**

Department of Environment and Primary Industries

**DTPLI**

Department of Transport, Planning and Local Infrastructure

**DTF**

Department of Treasury and Finance

**IBAC**

Independent Broad-based Anti-corruption Commission

**NeHTA**

National eHealth Transition Authority

**OCPC**

Office of the Chief Parliamentary Counsel

**PSSC**

Public Sector Standards Commissioner

**VPSC**

Victorian Public Sector Commission

**TAC**

Transport Accident Commission

**TAFE**

Tertiary and Further Education

**VCAT**

Victorian Civil and Administrative Tribunal

**VFMC**

**VGSO**

Victorian Government Solicitor's Office

**VMIA**

Victorian Managed Insurance Authority

# 1. Introduction

## 1.1 Purpose

This document provides guidance to inform advice and decision making about the legal form and governance arrangements for new public entities. Although the document provides an overview of available forms for public service and public sector bodies and provides some information on the use of public service bodies (i.e. departments and administrative offices), the focus is on the creation of public entities within the wider public sector. The guidelines can also be used when considering legal form and governance arrangements for changed public functions or when existing entities are being reviewed.

It is assumed that a prior decision has been made that a particular function or set of functions is best undertaken by a public entity rather than within a department or an administrative office. It is also assumed that consideration has been given to expanding the remit of an existing public entity to accommodate the function(s) before a decision is made to establish a new public entity. In all cases, early contact with the Government Branch in Department of Premier and Cabinet (DPC) is encouraged to inform any decision about the creation of a new public entity.

The various legal forms and governance arrangements adopted for Victorian public entities entail different levels of control and direction by the responsible Minister(s) and in turn, different responsibilities and levels of accountability for entities and their Boards and directors. As a general principle, consistent legal and governance arrangements should apply to entities that perform similar functions or require similar degrees of Ministerial control and direction. These guidelines aim to map the links between functions, levels of control, legal forms and compliance regimes as well as governance arrangements to ensure that the most appropriate structure is adopted for new public entities.



At the same time, these guidelines recognise that some variety in arrangements may be warranted, given the breadth of activities performed by the public sector. Therefore the guidelines provide a reference for decision making rather than a prescriptive set of rules.

In summary, the guidelines build on the Victorian Public Sector Commission's (VPSC) governance work program and reviews of public entities and provide:

- an overview of the structure and composition of the Victorian public sector
- a framework for matching public functions with legal forms for public entities
- guidance on specifying legal compliance and governance features and costs for entities
- (e.g. Board and management structures, employment and funding arrangements)
- a set of 'template' governance arrangements for public entities
- information on the processes for establishing a new public entity.

## 1.2 Public Sector Governance

Governance encompasses processes by which organisations are directed, controlled and held to account. It includes the processes whereby decisions important to the future of an organisation are taken, communicated, monitored and assessed. It refers to the authority, accountability, stewardship, leadership, direction and control exercised in the organisation.

Good governance provides the foundation for high performance. It strengthens community confidence in a public entity, and helps ensure the reputations of entities are maintained and enhanced. Good governance enables entities to perform efficiently and effectively, and to respond strategically to changing demands. Conversely, poorly conceived institutional and governance arrangements can be costly to the community by undermining the effectiveness of public entities and the achievement of government's policy goals.

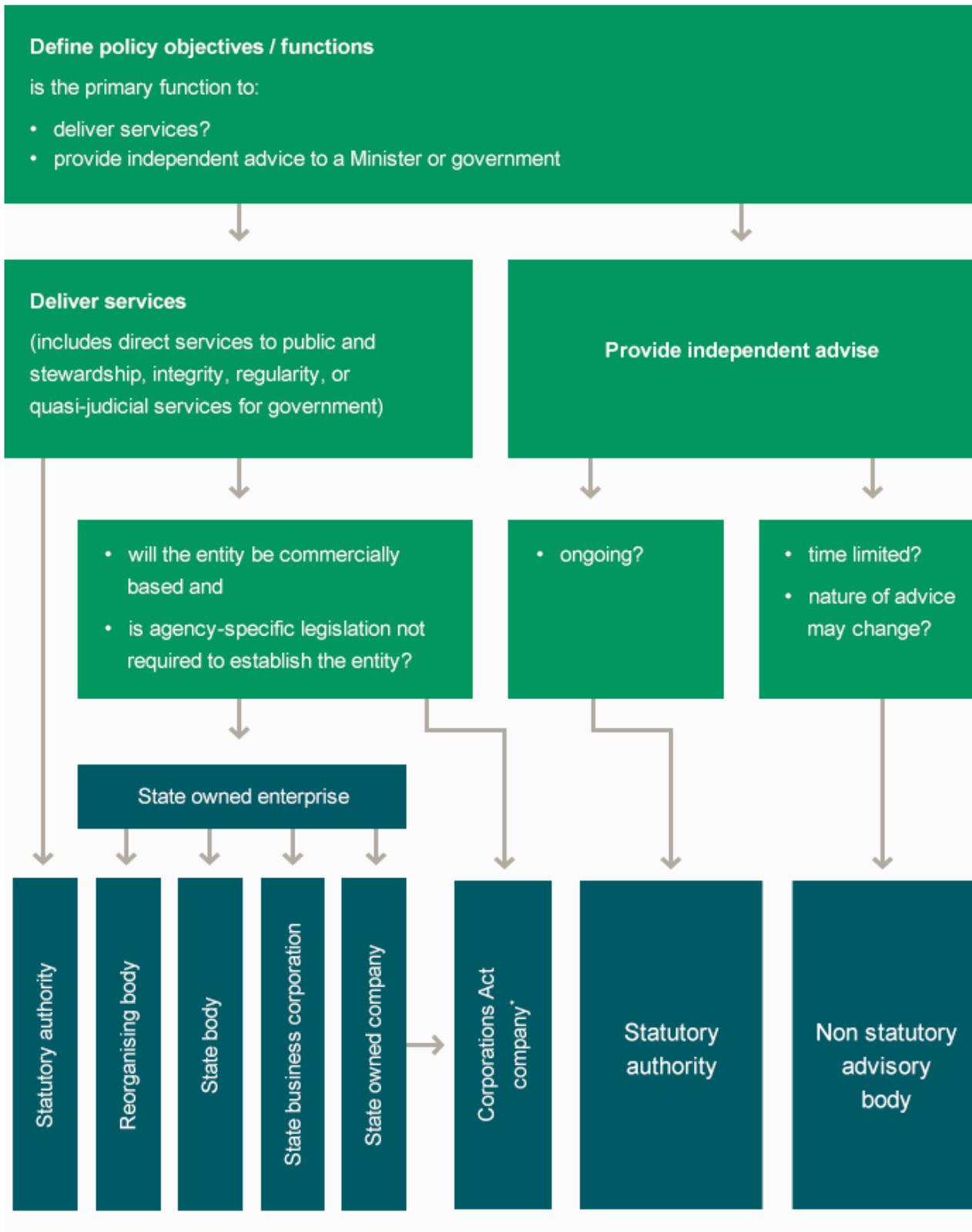
Governance arrangements in the public sector reflect the sector's unique accountability obligations compared to the private sector, with departments, agencies and entities responsible through their Ministers to the Parliament and ultimately to the people.

## 1.3 Process for Selecting Legal Form and Governance Arrangements for Public Entities

These guidelines propose a process for determining the most appropriate legal form and governance arrangements when establishing a public entity, and detail the practical matters that need to be considered. The process involves identifying the functions to be undertaken, considering the most appropriate legal form and governance arrangements, and consulting and seeking approval for the entity, as shown in Figure 1.

**Figure 1: Process for selecting legal forms and governance arrangements for public entities**





Process for selecting legal forms and governance arrangements for public entities.

\* usually a company limited by shares

## 2. Overview of Victorian Public Service and Public Sector

There is significant diversity in the organisation, structure and management of agencies within Victoria's public sector. Numerous changes in policy context and legislative reform over the last few decades have had particularly significant impacts on the role of the State and its structure and profile. Where once the Victorian public sector was responsible for directly delivering public services, there is now closer alignment and interaction between the private, public and not-for-profit sectors in achieving policy outcomes. There are many examples where functions once performed by departments are now undertaken by public entities operating at arm's length from Ministers or outsourced for delivery, on a contractual basis to the private sector or not-for-profit organisations.

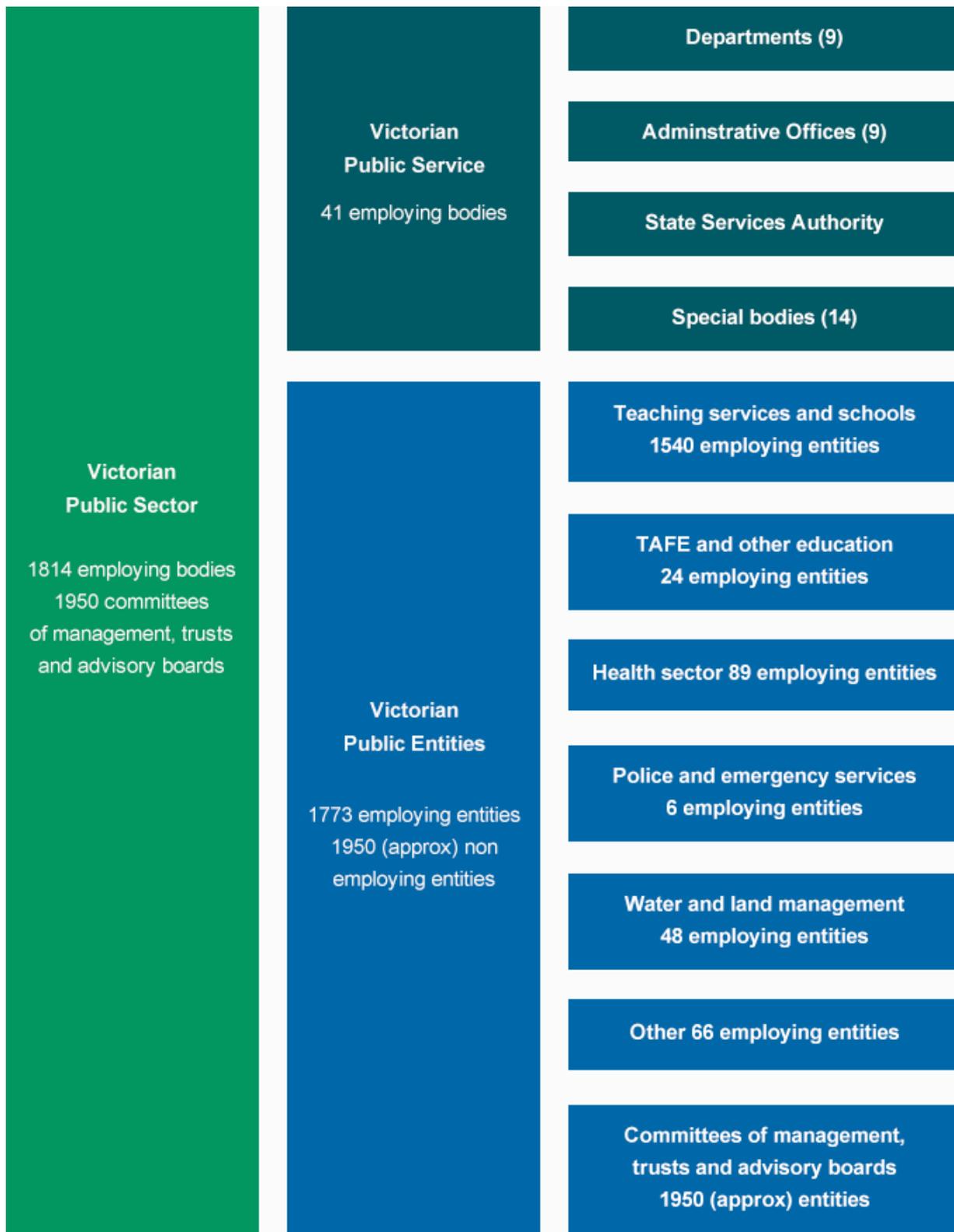
This chapter provides a profile of Victoria's public sector as an important context for the guidance provided in subsequent chapters.

### 2.1 Size and Composition

Victoria's public sector is divided into public service bodies and public entities operating in the wider public sector.<sup>1</sup> In 2013, the Victorian public service comprises nine departments, nine Administrative Offices and the Victorian Public Sector Commission (VPSC).<sup>2</sup>

Public sector entities include employing bodies such as hospitals, schools, Tertiary and Further Education (TAFE) institutions, police and emergency services organisations and water, land management and other bodies. Also included are the many public entities that do not employ staff, including Ministerial advisory committees, most cemetery trusts and Crown land committees of management. In addition, there are 14 special bodies, of which eight are public service employers, two are public entity employers and four that do not employ any staff.

#### Figure 2: Composition of the Victorian public sector at May 2013



Composition of the Victorian public sector at May 2012

## 2.2 Public Service Bodies

Public service bodies include departments, administrative offices and the VPSC. This section provides more details about departments, administrative offices and the VPSC and the functions they perform.

### 2.2.1 Departments

Under Victoria's Westminster system of government, departments exist to assist Ministers to perform their portfolio responsibilities and are a means by which government policy is implemented. Departments are part of the Crown and do not have a separate legal identity.

Departments advise Ministers on portfolio matters and implement Ministerial decisions. Consequently, the traditional view of Ministerial responsibility is that Ministers are responsible for the actions of departmental officials, who act within their duties and within the policy that the Minister has laid down.

Ministers have extensive powers to direct and control the activities performed by their portfolio department. Departmental heads are appointed by the Premier and responsible to their Minister(s) for the management of the department and for advice on all matters relating to the department and related administrative offices. Box 1 outlines the legislative provisions relating to these roles and responsibilities.

#### **Box 1: General responsibilities of department heads**

Section 13 of the Public Administration Act 2004 states that a Department Head is responsible to their Minister or Ministers for the general conduct and the effective, efficient and economical management of the functions and activities of:

- the department
- any administrative office existing in relation to the department.

Department Heads must advise the public service body Minister or Ministers in all matters relating to the department and any such administrative office.

Departments are established and abolished through an Order in Council made under section 10 of the Public Administration Act 2004. The Premier determines the number of departments and the assignment of Acts to individual Ministers. Matters to be administered by departments are allocated by the General Order. The Order is made



and signed by the Premier and:

- prescribes the names of Ministerial portfolios
- allocates Acts to Ministers to administer.

The number of departments and the functions allocated to them vary over time. A list of current Ministers and their portfolios is available on the Premier's website, [www.premier.vic.gov.au](http://www.premier.vic.gov.au). A current listing of all departments can be found on the VPSC website, [www.vpsc.vic.gov.au](http://www.vpsc.vic.gov.au), under 'machinery of government'.

Departments are predominantly staffed by Victorian public service staff employed by the relevant Department Head (Secretary). The Secretary of a department can report to one or more Ministers, depending on the General Order. The relevant powers of employment for the Department Head and employees are set out in section 20 of Part 3 of the Public Administration Act. Importantly, public servants, whether they be the departmental head or employees, are apolitical and serve the government of the day. Decisions relating to appointment and selection of public servants are to be based on merit and free from Ministerial involvement.

### **2.2.2 Administrative offices**

Administrative offices are a Victorian public service organisational form. As they are formally related to a department, administrative offices are part of the public service. They are established and abolished through an Order in Council made under section 11 of the Public Administration Act. Administrative offices may be part of the Crown or may have a separate legal identity. The Public Administration Act sets out the requirements for administrative offices.

Administrative offices are discrete business units and have a degree of autonomy from their parent department. They have separate internal structures and processes which allow them to operate with significant managerial flexibility.

Under section 14 of the Public Administration Act, the head of an administrative office is responsible to the relevant department Secretary for the management of the office and for advice on all matters relating to the office. This does not apply to other functions conferred on the head of the administrative office by another Act. For example, the head of the Environment Protection Authority is directly accountable to the responsible Minister for the exercise of powers assigned to the Commission under section 13 of the Environment Protection Act 1970. Because functions can be conferred

on administrative offices by legislation other than that assigned to the Minister or portfolio department, they can be a useful administrative form for public functions that require close oversight but which cross portfolio boundaries.

One aspect of administrative offices is that they can be established (or abolished) relatively quickly, via an Order in Council as opposed to formal legislative processes. As they are formally part of a department, they can also utilise corporate and other support functions already established in departments. Again this can facilitate an administrative office being operational quickly and at low cost.

A current list of all administrative offices (shown in Box 2) can be found on the VPSC website under Register of Instruments.

### **Box 2: Victorian administrative offices at May 2013**

As at May 2013, there are nine administrative offices (with relevant department):

- Environment Protection Authority (Department of Environment and Primary Industries (DEPI))
- Local Government Investigations and Compliance Inspectorate (Department of Transport, Planning and Local Infrastructure (DTPLI))
- Office of the Chief Parliamentary Counsel (DPC)
- Office of the Governor (DPC)
- Public Record Office Victoria (DPC)
- Regional Rail Link Authority (DTPLI)
- Victorian Government Solicitor's Office (Department of Justice)
- Office of Living Victoria (DEPI)
- Office of the Victorian Government Architect (DTPLI)<sup>3</sup>.

Administrative offices perform a defined range of functions and can be used to group together a cohesive set of activities or services. Some circumstances where administrative offices can be used are when:

- 'the objectives are relatively narrow and activities can be clearly specified. This is a key distinction between departments and administrative offices
- 'close Ministerial oversight is expected

- 'the function is expected to be time limited so can be easily established and abolished as needed by an Order in Council.<sup>4</sup>

The legal configuration of administrative offices means that they offer the public service benefits of departments for a more narrowly defined set of functions. Although they do not have a separate legal identity, administrative offices are business units that are separate and distinct from departments. They have separate internal structures and processes, and operate with significant managerial autonomy, including independent employment powers. This means that the employees of an administrative office are employees of the administrative office head. Administrative offices also have the advantage of being able to maintain strong branding and identity, separate from the parent department.

### **2.2.3 The Victorian Public Sector Commission**

The VPSC was established by Part 4 of the Public Administration Act. As with departments and administrative offices, the VPSC is a public service body. As a public service body, the VPSC is unique because it has a separate legal form, and has unique functions and powers conferred by the Public Administration Act, namely to:

- 'identify opportunities to improve the delivery and integration of government services and report on service delivery outcomes and standards
- 'promote high standards of integrity and conduct in the public sector
- 'strengthen the professionalism and adaptability of the public sector
- 'promote high standards of governance, accountability and performance for public entities.

The Authority comprises the Chair, the Public Sector Standards Commissioner (PSSC), and members appointed by the Governor in Council. The Authority reports directly to the Premier.

## **2.3 Special Bodies**

Under section 6 of the Public Administration Act, the Governor in Council may deem certain public service or public sector bodies to be special bodies for the purposes of the Act. The special body provision is a means to exempt these entities from particular types of reviews conducted by the VPSC (section 50 systems reviews or section 56



special reviews) and certain public sector values (section 7(3)), namely 'providing frank, impartial and timely advice to government' and 'implementing government policies and programs equitably'. The categories of bodies within the Public Administration Act are mutually exclusive: once a public entity is deemed to be a special body it ceases to be a public entity and becomes solely a special body. Being deemed a special body for the purpose of the Public Administration Act does not prescribe or imply a legal form; special bodies can take various legal forms.

As at May 2013, special bodies are:

- Department of the Parliament of Victoria
- the Independent Broad-based Anti-corruption Commission (IBAC)
- the Commission for Children and Young People
- the Electoral Boundaries Commission
- the Office of the Commissioner for Law Enforcement Data Security
- the Office of the Health Services Commissioner
- the Office of the Ombudsman
- the Office of the Privacy Commissioner
- the Office of the Freedom of Information Commissioner
- the Victorian Civil and Administrative Tribunal (VCAT)
- the Victorian Auditor-General's Office
- the Victorian Electoral Commission
- the Victorian Inspectorate
- Victoria Police.

### 3. Public Entities

Public entities are organisations that exercise a public function but are established outside the public service. As bodies operating at 'arm's length' from government, public entities perform their functions with some autonomy from Ministers and public servants in their day to day decisions. Public entities are defined in section 5 of the Public Administration Act, as shown in Box 3 below.

### **Box 3: Definition of a public entity<sup>5</sup>**

Under section 5 of the Public Administration Act, a public entity is defined as a body, whether corporate or unincorporated, that is established by:

- an Act (other than a private Act) or the Corporations Act
- the Governor in Council
- a Minister.

The Act applies a further set of tests in relation to certain forms of public entity. These are summarised below.

In the case of a body corporate, the Governor in Council or the relevant Minister must have the right to appoint at least one half of the directors. Section 5(1)(c) requires that the body have a public function to exercise on behalf of the State or be wholly owned by the State.

In the case of an advisory body, the body must:

- have written terms of reference guiding its operation
- be required to provide the advice or report to a Minister or the Government
- be declared to be a public entity for the purposes of this Act.

Public entities can be established in a variety of legal forms, including a statutory authority or a non statutory advisory body. A statutory authority can be established under its own establishing legislation (e.g. The Shrine of Remembrance Trust established under The Shrine of Remembrance Act 1978), sector specific enabling legislation (e.g. the Health Services Act 1988), or broader enabling legislation (e.g. the State Owned Enterprises Act 1992). The different types of legislation are described further in section 4.2.

## **3.1 Key Features of Public Entities**

Public entities are a diverse group of organisations, established using a variety of legal forms to perform a range of public functions. Despite this diversity, public entities share a number of common features. In general, public entities:

- 'perform public functions and implement government policy within defined boundaries, clearly defined goals or objectives and limitations on their exercise of authority, either through statute or other enabling instrument
- 'have different governance and accountability frameworks than the standardised direction and control mechanisms that apply to departments
- 'are part of government but have a separate legal identity. Most are incorporated bodies that can contract, employ staff, hold property and engage in legal proceedings in their own name
- 'operate at arm's length in their day to day operations from their responsible Minister
- 'are established with Ministerial powers of direction that are more structured, limited and specific than those for public service bodies (departments and administrative offices); and 'are generally not legally part of the Crown.<sup>6</sup>

For public entities that employ staff, the majority are governed by a Board, which in turn appoints a chief executive to manage the operations of the entity. However, there are instances where the government appoints an individual as the governing entity, with powers to employ staff and operate as an incorporated entity. This forms a statutory authority governed by an appointee.<sup>7</sup>

Table 1 highlights the key differences between public entities and public service bodies.

**Table 1: Key features of departments, administrative offices and public entities**

Feature	Department	Administrative Office	Public Entity
<b>Legal form</b>	Part of Crown. No separate legal identity.	Part of Crown. May have a separate legal identity for the exercise of some functions.	Many possible forms including unincorporated body such as an advisory body and an incorporated body. Generally have separate legal status to the Crown.
<b>Established mechanisms</b>	Order in Council under section 10 of the Public Administration Act.	Order in Council under section 11 of the Public Administration Act.	Many possible mechanisms, including Ministerial direction, specific legislation, State Owned Enterprises Act and <i>Corporations Act 2001</i> (Cth).



Feature	Department	Administrative Office	Public Entity
<p><b>Governance structure and relationship with minister</b></p>	<p>Secretary appointed by the Premier and responsible to their Minister(s). Minister has high level of direction and control.</p>	<p>Discrete business unit of department with significant managerial autonomy. Administrative office head employs staff and is responsible to the Secretary of the relevant department. Minister may have high level of direction and control through the Secretary. Administrative offices may also have statutory functions that are performed independently of the responsible departmental Secretary.</p>	<p>Typically has a governing Board appointed by the Minister. Degree of Ministerial control varies across different entities with different functions. Minister's powers of direction usually identified in enabling or umbrella legislation.</p>



Feature	Department	Administrative Office	Public Entity
<b>Financial arrangements</b>	Direct budget appropriation from Parliament.	Funded through relevant department.	Various sources of funding, including appropriation administered by the monitoring department, commercial revenue, fees, fines, levies.
<b>Employment arrangements</b>	Public service staff employed under Part 3 of the Public Administration Act.	Public service staff employed under Part 3 of the Public Administration Act.	Typically public sector staff employed under various public sector awards and agreements, e.g. Enterprise Bargaining Agreements.



<b>Feature</b>	<b>Department</b>	<b>Administrative Office</b>	<b>Public Entity</b>
<b>Functions</b>	Provide strategic policy advice to Ministers. Implement government policy. Provide a range of service delivery, regulatory and other functions.	Provide discrete groups of services and public functions.	Provide a wide range of functions at arm's length from Ministers, including service delivery, commercial activities and stewardship of public assets.

### 3.2 When to Create a Public Entity

A new public entity should only be set up where it can be demonstrated that this is the most effective and appropriate means of carrying out the desired function. Creating a public entity provides both benefits and risks to government. For example, the increased autonomy offered by a public entity may improve performance of a particular function but can also expose government to wider financial and employment risks.<sup>8</sup> In addition, the creation of entities that are at arm's length from Ministerial direction may lead to fragmentation as the entity has greater autonomy, and adherence to whole of government policies becomes more difficult to enforce.<sup>9</sup> In general, the creation of a public entity should only be undertaken in circumstances where:

- 'there are compelling ongoing reasons for a function to be performed at arm's length from routine Ministerial control, for example when greater independence in decision making may instil greater public confidence
- 'no existing public entity or public service body performs similar functions, and the remit of an existing body cannot be expanded to accommodate the identified function



- 'independence from the Crown is required, such as where the government may be bound by the organisation's decisions or the entity is established to scrutinise government actions
- 'provision of a clearly defined range of specialist functions may improve efficiency and effectiveness, by allowing those governing and managing the entity to focus solely on their defined role
- 'in the case of an advisory function, there is a need for independent, expert advice to Ministers or the government on technical or other specialised issues.

### 3.3 Functions Undertaken by Public Entities

Public entities undertake a wide range of advisory, service delivery, regulatory and other functions. Table 2 summarises the various functions undertaken by public entities in Victoria. A public entity will often have hybrid or multiple functions. It is the primary function of the entity which should inform its legal form. The process of choosing the legal form for a public entity is described in Chapter 4.

**Table 2: Functions undertaken by public entities**

Feature	Description	Examples
<b>Service delivery</b>	Entities that directly undertake delivery of essential public services.	Health services Catchment management authorities Port of Melbourne Corporation
<b>Stewardship</b>	Entities created to manage public assets such as Crown lands.	Shrine of Remembrance Trust Crown land committee of management



<b>Feature</b>	<b>Description</b>	<b>Examples</b>
<b>Integrity</b>	Entities that scrutinise the actions and decisions of public officials.	Disability Services Commission
<b>Regulatory</b>	Entities that administer regulation.	Essential Services Commissioner
<b>Quasi judicial</b>	Entities that exercise quasi judicial powers.	Victorian Civil and Administrative Tribunal (VCAT)
<b>Advisory</b>	Entities created to provide specialist advice on specific matters, usually directly to a Minister. Entities established to provide ongoing technical advice and/or undertake research.	Women in Primary Industries Advisory Panel Radiation Advisory Committee

Section 85 of the Public Administration Act clarifies the base level of Ministerial accountability and responsibility requirements for public entities. It specifies that a public entity is accountable to the relevant Minister for the exercise of its functions. It also specifies that the Minister is responsible to Parliament for the public entity's exercise of functions and the exercise of his/her powers to appoint or remove directors, review the entity's management structure, direct the entity or exercise control over its operations.



While this base level of Ministerial accountability and responsibility applies to all public entities, some entity functions require greater autonomy or independence from Ministerial direction than others. Different legal forms and governance arrangements can be used to achieve this independence, making it important to clearly identify the range of functions to be undertaken by a new public entity. The different requirements for independence are discussed below.

### **3.3.1 Service delivery functions**

Service delivery entities are established to deliver essential services, such as health, education, transport and emergency services. All service delivery functions involve technical outputs that require specialist expertise.

Delivery of essential public services is of critical importance to government; the risks of underperformance are significant, both politically and socially. Government may wish to exercise a high level of control over service delivery entities, given the relatively high level of political risk associated with these functions, and the public expectation that government will be able to influence and control the activities of service delivery entities. Thus, in general, public entities with service delivery functions should provide for a high degree of Ministerial control over and power to direct the entity's policy and strategic direction, consistent with government policy, but a lesser degree of Ministerial role in relation to operational issues.

While most service delivery entities operate with non commercial objectives, some have a commercial focus as part of their objectives. These entities conduct significant revenue raising activities in the exercise of their functions. Examples of service delivery entities with major commercial functions are the Port of Melbourne Corporation, Federation Square Ltd, and the Victorian Funds Management Corporation (VFMC). The first two provide services directly to Victorian citizens and businesses, whereas the VFMC provides financial management services to government and Victorian public entities.

In these entities, the imperative to operate with commercial objectives is not consistent with a high degree of Ministerial control over the decisions and management of the entity. However, given that the entity is conducting public functions and there is a public interest in the delivery of the service, Ministerial powers to direct may be required. For instance, some entities (such as the Port of Melbourne Corporation) exercise significant market power; as a result their pricing and other operational activity is regulated by government rather than their Board.

### 3.3.2 Stewardship functions

A number of Victorian public entities perform a custodial or stewardship function in relation to publicly owned assets. These entities are responsible for protecting and managing the assets in a manner that serves the long-term interests of the public. The Shrine of Remembrance Trust, which oversees the Shrine precinct, is an example of a public entity with a stewardship function. Stewardship can also have a conservation focus and may be associated with the conservation of both the natural and the built environment. For example, Crown land committees of management oversee the conservation, management and use of public land and buildings, such as the Mint Building in the CBD.

In general, entities with a stewardship function will operate without Ministerial direction for low level, day to day functioning, allowing local community involvement in decisions and operations. Thus, entities with a stewardship function have substantial responsibility for management decisions, subject to a general power of Ministerial direction.

### 3.3.3 Integrity functions

Entities with integrity functions are established to examine the actions or decisions of public officials with a focus on prevention, scrutiny and detection of:

- 'maladministration: administrative tasks that are not performed properly or appropriately. This can encompass inefficiency, incompetence and poorly reasoned decision making
- 'misconduct: conduct involving a negligent or reckless breach of trust, policy or the agency's values, including conduct which is likely to bring an agency (and the public sector) into disrepute
- 'corruption: deliberate acts of dishonesty, abuse of public trust, breach of the law or abuse of power for private benefit.

Integrity entities are established to either scrutinise the performance of executive government or to monitor the performance of government (and sometimes non government organisations) in a particular area, such as disability or health services. Given that these agencies are concerned with monitoring and reporting on the performance of government, public entities with an integrity function should operate with a significant degree of independence from Ministerial direction and be established in such a way to minimise potential conflicts of interest (both real and

perceived).

The benefits of creating a public entity to perform an integrity function, especially one which will act as a check on executive power should be weighed up against the benefits of establishing the function as an independent officer of Parliament.<sup>10</sup>

### 3.3.4 Regulatory functions

Public entities undertaking regulatory functions impose binding outcomes on businesses and individuals. Exercising regulatory power involves the use of legal instruments to achieve policy objectives and imposing an obligation on organisations or individuals engaged in some form of business. In non commercial circumstances, the exercise of regulatory power may be directed at the behaviour of individuals. Examples of regulatory activities include:

- 'issuing licenses and permits for entry into specific markets, businesses, occupations or activities, or registering participants in them, and establishing standards and codes of practice relating to their performance
- 'enforcing the provisions of acts or regulations and other regulatory instruments through, for example, conducting inspections, conducting investigations; issuing warnings; directions or penalties to change behaviour; and in some cases, taking action in the courts in response to breaches of regulation.

Given that regulatory bodies make decisions that affect the rights of businesses and individuals, impartiality in decision making is of particular importance to avoid perceptions of favouritism and corruption. Accordingly, the legal form of a public entity with regulatory functions should provide for considerable autonomy and in some cases a very high level of independence in the performance of its functions, with limits on Ministerial powers of direction.<sup>11</sup>

### 3.3.5 Quasi-judicial functions

As with regulatory bodies, public entities with quasi-judicial functions impose binding outcomes on businesses and individuals. Quasi-judicial functions involve conducting hearings and making findings on matters of fact. Certain public entities have a role in hearing appeals and complaints or making determinations on specific issues. An example of a quasi-judicial body in Victoria is VCAT.

The binding nature of quasi-judicial functions requires that they are performed

without Ministerial involvement. Therefore the entity needs to be established with limited or no Ministerial power of direction.

### 3.3.6 Advisory functions

While departments are the primary source of policy advice to Ministers, advisory entities can provide opportunities to bring in outside advice, gain access to specialist knowledge or seek a particular perspective. Advisory entities may be ongoing or they may only be established for a limited period of time.

Advisory entities are a special case of public entity as they rarely have control over public funds or employ staff and have few, if any, powers of their own. In general, a high degree of Ministerial control and oversight is appropriate. However, it is important that the terms of reference or statute that establishes the advisory entity is clear about the degree of independence expected to be exercised by the body. The degree of independence required can also influence the composition of the body; if a high degree of independence is required, for example, departmental officers from the Minister's department are generally excluded from membership. They can of course attend to assist the advisory entity.

## 4. Choosing a Public Entity Form

The 'legal form' of a public entity refers to its status as an incorporated or unincorporated body and the manner in which it is created; whether this be through a legislative or a non legislative process. In Victoria, public entities may be established using a number of legal forms, depending on factors such as the functions of the entity and the degree of Ministerial control required. To help with navigating through the range of legal forms, these guidelines propose two broad categories for public entities: non statutory advisory bodies, described in section 4.1, and statutory authorities, described in section 4.2.

A public entity will often have hybrid or multiple functions; when choosing a public entity form, it is recommended that a judgement be made on the 'primary' function versus 'supporting' functions. It is the primary function of the entity which should inform its legal form.

The variety of legal forms gives rise to a range of legal terms and descriptions, some of which are used interchangeably. The focus of this document, however, is on providing guidance on establishing the different forms, with each of the legal forms representing

generic 'shell' structures that can be modified and tailored to suit the particular circumstances of a given public entity. Thus there is considerable scope for flexibility to determine the specific governance arrangements that will apply to a particular entity.

When selecting a legal form, the first step is to select between an incorporated or unincorporated body. Incorporation provides a separate legal identity for the public entity, which protects the liability of members of the public entity to a greater extent than an unincorporated body, where members may be liable for the actions of other members. Incorporation is strongly recommended if the entity is to employ staff, and is necessary if the public entity is to:

- provide services to non government parties
- own or lease of property or other assets
- receive funding from direct budget allocation and/or other sources
- enter into contracts
- perform functions which expose it to potential legal challenge
- take legal action against others.

Incorporated public entities are used for a wide range of functions and have a number of legal forms, including a company or State owned enterprise. In general, a statutory authority is the most appropriate legal form for entities that are undertaking functions broader than the provision of advice.

Unincorporated bodies can be used for activities such as mediation, facilitation and dispute resolution. However, an unincorporated body (in the form of a non statutory advisory body) should be used in Victoria for a public entity that is established purely to provide advice to a Minister or government.

## 4. Choosing a Public Entity Form

The 'legal form' of a public entity refers to its status as an incorporated or unincorporated body and the manner in which it is created; whether this be through a legislative or a non legislative process. In Victoria, public entities may be established using a number of legal forms, depending on factors such as the functions of the entity and the degree of Ministerial control required. To help with navigating through the range of legal forms, these guidelines propose two broad categories for public entities:

non statutory advisory bodies, described in section 4.1, and statutory authorities, described in section 4.2.

A public entity will often have hybrid or multiple functions; when choosing a public entity form, it is recommended that a judgement be made on the 'primary' function versus 'supporting' functions. It is the primary function of the entity which should inform its legal form.

The variety of legal forms gives rise to a range of legal terms and descriptions, some of which are used interchangeably. The focus of this document, however, is on providing guidance on establishing the different forms, with each of the legal forms representing generic 'shell' structures that can be modified and tailored to suit the particular circumstances of a given public entity. Thus there is considerable scope for flexibility to determine the specific governance arrangements that will apply to a particular entity.

When selecting a legal form, the first step is to select between an incorporated or unincorporated body. Incorporation provides a separate legal identity for the public entity, which protects the liability of members of the public entity to a greater extent than an unincorporated body, where members may be liable for the actions of other members. Incorporation is strongly recommended if the entity is to employ staff, and is necessary if the public entity is to:

- provide services to non government parties;
- own or lease of property or other assets;
- receive funding from direct budget allocation and/or other sources;
- enter into contracts;
- perform functions which expose it to potential legal challenge; and
- take legal action against others.

Incorporated public entities are used for a wide range of functions and have a number of legal forms, including a company or State owned enterprise. In general, a statutory authority is the most appropriate legal form for entities that are undertaking functions broader than the provision of advice.

Unincorporated bodies can be used for activities such as mediation, facilitation and dispute resolution. However, an unincorporated body (in the form of a non statutory advisory body) should be used in Victoria for a public entity that is established purely

to provide advice to a Minister or government.

## 4.1 Non Statutory Advisory Body

A non statutory advisory body is a public entity established by a Minister or the Governor in Council (rather than under statute) to provide advice to a Minister or the government. In order to qualify as a public entity, a non statutory advisory body must:

- 'have written terms of reference guiding its operation
- 'be required to provide advice or report to a Minister or the Government
- 'be declared to be a public entity for the purposes of the Public Administration Act.

Non statutory advisory bodies are usually unincorporated, which means they cannot employ staff, enter into contracts, perform functions that expose the entity to legal challenge or take legal action against another party.

While departments are the primary source of policy advice for Ministers, establishing a non statutory advisory body provides the Government with a means to obtain independent or specialist advice in a particular area. Examples of non statutory advisory bodies include:

- 'the State Trauma Committee, which provides advice to the Minister for Health
- 'the Victorian Adaptation and Sustainability Partnership Ministerial Advisory Committee, which advises the Minister for Environment and Climate Change
- 'the Community Advisory Committee on Body Image, which provides advice to the Minister for Youth Affairs.

A non statutory advisory body provides a flexible structure for obtaining advice. This is particularly suitable for situations where the advice is only required for a limited time or where the nature of advice being sought may change. A non statutory advisory body is only appropriate if the role of the entity is limited to advice and does not involve other functions such as regulatory, quasi-judicial or service delivery functions.

The composition of the non statutory advisory body can be designed to meet the specific needs of the Minister or Government. Decisions need to be made around factors such as:



- 'the number of members of the body
- 'whether committee members are recruited for specialist knowledge and expertise or to represent particular bodies or interests
- 'the length of membership term
- 'remuneration of members and reimbursement of expenses
- 'processes for appointment and dismissal of members
- 'the frequency of meetings
- the duration of the existence of the body.

A statutory authority would be the preferred legal form for an advisory public entity when:

- 'the public entity has other functions in addition to providing advice (including functions that may expose it to legal challenge)
- 'the need for advice will be ongoing and is unlikely to change significantly under future governments
- 'the public entity will need to enter into contracts or employ staff.

Establishing a statutory authority can require the introduction, or amendment, of existing legislation, and thus this legal form can be more difficult to establish and change than a non statutory advisory body. In practice, few advisory bodies are established as statutory authorities.

## 4.2 Statutory Authority

These guidelines use the term 'statutory authority' to describe a public entity that is established under or by Victorian legislation. Examples of Victorian statutory authorities include The Shrine of Remembrance Trust, established under the Shrine of Remembrance Act, and health services established under the Health Services Act. In cases where it is not appropriate that a function be performed by a department, the government could introduce legislation to Parliament to establish a statutory authority to provide:

- 'service delivery
- 'stewardship of public assets



- 'integrity functions
- 'regulatory functions
- 'quasi-judicial functions
- 'independent advice.

A statutory authority should not be established when the function is more appropriately undertaken within a department. For instance, functions that:

- 'do not need to be independent from Ministerial influence
- 'do not need to be legally independent from the Crown.

A statutory authority should only be created for a purely advisory function where it can be clearly demonstrated there is a long term or ongoing need for an advisory function defined by statute. This will generally be where a Minister or department needs to secure periodic, high level technical, specialist or research related advice that is not normally available within the public service. Many advisory functions are not of this nature and do not warrant being embodied in a statutory authority.

A statutory authority can be established under its own establishing legislation, sector-specific enabling legislation or broader enabling legislation:

- 'agency-specific establishing legislation allows for the provision of clear direction on the objectives, functions, purpose and operation of the statutory authority, for example through the establishing legislation itself. This also provides a public record of the government's purpose in establishing the entity. However, significant lead times may be required to establish the entity and it can be a lengthy and highly visible process to amend or repeal the legislation. In general, agency-specific establishing legislation would be used to establish 'stand alone' bodies with unique functions, objectives and powers. Examples include the Transport Accident Commission (TAC) and the Victorian Managed Insurance Authority (VMIA).
- 'sector-specific enabling legislation provides a legislative framework under which multiple statutory entities with similar functions and activities can be established. Although the initial development and establishment of legislation can have a long lead time as is the case for agency-specific establishing legislation, once in place, the establishment of new public entities can be achieved relatively quickly. Sector-specific enabling legislation may be more appropriate where there are multiple entities with similar purpose and functions, such as community health centres and

hospitals established under the Health Services Act.

- 'broader enabling legislation, such as the State Owned Enterprises Act, enables public entities to be established by Governor in Council, without new legislation being passed by Parliament.

A statutory authority is generally governed by a Board, but may also be governed by an individual appointment. There are no predetermined legal rules for the establishment of a statutory authority, giving significant flexibility to tailor the governance arrangements to the specific entity. These details are discussed in more detail in Chapter 5 and include the following:

- 'appropriate level and forms of Ministerial direction and control
- 'internal governance structures, such as a multi member Board or individual appointment
- 'employer powers
- 'the application of whole of government legislation.

#### **4.2.1 State owned enterprises**

A State owned enterprise is a statutory authority established under the State Owned Enterprises Act. Examples in Victoria include VicForests and the Victorian Competition and Efficiency Commission.

The State Owned Enterprises Act defines four types of State owned enterprise, each with different objectives and functions. They are:

- State body: a flexible and versatile form of entity as the State Owned Enterprises Act does not stipulate a specific purpose: rather the purpose, functions and powers of a State body are described in the Order which establishes the body. The State body form is generally suited for entities that do not need the full commercial disciplines required of a State business corporation or State owned company. It is also a useful mechanism for establishing an entity prior to its conversion to a State business corporation or State owned company.
- State business corporation: a statutory corporation, including a State body, may be declared as a State business corporation under the State Owned Enterprises Act. A State business corporation is required to operate its business as efficiently as possible, consistent with prudent commercial practice, and to maximise its economic

contribution to the State. The State business corporation form is suitable for entities where there is a commercial focus and where a skills based Board is required to navigate through and make decisions on a range of complex infrastructure, commercial, legal, environmental or other issues.

- **State owned company:** a Corporations Act company declared as a State owned company under the State Owned Enterprises Act. As with State business corporations, a State owned company is required to operate its business as efficiently as possible consistent with prudent commercial practice and to maximise its economic contribution to the State. This is the most commercial structure available under the Act.
- **reorganising body:** a public entity can be declared to be a reorganising body in order to conduct or to facilitate a reorganisation of the entity. This type of State owned enterprise allows the Governor in Council to make changes to its constitution, governance arrangements and capital structure.

If the entity is to operate on a commercial basis or is transitioning from a non or quasi-commercial basis to a fully commercial entity, it may be appropriate to establish the entity as a State owned enterprise.

A State owned enterprise can be created by an Order of the Governor in Council, following Cabinet approval. While this has some practical advantages in allowing State owned enterprises to be established quickly, they will not benefit from the Parliamentary scrutiny that is required to establish other forms of statutory authorities.

Also, State owned companies are subject to substantial reporting and compliance obligations by virtue of their status as companies under the Corporations Act. Depending on the size of the entity being created, this can constitute a significant demand on the entity's resources. Thus a State owned company is only an appropriate legal form where the entity has full commercial objectives and where Parliamentary approval is not required.

For more details on when and how to establish a State owned enterprise, advice should be sought from the Deputy Secretary of Market Engagement and Corporate Division of the Department of Treasury and Finance.



## 4.3 Other Legal Forms

In addition to statutory authorities and non statutory advisory bodies, government has a number of other possible legal forms for public entities at its disposal, although the circumstances under which these are likely to be appropriate are limited. These include companies established under the Corporations Act, or incorporated associations.

### 4.3.1 Corporations Act companies

Companies can be established and incorporated under the Commonwealth Corporations Act. Corporations Act companies are classed by ownership and liability, and multiple configurations are possible. Of these, two have potential applicability as public entities:

- 'Company limited by shares: Under the Corporations Act, a company limited by shares has a capital base that consists of share capital and retained earnings, to allow it to operate as a commercial trading entity. The company has shareholders, whose liability is limited to the nominal value of their shares, plus any unpaid amount on their shares. There is no requirement that government be the sole shareholder for government controlled companies: other stakeholders can be shareholders. However in order to qualify as a public entity, government must retain the right to appoint at least half of the Board of directors. The company is expected to generate a profit, thus this form may be appropriate where the public entity is required to perform commercial functions, apply commercial judgement to decisions and enter into financial transactions. Under the Act, directors of a company limited by shares have specific duties and responsibilities, including a duty to act in the interests of the company rather than the interests of shareholders. This poses a risk when the company is established to perform a public function under the direction of a Minister, as the interests of the company may be different to those of the shareholders (including government).
- 'Company limited by guarantee: This is a company that has no share capital. It may have a small capital base of retained earnings. The liability of the members is limited to the amount they undertake to contribute to the company as an annual membership or in the event of the company being wound up. In that event, members agree ('guarantee') to provide to the company funds, up to a specified limit per member, to be used in the satisfaction of the company's debts. Other than the fact these are not for profit companies that cannot distribute earnings to members, they



are subject to all key requirements of the Corporations Act, such as not trading while insolvent. As with companies limited by shares, membership of a company limited by guarantee is not limited solely to government; other stakeholders can be members. Similarly, the directors of a company limited by guarantee are required by law to act in the best interests of the company itself. This can restrict the extent to which government can direct and control these companies. This type of legal form is appropriate where the State may want to be in a non commercial, corporate partnership with one or more other entities. An instance of this would be where Victoria joins with other jurisdictions to undertake a public purpose, such as the formation of the National eHealth Transition Authority (NeHTA), established by all Australian jurisdictions to promote the adoption of standards for the provision of computer based health services in the Australian health care system. The financial reporting requirements for companies limited by guarantee are based on annual revenue. Requirements for companies with annual revenue less than \$250,000 have recently been relaxed. For example, requirements to provide audited annual financial reports and a director's report have been removed. However, requirements for companies with annual revenue of more than \$250,000, and particularly those with revenue over \$1 million remain stringent. These require specialist expertise and often companies need to employ a dedicated resource such as a company secretary to ensure compliance. This can constitute a significant overhead.

The extent to which government can direct and control a Corporations Act company is limited because, as mentioned, directors are required to act in the best interests of the company itself which may not necessarily be in a manner consistent with government policy directions. Following a decision to establish a Corporations Act company, government's control over these entities is generally limited to decisions about the composition of the Board.

Further, notwithstanding recent changes to the financial reporting requirements for companies limited by shares, reporting and other obligations can be substantial and potentially onerous. Given the complications associated with the use of the Corporations Act as a legal form, they are not commonly used for public entities. Advice should be sought from the Deputy Secretary of Market Engagement and Corporate Division at DTF if the use of this legal form is being considered for a new entity.

### **4.3.2 Incorporated associations**

Incorporated associations are entities incorporated under the Victorian Associations

Incorporation Act 1981.<sup>12</sup> This legal form is designed to support small scale community/ not for profit organisations with little or no capital base, such as a sporting club, recreational or special interest group. It offers an alternative to the company form in terms of conferring the benefits of incorporation and limited legal liability for members.

The Associations Incorporation Act applies differential financial reporting and auditing requirements to incorporated associations depending primarily on their annual revenue, with requirements for review and auditing of financial records escalating as annual revenue increases.

However, governance and accountability standards for the Boards and directors of these entities are generally less rigorous than those for a Corporations Act entity or indeed most other public entity forms. For these reasons, the incorporated association form is generally not appropriate for a new public entity today, where performing a public function and exercising public authority requires clear and high standards of governance and accountability.

## 4.4 Summary of Legal Forms and Public Entity Functions

Public entity functions can be performed by entities with a variety of legal forms: there is no simple system for matching functions and legal forms. However, the main functions being undertaken by the public entity will have implications for the level of control and direction provided by the Minister, which in turn has implications for the legal form selected for the entity. These relationships are summarised in Table 3 below.

### **Table 3: Summary of public entity function, independence requirements and legal forms**



<b>Public entity function<sup>13</sup></b>	<b>Functional implications</b>	<b>Legal form options</b>	<b>Examples</b>
<b>Service delivery</b>	High degree of Ministerial control over strategic directions and policy. Limited Ministerial control over operations due to specialist/technical nature.	Statutory authority, governed by a Board or individual appointment.	Melbourne Health Roads Corporation (VicRoads). <sup>14</sup>
<b>Stewardship</b>	High degree of Ministerial control over strategic directions and policy. Limited Ministerial control over operations due to low risk nature.	Statutory authority governed by a Board.	Crown land committees of management.
<b>Integrity</b>	Little or no Ministerial control over operational decision making due to requirement for impartiality.	Statutory authority, generally governed by an individual appointment.	Independent Broad-based Anti-corruption Commission (IBAC).



<b>Public entity function<sup>13</sup></b>	<b>Functional implications</b>	<b>Legal form options</b>	<b>Examples</b>
<b>Regulatory</b>	In some cases there can be some degree of Ministerial control over strategic directions and policy. Little or no Ministerial control over day to day and operational decision making.	Statutory authority, governed by a Board or individual appointment.	Essential Services Commission. <sup>15</sup>
<b>Quasi-Judicial</b>	No Ministerial control over operational decision making due to requirement for impartiality.	Statutory authority, governed by a Board or individual appointment.	Victorian Civil and Administrative Tribunal (VCAT).
<b>Advisory</b>	Ministers determine scope of activities (i.e. advice).	Non statutory advisory body or statutory authority, governed by a Board or individual appointment.	Women in Primary Industries Advisory Panel. Principal Commissioner for Children and Young People. <sup>16</sup>

Quick reference guides for creating a statutory authority or a non statutory advisory body can be found in Appendix B.

## 5. Governance Arrangements

The previous chapter outlined a framework for matching public entity functions and legal forms. The next stage in establishing a public entity involves specifying the governance arrangements. To do this, the following aspects of public entity governance need to be considered:

'the relationship between the entity, the Minister and the department – what level of interaction between the entity, the relevant Minister and the department (as adviser to the Minister) is desirable? What specific powers does the Minister require?

- 'Board and management structure – is a governing Board desirable or should the entity be headed by a single person (e.g. a commissioner)? What management structure is desirable?
- 'processes for appointment and removal – how will the Board/individual appointee be appointed? What are the processes, and under what circumstances could a member be removed?
- 'employment arrangements – how will staff be employed by the entity?
- 'funding arrangements – what funding sources and financial delegation arrangements are appropriate?
- 'whole of government legislation – what whole of government legislation will apply and how will this be achieved?
- 'whole of government guidelines and policies – which government policies will apply to the entity? (e.g. the Indemnities and Immunities Policy, and the Victorian Government Board Appointment and Remuneration Guidelines for Victorian Government Boards, Statutory Bodies and Advisory Committees).
- 'codes of conduct – which code of conduct should apply to the employees and officers (including Board members) of the entity being established?

Careful consideration of each of these factors in relation to the proposed entity is required to reach a 'best fit' between functions and powers, governance arrangements and legal form. Given that there is no 'right' or perfect model for any particular entity, choosing the governance arrangements will be an 'on balance' judgement. For any given function, the choice of governance arrangements may vary over time due to changes in the entity's internal capabilities or external environment. The contextual environment in which the organisation operates will also play an important role in



influencing choices about governance arrangements. In some cases, public entities performing similar or parallel functions may have well established and effective governance arrangements and there can be benefit in emulating these arrangements.

## **5.1 Relationship Between the Entity, the Minister and the Department**

Public entities operate at 'arm's length' from Ministerial direction on a day to day basis. They generally have a high degree of autonomy in the operational aspects of their role, but are subject to varying levels of Ministerial direction regarding compliance with Government policies and strategies. Under Victoria's Westminster system of government, Ministers are accountable to Parliament regarding the performance of their portfolio public entities, consistent with the principle of responsible government.

The legislation, Order or Ministerial direction establishing an entity determines the nature of the interaction between the entity and the Minister and, in particular, the powers of the Minister to direct the entity. Determining specific Ministerial powers, the degree of independence of the entity and its relationship with the portfolio department is necessarily undertaken on a case by case basis, depending on the functions and objectives of the entity. General guidance on the roles and responsibilities of each party is provided in the following sections.

### **5.1.1 The Minister**

The roles and responsibilities of Ministers include exercising powers to:

- 'make or recommend the appointment and removal of directors
- 'give directions and request information (subject to applicable legislation)
- 'initiate review of the public entities' management systems, structures or processes.

### **5.1.2 Role of the department**

Departments exist to assist Ministers to perform their portfolio responsibilities and are a means by which Government policy is implemented. A department is the Minister's principal source of advice on the performance of public entities and on emerging risks within his or her portfolio. Departments assist with liaison between the public entity and the Minister and between the public entity and central agencies (DPC and DTF).

Departments advise Ministers on Board appointments, monitor entities' performance, alert Ministers to significant developments, including emerging risks, and provide advice on remediation.

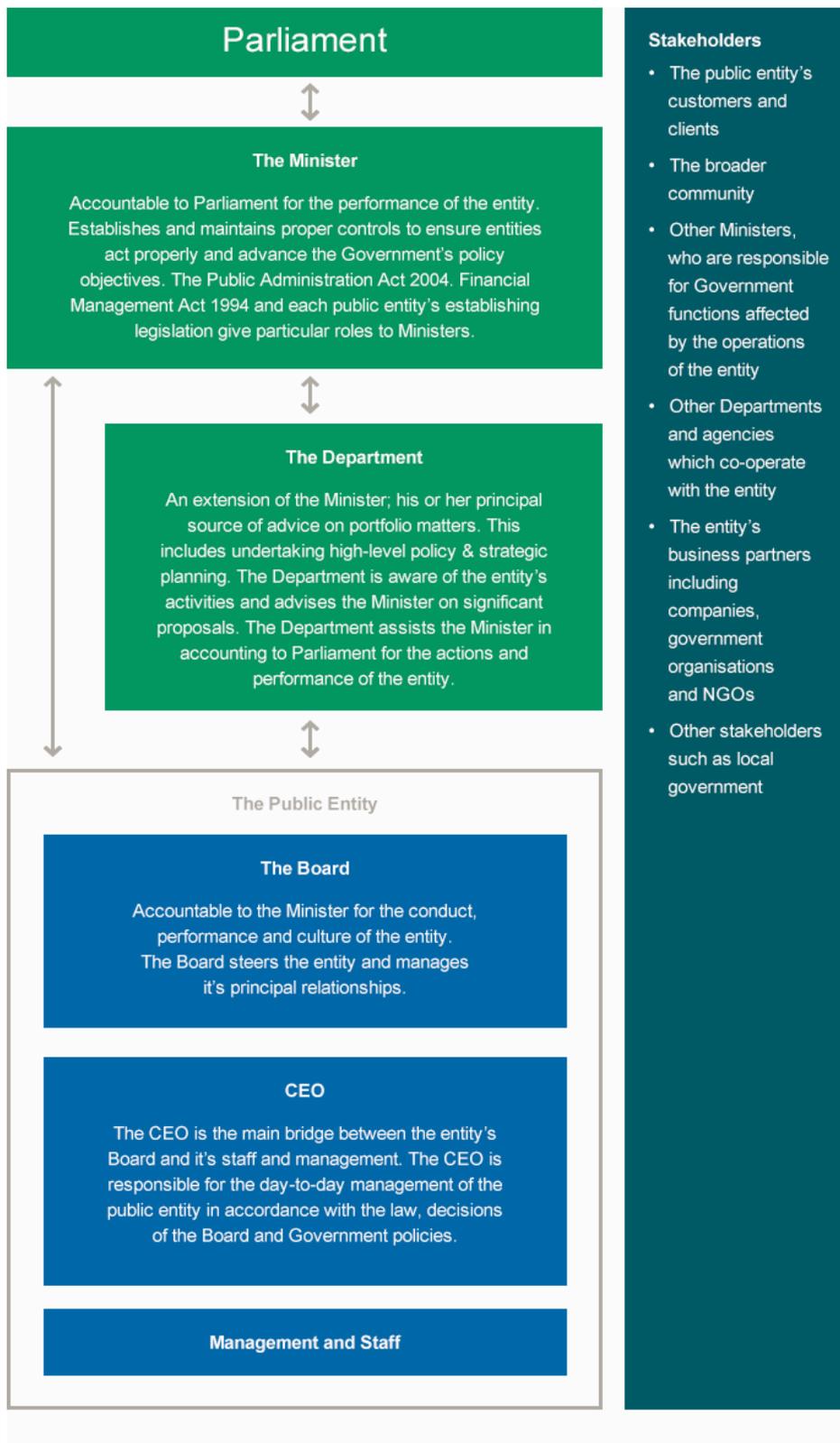
### 5.1.3 The entity and its board

The Board of the entity must account for the entity's adherence to the rules that it operates under, such as applicable legislation, guidelines and directions. It also undertakes internal governance functions. These can include:

- 'appointing and monitoring the performance of the CEO
- 'developing and reviewing organisational strategy, ensuring that it is consistent with overall Government policy and directions
- 'ensuring compliance with applicable rules and Board decisions
- 'promoting a positive and ethical culture within the organisation
- 'ensuring effective relationships and communication with the Minister's Department
- 'promoting effective communication with stakeholders.

The roles and relationships between the Minister, department and public entity are illustrated in Figure 3. See Appendix A for further detail of the roles and responsibilities of public entity Boards.

### **Figure 3: Accountability framework, key roles and relationships between Ministers, departments and public entities**



Accountability framework, key roles and relationships between Ministers, departments and public entities

## 5.2 Board and Management Structure

Governance of public entities can be configured as multi member or single member arrangements. Choosing between a governance structure that uses a multi member Board or an individual appointment (for example, a corporation sole) is a key decision when creating or reviewing entities. The following matters should be considered:

- the range of functions to be undertaken by the public entity
- the level and type of expertise in governance required by the public entity
- the diversity of skills and experiences required to manage the public entity
- the degree of independence or autonomy from Government required.

An individual appointment may be more appropriate where the entity does not have sufficient functions to warrant oversight by a Board or where sufficient skills to exercise functions are vested in the individual and his or her staff, where applicable. Examples include the Health Services Commissioner or the Privacy Commissioner.

A multi member Board is most appropriate where there are sufficient functions for the multiple Board members to oversee or where the entity's functions are sufficiently complex to require a diversity of skills and experience that may not be available if a single commissioner were appointed. A Board can include members with a range of different skills, whereas a single appointment would need to source any additional skills required from employees (who don't participate in decision making) or from external sources.<sup>17</sup>

If a Board structure is selected, consideration must be given to the number and nature of appointments to the Board. In order to serve their purpose and be effective, Boards need to be established appropriately and granted sufficient and clear powers to act as a Board. The number of Board members should be determined according to the anticipated size of the governance task involved. Larger and more complex public entities may require larger Boards, while smaller public entities with limited functions and budgets may not require as many Board members. In general, there is a trend towards smaller Boards, so that even in the case of more complex public entities, Boards with more than nine members should be considered carefully.

In some circumstances, existing general legislation mandates certain decision making structures. An example is the State Owned Enterprises Act, which requires that State business corporations operate with a Board of between four and nine directors.

Most Victorian public entities operate with a multi member Board of governance charged with making decisions about the direction and operations of the entity, and reporting to the relevant Minister. A Board of governance is generally the default position when establishing a new public entity.

## 5.3 Employment Arrangements

Deciding if and how a public entity employs staff is another key consideration when establishing public entities. Employment arrangements will vary depending on how the entity is established and the nature, size and complexity of the entity's functions.

Where a public entity has been established to provide advice, to act on a Minister's direction or to exercise authority on behalf of a Minister, the entity can be supported by public servants employed by the relevant department and does not need to directly employ staff. Typically, however, a public entity that operates at arm's length from a Minister will need to employ its own staff. To do this, the public entity needs a legislated power.

Public entities that are established under the Corporations Act have the power to employ under this Act and thus can employ any staff they require. Public entities established under the State Owned Enterprises Act must be given the power to employ in the establishing Order, or through a declaration as a declared authority under section 104 of the Public Administration Act. Section 5.3.1 of these guidelines contains further information on declared authorities. Other public entities that are expected to employ staff require a power to employ to be included in their establishing legislation.

Key employment powers include the capacity to appoint, promote and transfer staff as well as terminating their employment. When exercising these powers, public sector employers must comply with the public sector values, employment principles and any other relevant provisions of the Public Administration Act, regulations and employment standards issued by the PSSC. The employment powers are generally vested with the Board or the chair for the chief executive officer (CEO) position and with the CEO for all other employees. Further, public sector body and public entity heads are responsible for promoting compliance with the Code of Conduct for Victorian public sector employees issued by the PSSC.

Consideration should be given to the provisions of the Fair Work Act 2009 (Cth). For example, if a new entity is being established, and staff will transfer from a department or an administrative office to the new entity, the employment conditions for staff that applied under their previous agreement will be maintained. Any new employee would

also be entitled to the same employment rights as transferring employees. The Workplace Relations and Occupational Safety Branch in the Victorian Government Solicitor’s Office can provide legal advice on relevant employment entitlements.

**Table 4: Employment arrangements by public entity function**

<b>Function</b>	<b>Employment Powers</b>	<b>Staff</b>
<b>Service delivery</b>	Powers to be specified in establishing legislation.	Own staff, generally not public servants
<b>Stewardship</b>	Powers to be specified in establishing legislation.	May require staff (depending on functions), generally not public servants. May be volunteers
<b>Regulatory</b>	Powers to be specified in establishing legislation.	Departments or own staff who may be public servants
<b>Quasi judicial</b>	Not ususally required	Departmental staff who are public servants
<b>Integrity</b>	Powers to be specified in establishing legislation.	Departments or own staff who may be public servants

<b>Function</b>	<b>Employment Powers</b>	<b>Staff</b>
<b>Advisory</b>	Not usually required	Do not usually require staff. May be provided by relevant departments

### 5.3.1 Declared authorities

Section 104 of the Public Administration Act specifies that statutory offices, prerogative offices or groups of people employed in the service of the Crown may also be declared authorities. A declaration is made through an Order in Council. Once declared, any provisions of the Public Administration Act specified in the Order will apply to the entity/ officer. A declaration as a declared authority is extremely powerful because such a declaration can also potentially override other legislation and contractual provisions relating to the entity.

Declarations are commonly used in relation to employment provisions. For example, a declaration can be made to:

- 'make executives of the entity subject to public service executive employment provisions, so that the standard executive contract applies
- 'make (on occasion) other staff subject to the public service employment provisions of the Act (e.g. CenITex)
- 'create a closer linkage to the relevant portfolio department than would otherwise apply.

A public entity may also be made a declared authority to preserve public service employment rights and responsibilities when, for example, a function is moved from a department to another organisation within the wider public sector.

In each case, the Declaration Order specifies the name of the authority, the person or body having the function of public service body head and which provisions of the Public Administration Act apply to the authority. An up to date listing of declared authorities can be found on the VPSC's Register of Instruments at [www.vpsc.vic.gov.au](http://www.vpsc.vic.gov.au).

Section 104 of the Public Administration Act provides for a mechanism to differentially



apply or exempt parts of the Act to public entities.

## 5.4 Funding Arrangements

Different funding and financial management arrangements apply to public service bodies and to public entities. While departments receive an annual budget appropriation allocated by Parliament, public entities typically have a variety of funding sources. They may receive a direct funding allocation from Parliament or rely on a portion of the funding granted to a department. Public entities may also derive some or all of their income from the sale of goods and services or from fees and other charges. In all cases, the relevant Minister remains responsible for the expenditure of the public entity's funds.

The funding required by public entities may differ, depending on the functions performed by the entity. In general, where it is proposed that a public entity should have the power to employ staff in its own right, rather than having staff made available by the portfolio department, it should have financial autonomy from the department. The establishing legislation should make the relevant financial powers available to the entity and specify desired financial delegations.

Financial autonomy may carry a range of financial accountability requirements with it. Specific advice should be sought from the Deputy Secretary of Market Engagement and Corporate Division at DTF.

## 5.5 Application of Whole of Government Legislation

A number of pieces of whole of government legislation provide a governance and accountability framework for public entities. The application of these Acts and any specific obligations of a particular public entity will vary depending on the legal form, function and objectives of the entity.

Whole of government legislation that may apply to a given public entity includes:

- Audit Act 1994
- Borrowing and Investment Powers Act 1987
- Charter of Human Rights and Responsibilities Act 2006
- Equal Opportunity Act 1995

- Fair Work Act 2009 (Cth)
- Financial Management Act 1994
- Freedom of Information Act 1982
- Information Privacy Act 2000
- Independent Broad-based Anti-corruption Commission Act 2011
- Ombudsman Act 1973
- Public Administration Act 2004
- Public Records Act 1973
- Whistleblowers Protection Act 2001

There may also be other legislation specific to the entity and portfolio that may apply. It is recommended that legal advice be sought from an appropriate body (such as the Victorian Government Solicitor's Office) when considering the application of individual statutes to a public entity. More details of legislation that may apply to public entities can be found at Appendix C.

## 6. Consultation and Approval Processes

This chapter outlines the steps involved in establishing a new public entity and provides information about the various departments and agencies of government that may need to be involved in the process. Appendix D provides details of useful resources and whole of government policies.

### 6.1 Consultation

A number of Victorian Government agencies have a role in providing advice on governance matters and/or the creation of new entities. Policy officers involved in the establishment of a public entity should consult with these agencies when preparing a proposal for a new public entity.

Department of Premier and Cabinet (DPC): DPC provides advice to the Premier from a whole of government perspective. The Government Branch within DPC can provide advice on legal form, governance and accountability arrangements for public entities, and is the first point of contact when the creation of a new public entity or

administrative office is being considered. Advice from DPC should be sought early, including advice to clarify what (if any) Cabinet processes are required to establish a new body.

**Department of Treasury and Finance (DTF):** DTF provides policy advice to government on economic, financial and resource management to support the government in delivering its programs. DTF has overall responsibility for formulating and implementing the Government's longer term economic and budgetary objectives. It also performs a monitoring role to ensure that the State's financial accounting, control and reporting obligations are met. DTF analyses and provides advice to the Treasurer and the Minister for Finance on all Cabinet submissions that raise financial implications for the government. DTF, specifically the Deputy Secretary of Market Engagement and Corporate Division is an initial first point of contact when the creation of a new entity is being considered, and it is critical that DTF be closely consulted if the entity being established is to have commercial objectives.

**Victorian Government Solicitor's office (VGSo):** The role of the VGSO is as the primary source of legal advice for the Victorian State Government and its agencies. The VGSO can provide advice on:

- appropriate governance arrangements
- identified areas of legal risk and conflicts of interest
- employment arrangements for public entity staff
- appropriate levels of authorisation and delegation for decision makers
- a public entity's status in relation to the Crown.

**Office of the Chief Parliamentary Counsel (oCPC):** The responsibilities of the OCPC include drafting Bills for introduction to Parliament; and drafting, settling, certifying and advising on statutory rules and other subordinate legislation, including Orders in Council. OCPC can also advise on establishing public entities in legislation, whether this be agency-specific, sector-specific or broader legislation.

**Victorian Public Sector Commission (VPSC):** One of the VPSC's roles is to promote high standards of governance, accountability and performance for public entities, and publish guidance material to assist public service and public sector bodies to achieve and maintain these standards. The VPSC also has a role under the Public Administration Act to conduct reviews which can examine the functional relationships between two or more entities, and make recommendations relating to the

management systems, structures, systems and processes of public entities.

## 6.2 Naming Conventions

The name given to a public entity can inform community expectations and affect perceptions of the objectives and functions of an entity. The following points should be taken into consideration when considering the name of a public entity.

First, the name should accurately convey the core objective(s) or functions of the entity. This is particularly important for service delivery and some integrity related entities, as it may help to foster 'brand recognition' and improve the public profile of the entity.

Second, care should be taken to ensure that the title is legally accurate. For example, the use of the word 'trust' in the name of a public entity should be reserved for those entities that actually perform a trust function in a legal sense.

Third, where there are multiple entities carrying out similar functions, each entity should be differentiated by a distinguishing feature, such as the geographic location of the entity.

Finally, care should be taken to avoid confusion with other organisations (either public or private), both in the entity's full title and in any acronym that the title generates.

## 6.3 Approval Processes

The relevant portfolio Minister must approve the creation of a new public entity. Policy officers should also be aware of departmental requirements including consulting within and externally to the department, internal approval processes and departmental business planning processes. It is important that the Government Branch of DPC be consulted as an initial step when the creation of a new public entity is being considered, as options for legal form and governance arrangements are explored. Depending on the nature of the public entity being established, approval of additional office holders or bodies may be required. Where there are significant financial considerations, approval should be sought from the Treasurer. Any new public entities with judicial or quasi-judicial powers should be approved by the Attorney-General.

## 6.4 Record of Governance Decisions

Maintaining an accurate, transparent and enduring public record of the governance status of different entities in Victoria is highly desirable. The VPSC maintains a 'register of instruments', which contains a record of statutory instruments, including Orders of the Governor in Council, and codes of conduct and standards issued by the PSSC. This can be found on the VPSC website.

On behalf of DPC, the VPSC also manages a database of all appointments to government Boards. Departments are responsible for populating and maintaining all data in this database. The database is accessible by the public and can be found at [www.publicboards.vic.gov.au](http://www.publicboards.vic.gov.au).

## Appendix A: Roles and Duties of Boards

The roles and duties of the Board of a public entity are:

### Strategy

- 'set the broad strategy for the entity to meet its objectives and performance targets
- 'ensure the preparation of and approve strategic plans, annual reports, key procedures and policies
- 'approve decisions related to strategic initiatives such as commercial ventures, significant acquisitions, internal restructures and disposals
- 'approve the annual budget
- 'ensure that the entity follows corporate planning guidelines provided by the Minister, the Treasurer or the Department.

### Governance

- 'where the legislation permits, appoint the CEO
- 'establish performance measures for the CEO and a succession plan
- 'establish and monitor governance arrangements for the entity, including reporting systems to meet the information needs of the Minister, department, central agencies and the Board

- 'establish and review policies regularly (e.g. policies on fraud and conflicts of interest)
- 'foster a culture and set of values that are consistent with the duties and values detailed in the Public Administration Act 2004
- 'adhere to the Directors' Code of Conduct issued by the Public Sector Standards Commissioner
- 'evaluate the performance of the Board, the entity and the CEO.

## Risk Management

- 'integrate risk management into the entity's strategic planning process
- 'notify the Minister of known risks to the effective operation of the entity
- 'monitor and review the effectiveness and currency of internal financial and operational risk management, compliance and reporting systems
- 'ensure that the entity operates within the establishing legislation, within any delegations and in compliance with rules and procedures relating to the use of public funds.

# Appendix B: Quick Reference Guide for Creating a Public Entity

## B.1 Statutory Authority

### What is a Victorian statutory authority?

A statutory authority is a public entity established under Victorian legislation. A statutory authority is generally established with a Board of governance but can also be an individual appointment, in the form of a commissioner or corporation sole. Examples of Victorian statutory authorities include:

- 'the Shrine of Remembrance Trust, established under the Shrine of Remembrance Act 1978
- 'public hospitals established under the Health Services Act 1988.

## When might the government establish a statutory authority?

In cases where it is not appropriate that a function be performed by a department, the government may establish a statutory authority to provide:

- 'services: directly undertake delivery of essential public services (e.g. hospitals, schools, and water catchment authorities)
- 'stewardship: manage public assets such as Crown land committees of management
- 'integrity functions: examine the actions or decisions of other agencies in the Victorian public sector, (e.g. the Ombudsman or Auditor-General)
- 'regulatory functions: impose obligations on individuals or businesses,(e.g. Energy Safe Victoria)
- 'quasi-judicial functions: (e.g. VCAT)
- 'advice: provide advice to a Minister or undertake research on specific matters or issues on an ongoing or long term basis.

## How might the government set up and structure a statutory authority?

There are no predetermined legal rules for the establishment of a statutory authority, giving significant flexibility to tailor the governance arrangements to the specific objectives and functions of the entity. In selecting the appropriate form, there are a number of decisions that need to be made, including:

1. what degree of Ministerial direction and control is required?
2. does the entity need multiple members (a statutory authority governed by a Board) or is an individual statutory appointment appropriate?
3. does the entity need its own enabling legislation or can it be established using sector-specific legislation or general legislation?
4. does the entity need to be incorporated (statutory body corporate) or can it be unincorporated?

## Governance: board or appointment?

Statutory authorities may be established with a Board of Governance where there are sufficient functions for multiple Board members to oversee or where a diversity of skills

and experience is required that would otherwise be unavailable if a single commissioner were appointed. A Board of Governance may also be desirable for small public entities without employees, for example, Crown land committees of management or small cemetery trusts.

Alternatively, statutory authorities may be established with a single public entity head, such as a commissioner, where:

- 'the statutory authority does not have sufficient functions to warrant oversight by a Board
- 'sufficient skills to exercise functions are vested in the public entity head and his/her staff, where applicable (for example the Health Services Commissioner or the Privacy Commissioner).

## **Enabling legislation**

A statutory authority can be established under its own legislation, or sector-specific legislation or broader enabling legislation.

- 'Agency-specific establishing legislation allows for the provision of clear direction on the objectives, functions, purpose and operation of the statutory authority. It also provides a public record of government's purpose in establishing the entity. However, significant lead times may be required to establish the entity and it can be a lengthy and highly visible process to amend or repeal the legislation.
- 'Sector-specific enabling legislation provides a legislative framework under which multiple statutory entities with similar functions and activities can be established. As with agency-specific legislation, this provides for clarity on the objectives, functions and activities of the entities but can have long lead times for establishment and any amendment. Sector-specific legislation may be more appropriate where there are multiple entities with similar purpose and functions, such as hospitals.
- 'Broader enabling legislation such as the State Owned Enterprises Act 1992 enables public entities to be established by the Governor in Council, without new legislation being passed by Parliament.

## **Incorporation**

Incorporation establishes a public entity as a 'legal body', with particular responsibilities and provisions. Incorporation is necessary if the public entity will:

- 'employ staff
- 'own or lease property or other assets
- 'receive funding from sources other than direct budget allocation
- 'enter into contracts
- 'perform functions which expose it to potential legal challenge or take legal action against others.

In general, statutory authorities governed by a Board are incorporated. Statutory unincorporated bodies are more likely to be used for activities such as mediation, facilitation, or dispute resolution.

## **Employment arrangements**

The enabling legislation (or the Governor in Council Order if a State owned enterprise) should make provision for the employment of staff by the statutory authority and set out the key employment powers of the public entity. When exercising these powers, the statutory authority head must comply with the relevant provisions of the Public Administration Act, such as ensuring consistency with the employment principles and standards issued by the PSSC.

Generally, staff will be public sector employees rather than public servants (staff employed by departments and administrative offices), such that common pay structures will not apply and conditions and remuneration are determined through enterprise bargaining.

## **When should the government use an alternate legal form?**

Statutory authorities are generally not appropriate when the entity's sole purpose is to provide advice to the Minister or government. In these cases, the entity should follow the legal form of a non statutory advisory body (see Appendix B.2).

In addition, a statutory authority should not be established when the function is more appropriately undertaken within a department. This includes, for example, functions that:

- do not need to be independent from Ministerial influence
- do not need to be legally independent from the Crown



- do not require access to specialist skills or technical expertise that do not usually exist within the public service.

## Relevant legislation

- Financial Management Act 1994
- Public Administration Act 2004

## B.2 Non-Statutory Advisory Body

### What is a non statutory advisory body?

A non statutory advisory body is a public entity established by a Minister or the Governor in Council (rather than under statute) to provide advice to a Minister or the Government. Examples of non statutory advisory bodies include:

- 'the State Trauma Committee, providing advice to the Minister for Health
- 'the Victorian Adaptation and Sustainability Partnership Ministerial Advisory Committee, advising the Minister for Environment and Climate Change
- 'the Community Advisory Committee on Body Image, providing advice to the Minister for Youth Affairs.

Non statutory advisory bodies are unincorporated, which means they cannot:

- employ staff
- enter into contracts
- perform functions that expose the entity to legal challenge
- take legal action against another party.

### When would the government establish a non statutory advisory body?

While departments are the primary source of policy advice for Ministers, establishing a non statutory advisory body provides the government with a means to obtain independent or specialist advice in a particular area.



A non statutory advisory body provides a flexible structure for obtaining advice and also offers a high degree of Ministerial control. This is particularly suitable for situations where the advice is only required for a limited time or where the nature of advice being sought may change.

A non statutory advisory body is an appropriate structure for the public entity if the role of the entity is limited to advice and does not involve other functions such as regulatory, quasi-judicial or service delivery functions.

## **How would the government set up and structure a non statutory advisory body?**

A non statutory advisory body can be established by a Minister or the Governor in Council. In order to qualify as a public entity, it must:

- have written terms of reference guiding its operation
- be required to provide the advice or report to a Minister or the government
- be declared a public entity for the purposes of the Public Administration Act 2004.

The composition of the body can be designed to meet the specific needs of the Minister or government requesting the advice. Decisions need to be made around factors such as the:

- the number of members of the committee
- whether committee members are recruited for specialist knowledge and expertise or to represent particular bodies or interests
- length of membership term
- remuneration of members and reimbursement of expenses
- processes for appointment and dismissal of members
- the frequency of meetings
- the duration of the existence of the committee.

Given that these entities are not established under statute and are not incorporated, non statutory advisory bodies do not employ staff.



## When should the government use an alternate legal form?

A statutory authority would be the preferred legal structure for the public entity when:

- the public entity will provide other functions in addition to providing advice (including functions that may expose it to legal challenge)
- the need for advice will be ongoing and is unlikely to change significantly under future governments
- the public entity will need to enter into contracts or employ staff.

Given that establishing a statutory authority requires the introduction or amendment of existing legislation, this legal form is more difficult to establish and change than a non statutory advisory committee. Any advisory public entities that are established as statutory authorities are likely to exist beyond the term of the current government. However, in practice, few advisory bodies are established as statutory authorities.

### Relevant legislation

- Public Administration Act 2004

## Appendix C: Legislative Framework for Public Entities

There is a large body of legislation that applies to Victorian public entities. The Public Administration Act and the Financial Management Act provide a legislative framework to guide the governance and financial management of Victoria's public sector bodies. Many other Acts, such as the Corporations Act, will also apply; their specific application is dependent on the legal form of the public sector body.

### C.1 Public Administration Act 2004

The governance framework for Victorian public entities is established by a combination of the specifics of the entity's enabling legislation and the umbrella requirements set out in the Public Administration Act. The Act:

- defines the public sector and the various bodies within it
- establishes a framework to ensure the effective governance of the Victorian public

sector

- enshrines the public sector values
- prescribes a set of principles to underpin public sector employment.

In addition to defining public entities by reference to a set of criteria, the Act:

- includes directors of public entities in the definition of public officials (alongside the employees of those entities), allowing the PSSC to issue a code of conduct binding on this group of officials
- provides rules for the operation of public entities (Part 5), including a power for the Premier to order entities to comply with whole of government policy direction, and to provide certain types of information to the Premier and the Treasurer
- contains principles for the governance of public entities (Part 5) including: the duties of directors, chairpersons, and entities themselves; the accountability of entities to their portfolio Ministers; and provisions relating to the removal, suspension or standing down of directors.<sup>18</sup>

The Act does not automatically apply all of the requirements of Part 5 to all public entities, acknowledging the wide variety of public entities that exist, and the need to avoid a 'one size fits all' approach to their governance arrangements.<sup>19</sup> Specifically, Part 5 of the Act does not apply to public entities that pre-existed the commencement of the Act.

Part 5 does apply to all new entities (unless specifically exempted) established after 1 July 2005, the date that Part of the Act came into force and it may be applied to preexisting public entities by Order in Council. No such Orders have yet been made, and almost none of the public entities which existed when the Public Administration Act came into effect are covered by Divisions 2 and 3 of Part 5.<sup>20</sup> Division 2 of Part 5 applies governance principles to public entities including the duties of the Chairperson and the entity itself to provide information to the responsible Minister. It also sets out accountability arrangements between the Board of a public entity and the responsible Minister, and between the Minister and Parliament. Division 3 of Part 5 relates to the power to remove, suspend or stand down the director(s) of a public entity.



## C.2 Financial Management Act 1994

The provisions of the Financial Management Act apply to most public entities. The Financial Management Act establishes a framework that mandates governance and accountability arrangements for the financial management of organisations in the public sector.

The purposes of the Financial Management Act are to:

- improve financial administration of the public sector
- make better provision for the accountability of the public sector
- provide for annual reporting to Parliament on the operations and financial statements of public sector bodies.

The Financial Management Act affects public entities in a number of ways, with regard to their administrative arrangements, accountability requirements and specific directions from the Minister for Finance in respect of financial management matters. The accountability and reporting requirements within the Act apply to departments and 'public bodies'. Most public bodies under the Financial Management Act would be public entities under the Public Administration Act.

## Appendix D: Useful Resources

### Department of Premier and Cabinet

Appointment and remuneration Guidelines for Victorian Government Boards, Statutory Bodies and Advisory Committees

Outlines principles and procedures for the recruitment, selection, appointment and remuneration of part time non executive directors and members of:

- statutory authorities
- advisory committees
- Boards of public entities operating under the State Owned Enterprises Act and the Corporations Act.



Provides Cabinet, Ministers and departments with advice on making appointments and determining appropriate fee levels for directors of these bodies.

Available at [www.dpc.vic.gov.au](http://www.dpc.vic.gov.au)

## Department of Treasury and Finance

Government Policy and Guidelines: Indemnities and Immunities

Outlines the Victorian Governments' policy with respect to:

- **Indemnities:** where government accepts responsibility for financial liabilities that its employees or agents may incur
- **Immunities:** legislative provisions that prevent action from being taken against a person.

The Guidelines apply to Ministers, executive officers and some statutory office holders. They set out the circumstances under which the Treasurer will execute indemnities, and the circumstances under which statutory immunities can be used.

## Victorian Public Sector Commission

welcome to the Board: Good practice guide to governance for Victorian public entities and welcome to the Board: your introduction to the good practice guide to governance for Victorian public entities

Welcome to the Board is a comprehensive set of governance guidance materials to assist members of public entity Boards to better understand their role and to fulfil their duties and obligations. It covers:

- what it means to be a member of a Victorian public sector Board
- the Director's Code of Conduct and guidance notes
- the roles and relationships between Boards, departments and other stakeholders
- good practice approaches to the operational aspects of Boards
- compliance and accountability issues for Boards.



The Good practice guide on governance for Victorian public entities is available as a web guide on the VPSC website: [www.vpsc.vic.gov.au/](http://www.vpsc.vic.gov.au/)

The VPSC has also produced an introduction to the good practice guide. It provides an introductory overview of:

- the principles of public sector governance
- the roles and duties of a public entity Board, including the skills, qualities and conduct requirements for Board members
- the operations of a Board, including conduct of Board meetings, and guidelines for dealing with conflicts of interest, risk management and compliance.

Available at [www.vpsc.vic.gov.au/](http://www.vpsc.vic.gov.au/)

## **Employment arrangements for public entities**

Addresses employment considerations relevant to public entities, not public service bodies (departments and other public service organisations). This guide covers:

- how to provide an entity with the power to employ
- who should exercise those powers (e.g. CEO)
- issues to consider in relation to different types of employees (i.e. public sector staff and public service staff).

Available at [www.vpsc.vic.gov.au/](http://www.vpsc.vic.gov.au/)

## **Welcome to Government: your introduction to working in the Victorian public sector**

Provides guidance and explains the functions of key institutions in Victoria's system of government, such as the:

- Constitution
- Governor of Victoria
- Parliament, including the roles and functions of independent officers of Parliament
- Executive, including the roles and functions of Cabinet



- Judiciary, including the courts and wider criminal justice system.

The guide also describes the composition and role of the Victorian public service and public sector, including departments and administrative offices and provides an overview of the Victorian public sector values and codes of conduct for the Victorian public sector. Welcome to Government provides a brief overview of:

- financial management practices and processes
- accountability mechanisms
- public service and public sector employment arrangements
- relevant legislation
- the roles of the Commonwealth and local government.

## **Serving Victoria: a guide for public sector CEOs**

Provides a reference point for incoming CEOs on the unique aspects of the public sector operating environment. The guide:

- outlines the operating environment for public sector CEOs
- presents information, insights and issues to consider on the roles and responsibilities of CEOs; both as organisational managers, and as public sector and community leaders
- outlines the CEO's key relationships and provides advice on managing these relationships
- presents information, insights and issues to consider on managing organisational capability and compliance
- provides advice on managing significant events
- presents an extensive list of additional resources.

Available at [www.vpsc.vic.gov.au/](http://www.vpsc.vic.gov.au/)

## **Appendix E: References**

Bini, Marco 2008, 'The Public Administration Act 2004 (Vic): A new approach to the



liability and duties of directors on government boards and authorities', *Company and Securities Law Journal*, 26, pp. 172-190.

Bracks, Steve 2004, Second reading speech: Public Administration Bill, Victorian Hansard, 16 November, p. 1552.

Department of Premier and Cabinet, 2010, Appointment and Remuneration Guidelines for Victorian Government Boards, Statutory Bodies and Advisory Committees, <<http://www.dpc.vic.gov.au/CA256D8000265E1A/page/Guidelines+and+Procedures!OpenDocument&1=80-Guidelines%20and%20Procedures~&2=~&3=~>>

Department of Treasury and Finance 2008, Government Policy and Guidelines: Indemnities and Immunities, Department of Treasury and Finance, Melbourne.

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Public Accounts and Estimates Committee 2006, Report on a Legislative Framework for Independent Officers of Parliament, Parliament of Victoria, Melbourne.

Victorian Public Sector Commission 2009a, The State of the Public Sector in Victoria 2008-09, Victorian Public Sector Commission, Melbourne.

Victorian Public Sector Commission 2009b, Welcome to Government: Your introduction to working in the Victorian public sector, Victorian Public Sector Commission, Melbourne.

Victorian Public Sector Commission 2006a, Welcome to the Board: Your introduction to the good practice guide to governance for Victorian public entities, Victorian Public Sector Commission, Melbourne [www.vpsc.vic.gov.au](http://www.vpsc.vic.gov.au).

Victorian Public Sector Commission 2006b, Welcome to the Board: Good practice guide to governance for Victorian public entities, Victorian Public Sector Commission, Melbourne.

## **Legislation**

Associations Incorporation Act 1981

Audit Act 1994

Borrowing and Investment Powers Act 1987



Charter of Human Rights and Responsibilities Act 2006

Commission for Children and Young People Act 2012

Corporations Act 2001 (Cth)

Environment Protection Act 1970

Equal Opportunity Act 1995

Fair Work Act 2009 (Cth)

Financial Management Act 1994

Freedom of Information Act 1982

Health Services Act 1988

Independent Broad-based Anti-corruption Commission Act 2011

Information Privacy Act 2000

Ombudsman Act 1973

Public Administration Act 2004

Public Records Act 1973

Shrine of Remembrance Act 1978

State Owned Enterprises Act 1992

Water Act 1989

Whistleblowers Protection Act 2001

## Glossary

### **Administrative office**

Defined under s. 4 of the Public Administration Act, an administrative office is a business unit related to a department with a degree of autonomy from the department, operating with significant managerial flexibility. Administrative offices are part of the Crown and do not have a separate legal identity.



**Board**

Body of appointed or elected members who oversee the activities of a company or organisation. Under s. 4 of the Public Administration Act, the definition of Board includes the governing body of a public entity, a person who comprises a commissioner entity or, if the public entity does not have a governing body, the members of a public entity.

**Body corporate**

An incorporated body, establishing the entity as a 'legal body' with particular responsibilities and provisions.

**Capital base**

Includes the issued capital (or shares) of a company, plus any reserves and retained earnings.

**Commissioner**

A public entity where the governing body of the entity consists of one person appointed as a commissioner.

**Company**

A public commercial entity established and registered under the Commonwealth Corporations Act 2001.

**Company limited by guarantee**

A company with no share capital and where members act as guarantors, giving an undertaking to a nominal amount in the event of the winding up of the company or contribute an annual membership as their annual guarantee.

**Company limited by shares**

A company that has shareholders, whose liability is limited to the nominal value of their shares plus any unpaid amount on their shares.

**Crown**

The formal term for Her Majesty, used especially in the context of the Queen of Australia exercising her legal powers.

**Department**

Departments are the central policy advisers and program administrators for Ministers and government. Departments are part of the Crown and do not have a separate legal identity.

## **Directors**

Defined under s. 4 of the Public Administration Act to include members of the Board of a public entity.

## **Executive Council**

The Executive Council consists of all Ministers and provides advice to the Governor.

## **Governance**

The processes by which organisations are directed, controlled and held to account. Governance defines the relationship between the body, the responsible Minister, the department and stakeholders.

## **Governor in Council**

When the Governor acts on advice given by the Executive Council.

## **Governor of Victoria (Governor)**

The Crown's representative in Victoria. The Governor exercises power on the advice of the Premier.

## **Incorporated Entities**

Incorporated under the Associations Incorporation Act 1981.

## **Minister**

A member of the government, appointed by the Premier to be responsible for a particular area of administration; he or she is also a member of Cabinet.

## **Non statutory advisory board**

A public entity established by a Minister or Governor in Council advisory body rather than under statute, to provide advice to government.

## **Prerogative office**

An office under the Crown (other than a statutory office) to which the right to appoint is vested in the Governor in Council.

## **Public entity**

Entities that undertake a public function or are owned by government but operate at arm's length from the public service. Defined under s. 5 of the Public Administration Act, a public entity is established by an Act (other than a private Act), the Corporations Act, Governor in Council or a Minister and in the case of a body corporate, at least one half of the directors are appointed by the Governor in Council or a Minister.

## **Public official**

In these guidelines, refers to any public sector employee, judicial employee, statutory office holder, director of a public entity, or any person holding a legislative, executive or judicial office, whether appointed or elected, or a person employed to perform a public function, or provide a public service. This definition is broader to that defined under s. 4 of the Public Administration Act.

### **Public sector**

Defined under s. 4 of the Public Administration Act, the public sector comprises the public service, public entities and special bodies.

### **Public sector employee**

Employees of the Victorian public sector, including employees of employee the public service, public entities and special bodies.

### **Public service**

Departments, administrative offices and the Victorian Public Sector Commission.

### **Public service**

Defined under s. 4(1) of the Public Administration Act to mean a body department, administrative office or the Victorian Public Sector Commission.

### **Public service employees**

Employees of a Department, Administrative Office or the State employee Services Authority.

### **Retained earnings**

Company earnings that have not been paid out, typically reinvested back into the company.

### **Share capital**

The amount of money (cash or items of equivalent value) contributed by shareholders to a company in exchange for shares or stock in a company.

### **Shareholder**

An individual or entity that holds shares or stock in a company.

### **Special body**

Defined under s. 6 of the Public Administration Act, refers to a public body deemed to be a special body by the Governor in Council, to exempt the entity from certain provisions in the Act.

### **State body**

Defined under s. 3 of the State Owned Enterprises Act, a State body is a statutory corporation fully owned by the government and established by Order in Council.

### **State business corporation**

Defined under s. 3 of the State Owned Enterprises Act, a State business corporation is a statutory corporation (either a State body or a body corporate incorporated under an Act) declared by Order in Council under the State Owned Enterprises Act.

### **State owned company**

Defined under s. 3 of the State Owned Enterprises Act, a company within the meaning of the Corporations Act and registered in Victoria, that is declared by Order in Council to be a State owned company.

### **State owned enterprise**

Defined under s. 3 of the State Owned Enterprises Act, a public commercial entity established under the Act. Includes three types, as defined under the Act: State body, State business corporation or State owned company.

### **Statutory authority**

A public entity that is created by specific Victorian legislation to deliver a Victorian government service. Over time various generic names have been used to describe specific entities such as (cemetery) trusts, (Crown land) committees of management, (school) councils, public health care services, etc. These all fall within the definition of a statutory authority in this document.

A statutory authority can be governed by a Board (with multiple members) or governed by an individual appointment.

Note: within these guidelines, a statutory authority governed by an individual appointment refers to a single individual governing a public entity to undertake a legislated function. This includes any forms of statutory appointments such as a single commissioner entity or a corporation sole.

### **Statutory office**

An office established by or under an Act to which the right to appoint is vested in the Governor in Council or a Minister. Such an appointee may or may not be a corporate entity.

### **Westminster System of Government**

Victoria's system of parliamentary democracy, based on the United Kingdom's system of government and similar to that used in other Commonwealth countries such as

Canada and New Zealand.

## Footnotes

1. Public service bodies and public entities are defined in the Public Administration Act 2004, sections 4 & 5
2. Under Machinery of Government changes announced in April 2013, there will be nine departments from 1 July 2013
3. Under Machinery of Government changes announced in April 2013, the responsibility for the Victorian Government Architect will transfer from DPC to DTPLI by 1 July 2013
4. There are exceptions to this: the Public Record Office Victoria and the Victorian Government Solicitor's Office are examples of administrative offices with ongoing functions
5. The Public Administration Act (section 5) specifies that the following bodies are not public entities:
  - o 'a department or an administrative office
  - o 'an exempt body
  - o 'a special body in its capacity as a special body
  - o 'a registered community health centre within the meaning of the Health Services Act 1988 or a body that provides aged care services that is, or is capable of being, registered under that Act
  - o 'a body, or a class of body, that is declared by an Order under sub-section (2) not to be a public entity for the purposes of the Act.
6. The status of a public entity as part of the Crown can be clarified by reference to common law provisions. The Victorian Government Solicitor's Office can provide further advice on this
7. A statutory authority governed by an individual appointment can also be referred to as a corporation sole, commissioner entity or single person body corporate
8. Laking, R 2002 Agencies: their benefits and risks, Victoria University of Wellington, New Zealand, p. 11
9. Bini, M 2008 The Public Administration Act 2004 (Vic): A new approach to the liability and duties of directors on government boards and authorities, Company and Securities Law Journal, 26, p. 174.

10. The Public Accounts and Estimates Committee (PAEC) has developed principles for the creation of officers of Parliament: see PAEC 2006, Report on a Legislative Framework for Independent Officers of Parliament, 2006.
11. Currently in Victoria, regulatory functions are undertaken by units within departments and by public entities, operating outside of departments. This variation in legal form is the outcome of decisions made by different governments in various policy contexts over many decades. The discussion here is intended to be relevant to the establishment of new regulators that are public entities, where the decision to locate the regulatory function outside of a department or administrative office has been made by government
12. Similar legislation applies in other jurisdictions, but specific provisions may vary
13. These functions may also be undertaken within Departments. It is assumed that government has made a decision to establish a public entity to carry out these functions
14. The Minister for Roads and Ports has a high degree of control over the strategic directions and policy of the Roads Corporation (VicRoads)
15. The Essential Services Commission is subject to a very low degree of Ministerial control
16. The Principal Commissioner for Children and Young People also has an inquiry function with regard to deaths of children known to the child protection system and a legislative review function, however the primary function is to provide advice to the Minister for Community Services and the Minister for Children and Early Childhood Development
17. The VPSC publication Governance Arrangements for Victoria's Regulators – Discussion Paper identifies seven principles to consider when deciding on governance arrangements for regulators. Although the focus is on regulatory functions, the principles identified have broader applicability to other public entities
18. For more detail see the public sector governance material on the Victorian Public Sector Commission website
19. Bracks, S, 2004, Second reading speech: Public Administration Bill, Victorian Hansard, 16 November, p. 1552.
20. The notable exception is the water authorities covered by the Water Act 1989 where amending legislation was used to apply all of Part 5 to existing water entities